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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

September is upon us. It seemed like yesterday that I wrote the message for the June issue of Skrine Legal Insights. Time flies. The London Olympics in July/August have come and gone. Malaysia has also celebrated her 55th Merdeka (Independence Day) and on the 16 September 2012, Malaysia Day which is the day which unified Sabah and Sarawak with Malaya (West Malaysia). The month of September 2012 also witnessed the visit of the Duke and the Duchess of Cambridge (Prince William and Kate Middleton) to Malaysia as part of the Diamond Jubilee celebrations of Queen Elizabeth's reign as Queen of England.

The third quarter of 2012 witnessed two controversial decisions on Statutory Rape where our Courts appear to have protected the rapists at the expense of the under-aged victims. These decisions have understandably, raised much public outcry. With the Attorney General in full cry as well, I hope that the decisions will be overturned on review or appeal.

The global front brought its fair share of legal scandals. In Europe, we have the London Interbank Offered Rates or LIBOR scandal involving the manipulation of interest rates by several major banks; in USA there was the money laundering scandal by one of the European Banks in which fines of hundreds of millions were imposed; and in China, a Chinese lady lawyer who was convicted of poisoning a British lawyer to "protect" her son was apparently represented by a double or look alike at the sentencing by the court.

The third quarter has its fair share of pleasant memories as well, such as the London Olympics where Malaysia came within a whisker of a point of winning its first gold medal and won its first ever bronze medal in the diving events. The opening of Legoland Malaysia Theme Park in Johore also brought excitement and pleasant memories to young Malaysians.

To complement the memories of the third quarter, we have got our pool of passionate writers to provide our readers with an insightful discourse on the latest laws and cases. We do wish all our readers an interesting read.

Best Wishes and Thank You.

LEE TATT BOON
Editor-in-Chief
& Senior Partner

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ANNOUNCEMENTS

Who's Who Legal

We are pleased to announce that 6 of our lawyers have been listed as leading individuals in the *Who's Who Legal – The International Who's Who of Business Lawyers 2012*. The Firm extends its congratulations to the following lawyers for their outstanding work in their respective fields of practice leading to this accolade:

- Arbitration, Construction & Commercial Mediation - **Vinayak Pradhan**
- Banking & Corporate Governance - **Janet Looi**
- Commercial Litigation - **Leong Wai Hong**
- Commercial Litigation - **Wong Chong Wah**
- Life Sciences - **Khoo Guan Huat**
- Trademarks - **Lee Tatt Boon**

2012 Asian-Mena Counsel Survey

The firm is also pleased to announce that based on feedback and nominations of in-house counsel surveyed as part of the 2012 *Asian-Mena Counsel "In House Community Firm of the Year Survey"*, SKRINE was named the winner in the following categories:-

- Alternative Investment Funds (including private equity)
- Energy & Natural Resources
- Environmental
- Insurance
- Intellectual Property
- International Arbitration
- Life Sciences
- Litigation and Dispute Resolution
- Maritime & Shipping
- Restructuring & Insolvency
- Most Responsive Domestic Firm

The firm also won the overall domestic Malaysian firm award. We thank our clients and friends for their invaluable support leading to this accolade.

LEGAL UP-DATE

In LEGAL INSIGHTS Issue 1/2011, we featured a commentary on *Padiberas Nasional Berhad v Zainon bt Ahmad & 690 Others* where the Court of Appeal held that the employees of Padiberas were not entitled to retirement benefits under the provisions of Padiberas' Employment Handbook after the employees had received a pay-out pursuant to a mutual termination under a Voluntary Separation Scheme offered by Padiberas.

The appeal by the former employees of Padiberas against the Court of Appeal's decision was dismissed by the Federal Court on 16 July 2012.

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.

EXEMPTIONS UNDER THE

Faizah Jamaludin and Petrina Tan

for block exemptions and

The Malaysian Competition Act ("Act") came into force on 1 January 2012. The Act is adapted from competition law in the European Community ("EC"), with provisions corresponding to Articles 101 (covering anti-competitive agreements) and 102 (covering abuse of dominance) of the Treaty of the Functioning of the European Union.

Section 4 of the Act prohibits anti-competitive agreements between enterprises, namely agreements which have the object or effect of *significantly* preventing, restricting or distorting competition in any market for goods or services ("Chapter 1 Prohibition") whereas section 10 of the Act prohibits any abuse of an enterprise's dominant position in any market ("Chapter 2 Prohibition").

Similar to the other EC-based competition laws, the Act provides for avenues of relief against anti-competitive agreements. The Malaysian Competition Commission ("MyCC"), the body created by the Malaysian Competition Commission Act 2010, is empowered to implement and enforce the Act. The MyCC's Guidelines on Chapter 1 Prohibition ("Chapter 1 Guidelines") states that this relief can be granted independently through:

(a) Individual exemption under Section 6 of the Act; or
(b) Block exemption under Section 8 of the Act; or
(c) Invoking Section 5 of the Act.

This article will discuss the requirements and qualifications for individual and block exemptions from infringement of the Chapter 1 Prohibition and the procedure for applying for such exemptions to the MyCC. It should be noted that there is no provision for exemptions from the Chapter 2 Prohibition against abuse of dominance.

APPLYING FOR EXEMPTION UNDER THE ACT

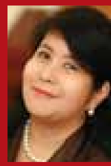
Section 6 of the Act empowers the MyCC to grant an individual exemption for an individual agreement and Section 8 of the Act empowers the MyCC to grant an exemption to a particular category of agreements which, in the opinion of the MyCC, satisfy the criteria set out in Section 5 of the Act. Both the individual exemption and block exemptions are granted by the MyCC by way of an order published in the *Gazette*.

To apply for either the individual exemption or block exemption, the applicant must first prove that the agreement meets all the criteria set out in Section 5 of the Act, namely that:

(a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
(b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
(c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
(d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

COMPETITION ACT 2010

provide an outline on applications
individual exemptions

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The Chapter 1 Guidelines further require the applicant to prove that the significant social or technological benefits that accrue from the exemption will be passed to the consumers.

The Act does not limit applicants to single enterprises and allows trade bodies or associations representing such enterprises to apply for a block exemption for categories of agreements entered into by the members of the association. It has been reported that the MyCC has received one application for individual exemption and three applications for block exemptions filed by trade associations on behalf of their members (*The Star*, 26 April 2012).

Any enterprise that seeks to apply for an individual exemption or a block exemption under the Act must submit a written application together with a fee of RM50,000 to the MyCC for each application. The enterprises granted block exemptions must also pay an annual fee of RM20,000 for every year that the block exemption is in effect while an enterprise that has been granted an individual exemption must pay an annual fee of RM10,000 for each year that the individual exemption remains in effect. According to the Chief Executive Officer of the MyCC, the fees are to cover manpower costs to be incurred by the MyCC "to study and review the applications, while also acting as an incentive for companies and industries to conduct their own assessments instead of leaving the task to MyCC" (*The Star*, 26 April 2012).

In considering any application for a block exemption, the MyCC may request for all documents and information that it deems necessary. Section 9 of the Act requires the MyCC to publish details of a proposed block exemption and to give members of the public at least 30 days from the date of publication to make submissions in relation to the proposed exemption. The MyCC is required to give due consideration to any such submission made in deciding whether or not to grant the block exemption.

APPROVAL OF APPLICATIONS

The MyCC may subject any individual exemption or block exemption to any condition or obligation as it deems fit and the exemption can be given for a limited period. Both individual and block exemptions may be given retroactively. The MyCC also has the inherent power to grant an interim exemption pending its final decision on the application for exemption.

For individual exemptions, where there has been a material change of circumstance or a breach of an obligation imposed, the MyCC may (i) cancel the individual exemption; (ii) vary or remove any condition or obligation; or (iii) impose additional conditions or obligations. Such cancellation, variation or removal or imposition of new conditions or obligations will take effect on the date the order is made.

The MyCC may also cancel the individual exemption where the information provided to the MyCC on which it based its decision to grant the exemption is false or misleading or where there has been a breach of any condition to the exemption. Where the individual exemption is cancelled by reason of false or misleading information, the individual exemption shall be void *ab initio*. Where it is cancelled because of a breach of condition, the cancellation takes effect from the date on which the condition is breached.

For block exemptions, if an enterprise which has been granted the exemption breaches a condition or fails to comply with an obligation imposed by the block exemption, the MyCC may cancel the exemption in respect of the agreement from the date of the breach. The Act also gives the MyCC the discretion to cancel the block exemption in respect of a particular agreement where it considers that the criteria set out in Section 5 of the Act does not apply to the agreement. The Act states that a cancellation for a breach of condition takes effect from the date of the breach. However, it is silent as to when a cancellation for a breach of obligation will take effect. With regards to the cancellation of a block exemption to an agreement which does not to meet the Section 5 criteria, the cancellation will take effect on a date specified by the MyCC.

