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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

Welcome to another issue of LEGAL INSIGHTS. This is the 29th issue of our quarterly publication over a period of seven and a half years. It is indeed an achievement that we can be proud of.

Shortly before I wrote this message, I was on a holiday in Europe, not to visit the more renown European cities, but the port cities of Nessebar (Bulgaria), Constanta (Romania), Odessa, Sevastopol, Balaclava and Yalta (all in Ukraine). The sojourn in these cities was unexpectedly and unusually fascinating and I recommend readers to visit these places if the opportunity arises.

The reason for drawing our readers to these unusual holiday destinations is to connect the readers to some extreme and unusual events that have occurred recently. For example, the 3 devastating earthquakes in Christchurch, New Zealand, the killer twisters in the USA that wiped-out an entire town and the huge forest fires, also in the USA, which destroyed an area of 60 square miles (equivalent to about two-thirds the size of Kuala Lumpur). We, Malaysians, are indeed fortunate that our country is rarely afflicted by these natural disasters.

Talking about the unusual, this issue of LEGAL INSIGHTS features several unusual articles. On the face of it, the subject matter of these articles do not offer much scope for a discourse on the law. Thus, I invite our readers to read about the EPL or the English Premier League, the ETP or the Economic Transformation Programme as well as Cloud Computing, with a legal twist.

Thank you,

LEE TATT BOON
Editor-in-Chief
& Senior Partner

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ANNOUNCEMENT

We are pleased to announce that Ruth Garnet Maran, Jillian Chia Yan Ping, Joshinae Wong and Shannon Rajan will be promoted to Senior Associates as from 1 July 2011. The Partners of the Firm extend our heartiest congratulations to each of them.

Ruth Garnet Maran is a member of our Dispute Resolution Division. She is a graduate of the National University of Malaysia. Her practice areas include corporate litigation and administrative law.

Jillian Chia Yan Ping graduated from the University of Nottingham in 2005. She is a member of our Intellectual Property Division. Her practice areas include information technology and data protection.

Joshinae Wong is a member of our Intellectual Property Division. She graduated from the University of Melbourne in 2005. Her practice areas include both litigation and non-litigation aspects of intellectual property work.

Shannon Rajan is a member of our Alternative Dispute Resolution Practice Group. He holds a Bachelor of Laws Degree from the University of London and a Master of Laws from the National University of Singapore. Shannon is also a Panel Mediator in the Malaysian Mediation Centre.

LEGAL UPDATES

The Deputy Minister of Information, Communication and Culture announced on 21 June 2011 that the Personal Data Protection Act 2010 will be enforced in early 2012. (*The Star, 21 June 2011*)

The Internet Corporation for Assigned Names and Numbers (ICANN) has approved the introduction of domain names which do not bear the suffix ".com". The criteria specified by ICANN must be fulfilled before approval is given for the use of such domain names. It is reported that the application fee is USD185,000 and the annual fee is USD25,000. (*The Star, 21 June 2011* and *The Star TechCentral, 21 June 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.

ATTAINING HIGH INCOME

Lee Tatt Boon explains the role of Transformation

These days the Economic Transformation Programme is an extremely hot topic in the various media and seems to enjoy coverage almost every other day of the week. While some of us have some idea what it is about, others may not be as well informed about it, especially the part played and contributed by Intellectual Property ("IP").

So, what is the Economic Transformation Programme or in short, the ETP? The ETP is a new government programme that seeks to transform Malaysia into a high-income economy. Under the ETP, the gross national income per capita income is expected to increase from USD6,700 (RM23,700) in 2009 to USD15,000 (RM48,000) by the year 2020.

The USD15,000 target is the high-income threshold set by the Malaysian Government based on the World Bank's current definition of high-income. The ETP was introduced in September 2010 and is part of the Government's Agenda which includes 1Malaysia, the Government Transformation Programme, the New Economic Model; and the 10th Malaysia Plan.

To drive the ETP with the view of increasing the Gross National Income (GNI) to RM1.6 trillion, the Malaysian Government has identified 12 key national economic areas (NKEAs) which are expected to make significant contributions to Malaysia's economic performance.

The 12 NKEAs are (1) Oil, Gas and Energy; (2) Palm Oil; (3) Financial Services; (4) Tourism; (5) Business Services; (6) Electrical and Electronics; (7) Wholesale and Retail; (8) Education; (9) Healthcare; (10) Communication Content and Infrastructure; (11) Agriculture; and (12) Greater Kuala Lumpur/Klang Valley.

> **"innovation through R&D is one of the critical factors to move up the economic value chain"**

THE ROLE OF IP IN THE ETP

In 5 out of the 12 NKEAs, innovation and research and development (R&D) seem to be the key success factor. For example in the Oil, Gas and Energy sector, the ETP aims to diversify the sector and ensure that the most innovative methods and technologies such as enhanced oil recovery (EOR) techniques are used to improve oil recovery from mature oil fields.

The Government also seeks expertise from specialist small field operators to exploit small or marginal fields that have less than 30 million barrels of recoverable oil.

Within the same sector, the ETP encourages the growth of alternative energy sources such as solar, nuclear and hydro power to overcome the decline in domestic natural gas production. Innovation and R&D will invariably be involved in such activities.

In the Oil Palm sector, the ETP is focused on improving upstream

THROUGH INNOVATION

Intellectual Property in the Economic Programme

LEE TATT BOON

Lee Tatt Boon is Senior Partner and Head of the Intellectual Property Division of SKRINE. He has more than 38 years of experience in advising on intellectual property matters.

productivity and exploiting untapped downstream potential through R&D and acquisition of new foreign technologies.

From the examples of the 2 sectors mentioned, innovation through R&D is one of the critical factors to move up the economic value chain and great emphasis is placed on innovation and R&D. Innovation and R&D are intellectual property and hence the role played by IP in the ETP is extremely significant.

AGENSI INOVASI MALAYSIA

In recognition of the importance of IP in relation to the ETP, the Government introduced several measures to ensure that the IP-related NKEAs succeed in their contribution to transform Malaysia into a high-income economy.

For one, the Government introduced the Agensi Inovasi Malaysia Act 2010 (Malaysia Innovation Agency Act 2010) (the "Act") with the avowed aim of stimulating and developing the innovation eco-system in Malaysia. The Act came into force on 15 April 2011.

The Act establishes a statutory body, Agensi Inovasi Malaysia (Malaysia Innovation Agency) ("AIM"), which is entrusted with the responsibility to formulate national policies, strategies and directions relating to innovation.

The functions of AIM include:

- organizing, cooperating and coordinating the performance of activities with the public and private sector to stimulate innovation in Malaysia;
- promoting and facilitating activities and initiatives by the public and private sector in relation to innovation;
- promoting the culture of innovation in the public and private and education sectors in Malaysia; and
- advising the Government in matters relating to innovation.

For a start, AIM is tasked with the responsibility of creating the National Intellectual Property Central Depository, a register of all IP which materialise from any research finding or project, whether fully or partly funded by the Government. The database includes all existing IP, whether or not registered under any written law. This database is in addition to the patent database currently maintained by MyIPO.

The public and investors, whether foreign or local, will be given access to the IP stored in the National Intellectual Property Central Depository to enable them to learn about the inventions and innovations and to decide whether or not to invest in or to commercialise any of those IP.

The Act establishes an Innovation Fund which is to be administered by AIM. The Innovation Fund is to be used solely for the purposes of research activities and initiatives relating to innovation, including funding of selected innovation determined by AIM.

AIM has the power under the Act to acquire IP funded by the government or privately owned and to promote, develop and commercialise any of the IP registered with the central depository, subject in each case, to the consent of the IP owner.

In addition, AIM also has the power to appoint innovation ambassadors and agents, establish companies and to invest and borrow. The exercise of its powers of investment is subject to the approval of the Finance Minister whilst its borrowing powers may only be exercised with the approval of the Prime Minister and the Finance Minister.

The Act also confers the power on AIM to endorse, by way of certification, any product or service which qualifies as an innovative product or service in accordance with the criteria established by AIM. The duration of each certification is limited to a period of 2 years.

THE NATIONAL INNOVATION POLICY

As a further initiative to promote the success of the ETP, the Malaysian Government is in the midst of drafting the National Innovation Policy, which amongst others will include:

- regulating and standardizing the practice of IP agents;
- reducing the costs of filing and maintaining of IP and encouraging more filings of local IP;
- streamlining and simplifying the administration and management of an IP portfolio;
- creating better awareness amongst universities, research institutions and the private sector of the protection, commercialisation and exploitation of IP;
- changing the mindset of the people that innovation is not rocket science and creating a culture of innovation;
- establishing a one stop search engine that would facilitate prior art and patent search whereby applicants can check whether similar inventions have been filed before, locally or internationally; and
- collaborating with other government or semi-government institutions in providing funding.

From the above, it can be seen that the success of the ETP to a large extent, rides on IP which has been recognised by the Malaysian Government as a significant source of comparative advantage of business and a major driver to transform Malaysia into a high-income economy.

