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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

Dateline: December 2012. This is the month which according to the Mayans, will have a day when the world will come to an end. That day is the 21 December 2012. I am writing this message on the 18 December 2012 which means that if you are reading this message when this issue of Legal Insights goes into circulation in early January 2013, somebody out there was a fear monger.

Unfortunately, the world did come to an end in December 2012 for 20 innocent and faultless children aged 6-7 in Connecticut, USA. It saddens me that despite touting themselves to be the policemen of the world, the USA was unable to prevent these senseless killings. How many innocent children need to die or Presidents be assassinated before they reform the gun laws? They say that the right to own guns is enshrined in their Constitution. This is one case when I can agree that the "law is an ass". It is incongruous that a constitutional right leads to the loss of innocent lives. To the parties with vested interest, the gun companies, the murdered young children are mere collateral mortality. I don't think any right thinking person can accept that. I cannot. For the sake of the USA as a nation, I do hope that the Newtown tragedy will lead to a meaningful and long overdue reform of their gun laws. Hand on Heart, I do.

Although the tragic events in Connecticut have cast a pall over the month of December, all of us at Skrine nevertheless wish our Christian readers a Blessed Christmas and all our readers a Happy New Year for 2013 and hope the new year will bring joy, good health, peace and prosperity in abundance.

God Bless and Happy Reading.

Best Wishes and Thank You.

LEE TATT BOON
Editor-in-Chief
& Senior Partner

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ANNOUNCEMENT

The Firm is pleased to announce that Senior Partner, Mr Lee Tatt Boon, has been elected as Chairman of the International Chamber of Commerce (ICC) Malaysia for 2012/2013. We extend our heartiest congratulations to him.

SKRINE INTERNATIONAL ARBITRATION DAY

The Firm hosted its inaugural International Arbitration Day, a one day seminar, at the Sime Darby Convention Centre on 11 October 2012 on the theme "Has International Arbitration in Malaysia Come of Age?".

Topics discussed included key developments and trends in international arbitration practices and the efforts of institutions in the country to promote Malaysia as an international arbitration destination.

The Opening Keynote Address was delivered by John Tackaberry QC, an eminent international arbitration silk whose career at the English Bar spans some 45 years. Other speakers for the various sessions included the Director of the Kuala Lumpur Regional Centre for Arbitration, Datuk Sundra Rajoo and members of the SKRINE International Arbitration Practice Group, Vinayak Pradhan, Ivan Loo, Lim Chee Wee, Ashok Kumar Mahadev Ranai, Kamraj Nayagam and Lee Shih. The seminar ended with a networking session and cocktails .

The feedback we received from the attendees was that it was a well organised talk with a diverse and interesting programme.

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.

IN LAW, ALL ROADS LEAD TO

Jason Teoh provides a commentary on

INTRODUCTION

In the realm of company law, the concept of separate legal personality sits uncomfortably with the doctrine of lifting the corporate veil.

Whilst the Companies Act 1965 recognises that a corporation is treated as a separate legal person which is solely responsible for the liability it incurs and is the sole beneficiary of any benefits it receives, the courts have from time to time exercised their discretion to disregard the separate legal personality and lift the corporate veil to impute liability on the parties who operate behind it.

THE ISSUE

In the recent case of *Irham Niaga Sdn Bhd & Irham Niaga Logistics Sdn Bhd v Tenaga Nasional Berhad* (unreported), the Kuala Lumpur High Court had the opportunity to consider the circumstances in which the court would exercise its discretion to lift the corporate veil of a subsidiary company so as to impute the liability of the subsidiary onto its holding company.

THE FACTS

The Defendant, Tenaga Nasional Berhad ("TNB"), the national electric company, is the holding company of TNB Transmission Network Sdn Bhd ("TNBT") and owns 100% of TNBT's equity. TNBT was set up to provide management and support services to TNB in relation to the national electricity transmission network. TNBT is a dormant company and remained a RM2 company at all material times after its incorporation.

Irham Niaga Sdn Bhd and Irham Niaga Logistics Sdn Bhd ("Plaintiffs") and TNBT entered into 5 Lease and Warehouse Management Agreements ("Agreements") between October 2001 and September 2002.

The parties were eventually embroiled in a dispute over TNBT's termination of the Agreements, essentially on the ground of alleged misrepresentation.

The dispute was referred to arbitration pursuant to the arbitration clauses in the Agreements, where TNBT was the claimant and the Plaintiffs were the respondents. TNB was not a party to the arbitration proceedings. The Plaintiffs counter-claimed against TNBT for wrongful termination of the Agreements in the arbitration and succeeded in their counter-claim. They were awarded a sum of approximately RM113 million with interest and costs.

TNBT exhausted all avenues to set aside the award and its application for leave to appeal to the Federal Court was dismissed. The final award has since been registered as a judgment of the court.

The Plaintiffs filed a claim in the High Court against TNB. The Plaintiffs claimed that TNB and TNBT, in maintaining TNBT as a dormant company, had refused to honour the final award and in the circumstances, the veil of incorporation of TNBT ought to be lifted so as to render TNB liable for the final award made against TNBT.

THE INTEREST OF JUSTICE

a recent case on lifting the corporate veil

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THE LEGAL PRINCIPLES

The Defendant contended that since the Court of Appeal's decision in *Law Kam Loy & Another v Boltex Sdn Bhd & Others* [2005] 3 CLJ 355, the law in Malaysia no longer allows the courts to disregard the corporate personality on the ground of "interest of justice" as propounded in *Hotel Jayapuri Sdn Bhd v National Union Bar & Restaurant Workers* [1980] 1 MLJ 109.

The Court of Appeal in *Law Kam Loy* had refused to lift the corporate veil and criticised the interest of justice exception on 2 grounds. First, that the concept was inherently vague and, second, that it did not provide the courts or the business community with any clear guidance as to when normal company law rules should be displaced.

Notwithstanding the criticism of the interest of justice exception in *Law Kam Loy,* the learned judge, Dato' Mohamed Ariff J, opined that the interest of justice concept remains important as a "*policy impetus for creating exceptions to the doctrines of separate legal personality and limited liability*" and ought not to be rejected outright.

The learned judge went on to state that while companies in a group should in law be free to arrange their affairs in the ordinary way, including transacting part of the business of the group through subsidiaries, the veil of incorporation could still be lifted in exceptional circumstances, such as in cases where special circumstances exist which indicate that the corporate personality is a mere façade that conceals the true facts.

His Lordship highlighted that this principle was recognised in *Law Kam Loy* where the Court of Appeal held that although the court could no longer disregard the corporate veil purely on the interest of justice exception, it could still do so in special circumstances, such as in a situation where actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity exists.