CONCLUSION

Like other EC-based competition laws, the Act was drafted on a "broad-brush" approach. It did not cater for or take into account the specific nature and requirements of the various markets and industries that form the Malaysian economy. For example, the economic, social and technical factors relating to the financial services industry are different from that of the wholesale flower market.

Again, similar to other competition laws, relief through individual and block exemptions are provided by the Act to cater for the specific requirements and factors of a particular market or industry. Agreements between parties in the market, either horizontal or vertical, may on the face of it be anti-competitive in order to achieve the necessary social benefits and efficiencies. As discussed in this article, where there are such social benefits or efficiencies arising from an agreement or category of agreements, the parties to the agreement (or agreements) can apply for either an individual or block exemption under the Act if they can show that the anti-competitive effect of the agreement is proportionate to the benefits provided by the agreement (or agreements) and that competition is not eliminated completely in respect of a substantial part of the goods or services in the relevant market.

Will the substantial application fee and annual fee set by MyCC act as a deterrent to potential applicants and accordingly, defeat the purpose of the provision for individual and block exemptions under the Act? Only time will tell.

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THE FIRST STEP

To' Puan Janet Looi and Syaida Majid examine the Contaminated Land Management and Control Guidelines

INTRODUCTION

The Department Of Environment ("DOE") made available on its website, a set of Guidelines on Contaminated Land Management and Control ("Guidelines"), which comprises 3 parts, namely:

(1) Malaysian Recommended Site Screening Levels for Contaminated Land ("Guideline No.1");

(2) Assessing and Reporting Contaminated Sites ("Guideline No.2"); and

(3) Remediation of Contaminated Sites ("Guideline No.3").

Although the Guidelines were made available on the DOE's website on 15 March 2011, the DOE has stipulated that the Guidelines have come into effect as of June 2009.

APPLICATION OF THE GUIDELINES

The contaminated land management framework applies to two main categories of land:

(1) Land that is currently used, or was previously used, to perform polluting activities with the potential to cause soil and groundwater contamination; and

(2) Land that involves a change in land use from polluting to non-polluting activities or vice versa.

Guideline No.1 contains a list of activities or usages that could cause soil and groundwater contamination, such as agricultural use, fertiliser manufacturing, landfill site, motor vehicle workshop, asbestos production, petroleum industries, service station, formulation and storage of pesticides and recycling treatment or disposal of toxic wastes.

The DOE's current position is that compliance with the Guidelines is voluntary in nature. The main purpose of the Guidelines is to establish a practical and nationally consistent framework for management of contaminated land in Malaysia and to obtain public feedback on the criteria, pending the issue of regulations on management of contaminated land under the Environmental Quality Act 1974.

GUIDING PRINCIPLES

The general guiding principles under the Guidelines are the "*Polluter Pay Principle*" and "*Risk-Based Approach*".

The Guidelines recognise that the "polluter" may be the land owner, the property occupant/users and/or the chemical/product/waste owner.

The "Risk-Based Approach" refers to an approach that places emphasis on the potential current and future risks associated with the presence of contaminants in the soil and groundwater matrix. This approach applies to the various processes of contaminated land management, including contaminated land planning and management, site assessment, remediation and closure.

RESPONSIBILITIES OF PARTIES

Guideline No.1 imposes the responsibility on the current land owner to determine if there is any subsurface contamination in their land and to notify the DOE accordingly. If the contamination of the subsurface is not caused by the present or previous activities on the land, the land owner is further responsible for identifying the polluter who will then be responsible for the remedial actions to be carried out.

The current land owner will be responsible for remediation actions if the identified polluter is no longer in operation in Malaysia.

If there is a dispute as to the party who is responsible for cleaning up a contaminated site, the Director-General of Environmental Quality has the authority to decide the same.

> **"The general guiding principles … are the "Polluter Pay Principle" and "Risk-Based Approach""**

Guideline No.1 also requires a seller or owner of land to disclose all soil and groundwater information relating to the subject land and the buyer to carry out a soil and groundwater assessment as part of the due diligence prior to the transaction.

SITE SCREENING LEVELS

Guideline No.1 sets out Site Screening Levels ("SSL") as a criterion for screening. The SSLs were developed by reference to the Regional Screening Levels of the United States' Environmental Protection Agency.

The guideline also stipulates that if a site clean-up is required, the responsible parties are required to justify that the selected Site-Specific Target Levels are protective of human health and ecological well-being. Alternatively, they may adopt the SSLs as the Site-Specific Target Levels, if the exposure scenario is consistent with the SSL's exposure assumptions.

If the contaminant detected is not covered by the SSLs, the responsible party is to propose to the DOE appropriate SSLs based on other international standards, or may develop Tier 1 SSLs by referring to the risk assessment procedures in Guideline No.2.

ASSESSMENT AND REPORTING

Guideline No.2 sets out the approach to be adopted in assessing and reporting of lands that fall within Guideline No.1. In essence, the assessment is divided into 3 parts as discussed below.


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Initial Assessment

An Initial Assessment or Phase 1 Environmental Site Assessment ("Phase 1 ESA") is required to be carried out in respect of land which is being (a) transferred; or (b) developed or redeveloped for a different land use purpose; or (c) used for polluting activities.

Detailed Assessment

A Detailed Assessment or Phase 2 Environmental Site Assessment ("Phase 2 ESA") is required for land which is identified with potential contamination based on the findings of the Phase 1 ESA.

Risk Assessment

Risk Assessment is required for land which is detected with subsurface contamination at concentrations higher than the relevant SSLs or land that is intended to be cleaned up.

"A Detailed Assessment ... is required for land which is identified with potential contamination"

Risk Assessment is divided into 3 levels - Tier 1 to Tier 3, depending on the site complexities and estimation of contaminant concentrations at points at which an individual or population may come in contact with a chemical of concern that originates from the site.

Guideline No.2 sets out the types of investigations that have to be carried out. For example, a Phase 1 ESA comprises a desktop study and site reconnaissance whereas a Phase 2 ESA requires installation of soil boreholes, ground water monitoring wells and soil and groundwater analysis. It also provides guidance on the factors that are to be considered when such investigations are being carried out.

REMEDIATION

Under Guideline No.3, remediation is required where:

(a) the soil and groundwater concentrations detected at site exceed the SSLs set out in Guideline No.1; or

(b) there are unacceptable human health risks based on the assessment performed in accordance with Guideline No.2.

Guideline No.3 also recommends that an immediate emergency response action plan be devised to contain physical threats/risks from sites that pose other immediate physical threats or risks.

Four steps are set out in Guideline No.3 for remediation actions:

Stage 1: Remediation Action Plan
Stage 2: Remedial Investigation, Feasibility Study and Remedial Design
Stage 3: Remedial Implementation
Stage 4: Post Remediation Evaluation

Remedial Action Plan

Guideline No.3 requires a Remedial Action Plan ("RAP") to be prepared and submitted to the DOE for approval before any remediation action is implemented.

The RAP should contain the following:

- An executive summary of remediation goals, proposed remediation strategy and actions and selected remediation technologies
- Background information on site condition and contamination and the responsible party
- Review of previous site investigations and assessments
- Proposed remediation targets, site specific target levels and also proposed remediation strategy and actions
- Detailed discussions on proposed remediation actions or technologies and any special approvals required from DOE or other government departments
- Site management plan, taking into account health and safety considerations on the disposal of waste generated and other potential adverse environmental impact from remedial tasks performed
- Implementation schedule
- Post-remediation evaluation

Any subsequent changes to the RAP due to changes in site conditions or additional information obtained is to be reported and a revised RAP is to be submitted to the DOE for approval.

Remedial investigation, feasibility study and remedial design

Activities comprised in remedial investigations ("RI") and feasibility studies ("FS") include identifying and defining the scope of suitable treatability studies and identifying the optimal sequence of site actions and investigative activities. Unless otherwise specified, all RI/FS works are to be reviewed by a qualified remediation specialist or a contaminated land manager.

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INTELLECTUAL PROPERTY AND COMPETITION LAW

Sri Richgopinath and Natalie Lim examine the relationship between intellectual property and competition law

Intellectual property rights ("IPRs") and competition laws may be said to be complementary in their shared objective of promoting economic efficiency and innovation for the benefit of consumers. However, they also appear to be at odds as competition laws have the primary purpose of protecting competition in the markets and reducing trade barriers whereas IPRs confer exclusive rights on the owner to exploit his intellectual creation.

IPRs are monopolistic in nature in that the proprietor is given the exclusive right to exploit the IPR. The rationale behind this is to reward the proprietor for the efforts, time and money expended on his intellectual creation.