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THE ARBITRATION (AMENDMENT) ACT 2011

Ashok Kumar explains the changes under the Arbitration (Amendment) Act 2011

The Arbitration Act 2005 ("Principal Act") was a long-awaited and much needed change to the landscape of arbitration practice in Malaysia. The Principal Act is based on the UNCITRAL Model Law and came into force on 15 March 2006 ("Commencement Date").

Being a relatively new legislation, the jurisprudence surrounding the Principal Act is still developing and different interpretations of the provisions and different approaches have been adopted by the Malaysian courts, no doubt due, in part, to the courts' lack of familiarity with the arbitral process and the UNCITRAL Model Law.

The Arbitration (Amendment) Bill 2010 ("Bill") was introduced to address the inconsistency in the interpretation of the provisions of the Principal Act and to give effect to some of the representations by the arbitral community.

The Bill passed into law as the Arbitration (Amendment) Act 2011 ("Amendment Act") upon receipt of Royal Assent on 23 May 2011 and publication in the *Gazette* on 2 June 2011. The Amendment Act will come into operation on a date to be appointed by the Minister by notification in the *Gazette*.

This article highlights the main changes that will be made to the Principal Act upon the Amendment Act coming into operation.

SECTION 8

The objective of Section 8 of the Principal Act is to restrict curial intervention in arbitration proceedings to the circumstances set out in the Principal Act, such as those set out in Sections 11, 37, 38, 39 and 42 thereof.

Notwithstanding the aforementioned provision, views have been expressed from the Bench that curial intervention may be permitted in a case of *"patent injustice"* (per Hamid Sultan, JC in *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83, 98) or in the exercise by the Court of its *"inherent jurisdiction"* (per Abdul Malik Ishak, JCA in *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 7 CLJ 785, 799 to 804).

The Amendment Act has now re-cast Section 8 to state that "No Court shall intervene in matters governed by this Act, except where so provided in this Act."

The Explanatory Notes to the Bill states *inter alia* that the purpose of this amendment is to limit court intervention to situations specifically covered by the Principal Act and to discourage the use of inherent powers.

With this amendment, it is hoped that the original objective of Section 8 will be achieved.

SECTION 10

The Amendment Act amends Section 10 of the Principal Act in three respects.

First, it removes the ground to stay arbitration proceedings in Section 10(1)(b) where the Court is satisfied that there is no dispute between the parties with regard to the matters which are to be referred. The Explanatory Notes to the Bill state that this provision is unnecessary.

The effect of the foregoing is that the only ground to stay arbitration proceedings under the amended Section 10(1) is where the Court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

An instance where Section 10(1)(a) of the Principal Act has been applied is *Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd* [2010] 9 CLJ 532 where the Court of Appeal held that the arbitration clause in the principal agreement had been abandoned and rendered null and void, inoperative and incapable of being performed when the parties executed various supplemental agreements which contained provisions whereby they agreed to submit to the jurisdiction of the court.

Secondly, the Amendment Act introduces special provisions in relation to admiralty proceedings which permit the Court to order that any property arrested, or bail or other security given, be retained as security for the satisfaction of any award that may be given in the arbitration proceedings or to order that a stay of court proceedings be conditional upon equivalent security being provided for the satisfaction of any award that may be given in the arbitration proceedings.

> **"The expression "substantially affects the rights of one or more of the parties" ... may be fertile ground for litigation"**

Thirdly, the Amendment Act introduces a new sub-section (3) to the Principal Act which provides that the provisions of Section 10 of the Principal Act apply to an international arbitration where the seat of arbitration is not in Malaysia.

SECTION 11

Section 11 of the Principal Act confers express powers on the High Court to make interim orders in respect of the matters set out in sub-paragraphs (a) to (h) of Section 11(1) of the Principal Act, including an order to prevent the dissipation of assets pending the outcome of the arbitration proceedings.

The Amendment Act clarifies that the power of the High Court under Section 10(1)(e) of the Principal Act to make interim orders "to secure the amount in dispute" extends to the arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court.

A new sub-section (3) extends the powers of the Court under

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Section 11 to an international arbitration where the seat of arbitration is not in Malaysia. The effect of this amendment is that the decision of the High Court in *Aras Jalinan v Tipco Asphalt Public Company Ltd & Others* [2008] 5 CLJ 654 is no longer good law insofar as it held that the Malaysian High Court has no jurisdiction to grant interim orders in arbitration matters where the seat of jurisdiction is outside Malaysia.

SECTION 30

Sub-section (1) of Section 30 of the Principal Act provides that in a domestic arbitration where the seat for arbitration is in Malaysia, the arbitral tribunal shall decide the dispute in accordance with the substantive law of Malaysia.

In other words, the provision appears to impose a mandatory obligation on the arbitral tribunal to apply the laws of Malaysia in every domestic arbitration where the seat for arbitration is in Malaysia.

The Amendment Act amends this provision to dispense with the requirement for the arbitral tribunal to apply Malaysian law where the parties to the dispute have agreed that the dispute is to be governed by the laws of a jurisdiction other than Malaysia.

SECTION 39

This section sets out the grounds on which the High Court can refuse to recognise or enforce an arbitration award.

The Amendment Act replaces the reference to "Malaysia" in Section 39(1)(a)(ii) with the words "the State where the award was made". This means that determination of the validity of the arbitration agreement should be determined in accordance with the laws of the State where the award was made and not necessarily under the laws of Malaysia.

Section 39(2)(a)(v) of the Principal Act confers the right on the Court to not recognise or enforce an arbitration award which contains decisions on matters beyond the scope of the submission to arbitration.

The Amendment Act introduces a new Section 39(3) to the Principal Act which reduces the harshness of Section 39(2)(a)(v) by providing that where the decision on matters submitted to arbitration can be separated from those which have not been submitted, the Court may recognise and enforce those parts of the award on matters that have been submitted for arbitration.

SECTION 42(1A)

Section 42(1) of the Principal Act allows any party to refer to the High Court any question of law arising out of an award.

The Amendment Act introduces a new Section 42(1A) to the Principal Act which confers power on the High Court to dismiss a reference under Section 42(1) unless the question of law substantially affects the rights of one or more of the parties.

The expression "substantially affects the rights of one or more of the parties" is unclear and may be fertile ground for litigation until such time that the Malaysian Courts make an authoritative ruling as to the circumstances that fall within the ambit of that expression.

SECTION 51

Section 51(2) of the Principal Act provides *inter alia* that the provisions of the Arbitration Act 1952 will continue to apply to arbitration proceedings which have been commenced before the Commencement Date. Under the English language text of the Principal Act, the sole criterion for determining whether this saving provision applies to an arbitration is whether the arbitration were commenced before or after the Commencement Date.

Section 51(2) of the Bahasa Malaysia text of the Principal Act was inconsistent with the English text in that it provided that the saving provision applied where an arbitration agreement is made or where arbitration proceedings are commenced before the Commencement Date.

The Amendment Act amends Section 51(2) of the Bahasa Malaysia text to remove the inconsistency with the English text of the Principal Act, the latter of which is the authoritative text.

The Amendment Act introduces a new sub-section (4) to Section 51 of the Principal Act which provides that the Principal Act will govern all court proceedings relating to arbitration which are commenced after the Commencement Date notwithstanding that such proceedings arise from arbitration proceedings that were commenced before the Commencement Date.

In other words, while arbitration proceedings which are commenced before the Commencement Date continue to be governed by the Arbitration Act 1952, any court proceedings which arise from such arbitration are to be governed by the provisions of the Principal Act.

CONCLUSION

The amendments are welcomed as they provide greater clarity and certainty in the law as well as finality in the arbitral process and enforceability of awards.

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GAME-CHANGER

Theresa Chong highlights the salient changes under the Malaysian Industrial Development Authority (Amendment) Bill 2011

THERESA CHONG

Theresa is the Head of the Corporate Division of SKRINE. Her practice areas include investment advice, mining and natural resources, automotive industry and hospitality industry.

BACKGROUND

The Malaysian Industrial Development Authority ("MIDA") was incorporated under the Malaysian Industrial Development Authority Act 1965 ("the Act") which came into force on 23 June 1966. The Act charged MIDA with the responsibility for promoting and coordinating industrial development in Malaysia.

Since its incorporation more than 4 decades ago, MIDA has played a pivotal role in transforming the Malaysian economy from one which was based on exports of primary commodities like rubber, palm oil and tin to one where the manufacturing sector now accounts for 26.6% of the Gross Domestic Product and 77.3% of the gross exports of the country (*Economic Report 2010/2011*).

On 30 March 2010, the Prime Minister of Malaysia, Datuk Seri Mohd Najib Tun Razak, announced at the launch of the New Economic Model that MIDA would be changing its name to the Malaysian Investment Development Authority and that it would be the principal Government agency to promote and facilitate investments in the manufacturing and services sectors, excluding utilities and financial services (*The Star Online, 30 March 2010*).