Having laid down the guiding principles, the Court then proceeded to consider whether the facts warranted the corporate veil to be lifted in the present case.

FINDINGS OF THE COURT

Having considered the evidence produced at the trial, the Judge was of the view that this was not a case where TNBT had been used as a front or a façade from the outset. Neither was it a case where actual fraud existed on the part of TNB and TNBT from the outset.

However, based on the totality of the evidence adduced during the trial, the Court was of the view that "*this is a case where special circumstances (exist) in a situation where there is inequitable or unconscionable conduct amounting to fraud in equity*".

The learned judge was satisfied that TNB was "*from the very outset at the centre of things and was the driving force*" of TNBT. TNB was in full control of TNBT through the provisions of funds, premises, personnel and through the legal structures that were put in place to ensure that ultimate control of TNBT resided in TNB at all times.

On the facts adduced, Dato' Mohamed Ariff J was satisfied that there was more than a "functional integrality" of TNB and TNBT. The judge was of the view that TNBT could not have a meaningful functional existence without the financial resources and personnel support from TNB.

The Court also held that TNB, in carrying out the corporate exercise of integrating TNBT back as a division of TNB but leaving TNBT to continue exist as a dormant company, had totally disregarded the interests of the Plaintiffs who had been previously paid the rentals through funds supplied by TNB but routed through TNBT.

Against this backdrop, the Court found it inequitable and unconscionable for TNB to have collapsed back TNBT's business into TNB, leaving TNBT as an empty shell without funds and without any meaningful personnel. In this regard, the Court took cognisance of the fact that documentary evidence had been produced which showed that a board paper had been circulated by TNB to deal with the legal, contractual and financial commitments to third parties that arose from the collapsing back exercise, but that TNB had not taken steps to implement the same.

The High Court allowed the Plaintiffs' claim and ordered TNB to pay to the Plaintiffs the final award made against TNBT.

CONCLUSION

The decision in *Irham Niaga* indicates that the interest of justice exception *per se* is no longer a sufficient ground for the court to lift the corporate veil. A claimant must show that special circumstances exist which warrant the court to take such action.

Although the interest of justice exception no longer enjoys the status it once had, it remains important as it forms the underlying basis for creating exceptions to the doctrines of separate legal personality and limited liability. As with all matters which involve the exercise of judicial discretion, the basis for the exercise of such discretion is always rooted in the interest of justice.

TNB has appealed to the Court of Appeal against the decision of the High Court.

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THE FLIP SIDE OF THE COIN

Joshua Teoh explains the principles of reverse passing off

WHAT IS REVERSE PASSING OFF?

Passing off is a cause of action founded in tort under the common law against the misrepresentation in trade by a trader which causes, or is likely to cause, damage to another trader's business, goodwill and reputation.

The conventional or classic form of passing off occurs when trader A represents his goods or services to the market as though his goods or services originated from trader B, who usually has a better reputation and goodwill in his goods or services than trader A, and as a result of such misrepresentation, consumers are confused or deceived into believing that the goods or services of trader A are associated with trader B.

On the other hand, reverse passing off (also known as inverse passing off) describes a situation where trader A represents the goods or services of trader B as though they are those of trader A, thereby denying trader B of the recognition and credit due to his goods or services and causing consumers to be confused as to the producer or origin of those goods or services.

The questions often asked in relation to reverse passing off are: What is the harm in such a method of doing business? Why would trader B be bothered about his goods after he sold them to trader A? Should not trader A be free to buy trader B's goods and do as he pleases with them?

> **"The clearest case of reverse passing off is where a trader sells the goods of another trader as though they originated from him"**

One possible answer to the above questions is that trader B may be interested in more than just making present sales. Perhaps he is more interested in building a lasting reputation and goodwill for his goods and business. For trader B to do so, customers must know that the goods originated from him and are not misled that the goods originated from trader A or that trader A is affiliated with trader B.

REVERSE PASSING OFF AS AN ACTIONABLE TORT

Although reverse passing off is not a nominate tort on its own, the common law has treated it as a further example of an actionable misrepresentation to which the normal principles of passing off apply. The essential features that can be found in cases of both conventional passing off and reverse passing off are the element of misrepresentation and the reasonably foreseeable consequence of a trader's business, reputation and goodwill being damaged by the conduct of another trader.

The leading case in the English common law for recognising reverse passing off is the Court of Appeal's decision of *Bristol Conservatories Ltd v Conservatories Custom Built Ltd* [1989] RPC 455. In this case, one of the defendants was employed by the plaintiffs as a salesman. During his employment with the plaintiffs, he had kept a book of photographs that showed conservatories designed and built by the plaintiffs. After he joined the defendants, he and other salesmen showed the same photographs to prospective customers as examples of conservatories which the defendants had purportedly supplied.

The Court of Appeal found that if a customer had ordered a conservatory from the defendants in response to the photographs, he would have been supplied with a conservatory of the defendants' manufacture instead of the represented commercial source, which was of the plaintiffs' manufacture. Therefore, there was a misrepresentation of the plaintiffs' goods through the photographs utilised by the defendants and this would have caused damage to the plaintiffs in the form of lost sales, considering that the prospective customers of the defendants could have been customers of the plaintiffs had not the misrepresentation been made.

> **"the common law has treated (reverse passing off) as … an actionable misrepresentation to which the normal principles of passing off apply"**

Bristol Conservatories Ltd is also noteworthy in two other respects. Firstly, it was not the first case of reverse passing off. Secondly, the Court of Appeal declined to decide whether there is a form of tort known as reverse passing off. Instead, it had preferred to find the facts of the case to be within the tort of passing off. Notwithstanding the foregoing, this decision has become the main reference point in subsequent cases of reverse passing off.

The Singapore case of *Tessensohn t/a Clea Professional Image Consultants v John Robert Powers School Inc & Ors* [1994] 3 SLR 308 has also recognized that reverse passing off is actionable. In this case, the appellant had operated a school that ran social development courses under a franchise from the respondent.

After the franchise was terminated, the appellant started her own school that offered similar courses and circulated to her students the respondent's lecture notes without any acknowledgement as to their source. The Court of Appeal held that the appellant had misrepresented to her students that the respondent's lecture notes were the product of the appellant's own effort and issued an injunction to restrain her from passing off the respondent's notes as her own.

In Malaysia, the only reported decision where the court had considered the issue of reverse passing off is the High Court case of *Ming Kee Manufactory Limited v Kee Hin Industries Sdn Bhd &*

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3 Ors [2008] 1 LNS 777. In this case, the plaintiff had invited the court to consider whether there was a case of reverse passing off by virtue of the defendants' sale of a product (plugs) which had a component (fuses) in it that originated from the plaintiff.