MALAYSIA

In Malaysia, most IPRs are governed by statutes. Section 35 of the Trade Marks Act 1976 confers the exclusive right on the owner to use, or license the use of, his trademark in relation to goods or services for which the mark has been registered. Section 36 of the Patents Act 1983 gives the owner of a patent the exclusive right to use and exploit the patent. Section 13 of the Copyright Act 1987 on the other hand, provides the exclusive right to the owner to deal with and control, *inter alia*, the reproduction in any material form, the communication and distribution of the copyrighted work to the public, by sale or otherwise.

Competition in Malaysia is mainly regulated by the Competition Act 2010 ("CA 2010"), which prohibits two types of conduct:

(a) an anti-competitive agreement, whether a horizontal or vertical agreement between enterprises or an association of enterprises, which has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services (section 4(1) prohibition); and

(b) an enterprise engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services (section 10 prohibition).

In the context of IPRs, the prohibitions under the CA 2010 give rise to the following issues. First, whether IPR licence agreements, technology transfer agreements and other IPR pooling arrangements, being vertical agreements, will be prohibited under section 4(1) of the CA 2010 in absence of any exemptions. Second, whether IPR agreements will be prohibited under section 10 as an "abuse" of dominant position, given that IPR essentially allows the owner to be in a dominant position.

To-date, the Malaysian Competition Commission ("MyCC") has only finalised the Guidelines on Market Definition, the Guidelines on Chapter 1 Prohibition (*Guidelines on Anti-competitive Agreements*), and the Guidelines on Chapter 2 Prohibition (*Guidelines on Abuse of Dominant Position*). The MyCC has stated in its Chapter 1 Guidelines that separate guidelines will be issued to address both IPR and issues relating to franchise agreements.

The Chapter 2 Guidelines include a statement that a refusal by a dominant enterprise to supply (which includes refusal to license IPR) may amount to an abuse of dominant position. The MyCC however recognises in its Chapter 2 Guidelines that forcing supply may reduce the incentive to invest in the product, IPR or essential facility. The MyCC will take into account the difficult trade-off involved in forcing supply which leads to a short-term increase in competition but which may harm longer term incentives for innovation and investment.

In the absence of specific guidelines that apply to IPR, we shall turn instead to other jurisdictions for an indication as to how concerns over IPRs have been addressed in light of competition law.

THE EUROPEAN UNION

The main prohibitions in the European Union ("EU") are contained in Article 101(1) (*anti-competitive agreements*) and Article 102 (*abuse of market power*) of the Treaty on the Functioning of the European Union ("TFEU").

> **"as a general rule, agreements and conduct concerning IPRs fall within the ambit of the competition laws"**

Vertical Restraints Block Exemption Regulation

The Vertical Restraints Block Exemption Regulation provides for an exemption for vertical agreements that contain certain provisions relating to the assignment of IPRs to, or use of IPRs by, the buyer, subject to the following conditions being fulfilled:

(1) the agreement must be a vertical agreement under which parties may purchase, sell or resell goods or services;

(2) the IPRs must be assigned to, or licensed for use by, the buyer;

(3) the IPR provision must not be the primary object of the agreement;

(4) the IPR provision must directly relate to the use, sale and resale of the goods by the buyer or its customer; and

(5) the IPR provision must not contain restrictions of competition that have the same object as vertical restraints which are not exempted.

Commission Regulation (EC) No. 1218/2010

The EU has also adopted the Commission Regulation (EC) No. 1218/2010 of 14 December 2010 ("EC 1218/2010") on the application of Article 101(3) of the TFEU to specialisation agreements. Article 2(1) of *EC 1218/2010* exempts the following


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types of specialisation agreements from the application of Article 101(1) of the TFEU provided that the combined market share of the parties concerned does not exceed 20% of the relevant market:

(1) unilateral specialisation agreement: an agreement whereby one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, who agrees to produce and supply those products;

(2) reciprocal specialisation agreement: an agreement whereby two or more parties agree on a reciprocal basis to fully or partly cease or refrain from producing certain but different products and to purchase those products from the other parties, who agree to produce and supply them; and

(3) joint production agreement: an agreement whereby two or more parties agree to produce certain products jointly.

The exemption under Article 2(1) of EC 1218/2010 also applies to specialisation agreements for the provision of services, other than distribution and rental services.

Article 2(2) of EC 1218/2010 provides that the exemption in Article 2(1) also applies to provisions contained in the specialisation agreements which relate to the assignment or licensing of IPRs between the parties provided that such provisions are not the primary object of the agreements but are directly related to and necessary for their implementation.

Technology Transfer Block Exemption Regulation

Furthermore, the EU has adopted a block exemption for technology transfer agreements i.e. the Technology Transfer Block Exemption Regulation ("TTBER"). The TTBER provides for specific situations where the licensing agreement will be exempted from the prohibition under Article 101(1). If the licensing agreement or any part of it falls outside the provided scope, the TTBER will not be applicable and therefore the agreement or part thereof may be deemed to be anti-competitive.

The TTBER defines a technology transfer agreement as a patent, know-how and software copyright licensing agreements or mixture thereof. The TTBER also makes it clear that other IPR, such as trademarks and other types of copyright licensing, will not fall within its ambit unless they are being licensed ancillary to a patent, know-how or software licensing agreement.

SINGAPORE

In Singapore, the main prohibitions are contained in Sections 34 (*arrangements that prevent, restrict or distort competition*) and 47 (*abuse of dominant position*) of the Competition Act 2004 ("CA 2004"). The Competition Commission of Singapore ("CCS") introduced the CCS Guidelines on the Treatment of Intellectual Property Rights ("CCS Guidelines") to provide guidance on the factors that the CCS will consider when assessing whether agreements or conduct concerning IPRs will contravene sections 34 or 47 of the CA 2004.

The CCS Guidelines define IPRs to include only rights granted under the Patents Act, Copyright Act, Plant Varieties Protection Act, Layout-Design of Integrated Circuits Act, Registered Designs Act and trade secrets. Rights pursuant to trademarks appear to be excluded from the purview of the CCS Guidelines, which suggests that trademark licensing agreements may still be subject to the general rule under the CA 2004.

AUSTRALIA

Section 51(3) of the Australian Competition and Consumer Act 2010 ("ACCA") exempts particular provisions of agreements or conduct in the exercise of certain IPRs, namely patents, registered designs, copyright, trademarks and rights pursuant to the Circuit Layouts Act 1989, from the prohibition under the ACCA.

For instance, the imposition of certain conditions on a patent licence is exempted to the extent that the condition relates to the invention to which the patent relates or articles made by the use of the invention. Similarly, the exemption extends to a provision in any licence, arrangement or understanding between the owner and a registered user of a trademark, to the extent that such provision relates to the kinds, qualities or standards of goods that bear the licensed trademark.

CONCLUSION

It is clear from the overview of the legislation and guidelines in other jurisdictions that as a general rule, agreements and conduct concerning IPRs fall within the ambit of the competition laws of those jurisdictions. Although various actions have been taken to exempt certain types of agreements and conduct concerning IPRs from the prohibitions under the competition laws, none of those jurisdictions have granted blanket exemptions that apply to all agreements and conduct concerning IPRs from their competition laws.

The uncertainty that we now face in Malaysia is the extent to which CA 2010 should affect IPRs. The need for the MyCC to issue guidelines to address IPR-related issues as soon as possible cannot be overstated. Until then, the spectre of the CA 2010 will, like the Sword of Damocles, hang over every transaction that involves the licensing of IPRs.

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MUCH ADO ABOUT NOTHING?

A review of the Mediation Act 2012 by Shannon Rajan

INTRODUCTION

After more than 5 years in the Malaysian legislative pipeline, the much anticipated Mediation Act 2012 ("the Act") came into operation on 1 August 2012.

The Act has been criticised by certain quarters as being a redundant piece of paper. This article discusses the main provisions of the Act and considers whether the aforementioned criticism is justified.

THE OBJECT AND PURPOSE OF THE ACT

The objective of the Act is to *"promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner."* The Parliament formulated an exceedingly modest purpose of the Act by failing to adopt uniform laws relating to the accreditation, qualification and professional standards of mediators, and perhaps less controversially, implement mandatory mediation in Malaysia.

Many mediators in Malaysia belong to professional institutions, such as the Malaysian Mediation Centre and the Chartered Institute of Arbitrators, and are required to adhere to the code of ethics and other related standards of their institution. There is no uniformity and consistency of accreditation, qualification and standards between these organisations and the Parliament's failure to introduce legislative consistency concerning the same can only be viewed as a missed opportunity to promote and encourage mediation in Malaysia.