More than a year after that announcement, the Malaysian Industrial Development Authority (Amendment) Bill 2011 ("Bill") was passed by the Dewan Rakyat of the Malaysian Parliament on 15 June 2011 (*Hansard, 15 June 2011*).

The Prime Minister of Malaysia has also announced that the proposed amendments under the Bill will come into force in July 2011 (*Bernama, 12 April 2011*).

This article highlights the main amendments to be made to the Act pursuant to the Bill. References in this article to a '*Clause*' are references to a Clause of the Bill.

CHANGE OF NAME

Upon the amendments coming into force, the name of the Act will be changed to "Malaysian Investment Development Authority (Incorporation) Act 1965" (Clause 3).

At the same time, MIDA's name will also be changed to the "Malaysian Investment Development Authority" (Clause 4(a)).

POWERS AND FUNCTIONS OF MIDA

In addition to its existing responsibility for promoting industrial development and related services, Clause 8 of the Bill expands the functions of MIDA to include the promotion of investments in the services sector (excluding the financial and utilities sectors). It should be noted that the Bill does not define "services" or "services sector".

Clause 12 of the Bill introduces a new Section 7C to the Act. This new provision confers powers on MIDA to incorporate companies under the Companies Act 1965 to carry out and have the charge, conduct and management of any project, scheme or enterprise planned or undertaken by MIDA in the performance of its functions or the exercise of its powers.

Unlike Section 33 of the Agensi Inovasi Malaysia Act 2010 which expressly permits the Agensi Inovasi Malaysia to incorporate companies under the Companies Act 1965 and to enter into joint ventures and other forms of co-operation with any other person, the proposed new Section 7C and the Act are silent as to whether MIDA is permitted to enter into such arrangements. In the absence of such express authority, it is doubtful that MIDA can invite other persons or entities to participate as shareholders in the companies which are incorporated by MIDA.

> **"MIDA's name will … be changed to "Malaysian Investment Development Authority"**

THE CHIEF EXECUTIVE OFFICER

The designation of the principal officer of MIDA is to be changed from 'Director General' to "Chief Executive Officer" ("CEO") (Clause 6). The CEO will be the Director General of the MIDA (Clause 7(b)).

In addition to the responsibilities set out in Section 3D(2) of the Act, the CEO will be responsible for managing the annual budget of MIDA and making decisions on the allocation for all activities, including development and operational expenditure (Clause 7(c)(iii)).

USE OF THE FUND

The Act established a fund, the Malaysian Industrial Development Fund ("the Fund"), which is to be used for the purposes of defraying all expenses incurred by MIDA in carrying out its functions under the Act.

In line with the change of name of the Act, the Fund will be renamed the "Malaysian Investment Development Fund" (Clause 13). The purposes for which the Fund may be utilized will be expanded to include:

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GROWTH WITH GOVERNANCE

An overview of the Capital Market Masterplan 2 by Sheba Gumis

SHEBA GUMIS

Sheba graduated from Universiti Teknologi MARA in 2009. She is an Associate in the Corporate Division of SKRINE.

The completion of the first Capital Market Masterplan in 2010 ("CMP1") paved the way for the Securities Commission to introduce the Capital Market Masterplan 2 ("CMP2"). Launched by the Prime Minister on 12 April 2011, CMP2 provides a broad outline of the strategic direction of the Malaysian capital market for this decade.

GROWTH WITH GOVERNANCE

With the Malaysian capital market expected to expand up to RM4.5 trillion by 2020, CMP2 is aptly themed *"Growth with Governance"* as it outlines the growth strategies to expand the role of the capital market and formulates governance strategies for investor protection and market stability. The objective of these strategies is to help the Malaysian capital market meet the challenges of the present decade.

> **"CMP2 provides a broad outline of the strategic direction of the Malaysian capital market"**

The challenges that have been identified by the Securities Commission include transforming the competitive dynamics of the Malaysian capital market, managing the risks for a changing landscape and growth prospects for the Malaysian capital market up to 2020.

GROWTH STRATEGIES

With Growth being one-half of the theme, CMP2 outlines growth strategies with the aim of expanding the role of the capital market in financing business ventures, widening ownership of assets and generating returns on long-term savings.

The growth strategies highlighted in CMP2 seek to promote capital formation, expand intermediation efficiency and scope, deepen liquidity and risk intermediation, facilitate internationalism, build capacity and strengthen information infrastructure.

CMP2 contains various recommendations to promote capital market growth. These recommendations include increasing private sector participation in the venture capital and private equity industries, improving the bond market and widening the Islamic capital market international base.

Among the initiatives that will be taken to increase participation in the venture capital and private equity industries are the establishment of a regulatory framework for these industries, expanding participation of investment management industry in venture capital and private equity and promoting participation by public listed companies in supporting the growth of venture capital investee companies.

Collaboration will be sought from the industry to evolve business models to promote the growth of small and mid-cap companies. Various initiatives will be implemented to widen access to the bond market, including measures to facilitate greater retail participation, expanding the range of fixed-income products, strengthening disclosure and documentation standards and enhancing the regulatory framework for credit rating agencies.

Among the measures that will be taken to widen the Islamic capital market international base are collaboration with the industry to expand the range of Shariah-compliant stockbroking and portfolio products, building scale in Shariah-compliant equity, sukuk and investment management segments and increasing international collaboration on Shariah research and product development.

CMP2 also places emphasis on socially responsible financing and investment to encourage intermediaries and public listed companies to give greater prominence to social and environmental issues.

Also in the pipeline is the establishment of a private retirement scheme industry under the oversight of the Securities Commission. Focus will also be placed on producing a highly electronic environment to attract investors.

> **"CMP2 contains various recommendations to promote capital market growth"**

GOVERNANCE STRATEGIES

As CMP2 is conceived in the aftermath of the 2007 financial crisis where the collapse of the U.S. sub-prime mortgage market and consequent calls on credit default swaps brought the international financial markets to the brink of collapse, it is not surprising that CMP2 gives equal emphasis to governance.

CMP2 deems it necessary to ensure that governance arrangements provide robust safeguards to protect the interests of investors and the stability of the market. It outlines six governance strategies to achieve this objective, namely enhancing product regulation to manage risks, expanding accountabilities as the intermediation scope widens, developing a robust regulatory framework for a changing market landscape, ensuring effective oversight of

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WHAT ABOUT ME ?

A commentary on Monorail Retail Sdn Bhd v Cho Choo Meng, Mohd Anwar bin Yahya & PriceWaterhouseCoopers Malaysia by Leong Wai Hong and Patricia Ng

The Court of Appeal recently upheld the High Court's decision in *Monorail Retail Sdn Bhd v Cho Choo Meng, Mohd Anwar bin Yahya and PriceWaterhouseCoopers Malaysia* (2010) 1 LNS 345 to strike out, without the need for a full trial, a claim against the receivers and managers for conspiracy to injure, cheating and defrauding an unsecured creditor. This decision has a significant implication for the receivership industry.

THE BACKGROUND

KL Monorail System Sdn Bhd ("Company") was granted the right by the Government of Malaysia to *inter alia* design, construct and operate a monorail-based public transport system within Kuala Lumpur under an agreement dated 15 December 2000 ("Concession Agreement").

To part finance the project, the Company obtained a loan from a financial institution ("Bank"). The loan was secured by fixed and/or floating charges over all of the Company's assets, properties and undertaking under a Debenture and a Supplemental Debenture.

> **"the R&M owed no fiduciary duties to unsecured creditors like the Plaintiff"**

When the Company defaulted in its obligations under the loan, the Bank appointed the 1st Defendant and the 2nd Defendant, partners of PriceWaterhouseCoopers Malaysia ("PWC"), as receivers and managers ("R&M"). The R&M took control of the charged assets under the debentures and eventually sold them for RM1.3 billion to Syarikat Prasarana Negara Berhad ("SPNB") with the express consent of the Government of Malaysia.

The Concession Agreement was also novated to SPNB pursuant to a novation agreement entered into between the Government of Malaysia, SPNB and the R&M ("Novation Agreement").

As the amount recovered from the sale of the charged assets was insufficient to repay the full amount owing by the Company, the Bank filed a winding up petition against the Company ("Winding Up Petition"). The R&M did not defend the Winding Up Petition and a winding up order was made against the Company.

Meanwhile, Monorail Retail Sdn Bhd ("Plaintiff"), the anchor tenant of the retail space at the Company's monorail stations, commenced legal proceedings against the Company ("Civil Suit") in respect of various claims under its tenancy agreement with the Company and obtained summary judgment.

THE PLAINTIFF'S CLAIM

The Plaintiff then filed suit in the present case against the R&M and PWC as the 3rd Defendant for approximately RM79.5 million being all sums claimed by the Plaintiff from the Company under the Civil Suit. The Plaintiff alleged that the R&M had conspired to injure, cheat and defraud the Plaintiff by not opposing the Winding Up Petition.