The High Court found that there was no reverse passing off as the defendants did not hold out the plaintiff's component as a product of theirs. In fact, the component had been sold with the plaintiff's brand still intact on it even though the brand could not be seen from the outside. Accordingly, the court held that there was no misrepresentation by the defendants.

Recently, there was a case in the United Kingdom which shared a similar set of facts with *Bristol Conservatories Ltd*. In *Pendle Metalwares Ltd (trading as Thomas Barker & Son) v Walter Page (Safeway's) Ltd and another company* [2012] Lexis Citation 59, the High Court followed *Bristol Conservatories Ltd* and held that the defendants' use of photographs that showed the plaintiff's product (cigarettes bin) amounted to reverse passing off.

> **"Reverse passing off may also arise in situations which do not involve the sale of goods or services of another trader"**

INSTANCES OF REVERSE PASSING OFF

The clearest case of reverse passing off is where a trader sells the goods of another trader as though they originated from him, by removing the original labelling of the goods or by re-labelling the goods as his own without prior authorisation from the producer or originator of the goods. However, a trader who sells a product which contains a component that is produced by another trader will not be liable for reverse passing off so long as the first-mentioned trader does not hold himself out to be the producer of the other trader's component, like the case of *Ming Kee Manufactory Limited*.

Reverse passing off may also arise in situations which do not involve the sale of goods or services of another trader.

Falsely advertising achievements of another as one's own

There have been decisions, such as *Samuelson v Producers Distributing Co* (1931) 48 RPC 580 and *Plomien Fuel Economiser Coy Ltd v National School of Salesmanship Ltd* (1946) 60 RPC 209, where the courts found a case of reverse passing off when a trader had, for the purpose of promoting and advertising his goods or services, adopted and used the achievements and credits of another trader.

Examples of such a situation include one where a trader uses or adopts the reviews and comments made in relation to goods or services of another trader to boost the sales of his own goods or services, or where a trader claims for his goods or services, credits that belong to another trader.

Although the situations depicted above do not involve the sale of any goods or services of another trader, there are nevertheless misrepresentations in that a trader has wrongfully claimed as his own, the achievements and credits that belong to the other trader.

Holding out goods or service of another as one's own

An example of such a situation would be the facts in *Bristol Conservatories Ltd* discussed above, where the photographs of the plaintiffs' goods were used by the defendants to promote the sale of the latter's goods.

Although there were no actual sales of the goods or services belonging to another trader, the misrepresentation was committed by the trader who held out the goods or services of another trader as samples of his own. As a consequence of such holding out, customers or potential customers may be induced to believe the trader who did the holding out was capable of providing the same goods or services, in terms of reputation, standard and quality, as the goods or services of the other trader.

CONCLUSION

Every trader is entitled to be given due recognition and credit as the producer and originator of his goods or services and not to let others dishonestly deprive him of what that is rightfully his. Similarly, unscrupulous traders should not be allowed to deceive consumers as to the producer or originator of goods or services that are sold in the market. The cause of action against reverse passing off would enable both of these objectives to be achieved.

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TAXATION OF LIMITED LIABILITY PARTNERSHIPS

Harold Tan and Sarah Kate Lee explain the tax treatment for LLPs in Malaysia

INTRODUCTION

In Issue 1/2012 and Issue 2/2012 of LEGAL INSIGHTS, we highlighted to our readers the main features of the Limited Liability Partnerships Act 2012 ("LLP Act") that introduced the limited liability partnership ("LLP") as an alternative business vehicle in Malaysia and discussed the procedure by which a conventional partnership or a private company may be converted into a LLP.

The Finance (No. 2) Bill 2012 ("Finance Bill") which was recently passed by the Malaysian Parliament and is pending Royal Assent by the Yang Di-Pertuan Agong, will introduce amendments to the Income Tax Act 1967 ("ITA") and the Real Property Gains Tax Act 1976 ("RPGT Act") to provide for the manner in which income tax and real property gains tax will be levied on a LLP.

The LLP Act came into operation on 26 December 2012. The amendments in the Finance Bill which relate to LLPs are to take effect on the same day when the Bill becomes law.

In this article, we shall examine the LLP from a tax angle. Where appropriate, we shall also compare the tax treatment for a LLP with that of a conventional partnership and a private company.

> **"A LLP that has a capital contribution ... of RM2.5 million or less ... shall be entitled to a preferential tax rate of 20% for the first RM500,000 of its chargeable income"**

TAX STATUS

The Finance Bill seeks to introduce a new definition of "limited liability partnership" into the ITA as a LLP registered under the LLP Act and to extend the definition of "person" to include a "limited liability partnership". For avoidance of doubt, the ITA will also be amended to exclude a LLP from the definition of a "partnership". With these amendments, a LLP will be given a similar treatment as a company and be treated as an entity chargeable to tax under the ITA.

The tax treatment for a conventional partnership differs from that of a LLP as it is the individual partners, and not the partnership, who are subject to tax.

RESIDENCE STATUS

The Finance Bill seeks to provide that the residence status of a LLP is to be determined based on the place where the management and control of the business or affairs of the LLP are exercised by its partners. This is similar to a company where tax residence is based on the place where the management and control of the affairs of the company are exercised by its directors or other controlling authority.

In contrast, the residence status of a partner in a conventional partnership is determined based on the number of days he is physically present in Malaysia.

BASIS PERIOD

The Finance Bill will amend the ITA to provide that the basis period for a year of assessment of a LLP to be similar to that of a company, namely that it is the financial year, which may not necessarily be the calendar year.

The basis period for taxation purposes of a partner in a conventional partnership, like any other individual taxpayer, is the calendar year that coincides with a year of assessment.

> **"a company or a conventional partnership which converts to a LLP (may) carry forward its unabsorbed business losses"**

RATE OF TAX

Subject to the exception discussed below, the Finance Bill seeks to impose a tax rate of 25% on the chargeable income of a LLP.

A LLP that has a capital contribution, whether in cash or in kind, of RM2.5 million or less at the beginning of its basis year shall be entitled to a preferential tax rate of 20% for the first RM500,000 of its chargeable income. Its chargeable income in excess of that amount shall be subject to the general tax rate of 25%. These rates are similar to the rates applicable to a company.

It is to be noted that the preferential tax rate mentioned above will not apply to a LLP which controls, or is being controlled by, a company that has more than RM2.5 million paid up capital in respect of ordinary shares.

Unlike a LLP, each partner of a conventional partnership is taxed at his individual tax rate, which ranges from 2% to 26%.