THE DEFINITION AND APPLICABILITY OF MEDIATION

Section 3 defines "mediation" as a voluntary process in which a mediator facilitates communication and negotiations between parties to assist the parties in reaching an agreement regarding a dispute. Although the independence and neutrality of the arbitrator are not included in the definition of mediation, such omission is not material as all appointed mediators are obliged to confirm their independence and neutrality under the Act.

The Act does not apply to matters which are set out in *Section 2* and the Schedule. These matters include, but are not limited to, disputes as to the effect of any provision of the Federal Constitution, prerogative writs, the issue of injunctive relief, election petitions and land acquisition proceedings.

COMMENCEMENT OF MEDIATION

Section 4(1) read together with *Section 4(2)* provides that parties may initiate mediation under the Act at any time and that mediation will not operate to stay, extend or prevent the commencement of any civil action in court or arbitration.

The procedures for the commencement of mediation are set out in *Section 5* and are as follows:-

(a) a person may initiate mediation by sending a written invitation to mediate to the person with whom he has a dispute;

(b) the written invitation must briefly specify the matters in dispute;

(c) upon receipt of the written invitation, the person with whom he has a dispute may accept the same in writing; and

(d) a mediation shall only be commenced if the person who initiates it has received the acceptance of the written invitation from the person with whom he has a dispute.

The written invitation is deemed to be rejected if the person initiating the mediation does not receive a reply from the person with whom he has a dispute within 14 days from the date he sent the written invitation or such other period of time specified in the invitation.

The Act has placed somewhat onerous procedural requirements for parties to comply with in order to commence mediation and they are counter-productive to the object and purpose of the Act. For instance, a verbal agreement for mediation appears to be insufficient for the purposes of the Act.

> **"mediation will not operate to stay, extend or prevent the commencement of any civil action in court or arbitration"**

Some other problems that may arise from the procedures are as follows:-

(a) as the Act does not define a "written" invitation, it is unclear whether it includes electronic communication such as e-mail and short messaging service (SMS);

(b) an acceptance is ineffective if a person has accepted, in writing, a written invitation within the period stipulated in the invitation, but his acceptance is received by the other person after the expiration of the stipulated period; and

(c) there is no saving provision which allows parties to mutually waive the requirements under *Section 5* to preserve the commencement of mediation.

Section 6 requires the parties to enter into a mediation agreement upon the commencement of mediation to record *inter alia* the parties' agreement to submit their disputes to mediation, appoint a mediator and bear the costs of mediation.

APPOINTMENT OF MEDIATOR

Sections 7(1) to *7(3)* provide that the parties shall (if necessary, with the assistance of an institution) appoint a mediator who possesses the relevant qualification, special knowledge or experience in mediation or satisfies the requirements on an institution.

Section 7(4) stipulates that, unless the parties agree otherwise,

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there shall be a sole mediator while *Section 7(6)* prescribes that the appointment of any mediator is to be valid only upon his written consent.

The appointed mediator has a mandatory obligation under *Section 7(7)* to disclose, prior to accepting the appointment, any known facts that a reasonable person would consider likely to affect his impartiality as a mediator, including a financial or personal interest in the outcome of the mediation. From the wordings of this section, there appears to be no continuing obligation on the mediator to disclose any matters affecting his impartiality and neutrality after the mediation has commenced.

TERMINATION OF APPOINTMENT

The parties may terminate the appointment of the mediator under *Section 8(1)* if the mediator has infringed the requirements of *Sections 7(2) and 7(7)* or obtained his appointment through fraud or is unable to serve as a mediator for the mediation. *Section 8(2)* allows the parties to terminate the appointment of a mediator for any reason whatsoever and requires them to inform the mediator of their reasons for the termination.

THE MEDIATION PROCESS

Section 9 highlights the role of the mediator, which *inter alia* includes facilitating mediation, determining the method of mediation and suggesting options for the settlement of the dispute. It is interesting to note the choice of words used in the provision i.e. "suggest options" as opposed to generate options, which may be in reference to other processes such as early neutral evaluation and binding and non-binding evaluation.

Section 11(1) provides that the mediator shall conduct the mediation privately and he may meet with the parties together or separately. *Section 11(2)* permits any party (with the consent of the mediator) or the mediator (with the consent of the parties) to appoint a non-party to assist in the mediation.

A mediator may end the mediation under *Section 11(3)* if he is of the opinion that further efforts at mediation would not contribute to a satisfactory resolution of the dispute between the parties.

CONCLUSION OF MEDIATION

Section 12 provides that mediation shall conclude upon:-

(a) the signing of a settlement agreement by the parties;

(b) the issuance of the mediator's written declaration that further efforts at mediation would not contribute to a satisfactory resolution of the dispute;

(c) the issuance of the parties' written declaration that the mediation is terminated; or

(d) the withdrawal from a mediation by death or incapacity of any party.

Section 13 stipulates that the parties shall enter into a settlement agreement when an agreement is reached regarding a dispute. The agreement must be in writing, signed by the parties and authenticated by the mediator.

Section 14 provides that a settlement agreement is binding on the parties and the same may, if proceedings have been commenced in court, be recorded as a consent judgment or judgment before the court.

CONFIDENTIALITY, PRIVILEGE AND IMMUNITY

To augment the mediation process, *Section 15* prohibits a person from disclosing any mediation communication and *Section 16* declares that such communication is privileged and is not subject to discovery. These safeguards are subject to the exceptions set out in the respective provisions.

To safeguard a mediator, *Section 19* exempts a mediator from liability for any act or omission in the discharge of his function as mediator save where the act or omission is fraudulent or involves wilful misconduct.

CONCLUSION

The Act is largely a regurgitation of the procedural rules of various institutions relating to mediation. It does not contain any provisions to regulate the practice of mediation by mediators or establish standards of competency (including minimum qualifications) for mediators or establish an accrediting authority to confer and revoke accreditation in appropriate circumstances.

The Malaysian Parliament has also shied away from introducing mandatory mediation, which would have relieved the court system of the pending cases in the dockets and placed Malaysia alongside with other nations with modern and sophisticated mediation process.

The Act is not completely devoid of merits. It contains some provisions that would promote mediation in Malaysia. It expressly provides for the enforceability of a settlement agreement that is signed at the conclusion of a successful mediation and protects from liability, a mediator who has properly discharged his duties as such.

Despite its shortcomings, it would be unduly harsh and premature at this juncture to conclude that the Act is much ado about nothing.

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BODY OF EVIDENCE

Kok Chee Kheong recalls a sensational murder trial from the 1960s

Sunny Ang Soo Suan came from a middle-class family. He was a flamboyant character. Not only was he a competent scuba-diver, he was also a race-car driver of some note, having secured a top-10 placing in the inaugural Singapore Grand Prix in 1961.

Ang was less successful in establishing a career, having failed to complete his teacher's training course and a pilot training course. Ang was also a part-time law student and wanted to further his studies in England. Ang was made bankrupt in 1962 after he failed to satisfy a judgment debt of about $2,000-00.

Jenny Cheok Cheng Kid worked as a waitress at the Odeon Bar and Restaurant, earning $90 per month plus tips of about $10 per day. Cheok was estranged from her husband and had 2 young children who lived with their father.

Ang met Cheok in the middle of 1963 and shortly thereafter, they became romantically involved.

THE FATEFUL DAY

On 27 August 1963, Ang hired a boat from Yusof bin Ahmad to take Cheok and him scuba diving and to collect corals. The boat left Jardine Steps at around 2.30 p.m. and headed for Pulau Dua (Sisters Islands).

The boat dropped anchor in the waters between the Sisters Islands about an hour later. Cheok made two dives alone, surfacing after the first to change her air cylinder tank. She did not surface from her second dive.

> **“Ang did not join the divers from St. John's Island to look for Cheok”**

After unsuccessful attempts to find Cheok by tugging at the guide-line and looking for tell-tale signs of bubbles on the water surface to pin-point her location underwater, Ang and Yusof went to the nearby St John's Island to seek help. The divers who accompanied them back to the vicinity of Sisters Islands could not find Cheok.

Cheok's body was never found despite search attempts by divers from the Royal Navy and the Royal Air Force Changi Sub-Aqua Club.

THE TRIAL

Ang was charged with the murder of Cheok on 29 December 1964. He had earlier been charged with the same offence but had been given a discharge not amounting to an acquittal on a technical ground.

The trial before High Court Judge, Buttrose J and a seven-man jury began on 26 April 1965.

The boatman's evidence

Yusof, the boatman, testified that Ang did not dive underwater to look for Cheok even though their attempts to locate her from the water surface were unsuccessful.

He further testified that Ang did not appear to act with any urgency even when they sought help at St. John's Island. According to the boatman, Ang was calm enough to change from his swimming trunks into his street clothes during the trip to St. John's Island to seek help.