The Plaintiff also contended that the R&M had exceeded their powers by entering into the Novation Agreement as the Concession Agreement was not part of the charged assets under the debentures, thereby depriving the Plaintiff of assets of the Company. The Plaintiff further contended that the R&M had breached their fiduciary duties owed to the Plaintiff.

The R&M and PWC applied to strike out the Plaintiff's suit under O.18 r 19 of the Rules of the High Court on the ground that the Plaintiff had no *locus standi* to sue.

DECISION OF THE HIGH COURT

The learned Judicial Commissioner, Dr Prasad Abraham, held that as the Company had been wound up, the Plaintiff's position as an unsecured creditor is clearly set out in *McPherson's Law of Company Liquidation*, namely that:

"It is equally clear that neither creditors nor members acquire any proprietary interest in the company's property by reason or in consequence of winding up. No doubt this follows logically from the foregoing principles and from the well-known doctrine that the company exists as a separate legal entity, but since on winding up the assets cease to be available for the profit-making purposes of the company and acquire instead the character of a fund destined for the payment of debts and for distribution among the members in accordance with the scheme in the Act, it might be thought that this would give the creditors and members some new form of right in the assets in question. Nevertheless, it is not now the law … that the liquidator holds the company's assets as trustee, or that creditors or members have any kind of beneficial trust held in them apart from their statutory rights to receive a distribution or dividend …"

> **"The Judicial Commissioner also found the allegations of fraud and cheating to be unsustainable"**

The learned Judicial Commissioner, relying on *O' Donovan on Receivers and Managers*, also held that the right to pursue a claim that the R&M had exceeded their powers by novating the Concession Agreement rested with the liquidators on behalf of the general creditors and not with the Plaintiff.

With regard to the question as to whether the R&M had the power to novate the Concession Agreement, the Judicial Commissioner was of the view that the R&M could rely on the incidental powers under the debentures to clothe them with the necessary authority.


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The learned Judicial Commissioner also held that the R&M owed no fiduciary duties to unsecured creditors like the Plaintiff.

His Lordship further held that a close examination of the statement of claim showed that a cause of action for conspiracy could not be sustained against the R&M as the settlement scheme did not have the sole or predominant purpose to injure the Plaintiff. The Judicial Commissioner also found the allegations of fraud and cheating to be unsustainable.

In closing, the learned Judicial Commissioner observed that the Plaintiff's rights as an unsecured creditor lay in either filing a proof of debt or moving the liquidator to take action on behalf of the Company or in the alternative, seek sanction from the liquidator to bring the action on behalf of the Company.

The learned Judicial Commissioner thus allowed the R&M's application and ordered that the suit against the R&M be struck out. His Lordship also struck out the suit against PWC on the ground that the R&M were appointed in their personal capacity and not as partners of PWC.

DECISION OF THE COURT OF APPEAL

The Plaintiff appealed against the dismissal of their suit against the R&M. The Court of Appeal unanimously upheld the decision of the High Court to strike out the Plaintiff's claim against the R&M. The Panel agreed that the Plaintiff had no *locus standi* to commence an action against the R&M at all despite the best efforts of the Plaintiff to allege fraud to sustain its claim.

CONCLUSION

Although the legal principles applied by the Malaysian courts in this case are trite law in England, the decision is significant as it appears to be the first reported decision in Malaysia on this issue.

The decision of the Court of Appeal is important as it means that the Plaintiff cannot argue that it had *locus standi* to commence an action or challenge the actions of the R&M by alleging that the R&M acted fraudulently in carrying out its duties and functions in realizing the assets of the Company.

This decision is most welcomed. If it had been decided otherwise, it would have opened the floodgates for litigation by unsecured creditors against receivers and managers.

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PADDLING WITH THE DRAGONS

The firm's dragon boat team, the Skrine Dragons, only in the mid-season of this year's dragon boating, has already competed in two competitions and clocked personal best times in the process.

On 29 May 2011, the team took part in the Ministry of Youth and Sports' Water Sports Festival in Putrajaya, which was held in conjunction with the One Million Youth Gathering. The firm fielded three boats of 10-paddlers each and one of our women's boats secured a passage into the finals. We then clinched fifth position, narrowly missing out on fourth place by just 0.3 seconds. This was a perfect start for the rest of our competitive season.

The team then headed up north to compete in the 32nd Plenitude Penang International Dragon Boat Festival from 10 to 12 June 2011. Close to 30 teams participated in the event, including those from Guam, Australia, Singapore, Indonesia, Hong Kong, Macau, Philippines, UAE and China.

Being the only corporate team in the competition, the Skrine Dragons enjoyed the good natured ribbing from the other teams, some of which comprised national teams. It was heartening for the team to discover that not only did we beat our previous race-timings, we also earned an interview with a local news station.

The Skrine Dragons are now raring to jump back into training to work towards our next competition, the Malaysia International Dragon Boat Festival 2011 in October.

UP IN THE CLOUDS

Still cloudy about the Cloud? Jillian Chia sheds some light on cloud computing

The winds of change have swept in the Cloud, the next new thing to take the technology industry by storm. "The Cloud" is a metaphor for the Internet and cloud computing generally refers to the use of the Internet to provide hardware and software as a service.

Cloud computing allows hardware and software to be provided as a service via the internet, whereby users can access infrastructure (such as servers), systems and applications using a web-browser. Cloud computing consists of various services, namely:

- IT infrastructure (such as hardware, storage, network) being sold as a service on a usage basis (IaaS);
- Application development platform sold as a service (PaaS); and
- Software being sold as a service where software applications can be hosted in an external environment and accessed using the internet (SaaS).

Though cloud computing has become increasingly popular in recent years, it is not new to the world of technology. If you have used applications such as Facebook, MySpace or Gmail, you have used cloud computing. Search engines, such as Google and Yahoo! are forms of cloud applications. Similarly web hosted emails, such as Gmail or Yahoo! Mail, as well as social networking sites are also cloud applications as they can be accessed via the internet.

EVERY CLOUD HAS A SILVER LINING

With the advent of cloud computing, users can now access infrastructure, hardware, software, applications and systems via the internet without the hassle of having to purchase physical infrastructure. Google, Amazon and IBM are a few of the companies which have embarked on projects to provide cloud computing on a large scale. Not wanting to be left behind, Apple launched its iCloud service at the Apple Worldwide Developers Conference on 6 June 2011.

> **"cloud computing (is) the use of the Internet to provide hardware and software as a service"**

Several factors have contributed to the popularity of cloud computing in recent times. The number of individual users who use mobile computing devices such as laptops, tablet computers and smartphones are increasing each day. This increases the need for a shared data centre that can be accessed anywhere. With the emergence of the Cloud, any device connected to the Internet is connected to the same pool of computing power, applications and files. Users can use the Cloud to store and access personal files such as photographs, mp3s, videos or even perform word processing on a server that is located remotely, thereby dispensing with the need for thumb drives and other external storage devices.

For businesses, cloud computing has opened up a whole new horizon of possibilities as it enables software and applications to be implemented more efficiently without the need to incur substantial sums of money on software and IT infrastructure.

Clearly the greatest benefit of cloud computing is that a user can access a computing solution regardless of his location as long as an internet connection is present. Further, software is also kept updated by the cloud service provider, reducing the need for businesses to hire in-house software support. The costs involved are also reduced as compared to the traditional licensing model whereby the applications are installed, operated and maintained on the premises.

Another reason to venture into the Cloud is the flexibility that comes with it. With cloud computing, software and hardware resources can be easily scaled up or down depending on the user's needs. As the user does not own the physical infrastructure (such as the servers) he only needs to pay for the resources that he uses.

For some businesses, cloud computing would be warmly welcomed as the burden of ownership, administration, and operation of the hardware and software is shifted to a third party provider, allowing businesses to focus on their core operations instead of having to deal with IT related problems.

THE CLOUD OF DOUBT

Despite its benefits, venturing into the Cloud is not without its problems, and the concept of cloud computing has given rise to a number of practical and legal concerns.

Security and Privacy

One of main reasons users are reluctant to use cloud computing is due to security and privacy concerns. Having your data and information in the hands of another entity is deemed to be risky and worrying to some if not most, especially businesses which deal with sensitive or confidential information. Many companies are reluctant to take advantage of the benefits of cloud computing due to the fear of data loss or damage. It is important for any company which decides to use cloud computing to be aware of the security and privacy standards and policies of the cloud service provider that it is signing up with. There must also be a right to audit and conduct regular checks on the cloud provider's policies and processes.

Jurisdiction

Privacy and data protection laws which vary from country to country is another area of concern. Data may be stored in jurisdictions unfamiliar to the customer and the laws in those jurisdictions may contain provisions which customers are less than comfortable with. For example, in certain jurisdictions, law enforcement agencies are permitted to have access to information without the knowledge or consent of the owner of the data.

Cloud computing may give rise to difficulties in determining where the data is stored and what laws and courts govern the use and

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processing of such data. It also begs the question as to how a cloud customer will deal with situations where the data protection laws in the customer's home country conflict with the laws of the country where the data is stored. Customers may not always have control over these factors as laws in certain countries may prevail over the agreement between the parties.