CHARGEABILITY OF INCOME DISTRIBUTED

The ITA will be amended to provide that all profits paid, credited or distributed to partners in a LLP are exempt from tax. Again, this treatment is similar to a company where dividends paid to shareholders out of profits which have been subject to full Malaysian taxation are exempted from tax.

In a conventional partnership, every partner is assessed separately for his share of the partnership income.


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DEDUCTION OF REMUNERATION PAID TO A PARTNER

The Finance Bill provides that any remuneration paid to a partner by a LLP will not be eligible for deduction if it is not provided for in the LLP agreement made in accordance with section 9 of the LLP Act. This differs from a company where remuneration paid by a company to its directors and officers are tax deductible.

A conventional partnership, not being a separate entity chargeable to tax, is unable to claim a deduction in any event.

UNABSORBED BUSINESS LOSSES

The Finance Bill seeks to allow a company or a conventional partnership which converts to a LLP to carry forward its unabsorbed business losses to be utilised against the future income of the LLP.

DUTY TO FILE RETURNS

The Finance Bill imposes the responsibility for doing all acts and things required under the ITA, including the duty to file returns, on behalf of the LLP on the compliance officer who is appointed from amongst the partners of the LLP. If no compliance officer is appointed, then the responsibility will lie, jointly and severally, with the partners of the LLP.

> **“ a LLP (must) furnish a tax return for a year of assessment within 7 months from the date following the close of its accounting period ”**

Similar to the requirement imposed on a company, the Finance Bill seeks to require a LLP to furnish a tax return for a year of assessment within 7 months from the date following the close of its accounting period.

Although a conventional partnership is not assessable to tax, the partnership is nevertheless required to file a tax return no later than 30 June in the year following each year of assessment. The responsibility for filing the returns of the partnership rests on the precedent partner.

As each partner in a conventional partnership is chargeable to tax individually, he is required to file separate tax returns.

In the case of a company, the responsibility for doing all acts and things required to be done by the company (including the filing of tax returns) lie, jointly and severally, with (i) the manager or other principal officer of the company in Malaysia; (ii) its directors; (iii) its secretary; and (iv) any person (however described) exercising the functions of any of the aforementioned persons.

REAL PROPERTY GAINS TAX

The Finance Bill seeks to amend the RPGT Act to include a LLP as an entity chargeable to real property gains tax. It further seeks to impose on the compliance officer of a LLP, and if no compliance officer is appointed, on the partners, jointly and severally, the onus to be assessed and charged to tax under the RPGT Act.

The position of a conventional partnership under the RPGT Act is similar as it is considered as an entity, separate from its partners, chargeable to real property gains tax. Further, any person who at the time of disposal of a chargeable asset of the partnership is the precedent partner is to be assessable and chargeable with the tax payable by the partnership under the RPGT Act.

A company is chargeable to real property gains tax under the RPGT Act. If the company defaults in payment of such tax, its directors, secretary and manager or other principal officer in Malaysia can be held jointly and severally assessable and chargeable with the tax payable by the company.

CONCLUSION

The advent of the LLP Act has brought into Malaysia the LLP, which is essentially a hybrid between a conventional partnership and a private company, as an alternative business model to conduct commerce.

The proposed amendments to the ITA and RPGT Act under the Finance Bill that establish the basis on which a LLP is to be taxed is an important missing piece of the LLP jigsaw that has now been put in place.

Under the Malaysian LLP model, the tax treatment for a LLP will be substantially similar to that of a company. This is a significant departure from several other common law jurisdictions that have also adopted the LLP, such as the United Kingdom and Singapore, where a LLP is treated for tax purposes in the same way as a conventional partnership and not as a separate taxable entity.

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GOING TO THE BALLOT BOX

Petrina Tan provides an overview of the general election process in Malaysia

The 13th General Election is imminent as the 5-year mandate given to the political parties to form the Federal Government and the respective State Governments at the 12th General Elections will expire on 28 April 2013. Malaysians from all walks of life will soon get swept up in the election fever as candidates from both sides of the political divide woo voters with fiery speeches at *ceramahs* (political rallies) and through the electronic media.

This article provides an overview of the general election process, from nomination of the candidates to polling day and to election petitions and election offences.

THE LEGAL FRAMEWORK

Elections in Malaysia are governed by the Federal Constitution, the state constitutions and the following acts and regulations: the Election Commission Act 1957 ("ECA"), Elections Act 1958, Election Offences Act 1954, Elections (Conduct of Elections) Regulations 1981, Elections (Registration Of Electors) Regulations 2002 and Elections (Postal Voting) Regulations 2003.

CALLING THE SHOTS

The Election Commission ("EC") was formed pursuant to the ECA. It is central to the election process as its primary task is conducting general elections and by-elections. The EC reviews and delineates Parliamentary and State constituency boundaries, registers voters and reviews the electoral roll that contains the names, details and constituencies of voters.

THE RIGHT TO BE COUNTED

Every Malaysian citizen of 21 years of age and above who is resident in a constituency and is registered on the electoral roll as a voter is eligible to vote. Persons of unsound mind and prisoners are disqualified from voting.

Malaysians abroad may vote as absent voters if they meet certain specified criteria e.g. those in government service and the armed forces and full time students in universities, training colleges or higher educational institutions and their respective spouses.

Mass media workers, including electronic and portal media workers, who are certified by their employer to be liable for duties outside their registered constituencies to cover the election (but not other events) on a polling day, have recently been included as a new category of postal voters.

LET THE GAMES BEGIN

The general election process kicks off with the dissolution of Parliament and the State Legislative Assemblies. Returning Officers ("RO") will be appointed by the EC for each constituency to oversee and conduct the election. The EC will then issue writs to the ROs to empower them to conduct the election. After the writs are issued, a notice of election will be gazetted for public display at various locations. The notices contain 2 very important dates, namely Nomination Day and Polling Day.

There is no legal requirement for state and federal elections to be held simultaneously. For example, state elections for Sarawak are held at a different time from federal elections.

FACE OFF

On Nomination Day, the RO of each constituency will receive the nomination forms from the candidate and his proposer and seconder, or from any two or one of them, between 9.00 a.m. to 10.00 a.m. at the nomination centre set up by the EC. Often, the candidate, his proposer and seconder will march to the nomination centre with pomp and style, accompanied by a coterie of loyal party supporters bearing flags and banners.

The nomination forms must include *inter alia* a statutory declaration by the candidate and an election deposit paid by the candidate. For parliamentary seats, the election deposit is RM10,000.00 whereas the deposit for state seats is RM5,000.00. This deposit is forfeited if a candidate fails to secure at least 1/8th of the total number of votes cast in a constituency.