Yusof further testified that Ang did not join the divers from St. John's Island to look for Cheok when they returned to the vicinity of Sisters Islands.

A novice in dangerous waters

Evidence suggested that Cheok was a novice diver, having only taken up the sport after she became acquainted with Ang. Although Ang admitted that Cheok could barely float in the water when he first met her, he claimed that he had given her about a dozen lessons and that she had made good progress under his tutelage.

> **“This is the first case of its kind to be tried in our courts in that there is no body”**

Expert witnesses testified that the waters around Sisters Islands were dangerous due to strong undercurrents and that it was unsafe for a novice to dive in those waters alone.

The flipper

One of the flippers worn by Cheok on 27 August 1963 was recovered on 3 September 1963 not far from the spot where she had gone missing.

The heel strap of the flipper had been severed by 2 clean cuts. According to the Government chemist, Phang Sin Eng, the cuts were made by a sharp instrument, such as a razor blade, knife or a pair of scissors. He was emphatic that the cuts could not have been caused by corals.

Another expert witness testified that the loss of a flipper could impair the mobility of a diver and could lead to panic, particularly in the case of a novice diver.

The insurance policies

Witnesses from several insurance companies testified that Cheok

KOK CHEE KHEONG

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had personal accident policies for $450,000-00, a substantial amount in the 1960s. The policies were taken within 3 weeks after Ang's first meeting with Cheok. The beneficiaries named in those policies were either Ang's mother, Yeo Bee Neo, or Cheok's estate.

One of the insurance policies for the sum of $150,000-00 had lapsed on 26 August 1963 but had been extended on the morning of 27 August 1963 for a further period of 5 days. Evidence was also produced that Ang did not renew or extend his own accident policy which had been taken out at the same time.

Another of Cheok's accident policies for a sum of $100,000-00 was due to expire on 28 August 1963.

It also transpired that Cheok had drawn up a will on 7 August 1963 at Braddell Brothers, a law firm, and that she had been accompanied by Ang at the material time. Ang's mother was named as the sole beneficiary in Cheok's will.

The representatives from the insurance companies also testified that Ang had filed claims with their companies on Cheok's insurance policies barely 24 hours after the disappearance of his girlfriend.

“ the body of evidence taken as a whole led only to one conclusion: that Ang had murdered Cheok ”

THE VERDICT

The trial concluded after 13 days. After deliberating on the evidence for 2 hours, the jury unanimously found Ang guilty of the murder of Cheok on 18 May 1965. Ang was sentenced to death by the trial judge.

THE APPEALS

Ang's appeal on grounds that the trial judge was biased and had failed to provide adequate directions to the jury on the dangers of convicting an accused person on circumstantial evidence were dismissed by the Federal Court (see [1966] 2 MLJ 195). On the question of bias, the Federal Court was satisfied that although the judge had expressed strong views on certain matters, he had made it clear to the members of the jury that they were the sole judges of the facts in the case.

The Federal Court was satisfied that the trial judge had on two occasions during summing-up, given adequate directions to the jury on the requirements for a conviction based on circumstantial evidence.

Ang's application for special leave to appeal to the Judicial Committee of the Privy Council was refused on 4 October 1966. His petitions for clemency to the President of Singapore, Yusof bin Ishak, were rejected on 31 January 1967.

Having exhausted all avenues to avoid the inevitable, Ang was sent to the gallows on 6 February 1967.

SIGNIFICANCE OF THE CASE

The significance of *Sunny Ang* lies not in the fact that it captured the attention of the public. Rather, its' significance can be found in the opening address of Francis Seow, the Senior Crown Counsel at Ang's trial:

"This is an unusual case insofar as Singapore, or for that matter Malaysia, is concerned. This is the first case of its kind to be tried in our courts in that there is no body."

What Senior Crown Counsel meant was that *Sunny Ang* was the first case in Singapore and Malaysia where an accused would be tried for murder based on circumstantial evidence. Unlike direct evidence where the truth of an assertion is established by the evidence itself, circumstantial evidence by itself does not, but requires an inference to connect it to a conclusion of fact.

The burden to be discharged by the prosecution when it relies on circumstantial evidence to prove its case is aptly put by the trial judge in his summing-up to the jury:

"(O)ne of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might … be capable of explanation. The question for you is: where does the totality of them, the total effect of them, lead you to? Adding them together, considering them, not merely each one in itself, but altogether, does it … lead you to the irresistible inference and conclusion that the accused committed this crime?"

In *Sunny Ang*, this question was answered unequivocally in the affirmative by the jury. Notwithstanding the absence of the body of the victim, the jury was satisfied that the body of evidence taken as a whole led only to one conclusion: that Ang had murdered Cheok.

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OF GOOD CONSCIENCE AND COMMERCIAL SENSE

Serene Hiew reviews a landmark case on performance bonds

INTRODUCTION

The Federal Court in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401 has recently decided and recognised unconscionability, apart from the traditional ground of fraud, as a separate and distinct ground to restrain a beneficiary from making a call on, or receiving monies under, an on-demand performance bond.

BRIEF FACTS

Malaysian Refining Company Sdn Bhd ("MRC") awarded Sumatec Engineering and Construction Sdn Bhd ("Sumatec") a contract to design, supply, fabricate and erect certain structural steel for a refinery in Malacca. The contract price was RM47,846.688. Pursuant to the contract, Sumatec provided an on-demand bank guarantee to MRC for RM4,784,688.80 for the due performance of the contract.

> **" the principle recognising unconscionability as a separate and distinct ground ... accords with good commercial sense "**

Disputes arose between the parties. Sumatec contended, *inter alia*, that MRC had reduced the works to be performed by Sumatec under the contract by removing certain aspects of the works from the original scope of works. As a result, the value of the remaining works had been reduced to about RM13 million. The bank guarantee, however, remained in force despite the reduction in the value of the works.

Sumatec claimed that they had by 31 May 2009 completed all works required of them under the reduced scope of contract by delivering all the agreed steel structure. However, MRC made a claim for 'back charges' for rectification works without giving any prior notice to Sumatec to rectify the defects in the works. The parties held several meetings to try to resolve the issue but to no avail.

MRC then made a demand for payment of the bank guarantee. Sumatec applied for an injunction to restrain MRC from calling on, or receiving monies under, the on-demand performance bond on grounds that MRC's call on the bank guarantee was unconscionable.

Sumatec succeeded in the High Court in obtaining the injunction but the decision was reversed on appeal to the Court of Appeal. The Court of Appeal applied the *American Cynamid* test (also known as the balance of convenience test) and held that on the facts of the case, the balance of convenience tipped in favour of MRC and that damages would be a sufficient remedy for Sumatec should it eventually succeed in its claim against MRC. Sumatec appealed to the Federal Court.

FINDINGS OF THE FEDERAL COURT

The question before the Federal Court was whether "unconscionable conduct" on the part of a beneficiary of an on-demand bank guarantee or a performance bond is a distinct ground, apart from "fraud", that entitles the Court to restrain the beneficiary from calling on or demanding and receiving monies under the on-demand bank guarantee or performance bond.

The Federal Court answered the question cited in the affirmative. In coming to this decision, the Federal Court considered the decisions in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283, *LEC Contractors (M) Sdn Bhd v Castle Inn Sdn Bhd & Anor* [2000] 3 CLJ 473, *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442, and the legal position adopted by the courts in Singapore, Australia and the United Kingdom. The Federal Court held that the principle recognising unconscionability as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond accords with good commercial sense and unconscionability may now be raised as a distinct ground.

Whilst acknowledging the importance of the fundamental principle behind a bank guarantee, it being a contract that is separate and independent of the underlying contract between the disputing parties and the contract between the account party and the bank, the Federal Court recognised that the rigidity of the autonomy principle could sometimes lead to injustice. It was further observed that the courts, both in Malaysia and other common law jurisdictions, are now more willing to look beyond the fraud exception and to consider unconscionability as a separate and independent ground to allow for a restraining order on the beneficiary.

Their Lordships agreed with the "seriously arguable and realistic inference" test cited by Mohamad Ariff bin Md Yusof JC in *Focal Asia Sdn Bhd & Anor v Raja Noraini Raja Datuk Nong Chik & Anor* [2009] 1 LNS 913. This test was adopted by the Court of Appeal at the intermediate stage of the present case (see: [2011] 7 CLJ 21, 33-34) and expressed by Ramly JCA in the following terms:

"As in the case of fraud, to establish "unconscionability" there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the Respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of "unconscionability" which would basically mean establishing a strong prima facie case … "unconscionability" should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man."

Whether or not unconscionability is found to exist would depend largely on the facts of each case.