Downtime

Downtime and outages are common problems in computing. Cloud computing is not spared from such problems. A cloud computing customer must develop strategies and backup plans in the event of outages or downtime. It is therefore pertinent for a cloud computing customer to understand the disaster recovery and business continuity measures which are offered by its service provider and for the customer to have its own plan both with and without the assistance of its cloud provider.

Having a stable internet connection is also something which a customer of the Cloud needs to think about. An unstable internet connection in the customer's premises may mean more downtime and outages which would negate the benefits of cloud computing.

Contractual Issues

As pricing of cloud computing is largely on a pay-per-use basis, companies also need to ensure that there are adequate means to verify the fees charged by the service provider. Having service level agreements in place are also essential to ensure that the customer is provided with a satisfactory level of accessibility to its computing solutions.

Intellectual Property

There has been some debate as to whether a customer who subscribes to the cloud services owns the data or whether the data belongs to the provider of the storage space. As such, any agreement with a cloud service provider should spell out clearly the ownership rights in the data and applications stored in the Cloud as well as the ownership in any developments that arise from the cloud computing arrangement.

BRINGING IN THE CLOUD

There is presently no specific legislation in Malaysia which governs the provision of cloud computing services. However certain licensing requirements may apply if the services fall within the licensing requirements under the Communications and Multimedia Act 1998:

(i) *Network Facilities Provider ("NFP") Licence* for the provision of network facilities or physical infrastructure for or in connection with the provision of network services e.g. satellite earth stations, broadband fibre optic cables, telecommunications lines and exchanges, radio communications transmission equipment, mobile communication base stations and broadcasting transmission towers and equipment.

(ii) *Network Service Provider ("NSP") Licence* for the provision of network services for basic connectivity and bandwidth to support various applications e.g. bandwidth services, broadcasting distribution services, switching services, gateway services, access applications service, space services and cellular mobile services.

(iii) *Applications Service Provider ("ASP") Licence* for services provided by means of, but not solely by means of, one or more network services. The ASP licence is generally for the provision of particular functions such as voice services, data services, content based services, electronic commerce and other transmission services.

(iv) *Content Applications Service Provider ("CASP") Licence* for the provision of application services which provide content, such as traditional broadcasting services and newer services such as online publishing and information services.

It is more likely that an ASP or CASP licence may be required, rather than a NFP or NSP licence. However this will largely depend on the type of services provided by the cloud service provider. Due to the wide range of services that may be offered under cloud computing, the licensing requirements may vary from service to service and service providers should exercise prudence by clearing any licensing requirements with the relevant authorities.

The Personal Data Protection Act 2010, which is pending enforcement, is also an important legislation for cloud service providers to note. Service providers should ensure that their customers have obtained adequate consent from the data subject (the individual to whom the data relates to) particularly in respect of the transfer of the data out of the country via the internet into the cloud computing solution.

CONCLUSION

Although cloud computing is still in its infancy, there is great potential in what it has to offer. It will undeniably be the future of outsourced data processing. The services cloud computing offers will change the way organizations and individuals deal with their information and transform the way companies look at their IT solutions.

The draw of cloud-based computing such as data accessibility and substantial cost savings clearly ensure that cloud computing is here to stay. However, as with all new technology, users must understand, and take measures to mitigate, the risks associated with it in order to reap the full benefit of the technology.

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THE SKW-BURSA SAGA : THE NEVER ENDING STORY

Ruth Garnet Maran discusses the Syarikat Kayu Wangi cases

The decisions of the High Court and the Court of Appeal in *Syarikat Kayu Wangi Berhad v Bursa Malaysia Securities Berhad & Securities Commission (unreported)* have important implications on companies that are listed on Bursa Malaysia Securities Berhad ("Bursa") in two respects. Firstly, they provide guidance on the approach which the Court will take when it is called upon to review enforcement proceedings taken by Bursa, and secondly, whether a denial of oral representations amounts to a denial of a right to be heard.

Although proceedings were filed against Bursa and the Securities Commission ("SC"), this article focuses solely on the proceedings against Bursa.

BACKGROUND

Syarikat Kayu Wangi Berhad ("SKW") is listed on Bursa's then Second Board. In May 2006, SKW was classified as an Affected Lister Issuer as its shareholders' equity fell below 25% of its issued and paid-up capital.

Consequently, SKW was obliged to submit a Regularisation Plan to the SC and Bursa for approval within 8 months, failing which, Bursa would be entitled to take action, including commencing de-listing proceedings, against it. Although it was granted an extension of time by Bursa to submit its Regularisation Plan for approval, SKW failed to do so within the extended timeline.

Bursa issued a Notice to Show Cause requiring SKW to make representations as to why SKW's securities should not be de-listed. SKW submitted written and oral representations to Bursa's Listing Committee. As SKW had by this time submitted its Regularisation Plan to the SC for approval, SKW was informed that Bursa would await the outcome of SKW's application to the SC (including any ensuing appeal) and that Bursa would proceed to de-list SKW if its appeal was unsuccessful.

In August 2007, the SC rejected SKW's Regularisation Plan as it fell short of the required standard. SKW's appeal against this decision was rejected. In November 2007, Bursa notified SKW that its securities would be de-listed unless SKW submitted an appeal Bursa, which it duly did. After deliberating on the matter, Bursa's Appeals Committee rejected SKW's appeal on 30 November 2007. Bursa informed SKW of its decision and that de-listing would be effected on 13 December 2007 ("Delisting Decision").

On 12 December 2007, SKW and two of its shareholders, namely Maple Diversified Sdn Bhd ("Maple") and Ng Eng Howe (who later withdrew as a party to the action) simultaneously filed separate suits against Bursa and the SC. SKW filed its suit in the High Court in Shah Alam ("Shah Alam Case") while its shareholders filed their case in the High Court in Penang ("Penang Case").

THE SHAH ALAM CASE

SKW obtained leave to commence judicial review proceedings against Bursa in respect of the Delisting Decision (Civil Suit MT FLJC 13-6-2007).

On 14 September 2009, Dato' Hinshawati Binti Shariff, JC dismissed SKW's application against Bursa on, amongst others, the following grounds:

(1) SKW's complaints that Bursa had taken into consideration irrelevant matters and had not considered relevant matters in arriving at the Delisting Decision were unsubstantiated;

(2) The Courts will not second-guess the informed judgment of responsible regulators steeped in knowledge of their particular market - *R v International Stock Exchange of the UK and Ireland, Ex-parte Else Ltd* (1993) 1 QB 534 was cited as authority in support of this proposition; and

(3) SKW's complaint that there had been a breach of natural justice as it had not been given the opportunity to make oral representations before the Appeals Committee was without merit. The Judge was of the view that the Appeals Committee had every right to refuse a request for oral representations when facts have been sufficiently laid out in the written representations. In the opinion of the learned Judge, SKW had been heard through its written submissions.

SKW appealed to the Court of Appeal against the decision of the High Court (Civil Appeal No. B-01-319-2007)("SKW Appeal").

THE PENANG CASE

In the writ filed at the Penang High Court (Civil Suit No. 22-750-2007), Maple sought declaratory relief against and an injunction to prevent Bursa from de-listing SKW on the ground that the rights of the minority shareholders would be infringed.

Maple obtained an *ex parte* injunction to restrain Bursa from taking any action to de-list SKW. Due to a change of judges, an *ad interim* injunction was granted on the same terms as the *ex parte* injunction until the conclusion of the *inter partes* hearing of the injunction.

Bursa applied to strike out Maple's writ and statement of claim and to set aside the *ad interim* injunction ("Bursa's Applications").

Maple's application for an *inter partes* injunction and Bursa's Applications were heard together on 28 April 2010.

Dato' Abdul Halim bin Aman, J allowed Maple's application and dismissed all of Bursa's Applications. The learned Judge rejected Bursa's contention that Maple, as a shareholder of SKW, did not have any contractual relationship with Bursa and therefore did not have *locus standi* to make a claim against Bursa and held that Maple had *locus standi* for various reasons including the following:

(1) Maple had a cause of action against Bursa based on the implied contract between Maple and Bursa whereby SKW was listed on Bursa and Maple was a general investor who purchased SKW's

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shares on the stock exchange operated by Bursa;

(2) Maple would be an 'aggrieved party' if Bursa proceeds with its de-listing of SKW as Maple was an innocent party who would suffer great loss; and

(3) Maple's action fell within an exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461 which permitted aggrieved shareholders to bring an action on their own behalf when wrongdoers were in control of the company.

His Lordship was also satisfied that Maple had fulfilled the requirements set out in *Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & 2 Ors* [1995] 1 CLJ 293 for an injunction to be granted in its favour.

The Judge dismissed Bursa's application to strike out Maple's writ of summons and statement of claim as he was satisfied that, based on the facts of the case, Maple's claim was not one which plainly and obviously ought to be struck out. The Court also held that Maple had successfully shown that there were triable issues that ought to be decided in a full trial and not through affidavit evidence. The action by Maple was also not an abuse of process as alleged by Bursa.