> **"the election deposit … is forfeited if a candidate fails to secure at least 1/8th of the total number of votes cast in a constituency"**

After the nomination forms have been posted in a conspicuous location outside the nomination centre, the RO and the assistant RO will closely scrutinise the forms to verify that they are complete and that the candidate is qualified to stand for election. Grounds for automatic disqualification include being an undischarged bankrupt, failure to submit election expenses returns or being convicted, within the preceding 5 years, of an offence and sentenced to a term of imprisonment of not less than 1 year or a fine of not less than RM2,000.00.

Any candidate or registered voter of the constituency may raise objections against the nomination forms to the RO on the grounds that the particulars of the candidate in the nomination form are insufficient for identification or that the form does not comply with the statutory requirements. However, they are limited to a tight one hour time frame i.e. from 10.00 a.m. to 11.00 a.m. on Nomination Day itself. The RO will decide on the validity of the objection and this decision is final, although a person aggrieved by the RO's decision may present an election petition against it within 21 days of the election result being gazetted.

Once the RO has concluded checking the forms, he will announce the candidates' names and their respective parties contesting the election. At this point, the public will know whether there will be

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any clash of the titans where leading candidates from opposing parties lock horns in a battle that will consign the loser to the political wilderness, at least until the next election or by-election.

If there is only one qualified candidate, that candidate will be declared as winner of the election without contest.

RULES OF ENGAGEMENT

The election campaign begins as soon as the RO announces that an election will be contested in a constituency. Campaign activities range from the ever popular '*ceramahs*' by candidates, affixing of posters and party flags to walkabouts and visits to the constituency. Needless to say, the fight for votes will also be carried out through campaigns in cyberspace. The frenetic campaign activities end at midnight on the eve of Polling Day.

A candidate requires a permit from the State Elections Officer in order to display or distribute election campaign materials to the public. A candidate is also required to pay a campaign materials deposit of RM5,000.00 for a parliamentary seat and RM3,000.00 for a state seat.

> **"there is a cap on permitted election expenses"**

The deposit is returned to the candidate or his agent when all his campaign materials are cleared within 14 days of polling. If a candidate fails to attend to the cleaning up within the specified period, the deposit will be used by the local authority to clean up the constituency and any balance will be returned to the candidate or to his agent, as the case may be. Where the cost of cleaning up exceeds the deposit, the difference is a debt due to the Government and may be recovered from the candidate accordingly.

It is worth noting that there is a cap on permitted election expenses i.e. not more than RM200,000.00 for a parliamentary seat and not more than RM100,000.00 for a state legislative assembly seat. A candidate is required to submit a return of his election expenses to the EC within 31 days from the date on which the election result is gazetted. Failure to do so will result in the candidate being ineligible for election for 5 years from the date that he is required to lodge the return as aforesaid.

THE DAY OF RECKONING

Polling Day runs from 8.00 a.m. to 5.00 p.m. nationwide, except in certain polling centres in remote areas in Sabah and Sarawak where polling ends earlier. It will see the turnout of the electorate, whose names are listed on the electoral roll at polling centres to cast their votes. Votes are given by ballot and marked on ballot papers. These ballot papers are marked with a number on the top left hand corner which corresponds with the number marked on the counterfoil attached to it.

Malaysia practises the rule of 'one person, one vote' based on the principle that every person counts for one and no more. However the great disparity in the number of voters between the larger urban constituencies and smaller rural constituencies greatly dilutes the efficacy of this rule.

Absent voters, such as members of the Armed Forces and the Royal Malaysian Police, are advance voters by default and must cast their votes 3 days earlier or by post. In any event, all marked postal ballot papers must reach the RO's office by 5.00 p.m. on Polling Day.

> **"The frenetic campaign activities end at midnight on the eve of Polling Day"**

Once polling closes, the Presiding Officer, together with the Counting Clerks, will begin counting the ballot papers comprising the day's votes as well as postal votes. The counting of votes is a tense affair and is conducted under close scrutiny by eagle-eyed representatives of the candidates to ensure that the votes cast are properly accounted for. A candidate may request for a recount of the votes.

Election winners are decided based on the 'simple majority' or 'first past the post' principle. The RO will declare the winner after the votes have been tallied. The decision of the RO is final but a dissatisfied party may challenge the RO's decision by filing an election petition to the election court.

The ballot papers will be kept in safe custody by the RO for 6 months from Polling Day. Unless otherwise directed by the EC, the RO will destroy the ballot papers at the end of the 6 months period.

RECOURSE FOR THE VANQUISHED

The results of an election can only be challenged by an election petition which must be submitted within 21 days from the date of the election results being gazetted.

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CLASH OF THE TITANS

Raytheon retains right to use trade mark for laser guided bomb kits in Malaysia

JEFFRI CHEONG SIU KONG

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US defence contracting giants, Raytheon Company and Lockheed Martin Corporation have been engaged in lengthy litigation spanning numerous countries over the use of the term "PAVEWAY" as a trade mark for laser guided bomb kits produced by both parties.

Raytheon has been manufacturing laser guided bomb kits that are attached onto standard GBU-10, GBU-11, GBU-12 warheads. These kits provide the bombs with laser guidance capability. Raytheon has branded its laser guided bomb kits as "PAVEWAY" since the 1970s. "PAVEWAY" laser guided bombs manufactured by Raytheon have been used by armed forces all over the world.

The U.S. government approved Lockheed Martin as a second supplier of laser guided bomb kits in 2005.

Lockheed Martin disputes Raytheon's use of the term "PAVEWAY" in a trade mark sense and takes the position that "PAVEWAY" is a generic term which describes the technology employed by both companies for their laser guided bomb kits. In other words, Lockheed Martin claims that it is not a term which Raytheon has exclusive rights to.

> **"evidence of use outside Malaysia cannot … support an application to expunge a Malaysian trade mark where no such use existed in Malaysia"**

In Malaysia, only Raytheon has ever sold laser guided bomb kits to the Malaysian government and Raytheon has done so since the 1980s. Lockheed Martin on the other hand, has not sold any of their laser guided bomb kits to Malaysia but has circulated information about their products to the Malaysian government.

In 2005, Raytheon registered "PAVEWAY" as a trade mark in Malaysia. Subsequently, in 2008, Lockheed Martin filed an application in the High Court to expunge the trade mark on the basis of it being a generic term.

Raytheon succeeded in defending the application to expunge on the basis that the "PAVEWAY" trade mark satisfied all provisions of section 10 of the Trade Marks Act 1976 for a registrable trade mark, primarily that it was an invented word, it had no direct reference to the goods it was applied on and it was a distinctive mark.