On the facts of this case, it was held that although Sumatec had raised several incidences of the alleged unconscionable

SERENE HIEW

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conduct on the part of MRC, it had not proven unconscionability. Therefore, their Lordships could not find any reasons to justify an interference with the Court of Appeal's decision to set aside the injunction. Accordingly, the decision of the Court of Appeal was upheld by the Federal Court.

COMMENTARY

It is important to note that the Federal Court emphasised the distinction between an injunction to restrain a beneficiary from making a demand on, or receiving monies under, an on-demand performance bond and an injunction to restrain the issuing bank from making payment out on a performance bond. The principles laid down in the *Sumatec Case* only apply to the former case. In the latter case, an injunction would ordinarily not be granted unless the applicant is able to show that there is fraud on the part of the beneficiary in making the call on the performance bond and that the fraud has been brought to the attention of the issuing bank.

> **“ the party alleging unconscionable conduct must provide manifest or strong evidence … of the alleged unconscionable conduct ”**

The Federal Court's decision in the *Sumatec Case* is a very important decision on this area of law as it is now clear that 'unconscionability' is recognised as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond.

Concerns that the decision in the *Sumatec Case* will open the floodgates for plaintiffs to challenge the conduct of the beneficiary calling upon a bond in any particular case are largely allayed as the Federal Court has set a high threshold to prove "unconscionable conduct". The Court has emphasised that a bare assertion will not suffice and that the party alleging unconscionable conduct must provide manifest or strong evidence of some degree in respect of the alleged unconscionable conduct.

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DRAGONS IN HONG KONG

On 4 to 7 July 2012, the Skrine Dragons participated in the prestigious *8th Club Crew World Championships* in Hong Kong.

The *Championships* saw a gathering of over 4,700 dragon boaters from 25 countries. The races took place at the Victoria Harbour Racing Course, where the modern era of Dragon Boat racing began in 1976.

The Skrine Dragons

Each race was watched live on the worldwide web and this was by far the most exhilarating and challenging race entered into by the Skrine Dragons.

The Skrine Dragons, as the sole Malaysian representative, took part in several 200m and 500m races. The Team truly held their own against world-class international teams by besting far more experienced teams from France, Singapore, Hong Kong, Korea and Philippines.

The *Championships* represent the culmination of the Skrine Dragons' dragon boat season and hard work. The Skrine Dragons look forward to be back paddling hard and strong in 2013!

Paddles up!

Dragons (No.12) battling neck and neck with other teams

LEE SHIH

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POLAR OPPOSITES

Lee Shih explains why the High Court decided that it has no jurisdiction to set aside an arbitral award with the seat outside of Malaysia

The High Court has confirmed in its oral grounds of judgment in *Twin Advance (M) Sdn Bhd v Polar Electro Europe BV* (Penang High Court Originating Summons No. 24-2292-12/2011) that where the seat of arbitration is outside of Malaysia, the Malaysian Courts have no jurisdiction under section 37 of the Arbitration Act 2005 ("the Act") or under its inherent jurisdiction to set aside such an arbitral award.

BRIEF FACTS

The foreign defendant commenced arbitration proceedings against the Malaysian plaintiff where the seat of arbitration was in Singapore. The defendant obtained an arbitral award for damages and thereafter commenced proceedings to enforce the award in Malaysia under section 38 of the Act.

The plaintiff then filed an Originating Summons in the Malaysian courts to set aside the arbitral award, relying on section 37 of the Act. The defendant obtained leave to enter conditional appearance and applied to strike out the proceedings under the Originating Summons on the grounds that the Malaysian courts had no jurisdiction to hear such an application and that any application to set aside the arbitral award should have instead been made in the Singapore courts where the seat of arbitration was.

MODEL LAW AND NON-INTERFERENCE

On 7 August 2012, the Court read out its oral grounds of judgment allowing the defendant's striking out application. The Court first highlighted the historical context of the Act and the adoption of the United Nations Commission on International Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 ("Model Law"). The Court also agreed with the approach that it was Parliament's intention to limit the Court's intervention in international arbitrations and that the Court may only exercise such powers if the Act expressly provides the Court with such powers.

The Court also referred to the Officiating Address by the Chief Justice of Malaysia at the Launch of the KLRCA Fast Track Rules made on 27 February 2012. The Chief Justice had stressed that with the amendments to the Act that came into force in July 2011, the Courts are more receptive to respecting the parties' choice to go for arbitration. The Chief Justice had also highlighted that section 8 of the Act (being identical to Article 5 of the Model Law) states in clear terms that no court shall intervene in matters governed by the Act, except where expressly provided in the Act.

THE PLAINTIFF'S ARGUMENTS

The plaintiff advanced two main arguments in support of its contention that the Court had jurisdiction under the Act to hear the setting aside. Firstly, that the plain wording of section 37 of the Act (which is based on Article 34 of the Model Law) provides that "*an award may be set aside by the High Court*" and makes no reference to whether the award had its seat of arbitration in or outside of Malaysia.

Secondly, the plaintiff submitted that as the grounds for setting aside listed in section 37 of the Act are also repeated in the grounds for resisting enforcement under section 39 of the Act, it would be inconsistent to hear the grounds listed in section 39 without also being able to apply the grounds in section 37 of the Act.

FINDING OF NO JURISDICTION

The Court disagreed with the plaintiff's submissions. The Court held that section 3 of the Act, being based on Article 1(2) of the Model Law, makes it clear that the provisions of the Act would not apply to any arbitration with the seat of arbitration outside of Malaysia. Nonetheless, it further held that section 3 is a general provision which must be read subject to any specific provisions under the Act, for instance enforcement under sections 38 and 39 of the Act (which are based on Articles 35 and 36 of the Model Law). Section 38 has a specific reference to "*an award from a foreign State*" while section 39 contained the wording "*irrespective of the State in which it was made*".

Under the recent amendments to the Act, both section 10 which relates to a stay of Court proceedings (based on Article 8 of the Model Law) and section 11 which allows for interim measures (based on Article 9 of the Model Law) also expressly state that they apply to international arbitrations with the seat of arbitration outside of Malaysia.

The Court further went on to hold that there was a glaring distinction in the references to "*an award from a foreign State*" and "*irrespective of the State in which it was made*" in sections 38 and 39 respectively which were omitted from the wording of section 37 of the Act.

The Court also noted that sections 37(2)(a) and (b) of the Act listed out additional grounds allowing for the setting aside of an award which were absent in the grounds listed in section 39 of the Act.

On the basis of statutory interpretation, the Court held that the different wording in sections 38 and 39 compared with section 37 of the Act was not unintentional. It was intended for section 37 to be read in harmony with section 3 which would then only apply where the seat of arbitration is in Malaysia. Sections 38 and 39 are to be construed as an exception to the general position of section 3 of the Act.

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IS THE GAME WORTH THE CANDLE?

Vijay Raj discusses a novel application of the principle of proportionality in defamation suits

Defamation suits seem to be on the rise, perhaps due in part to the increased opportunity of publishing words on the internet, and in hardcopy through the aid of printers.

However in the case of *Naza Kia Sdn Bhd v Eco Oto (M) Sdn Bhd & Anor* (Civil Suit No. S–22–392–2008), the Kuala Lumpur High Court held last year that:

"The bringing of a suit by the Plaintiff as a claimant who had suffered no or minimal damage to his reputation might constitute an interference with freedom of expression that was not necessary for the protection of the Plaintiff's reputation …"

In that case, the Plaintiff sued the Defendants for defamation that they alleged arose from a letter written by the Defendants to the then Minister of Finance I that was resent to the then Minister of Finance II. In that letter, the Defendants complained about the Plaintiff after the latter refused to pay for services rendered by the 1st Defendant, despite repeated requests.

The Defendants made a number of allegations in the letter that the Plaintiff was unhappy about. The Defendants said that they had no choice but to write the letter because they had exhausted all avenues in seeking payment, barring court action.

The Defendants also said that since they had done the work in relation to a project that was launched by the then Minister of Finance II, it was appropriate that they should raise the matter of non-payment before the same Minister prior to commencing court proceedings.

As it turned out, the letter was unhelpful and it became necessary for the 1st Defendant to commence a civil suit to recover the debt. The debt recovery suit was commenced shortly after the defamation suit. After a trial involving many witnesses, it was adjudged in the debt recovery suit that the payment claimed by the 1st Defendant was in fact due to them.

The Defendants contended in the defamation suit which remained pending after the disposal of the debt recovery suit, that having regard to all the facts, even if some of the statements in the letter may be considered defamatory, the damage to the Plaintiff's reputation was minor or minimal and therefore, that a summary and immediate dismissal of the defamation suit was warranted. It appears that such a proposition was hitherto unsupported by any case law in Malaysia.