As His Lordship had granted Maple's application for an injunction to be issued against Bursa, the application by Bursa to set aside the *ad interim* injunction was dismissed.

Bursa appealed to the Court of Appeal against the decision of the High Court to dismiss Bursa's Applications ("Bursa Appeal").

THE APPEALS

Given that both matters arose from the same set of facts, the SKW Appeal and the Bursa Appeal were fixed for hearing together on 28 April 2011.

The parties agreed to proceed with the SKW Appeal. With regard to the Penang Case, it was further agreed that if the Court of Appeal ruled in favour of SKW in the SKW Appeal, Bursa would withdraw the Bursa Appeal and conversely, that if the Court of Appeal ruled in favour of Bursa in the SKW Appeal, Bursa would withdraw the Bursa Appeal on condition that Maple withdraws the writ in the Penang Case.

Bursa contended that the court should be slow to interfere with the decisions of Bursa in the exercise of its duties under the Capital Markets and Services Act 2007. The Court of Appeal's decision in *Bursa Malaysia Securities Berhad v Gan Boon Aun* [2009] 6 MLJ 695 (which held that the court should intervene only where the enforcement actions are in excess of statutory authority or are so erroneous as to warrant judicial intervention) and the High Court's decision in *Tengku Dato' Kamal ibni Sultan Sir Abu Bakar & Ors v Bursa Malaysia Securities Berhad* [2010] 6 CLJ 581 (which held that judicial intervention is warranted only when there is a lack of good faith by the regulator in the exercise of its discretion) were cited in support of this proposition.

After hearing the submission of all parties, the Court of Appeal ruled in favour of Bursa and dismissed the SKW Appeal. The New Straits Times reported on 7 May 2011 that the Court of Appeal agreed with Bursa's submissions that the courts should be slow to interfere in the decisions made by the capital market regulator on listing matters. It was further reported that their Lordships had remarked that market stability would suffer if the courts were to unreasonably intervene with decisions of the regulator as this would lead to uncertainty in the market.

COMMENTARY

The Court of Appeal decision in the SKW Appeal affirms the principle laid down in *Gan Boon Aun* and *Tengku Dato' Kamal* that the courts should only exercise their powers of judicial review sparingly when reviewing enforcement decisions of Bursa.

The decision of the High Court in the Shah Alam Case also establishes that in relation to Bursa's enforcement proceedings, the right to be heard can be by way of written representations and the denial of a right to oral representation does not necessarily result in a breach of the rules of natural justice.

The Bursa Appeal was withdrawn *as per* the agreement between the parties before the hearing of the SKW Appeal. It is regrettable that the Bursa Appeal did not proceed as there appear to be good grounds to argue that Maple, as a shareholder of SKW, did not have *locus standi* to commence proceedings against Bursa in relation to the Delisting Decision and that the learned Judge had erred in applying the exception to the rule in *Foss v Harbottle* in the Penang Case.

THE SAGA CONTINUES ...

Notwithstanding the Court of Appeal's decision, SKW has remarkably managed to avoid de-listing as it had on 11 May 2011, a mere 2 days before Maple withdrew its writ in the Penang Case, procured an *ex parte* injunction, restraining Bursa from de-listing SKW pending the disposal of a new judicial review application to quash a decision by Bursa Malaysia not to consider a New Regularisation Plan announced by SKW on 19 January 2011.

This application for judicial review by SKW has been fixed for hearing on 12 July 2011.

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THE ENGLISH PREMIER LEAGUE

Kok Chee Kheong explains the legal framework and the pounds and pence of the EPL

By now the euphoria or the anguish, depending on whether you love or loathe them, of seeing the Manchester United players kissing and lifting the English Premier League Trophy for a record-breaking 19th time last May would probably have receded into the recesses of your memory.

Another English Premier League ("EPL") season is over. Dreams, like those of Chelsea and Arsenal, have been shattered. Clubs that do not have owners with deep-pockets check their bank balances and credit lines to see how much they can afford to spend on signing new players.

For the relegated clubs, Blackpool, Birmingham City and West Ham United, it is time to prepare for a more frugal existence in the Championship by offloading players to trim wage bills. It is also time to transfer their much coveted membership in the big league to the promoted clubs, Queens Park Rangers, Norwich City and Swansea City.

Have you ever wondered, "Who organizes the EPL?", "What are the sources of income of the football clubs?" and "What are "parachute payments?". These and other related questions will be answered in this article.

THE EPL

The EPL is a football competition organised by The Football Association Premier League Limited ("Company"). The competition is played in a league format where 20 clubs play each other twice in each season, on a home and away basis.

The EPL was launched in 1992 when the 22 First Division clubs broke away from the Football League to form the Company to run their own competition. The number of clubs was reduced to 20 at the end of the 1994/1995 season when 4 clubs were relegated but only 2 promoted.

THE LEGAL FRAME-WORK

The Company is a limited liability company. It is incorporated under the Companies Act 1985 with share capital. Its main object is to organise and manage a football league, namely the EPL.

The Company has the power to enter into television, broadcasting, sponsorship, commercial and other transactions in connection with the EPL. It also has the power to make rules for the management of the EPL.

In the exercise of its rule-making power, the Company has adopted a comprehensive set of rules ("Rules") that regulate matters ranging from membership of the EPL, finance, team jerseys, the registration and transfer of players and disciplinary procedures to the minutiae like the size of the teams' changing rooms and the persons who are permitted to sit on a trainer's bench during an EPL match.

The Company presently has an issued share capital of £21 consisting of 20 ordinary shares of £1.00 each and 1 non-redeemable special rights preference share of £1.00 ("special share"). Each of the 20 clubs in the EPL ("Clubs") holds 1 ordinary share in the Company.

The Company's articles of association ("Articles") specifically provide that the special share is to be held by the Football Association Limited ("FA"), the body which governs the game and sanctions all football competitions in England.

Although the holder of the special share has no right to vote at the Company's general meetings, its written consent is required before certain actions can be effective. These include a change of the name of the Company, the amendment of the objects of the Company and of certain provisions of the Articles, such as any variation of the rights attached to any share in the Company, including the special share.

The written consent of the holder of the special share is also required before any change can be made to certain provisions of the Rules, including those which relate to name of the competition, the number of members, promotion to and relegation from the EPL and the criteria for membership of the EPL.

Each Club which is relegated from the EPL is required by the Articles and the Rules to transfer its share in the Company to one of the promoted clubs.

> **"Broadcasting money … is the Company's main source of income"**

MONEY MATTERS

The main sources of income of the Company are broadcasting money, title sponsorship money, radio contract money and commercial contract money.

Broadcasting money, which is divided into UK broadcasting money and overseas broadcasting money, is the Company's main source of income and amounted to £1.04 billion in the 2009/2010 season. In fact, one of the main factors which led to the formation of the EPL was that the football clubs in the Football League's First Division wanted to exclude the clubs in the lower divisions of the Football League from having a share of the broadcasting money.

The Rules prescribe that the expenses of the Company and the EPL are to be paid out of the overseas broadcasting money, commercial contract money, radio contract money, title sponsorship money and other income excluding the UK broadcasting money. If such income is insufficient to meet these expenses, the board may, with the approval of its members in general meeting, require the members to contribute money to cover the deficit.

SHARING THE BOUNTY

The Company's surplus income is distributed in the manner set out below.

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UK broadcasting money

A part of the UK broadcasting money is to be paid to the FA for players' education, insurance and benevolent purposes and for any other purpose approved by the Company in general meeting.

The balance is the divided into 3 parts, ½ of which comprises the Basic Award Fund, ¼ the Merit Payments Fund and the last ¼, the Facility Fees Fund.

The Basic Award Fund is divided into 24.5 shares. Each Club receives 1 share and the remaining 4.5 shares (less a prescribed deduction) are divided between the clubs that were relegated from the EPL in the preceding 4 seasons ("Relegated Clubs"). For the 2010/2011 season, each Club received a payment of £13,819,031 from the Basic Award Fund.

The Merit Payments Fund is distributed amongst the Clubs according to their position at the conclusion of each season. The Club that finishes in 20th position receives 1 share and each Club that finishes 1 position higher receives 1 additional share so that the Club which finishes in 1st position receives 20 shares. For the 2010/2011 season, West Ham United who finished in last place received £756,756 while Manchester United, the champions, received £15,135,120 from the Merit Payments Fund.

The Facility Fees are paid to the home and the away teams that participate in EPL matches which are televised live. The amount of Facility Fees to be paid is determined by the board of the Company.

For the 2010/2011 season, a sum of £582,089.80 was paid to each Club which participated in a match that was televised live. Each Club received a minimum of £5,820,898 million even if it was involved in less than 10 live matches. For the recently concluded season, Manchester United received the highest amount of Facility Fees amounting to £13,548,306, followed by Liverpool with £12,099,410 and Chelsea and Arsenal jointly with £11,616,454.