Much emphasis was placed on the principle that trade mark law is territorial in nature which means that the Courts ought to only have regard to evidence of use of the mark in Malaysia. Lockheed Martin was contending that their use of the mark in the United States ought to have been taken into consideration given that the market for laser guided bombs is unique and confined to a specialised market.

The High Court reaffirmed and followed established principles of *McLaren International Ltd v Lim Yat Meen* [2008] 1 CLJ 613 and *Lim Yew Sing v Hummel Int Sports & Leisure* [1996] 3 MLJ 7 which confirmed that the first to use the mark in Malaysia has greater rights and evidence of use outside Malaysia cannot operate to support an application to expunge a Malaysian trade mark where no such use existed in Malaysia.

> **"the Malaysian courts have reaffirmed the doctrine of first use and territoriality in Malaysian trade mark law"**

Lockheed Martin appealed to the Court of Appeal but its appeal was dismissed.

Lockheed Martin then applied for leave from the Federal Court to determine the question of *"whether a mark, if perceived to be generic in its country of origin, could be registered in Malaysia"*. Raytheon responded to this contention by arguing among other things, that the question had already been dealt with in the case of *Meidi-Ya Co Ltd Japan and Anor v Meidi (M) Sdn Bhd* [2009] 2 CLJ 15 which applied the "McLaren" and "Lim Yew Sing" principles. Lockheed Martin was not granted leave to appeal.

In light of these rulings, the Malaysian courts have reaffirmed the doctrine of first use and territoriality in Malaysian trade mark law.

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SKRINE DINNER & DANCE 2012

The Skrine Dinner and Dance 2012 was held at Bukit Gambang Resort City, Kuantan on 1 and 2 December 2012 with the theme "*Superheroes vs Supervillains*".

About 350 staff and their family members converged at the Bukit Gambang Water Park for a weekend of fun and excitement. The attractions in the Water Park include amongst others, a 24,000 square feet wave pool, racer slides, tube slides and family river raft rides.

The weekend's events started with a series of inter-house water polo matches. The Top Guns emerged as the champions after a fierce battle with the other teams.

In the evening, the attendees headed to the Grand Ballroom which had been creatively and colourfully decorated to reflect the theme. The appearance of many attendees dressed as superhero or supervillain characters further added to the "*Superheroes vs Supervillains*" atmosphere. Seen among the crowd were Batman, Robin, Darth Vader, Spiderman, Superman, the Joker, Princess Leia, Catwoman, Cruella de Vil and members of the X-Men.

The entertainment for the evening included a "*Gangnam Style*" opening dance by the Organising Committee, a skit by the pupils, a best dressed parade, and a boat race. The highlight of the evening was the inter-floor performance competition, where the 4 floors of Skrine competed against each other.

The floors presented entertaining performances which featured, amongst others, the Power Puff Girls, James 'Blonde', Super-Lawyers as well as Bumblebee from Transformers. However, it was the 12th Floor that emerged as the winner with its performance "*Superhero talent show*". Overall, the Dinner and Dance was a success with full credit going to the Organising Committee for a job well done.

BRIDES IN THE BATH, BABIES IN THE BACKYARD AND SINISTER SOLICITATIONS – FROM THE TIMES TO THE TEXTBOOKS

Kamraj Nayagam continues the landmark case series with an overview of the early decisions on similar fact evidence.

The sensational trial is a staple of media reporting in the English speaking world. Mona Fandey, Jean Sinnappa, Sunny Ang, Crippen, Scopes (The monkey trial), OJ Simpson … the list goes on. Most involve murder. Few break new legal ground. This is hardly surprising - dry legal analysis seldom makes for sensational newspaper coverage. To this rule, the cases on similar fact evidence appear to provide an exception, being as much notorious for their gruesome facts as they are studied for their effect as legal precedents.

"Similar fact evidence" is the name given to the principle of law which allows evidence of a person's propensity to commit similar acts to be brought before a court. It is a principle of law which applies to both civil and criminal cases, as can be seen from *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534 (quoting from the speech of Lord Phillips):

"11. For obvious reasons evidence has never been admissible if it has not been relevant to the issues arising in the proceedings. Rules of admissibility govern the circumstances in which the evidence which is relevant is not admitted. Two policy considerations underlie the rules of admissibility with which this appeal is concerned. First, evidence should not be admitted if it is likely to give rise to irrational prejudice which outweighs the probative effect that the evidence has in logic. This consideration of policy carries particular weight where the tribunal is a jury, whose members are not experienced as the judges in putting aside irrational prejudice. Secondly, evidence should not be admitted if its probative weight is insufficient to justify the complexity that it will add to the trial. That is a consideration of general application.

12. The evidence whose admissibility is in issue on this appeal is known as "similar facts" evidence. Issues in relation to such evidence normally arise in criminal rather than civil proceedings. Where a defendant to a criminal charge has a criminal record, his propensity to commit crime will normally have some relevance to the question of whether he committed the offence with which he is charged. ***As a general rule such evidence has none the less been held to be inadmissible on the ground that its prejudicial effect is likely to outweigh its probative value.*** *Exceptions have, however, been made to this general exclusion. The nature and extent of those exceptions have proved a frequent preoccupation of the appellate courts and, on at least four occasions, of your Lordship's House."*

The tension between probative force and prejudicial effect identified in the quotation above may be summed up in two old saws. The first being "the leopard does not change his spots" and the second, "give a dog a bad name, and hang him on it."

The study and practice of criminal law seldom overlap with what the late John Mortimer QC, author of the Horace Rumpole series, called "the Sunday morning murder." But exceptions do exist. For example, Sir Edward Marshall Hall KC, the "Great Defender" of Edwardian England, was renowned for his devastating cross-examinations, impassioned closing speeches, and for having the most handsome profile in England. He was also notorious for stage-whispering to his junior counsel in open court "You must argue this point: there is some law in it!" It was said of Marshall Hall that his stage whispers could be heard in the public gallery – of the next-door court. Yet his name appears in one of the most cited cases on evidence, as counsel for George Joseph Smith, the accused in the Brides in the Bath case.

Two of the cases featured here, *R v Smith* [1914-15] All ER Rep 262 and *R v Armstrong* [1922] All ER Rep 153 are covered in the collected "Penguin Famous Trials". They are also well covered on the internet. The third, *Makin v AG of NSW in Australia* [1891-94] All ER Rep 24, also known as the "Babies in the Backyard", is the leading case.