The Defendants' argument was a novel proposition in defamation claims in Malaysia as the law seemed to allow a plaintiff to prosecute till the end a claim for defamation even if the damage to reputation was minor or minimal, so long as some ground existed to support the contention that, from an objective point of view, the plaintiff's reputation had been lowered in at least one person's mind.

The learned High Court Judge, Dato' John Louis O'Hara, accepted the Defendants' contention as well as the English cases that were cited in support of the contention and struck out the defamation suit summarily without requiring a trial to be had. In so doing, His Lordship, amongst others, held as follows:

"The Plaintiff argues that this suit should go for trial. I reject the Plaintiff's argument that I should not strike out the Plaintiff's claim because if I did so, it would deprive the Plaintiff of his right that the suit should go for trial. And I am obliged to ask the same question that Justice Eady asked in Schellesiberg v British Broadcasting Corporation … in regard to the requirement for proportionality that is whether "the game is worth the candle", which Lord Phillips MR answered in Jameel (Yusoef) … that "the game will not merely not have been worth the candle, it will not have been worth the wick". Therefore to allow the Plaintiff's claim to go on to trial would be a clear abuse of process in view of the findings of (the High Court in the debt recovery suit)."

> **"to allow the Plaintiff's claim to go on to trial would be a clear abuse of process in view of the findings (in the debt recovery suit)"**

In one of those English cases, that is *Jameel (Yousef) v Dow Jones & Co Inc* [2005] 2 WLR 174, a claimant from outside England commenced defamation proceedings in England against the publisher of a US newspaper in respect of an article posted on an internet website in the USA, which was available to subscribers in England.

The claimant alleged that the article and a link referred in it implied that he had been involved in a terrorist organization. The publisher said that only five subscribers within England read article, and therefore, that the claimant had suffered no or minimal damage to his reputation.

The claimant though disputing that only five subscribers had read the article, accepted that there had not been many readers of the article in England. The English Court of Appeal held that the defamation proceedings were an abuse of court process since, amongst others, the damage to the claimant's reputation was insignificant.

In arriving at its decision, the English Court of Appeal also considered other areas of English law and procedure that, at first

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"REFER TO DRAWER"

Susanah Ng explains the dangers of the indiscriminate use of the above-referred phrase

You gaze fondly at your long service award plaque and think, "How time flies. It has been 25 years since you first started as a bank teller and slowly rose to become the branch manager."

You are jolted from your reminiscing by a ruckus outside your room. You rush to the scene of the commotion. Before you stands a very angry man, Mr. X, shouting at the top of his voice that the bank had wrongfully dishonoured his cheque despite him having sufficient funds in his account.

You usher him into your room to speak to him in private. After having calmed down, Mr. X explains that he had issued a cheque to his consultant as payment for consultancy services rendered. However, the cheque was dishonoured and returned to the payee with the words "Refer to drawer".

You check Mr. X's account and realize that the bank had erroneously dishonoured his cheque. You apologize and say, "But this is an innocent and small mistake. It merely informs the payee to check with you." After all, the phrase is used in banking transactions almost on a daily basis.

Mr. X does not accept your reasoning. "You will hear from my solicitors", he says and storms out of your office. Sure enough, the very next day, you receive a letter of demand from Mr. X's solicitors seeking damages for breach of contract and defamation. You refer the matter to the bank's solicitors, rather bewildered as to how Mr. X could claim that he had been defamed by the bank. Had he?

MATTHEW VERGIS v HSBC BANK MALAYSIA

The facts in *Mathew Vergis & Anor v HSBC Bank Malaysia Bhd* [2012] 2 CLJ 922 are somewhat similar to those experienced by our friendly bank manager described above.

The Plaintiffs were customers of the Defendant bank and operated a current account with them. The Plaintiffs issued two cheques drawn on the said account payable to third parties to meet certain financial obligations of the Plaintiffs.

Although the Plaintiffs had more than sufficient funds in their current account to meet the cheques payments, the cheques were nevertheless dishonoured by the Defendant upon presentation and returned to the payees with the phrase "Refer to the Drawer".

The issues for determination by the High Court were:

(1) Whether the phrase "Refer to the Drawer" with reference to the cheques under the circumstances of the case were libellous and/or capable of carrying a defamatory meaning; and

(2) Whether the said phrase was in fact defamatory of the Plaintiffs.

The Plaintiffs contended that the phrase used by the Defendant upon dishonouring the cheques was in law, defamatory of the Plaintiffs under the circumstances of the case and was in fact, defamatory to the Plaintiffs. The Plaintiffs cited 12 cases from Malaysia and other jurisdictions in support of their contention.

On the other hand, the Defendant argued that the phrase was not libellous and even if it was capable of a defamatory meaning, it was in fact not defamatory of the Plaintiffs for two reasons. Firstly, banks (which included one of the payees of the dishonoured cheques) are used to those words being used in practice. Secondly, the payee of the other dishonoured cheque was the Plaintiff's brother and his estimation of the Plaintiff would not have been affected by the phrase. The Defendant cited 15 cases and claimed that the majority of the Malaysian cases cited supported its contention.

> **"It was settled law that if the dishonour was without reason, the customer had been libelled"**

DECISION OF THE HIGH COURT

Lau Bee Lan J allowed the Plaintiffs' claim with damages to be assessed by the Registrar.

Her Ladyship adopted the approach taken by Gopal Sri Ram JCA (as he then was) in *Chok Foo Choo v The China Press Berhad* [1999] 1 CLJ 461 and held that in deciding whether the phrase "Refer to the Drawer" was capable of being libellous, one had to look at the context and circumstances in which the phrase appeared. If the phrase is defamatory based on its natural and ordinary meaning, then one had to look at the meaning which a reasonable man of ordinary intelligence, general knowledge and experience of worldly affairs would be likely to assign to it. This included any implication or inference which a reasonable person, guided not by any special knowledge but only by general knowledge, and not fettered by any strict legal rules of construction, would draw from those words.

Her Ladyship also relied on the case of *Lee Wah Bank Ltd v Ng Kim Lek & Ors* [1978] 1 LNS 95 where the Federal Court held that it was settled law that if the dishonour was without reason, the customer had been libelled and was entitled to damages.

The learned Judge also relied on *Top-A Plastics Sdn Bhd & Ors v Bumiputra Commerce Bank Bhd* [2006] 3 CLJ 460, where Ramly Ali J (now JCA) held that:

"It is a question of law for the court to decide whether the natural and ordinary meanings of the words used in the articles are capable of conveying a defamatory meaning of and concerning the plaintiff. Libel does not depend on the intention of the defamer but on the fact of defamation and it is irrelevant to consider the meaning (that) the writer and publisher intended to convey."

SUSANAH NG

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Her Ladyship also referred to *Gatley on Libel and Slander* where the learned author stated that words are not to be construed in a milder sense (*mitiori sensu*) merely because they are capable on some forced construction of being interpreted in an innocent sense. Further, an imputation may be defamatory whether or not it is believed by those to whom it is published.

The learned judge concluded that the phrase "Refer to Drawer" when used in the context of cheques being returned for non-payment was capable of carrying a defamatory meaning that the drawer had insufficient funds in his account to meet the cheque payments. As the Plaintiff in the present case had sufficient funds in his account, the phrase was clearly untrue and is thus libellous to the Plaintiff.

In the light of the passage cited from *Gatley on Libel and Slander*, the learned judge held that the payee's belief as to the drawer's ability to pay was irrelevant.

CONCLUSION

In conclusion, the phrase "Refer to Drawer" may be regarded as defamatory and would found a successful action for defamation unless justified. A phrase is either defamatory or not. It is defamatory even if justified. Justification is merely a defence to publishing a defamatory statement, but this defence does not, strictly speaking, "undo" the defamatory meaning of the phrase. The arguments that banks are used to such a phrase being used in practice and that the esteem of the drawer would not be affected in the view of the payee are irrelevant to the question of liability.

Although this case does not break any new ground, it is a timely reminder that a bank should exercise great care when they use the phrase "Refer to Drawer" as a ground not to honour payment on a cheque. If they do so without good reason or cause, the bank could be liable to its customer not only for breach of contract but also for defamation.

Perhaps our friendly bank manager will now have second thoughts about Mr. X's claim that he had been defamed.

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LIABILITY ON UNAUTHORISED CREDIT CARD CHARGES

After a day of intense retail therapy, you suddenly realise that you had left your credit card in one of the shops at the mall several hours ago. You experience heart palpitations at the thought of being charged astronomical sums for unauthorised or fraudulent transactions. What should you do?

The answer is simple. Report the loss of your credit card to your credit card issuer without any delay.