Overseas broadcasting money and title sponsorship money

The surplus of the overseas broadcasting money and title sponsorship money is divided into 24.5 shares. As in the case of the Basic Award Fund, each Club receives 1 share of these payments while the remaining 4.5 shares (less a prescribed deduction) are divided among the Relegated Clubs.

Commercial contract money and radio contract money

The surplus of the commercial contract money and radio contract

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GAME-CHANGER

continued from page 6

(1) providing loans or any financial assistance to members of the private sector for purposes approved by the Minister (Clause 14(a)); and

(2) providing financial assistance or credit facilities, with or without interest, or any contribution to any person for educational purposes, scholarships or any other purposes subject to the approval of the Minister (Clause 14(b)).

Although the powers to grant loans and provide financial assistance to the private sector may enable MIDA to play an even more dynamic role in the development of the Malaysian economy, it is imperative that MIDA establishes proper governance procedures to prevent these powers from being abused.

THE OIL AND GAS SECTOR

The Bill had barely begun its passage through the Malaysian Parliament when it was reported that the Malaysian Government would soon establish the Malaysian Petroleum Resource Corporation ("MPRC") to spur the development of the oil and gas sector. It was further reported that the MPRC would come under the auspices of MIDA (*StarBiz, 14 April 2011*).

> **"The proposed amendments are … a game-changer"**

CONCLUSION

The proposed amendments will significantly expand the role of MIDA in the development of the Malaysian economy by extending its powers and responsibilities to include the promotion of investments in the services sector (excluding the financial and utilities sectors).

As can be seen from the Economic Report 2010/2011, MIDA has a proud and successful record of promoting industrial development in Malaysia. It is hoped that MIDA will be equally, if not more, successful in the development of the services sector in Malaysia.

The proposed amendments are more than a mere rebranding exercise. They are in fact a game-changer in Malaysia's quest to attract more foreign investments in an increasingly competitive global environment.

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YOURS OR MINE?

A commentary on Sediabena Sdn Bhd v Qimonda Malaysia Sdn Bhd
by Lam Wai Loon and Tan Lai Yee

It is common to find a provision in a standard form building contract which allows an employer to retain and hold a specified percentage of the amount certified in an interim certificate of payment for the work done and materials supplied by the contractor to ensure repair by contractor within the defect liability period of any defect in the construction works.

Based on English law, the contractor will not be able to claim for the release of the retention monies in the event the employer goes into liquidation or has a winding up petition presented against it, if the employer has not put the retention monies into a designated account separate from its general funds. This is the position notwithstanding that the contract specifically provides that the retention monies are to be held by the employer as fiduciary on trust for the contractor.

> **"the High Court decided not to follow the English position, but instead held that the retention monies under the contract are monies held in trust by the employer"**

In the recent case of *Sediabena Sdn Bhd & anor v Qimonda Malaysia Sdn Bhd (in liquidation)*, the High Court decided not to follow the English position, but instead held that the retention monies under the contract are monies held in trust by the employer in favour of the contractors, and as such, the contractors as beneficiaries of the monies were still entitled to claim for their release after the employer has gone into liquidation even though the retention monies were not set aside in a designated account separate from the employer's general funds.

BRIEF FACTS

The Plaintiffs were the Defendant's contractors for a project known as the 'Design and Build For Qimonda Global Module House Project at Senai Johor' ("Works") which adopted the Singapore REDAS Design and Build Contract ("Contract"). Retention monies were deducted by the Defendant from the Plaintiffs' interim certificates for the purpose of making good defects in the Works carried out by the Plaintiffs during the liability period ("Retention Monies"). The Contract did not expressly state that the Retention Monies were held by the Defendant as a 'fiduciary' for the Plaintiffs.

The Defendant went into voluntary liquidation before the Retention Monies were released to the Plaintiffs and Liquidators were appointed over the Defendant. The Retention Monies were not set aside in a separate account prior to the Defendant's liquidation.

The Plaintiffs requested that the Retention Monies be released to them under the Contract. However, the Liquidators refused to do so contending, in the main, that the Retention Monies are not trust monies as there was no express trust provision which provided for the Retention Monies to be held by the Defendant as a 'fiduciary' in favour of the Plaintiffs. The Liquidators also contended that as the Retention Monies were not separated prior to the liquidation of the Defendant, they had become part of the general liquidation fund and that the release of the same to the Plaintiffs would constitute a preferential treatment to the Plaintiffs over the other creditors of the Defendant who have a right to the liquidation fund.

As a result, the Plaintiffs sought a declaration in the High Court that the Retention Monies were held in trust by the Defendant for the Plaintiffs and for a further order that the Retention Monies be released to the Plaintiffs.

DECISION OF THE COURT

The issues for decision by the High Court were, in the main, whether the Retention Monies held by the Defendant were trust monies; and whether the Plaintiffs were still entitled to claim for the release of Retention Monies which had not been set aside in a separate account prior to the Defendant's liquidation.

The High Court granted the declaration sought by the Plaintiff, namely that the Retention Monies were trust monies and further ordered the Defendant to release the same to the Plaintiffs.

> **"the Retention Monies did not belong to the Defendant in the first place"**

The Learned Judge took the view that the Retention Monies was, by its nature and purpose, trust monies because the Retention Monies could be deducted by the Defendant for only one purpose, namely, to rectify any defects during the liability period. The absence of any express provision for trust in relation to the Retention Monies did not dilute the Plaintiffs' beneficial interest in such monies. His Lordship was of the opinion that there was a legitimate expectation on the part of the Plaintiffs that the Retention Monies would be released to them if no claim was made against them under the Contract for defective or uncompleted Works.

The Learned Judge also took the view that there was no requirement for the Plaintiffs to take steps to ensure that the Retention Monies were set aside before the Defendant's liquidation in order to safeguard the Plaintiffs' beneficial interest in such monies. The fact that the Retention Monies were not set


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aside prior to the Defendant's liquidation did not raise the issue of preferential treatment to the Plaintiffs over the other creditors as the Retention Monies did not belong to the Defendant in the first place.

The High Court held that the act of separating the Retention Monies would be useful, but by no means conclusive evidence of the creation of a trust. The Judge took the view that the requirement for the separation of the Retention Monies would impose an extremely high obligation upon the contractors to safeguard the retention funds during the performance of a contract, and more often than not, would not reflect the commercial reality of the construction industry, particularly in the Malaysian context.

The Learned Judge also highlighted that the reported case laws in Malaysia would reveal only a handful of cases where the contractor had actually applied for the preservation of the retention monies during the pendency of a contract, and there could be many reasons why the fund was not set aside, the obvious ones being that the contractor would not want to jeopardise the commercial relationship of the parties when the contract was subsisting as the contractor would not really apply his mind to taking such action to preserve the retention funds especially when the employer was paying monies under the payment certificates.

In coming to its decision, the High Court chose not to follow the long line of established cases in England for the proposition that the failure by a contractor to take steps to ensure that the retention monies are set aside in a separate account would result in the contractor losing its right to claim for their release in the event of the employer's liquidation.

With this decision, contractors in Malaysia will be assured that, notwithstanding the liquidation of the employer, their beneficial interest in the retention sum will be safeguarded even though the employer did not set aside the retention sum in a separate account prior to its liquidation. This High Court decision is certainly one that all contractors in Malaysia will welcome.

CLOSING NOTE

The Defendant's appeal to the Court of Appeal against the decision of the High Court has been fixed for hearing on 12 July 2011.

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GROWTH WITH GOVERNANCE

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risks, strengthening corporate governance and broadening participation in governance.

CMP2 will see a more conducive environment and a more efficient framework for product innovation. The intermediation scope of capital market intermediaries will be widened whereas greater accountability will be placed on boards of directors. Active shareholder participation will be promoted.

Among the governance measures that will be implemented are the streamlining of fund raising and product assessment processes and disclosure requirements, strengthening disclosure and post-issuance obligations, enhancing regulation of sophisticated products, enhancing internal and external controls for managing conflicts of interest and extending regulatory oversight over participants across the transaction chain.

> **"CMP2 deems it necessary to … provide robust safeguards to protect the interests of investors and the stability of the market"**

Other areas where governance measures will be strengthened are regulatory oversight over systemic risks, transparency and communication on risks and the capability of intermediaries for risk management. Measures will also be introduced to achieve a more balanced composition of the boards of directors of public listed companies.

CONCLUSION

The main criticism of CMP2 is that unlike CMP1 which identified 152 specific recommendations to be implemented, CMP2's strategies are broad and lack the specificity of its predecessor. It is evident that CMP2 is a skeletal framework which leaves the finer details to be fleshed out as the various strategies are implemented in the course of the present decade.

CMP2 seeks to produce an innovative capital market which is broad and deep, and operates within a framework of high standards of governance. If these objectives can be achieved, Malaysia will be one step closer to achieving its aspiration of becoming a developed nation by 2020.

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DENIAL OF THE RIGHT TO OPPOSE

Joshinae Wong explains the legal implications

JOSHINAE WONG

Joshinae is a graduate of the University of Melbourne. She joined our Intellectual Property Division in 2007 and will be a Senior Associate as from 1 July 2011.