BABIES IN THE BACKYARD

John and Sara Makin (husband and wife) were accused of murdering Horace Amber Murray, a baby they had fostered. At their trial, evidence was led that the bodies of twelve other fostered infants were found buried in the gardens of premises previously occupied by the defendants. The trial exposed the practice of "baby-farming", whereby working mothers (often single parents) in Australia would pay people to take care of their infant children. Often these mothers were unable to visit their children on a regular basis. It appears that the Makins were taking in children for very low rates. Their story was that they had adopted the child, who had then died.

In rebuttal of this, evidence was led that the Makins had taken in other infants for money and that the bodies of other infants had been found. It appears that they had deliberately murdered the children (using a knitting needle or hat-pin to administer a stab to the heart) with a view to making a profit on the small sums given by the parents of the children.

In some cases the Makins went to some lengths to deceive the parents into parting with further sums of money, and they appear to have made it a practice to move from house to house and town to town with some frequency, doubtless trying to keep ahead of suspicion.

The Makins were convicted, and appealed. The case went from Australia to the Privy Council, which held that:

"Their Lordships do not think it necessary to enter upon a detailed examination of the evidence in the present case. The prisoners had alleged that they had received only one child to nurse; that they had received 10s. a week whilst it was under their care, and that after a few weeks it was given back to the parents. When the infant with whose murder the appellants were charged was received from the mother she stated that she had a

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child for them to adopt. Mrs Makin said that she would take the child, and Makin said that they would bring it up as their own and educate it, and that he would take it because Mrs Makin had lost a child of her own two years old … The mother said that she did not mind his getting £3 premium so long as he took care of the child. The representation was that the prisoners were willing to take the child on payment of the small sum of £3, inasmuch as they desired to adopt as their own. Under these circumstances their Lordships cannot see that it was irrelevant to the issue to be tried by the jury that several other infants had been received from their mothers on like representations, and upon payment of a sum inadequate for the support of the child for more than a very limited period, or that the bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners."

The appeal failed and John Makin was hanged. Sara Makin, having received a recommendation for clemency from the jury, lived until 1918. The case exposed the dreadful state of childcare in Australia, and prompted legal and social reforms.

"the bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners"

BRIDES IN THE BATH

The most well-known of the English cases is *R v Smith* (supra). George Joseph Smith was convicted of the murder of Beatrice "Bessie" Munday. At the trial, evidence was led as to the deaths of Alice Burnham and Margaret Lofty. Both had married Smith (who used various names). Both had given or willed to Smith all their worldly wealth. Smith had also insured their lives.

Smith would ensure that the rented rooms where the newly married couple spent their first night of connubial bliss contained a bath. He would then suggest that the bride takes a bath. In each case, the bride drowned in the bath. Evidence was also led that it was virtually impossible for a healthy person to accidentally drown in this manner, but that if suddenly forced under it would be almost impossible to resist.

It appears that Smith's introduction to serial murder may have been almost accidental. His first victim, Bessie Munday, was a victim of his previous preferred crime, that of bigamy. It appears not to have been adduced at the trial that Smith had entered into no less than seven bigamous marriages, in each case deserting the bride as soon as he had parted her from whatever wealth she possessed.

In the case of Bessie Munday, she was unfortunate enough to meet with Smith again, by accident. He apparently persuaded her to forgive him, and moved into rented accommodation with her. Shortly thereafter he bought a bath and before long, she drowned in the bath. It seems likely that Smith murdered her to cover his tracks, and in so doing discovered that it was easier to murder his brides than to desert them.

Smith was convicted of the murder of Bessie Munday. His appeal failed despite the valiant efforts of his counsel, Marshall Hall KC.

The report is short, and consists largely of adopting the principle set out in *Makin*. Nevertheless, it remains a commonly cited case in legal textbooks, perhaps because of its gruesome facts.

SINISTER SOLICITATIONS

The case of Major Herbert Rowse Armstrong cannot be said to have created any new law, but rivals the others in sensationalism, and, even allowing for the loss of life, shows an element of black comedy lacking in the other cases.

Unlike the other two cases, which as it were, shone a light into the darker recesses of society, the *demi-monde* so beloved of Victoriana, Armstrong's case took place in surroundings of utmost respectability, and he remains the only English solicitor to hang for murder.

Armstrong was convicted of murdering his wife by arsenic poisoning. The case had first come to the attention of the authorities based on a suspicion that Armstrong was attempting to murder one Oswald Martin, the only other solicitor in Hay-on-Wye, a picturesque little town situated on the border of England and Wales.

Martin had been taken violently ill after going to Armstrong's house for tea. Armstrong had passed him a scone, saying "excuse fingers." Martin's father-in-law's suspicions were roused when he recalled that he, as the town chemist, had sold to Armstrong a considerable quantity of arsenic, which he claimed was for killing dandelions.

Further investigations revealed that a member of Martin's household had been taken ill after eating some chocolates which were sent anonymously. The remaining chocolates were examined, and each was found to have a syringe-hole in the bottom.

Whilst the police continued to investigate the matter, Armstrong

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SATELLITE WARS

Lee Shih comments on the Astro v Lippo Saga

In the Singapore High Court decision of *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2012] SGHC 212, the Plaintiffs from the Astro group of companies ("the Astro Claimants") succeeded in enforcing five arbitral awards totalling more than US$250 million against the Defendants from the Lippo group of companies ("the Lippo Respondents").

Although the case was decided under the provisions of the Singapore International Arbitration Act ("IAA"), the decision is also useful in the Malaysian context for the interpretation of the Arbitration Act 2005 ("Malaysian Arbitration Act").

This article will first set out a brief overview of the relevant provisions of the IAA before going on to discuss the facts and the legal issues of the case.

SINGAPORE INTERNATIONAL ARBITRATION ACT

The IAA follows closely the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). Section 3 of the IAA states that, subject to the IAA, "*the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.*" The excluded Chapter VIII of the Model Law deals with the enforcement, and opposition to the enforcement of arbitral awards. There are a number of Articles of the Model Law (incorporated by IAA) and Singapore procedure which are relevant to the facts and disputes of the case.

First, Article 16 of the Model Law provides that the arbitral tribunal may rule on its own jurisdiction either as a preliminary determination or as a determination within the award on the merits. Where the arbitral tribunal makes such a preliminary determination on jurisdiction, the dissatisfied party may, under Article 16(3) of the Model Law (equivalent to section 18(8) of the Malaysian Arbitration Act), appeal to the Singapore High Court within 30 days.

Secondly, Article 34 of the Model Law (similar to section 37 of the Malaysian Arbitration Act) sets a time limit of 90 days for a dissatisfied party to apply to the Singapore High Court to set aside an arbitral award.