Clause 15.2 of Bank Negara's Credit Card Guidelines (BNM/RH/GL-041-01)(the "Guidelines") provides that the cardholder's maximum liability for unauthorised transactions as a consequence of a lost or stolen credit card shall be limited to the specified by the issuer of credit cards, which shall not exceed RM250, provided the cardholder has not acted fraudulently or has not failed to inform the issuer of credit cards as soon as reasonably practicable after having found that his credit card is lost or stolen.

The efficacy of Clause 15.2 was tested in *Diana Chee Vun Hsai v Citibank Berhad* [2009] 6 CLJ 774. In this case, the cardholder reported the loss of her credit card to the issuer of her credit card on the day that she discovered its loss. The card issuer claimed a sum of RM1,859.01 from the cardholder as unauthorised charges incurred on her credit card. The card issuer relied on a provision in the credit card agreement which stated that the RM250 limit only applied to transactions effected within one hour prior to the reporting of the loss of the credit card.

The High Court ruled in favour of the cardholder and held that the Guidelines are subsidiary legislation and have the force of law. The Court also found that the credit card agreement must be construed in accordance with the Payment Systems Act 2003 and the card issuer could not circumvent the Guidelines in order to limit its liability. Accordingly, the Court held that the provision in the credit card agreement relied on by the card issuer to limit the application of the RM250 liability was "unreasonable, ridiculous and contrary to Clause 15.2 of the Guidelines". The Court also held that the onus lay on the card issuer to prove that there had been unreasonable delay by the cardholder to report the loss of the card and that it had failed to produce any evidence to discharge this burden.

Hence, if you report the loss without delay, like Ms Chee did, you should be able to limit your loss to RM250 if the unauthorised charges exceed that amount.

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THE FIRST STEP

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Based on the findings of the RI/FS, a remedial design is to be prepared by a qualified remediation specialist, reviewed by a contaminated land manager and submitted to the DOE. The design should include process design and take into consideration the need to comply with all relevant regulatory requirements such as air emission requirements, noise and vibration limits and discharge quality requirements.

Guideline No.3 also requires the remedial design document to demonstrate the calculation on the final concentrations of the contaminants to be achieved and an estimate of the remediation period based on the applicable design practices.

“ The Guidelines represent a first step taken by the DOE in managing land contamination in Malaysia ”

Remedial Strategy & Action

Examples of containment of contaminant and remediation measures set out in Guideline No.3 include:

- Vertical barriers to prevent horizontal migration of contamination in soil or groundwater
- Capping to isolate contaminated soil from potential receptors and limit infiltration of rain
- Hydraulic control combined with *ex situ* groundwater treatment
- Active soil remediation to reduce or remove contaminants' mass/concentration from soil or groundwater
- Groundwater remediation such as pump and treat and air sparging.

Guideline No.3 requires remedial measures for contaminated soil or groundwater to be carried out under environmental and specialist supervision to ensure that remedial measures are implemented in accordance with the RAP.

Post Remediation Evaluation

This phase involves the implementation of procedures to evaluate the effectiveness of the remediation work performed by confirming that the site complies with the clean-up criteria set out in the RAP.

Upon completion of the evaluation and adjustment phase, a site validation report is to be prepared by a qualified remediation specialist or remediation project manager, detailing the application of the RAP and any variances therefrom. Compliance with authorities' requirements and documentary evidence to show disposal off site of any contaminated material is also required. The validation report is to be approved by a contaminated land manager before it is submitted to the DOE for final approval.

In the case of non-achievement of the targets, Guideline No.3 states that the reasons for this must be stated and additional site work proposed to achieve the targets listed.

Upon the completion of the post remediation evaluation, the polluter or responsible party is required to submit a project closure report to the DOE for approval. This report is to be prepared by a qualified remediation specialist and reviewed by a qualified contaminated land manager. The report is to contain the site remediation objectives and targets, scope of the remediation activities and findings of the post remediation evaluation.

On-going Monitoring and Management Plan

Guideline No.3 recommends on-going monitoring and a management plan for a site where:

- full clean-up is not possible or preferable;
- monitored natural attenuation is selected as the preferred option; or
- on site containment of contamination is proposed.

A monitoring programme should set out details of the proposed monitoring strategy, what is to be monitored, the location and frequency of the monitoring and reporting requirements and the proposed period for reviewing the monitoring and management plan.

CONCLUSION

The Guidelines serve as a good guide to owners and users of land on the assessment process of land contamination and the possible remedial measures to be undertaken in order to minimise or reduce land contamination. Proper assessment and management of contaminated sites can assist in achieving sustainable development as well as bring Malaysia closer to the international standards.

The Guidelines represent the first step taken by the DOE in managing land contamination in Malaysia. Although compliance with the Guidelines is presently voluntary, it is hoped that the relevant stakeholders will support the DOE's efforts to achieve the aforesaid objective by complying with the Guidelines. It is said that the first step is always the hardest, but it is the only way to reach the second step!

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POLAR OPPOSITES

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Such an interpretation was in line with the Model Law framework and also consistent with the Federal Court authorities of *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 and *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd* [2010] 2 MLJ 23 which held that a setting aside of an award must be applied to the court at the seat of arbitration. While the Court recognised that these authorities were decided under the previous Arbitration Act 1952, the same principles would still apply in interpreting sections 37, 38 and 39 of the present Act.

Having held that section 37 of the Act was not applicable to the award where the seat of arbitration is outside of Malaysia, the Court then considered whether it could invoke its inherent jurisdiction in an application for setting aside. The Court answered in the negative and adopted the Court of Appeal decision of *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors* [1998] 2 MLJ 20 in finding that the Court has no inherent jurisdiction to interfere with arbitrations.

It was held that it was the consensus of the parties to arbitrate any dispute and for the seat of arbitration to be in Singapore. The plaintiff's remedy was clearly unaffected as it could have gone to the Singapore Courts to make the necessary application for setting aside. Therefore, the application pursuant to section 37 of the Act could not be maintained for want of jurisdiction and the Court struck out the proceedings. The plaintiff has since filed an appeal against this decision.

COMMENTARY

It is clear from this decision that an application to set aside an arbitral award under section 37 cannot be equated with the opposition to an application to enforce an arbitral award under section 39 of the Act. The former applies only to arbitral awards where the seat of arbitration is in Malaysia whereas the wording of section 39 makes it clear that that provision applies to an arbitral award irrespective of the State in which it was made.

This decision is significant in confirming that Malaysian Courts have no jurisdiction, whether under the Act or under its inherent jurisdiction, to set aside any foreign arbitral awards i.e. an award where the seat of arbitration is outside of Malaysia. This interpretation of the Act harmonises Malaysia's arbitration laws with that of the approach under the Model Law. The proper venue for setting aside of such a foreign arbitral award must be the national courts of the seat of arbitration.

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IS THE GAME WORTH THE CANDLE?

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blush, may not correspond to local law and procedure. However, those differences do not seem to warrant a different conclusion about summarily striking out a defamation suit in Malaysia that is disproportionate to the damage suffered, and certainly the Kuala Lumpur High Court in *Naza Kia* did not think so.

Jameel was recently applied by the English Court of Appeal in *Khader v Aziz & Ors* [2010] EWCA Civ 716 where the claimant's defamation proceedings was struck out because it was held that even if the claimant were to succeed at trial:

"She would at best recover minimal damages at huge expense to the parties and of court time. This would be so, even if she and those representing her were to adopt for the future a hitherto elusive economical approach to the amount of paper and time which the case might need. As things are, the parties' expenditure must vastly exceed the minimal amount of damages which the claimant might recover even if she were to succeed in overcoming all the obstacles in the path of such success. The judge was correct to conclude that this claim is disproportionate and that it should be struck out as an abuse."

The English cases mentioned above were reported in the years 2000, 2005 and 2010 respectively, and are therefore relatively recent decisions of the English courts when compared to the law relating to defamation that dates back to more than 150 years. The relevance of the English law of defamation in Malaysia was after all obvious long ago when the Kuala Lumpur High Court in *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 31 MLJ 142 observed that the law of defamation in Malaysia was for all intents and purposes the same as the law of defamation in England.

It does not therefore seem out of place to welcome the decision of the Kuala Lumpur High Court in *Naza Kia* where the principle of proportionality has been applied for the first time to defamation claims in Malaysia. A wider adoption of this principle will sieve out claims that are founded on insignificant damage to reputation, leaving the courts to devote their time and resources to more important claims that merit the courts' attention.

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Editor's Note: The Plaintiff in *Naza Kia* appealed to the Court of Appeal against the striking out, but the appeal did not proceed as the matter was settled on terms agreed by the parties and without admission as to liability by either. The judgment in the Defendants' debt recovery suit can be found at [2010] MLJU 1192.

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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