In *Ginvera Marketing Enterprise Sdn Bhd v Tohtonku Sdn Bhd* [2010] LNS 619, the High Court ruled that the Plaintiff's Certificate of Registration was invalid and hence could not be used as the basis for its claim for trade mark infringement against the Defendant, as the Certificate was not issued in compliance with the provisions of the Trade Marks Act 1976 ("Act") and Trade Marks Regulations 1997 ("Regulations").

BRIEF FACTS

The Plaintiff developed an exfoliating gel product and started to market it under the brand name 'Marvel Gel'. An application was made to register 'Marvel Gel' which was accepted by the Registrar and subsequently advertised in the Government Gazette on 20 December 2001. At this point, the Defendant filed a Notice of Opposition on 7 February 2002 opposing the registration of 'Marvel Gel'. Notwithstanding the Defendant's objection, the Registrar proceeded to issue the Certificate of Registration on 4 March 2002.

The Defendant, who traded under the brand name 'Follow Me' then manufactured and sold a skin product under the name 'Follow Me UV White Marvel Gel' from 2001 until 2003, and then changed the product name to 'Follow Me UV White Renewal Gel'.

The Plaintiff claimed trade mark infringement, or alternatively, passing-off based on the Defendant's use of "Follow Me UV White Marvel Gel", and subsequently "Follow Me UV White Renewal Gel". The Defendant counterclaimed for the Certificate of Registration to be set aside.

THE JUDGMENT

The Plaintiff contended that the Certificate of Registration should be taken as *prima facie* evidence of the validity of the registration and therefore, it was valid and subsisting at the material time. The High Court rejected this argument and held that the Certificate of Registration had been issued contrary to the Act and the Regulations which expressly provided for an opposition procedure.

As the Defendant had been denied the right to be heard in the opposition proceedings, a right provided for by the Act and Regulations, the Certificate was therefore obtained in breach of the principles of natural justice and was invalid. As such, the Plaintiff's claim for trade mark infringement could not stand as the mark 'Marvel Gel' was in effect, unregistered at the material time.

NO PASSING OFF

The High Court then went on to consider the claim for passing-off and concluded that ordinary members of the public who bought skin products in Malaysia would not believe that the Defendant's product was the Plaintiff's product, or associated with the Plaintiff. The Court considered that:

(1) the presentation of the Defendant's product was different from that of the Plaintiff's - the Plaintiff's product was 'Ginvera Marvel Gel' whereas the Defendant's packaging focused on the brand 'Follow Me' in a manner where the public's attention would be drawn to the words 'Follow Me'. The Court emphasized that the words 'Follow Me' was the Defendant's brand and was used on its other products. Hence, the Court felt that a reasonable person would recognise the 'Follow Me UV White Marvel Gel' product of the Defendant to be that of the Defendant, and not of the Plaintiff.

(2) there was no evidence from the Plaintiff that customers were confused by the Defendant's use of Marvel Gel – although the Plaintiff submitted survey evidence, the Court did not give weight to this as *inter alia* (i) the survey was carried out subsequent to commencement of the suit; (ii) the actual survey forms were not produced; (iii) the persons who conducted the interviews did not give evidence; and (iv) the questions were framed in a leading manner.

(3) the term 'Marvel Gel' has a dictionary meaning and is descriptive of the product. The Court was of the opinion that the term had not lost its primary significance and had not acquired a secondary meaning distinctive of the Plaintiff's products. The Defendant thus could not be prevented from using the same as long as it was made clear that their brand of the products were not the same brand as that of the Plaintiff's.

The Court further found that the Plaintiff could not maintain its claim against the Defendant in relation to the Defendant's use of 'Follow Me UV White Renewal Gel', as the use complained of occurred after the commencement date of the action and any amendments to the Writ would have to be dated back to the date of issuance of the Writ.

CONCLUSION

This recent decision demonstrates *inter alia* that a Certificate of Registration obtained in violation of the Act and the Regulations cannot form the basis of an infringement claim, and the difficulties in establishing confusion where the subject mark is used together with a distinctive brand name and where the subject mark is descriptive.

The decision is presently under appeal.

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THE ENGLISH PREMIER LEAGUE

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money is shared equally among the 20 members. The Relegated Clubs are not entitled to a share of these payments.

Parachute payments

As mentioned above, the Relegated Clubs are entitled to share in the remaining 4.5 shares of the moneys which are distributed from the Basic Award Fund and the surplus overseas broadcasting money and title sponsorship money. Each Relegated Club's share is as follows –

- in the first season after being relegated, a sum equal to 55% of 1 share;
- in the second season after being relegated, a sum equal to 45% of 1 share; and
- in the third and fourth seasons after being relegated, a sum equal to 25% of 1 share.

The Rules prescribe that a sum of £2.3 million is to be deducted from each payment to a Relegated Club.

In other words, a Relegated Club receives a total of 1.5 shares (less total deductions £9.2 million) over 4 seasons after being relegated. These payments are to help the Relegated Clubs cope with the adverse financial impact of relegation and are commonly described as "parachute payments".

> **"The introduction of the Regulations will compel Clubs to maintain greater financial discipline"**

For the 2010/2011 season, each Relegated Club that was relegated in the preceding season, such as Hull City, received a total payment of £15,031,094.

CLUB GENERATED INCOME

To obtain an insight into the income of the Clubs across the spectrum of the EPL, we have highlighted information on the income of Manchester United, Everton and West Ham United, the teams that finished in 2nd, 8th and 17th places respectively in the 2009/2010 season.

Without doubt, broadcasting money comprise a substantial portion of a Club's income. In the 2009/2010 season, broadcasting money accounted for 36.6% of Manchester United's income and for 63% and 53% of the income of Everton and West Ham United respectively.

Broadcasting money aside, the main source of income of a Club is gate receipts (including match day related activities). Manchester United raked in £100.2 million while Everton and West Ham United took in £19.2 million and £16.9 million respectively from these activities in the 2009/2010 season.

Other important sources of income of the Clubs are income from sponsorship, commercial and merchandising activities. In the 2009/2010 season, these activities contributed £81.4 million, £8.76 million and £16.8 million of the respective incomes of Manchester United, Everton and West Ham United.

Player trading rarely earns a profit unless a player is sold for a transfer fee that substantially exceeds his acquisition cost and the Club does not reinvest the fees received in other players or for other purposes. A case in point, the transfer of Cristiano Ronaldo to Real Madrid in 2009 for £80 million netted a whopping profit of about £44 million for Manchester United after it reinvested part of the transfer fees on 3 new players.

STRUGGLING TO BREAK EVEN

Although their incomes are substantial, most Clubs struggle to break even or earn a modest profit as they are weighed down by high wage bills. For example, Manchester United's wage bill (including bonuses and pension costs) for the 2009/2010 season amounted to £131.7 million while Everton and West Ham United expended £54.3 million and £50.2 million respectively for wages.

Matters reached the height of absurdity when Manchester City's wage bill of £133 million amounted to 107% of its total income of £124.3 in the 2009/2010 season.

In the 2009/2010 season, only 7 Clubs generated operating profits while the remaining 13 Clubs incurred operating losses.

FINANCIAL FAIR PLAY REGULATIONS

The new UEFA Club Licensing and Financial Fair Play Regulations ("Regulations") which take effect from the 2013/2014 season imposes a "break-even requirement" which requires each club to ensure that its income is sufficient to cover its expenses in each monitoring period in order to be eligible for a UEFA licence to play in European competitions like the Champions League. The initial monitoring period is 2 years and every subsequent monitoring period is 3 years.

The Regulations define the types of income and expenditure which are to be considered in determining whether a club has satisfied the break-even requirement. The Regulations also permit an acceptable deviation of €5,000,000 and a greater amount of deviation, within the limits specified in the Regulations, if the excess is covered by contributions from equity participants or related parties.

The introduction of the Regulations will compel the Clubs to maintain greater financial discipline and take measures to rein in the escalating wage bills.

Audere est Facere.

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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.

THE FIRM'S CLIENT PORTFOLIO COVERS VARIOUS INDUSTRIES INCLUDING FINANCE, COMMERCIAL BANKING, INVESTMENT BANKING, INSURANCE, INFORMATION & COMMUNICATIONS TECHNOLOGY, MULTI-MEDIA, CONSTRUCTION, ELECTRONICS, MINING, OIL AND GAS, AVIATION, SHIPPING AND PHARMACEUTICAL INDUSTRIES. THE FIRM HAS DEVELOPED OVERSEAS TIES THROUGH ITS MEMBERSHIP OF INTERNATIONAL ORGANISATIONS SUCH AS LEX MUNDI, PACIFIC RIM ADVISORY COUNCIL, THE INTER-PACIFIC BAR ASSOCIATION, THE ASEAN LAW ASSOCIATION, THE INTERNATIONAL TRADEMARKS ASSOCIATION AND THE INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

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