Lastly, in terms of enforcing an arbitral award and recognising such award as a Singapore Court Judgment, the Singapore procedure allows the Court to grant leave to enforce the award on an *ex parte* basis (i.e. without the presence of a respondent). The Order must be served on the respondent who may then apply to set aside the Order within a prescribed time frame.

FACTUAL BACKGROUND

In 2008, the Astro Claimants (consisting eight companies) initiated arbitration proceedings against the Lippo Respondents (being three companies) under the auspices of the Singapore International Arbitration Centre. The dispute concerned a failed joint venture relating to the supply of satellite-delivered direct-to-home pay television services in Indonesia.

The Astro Claimants succeeded in obtaining five arbitral awards against the Lippo Respondents, totalling more than US$250 million. The Astro Claimants then obtained leave from the Singapore High Court to enforce the five awards against the Lippo Respondents ("Enforcement Orders") and attempted to serve the Enforcement Orders on the Lippo Respondents in Indonesia.

In this dispute, there were two important time limits that had passed. Firstly, in the course of the arbitration, the Lippo Respondents had challenged the jurisdiction of the arbitral tribunal on the ground that three of the Astro Claimants were not parties to the arbitration agreement. The tribunal ruled by way of a preliminary determination that it had the jurisdiction to adjudicate the disputes in the arbitration. The Lippo Respondents did not appeal to the Singapore Court against this decision within the 30 days period prescribed under Article 16(3) of the Model Law. Instead, the Lippo Respondents chose to continue with the arbitration proceeding under protest, and filed a counterclaim against the Astro Claimants in the arbitration. The time limit for appeal against this determination of jurisdiction had long passed.

> **"a domestic international arbitral award (is) subject to the sole and exclusive challenge through the setting aside mechanism"**

Secondly, after the five arbitral awards were issued in favour of the Astro Claimants, the Lippo Respondents did not to apply to the Singapore High Court to set aside the awards within the 90 days period prescribed under Article 34 of the Model Law. As such, the time limit for doing so had also expired.

The Enforcement Orders were then purportedly served on the Lippo Respondents in Indonesia. After the expiry of the period to set aside the Enforcement Orders, the Astro Claimants entered judgment against the Lippo Respondents. The Lippo Respondents subsequently applied to challenge the service of the Enforcement Orders and to challenge the enforcement of the awards on the ground that the tribunal had no jurisdiction to join three of the Astro Claimants in the arbitration.

THE LEGAL ISSUES

The Lippo Respondents challenged the validity of service of the Enforcement Orders. The High Court ruled that there was no proper service of the Enforcement Orders and gave leave to the Lippo Respondents to challenge the enforcement of the awards.

Of greater significance, however, were the issues concerning the challenge to the enforcement of the awards. These issues gave rise to certain novel questions of law and which led to the Singapore Court having earlier allowed the *ad hoc* admissions of foreign counsel, namely David Joseph QC for the Astro Claimants and Toby Landau QC for the Lippo Respondents, to argue the

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matters in the Court.

There were two significant issues concerning the challenge to the enforcement of the awards, *viz*:

1. Whether the Lippo Respondents were entitled to resist the enforcement of the awards in the country in which the awards were made when they did not take any steps to set aside those awards within the prescribed time frame; and

2. Whether the Lippo Respondents had a right to revive a challenge based on the alleged lack of an arbitration agreement and a misjoinder of some of the Astro Group companies to the arbitration well after the award had been made.

Issue 1: Failure to Apply to Set Aside and Ability to Resist Enforcement

Under the Model Law, it is generally accepted that there are two forms of challenging an award. The first is an 'active' remedy under Article 34 (equivalent to section 37 of the Malaysian Arbitration Act) to apply to set aside the award. The second is a 'passive' remedy under Article 36 (equivalent to section 39 of the Malaysian Arbitration Act) where the resisting party can wait until an application is made to enforce the award under Article 35 (equivalent to section 38 of the Malaysian Arbitration Act) and at that point in time, raise the grounds under Article 36 to oppose the enforcement.

As explained by the Singapore High Court, the IAA makes a distinction between an international arbitral award rendered in Singapore (i.e. a domestic international arbitral award) and an international arbitral award rendered in a foreign New York Convention country (i.e. a foreign international arbitral award).

For an international arbitral award (whether domestic or foreign), the IAA specifically excludes the mechanism of opposing the enforcement provided in Chapter VIII of the Model Law i.e. Articles 35 and 36. However, in respect of a domestic international arbitral award, an award is deemed "*final and binding*" under section 19B of the IAA, but subject to the express right of the dissatisfied party to resort to the sole and exclusive challenge through the setting aside mechanism.

Although Chapter VIII of the Model Law is excluded by the IAA, in the case of a foreign international arbitral award, the dissatisfied party may still oppose the enforcement of the award under the prescribed grounds set out in section 31 of the IAA (which reproduces Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York on 10 June 1958).

The Court pointed out that this difference in approach to domestic and foreign international arbitral awards is not unique to Singapore as several civil law jurisdictions, such as Germany and Quebec also adopt a similar difference in the treatment of domestic and foreign international arbitral awards.

The Court further emphasised that the Model Law more properly resembles civil law rather than common law drafting. Hence, any discussion on the Model Law should draw from arbitration law in civil law jurisdictions.

The Lippo Respondents' sole avenue of challenge in the Singapore Courts in relation to the arbitral awards was through an application to set aside those domestic international arbitral awards. The Lippo Respondents had failed to do so within the statutorily prescribed time limits. Therefore, the Lippo Respondents could not avail itself of the remedy of opposing the enforcement of those awards.

Issue 2: Failure to Appeal on Jurisdiction Challenge

In relation to the issue of the tribunal's preliminary determination on jurisdiction, an aggrieved party in such a situation would have three options in attempting to challenge this preliminary determination:

1. Appeal to the Court under Article 16(3) of the Model Law;

2. Choose to leave the arbitral regime in protest and not to appeal under Article 16(3), and boycott the proceedings. Arguably, the boycotting party would then be able to apply to set aside the award under Article 34(2)(a)(i) on jurisdictional grounds; and

3. As arose in the present facts, the aggrieved party could choose not to appeal under Article 16(3) but continue with the arbitral regime by fully participating in the hearing with an express reservation of its rights.

The High Court held that in relation to the third option, it would not be open to a party to hold off bringing a jurisdictional challenge (i.e. by failing to appeal to the Court within the set time limit) and, at the same time, participate in the arbitration on the merits in the expectation that it could revive its jurisdictional challenge at a later stage should it prove to be unsuccessful in the arbitration. Such conduct would make a mockery of the finality and effectiveness of arbitral awards on jurisdiction.

Challenging such an award on jurisdictional grounds is thus excluded from the grounds which a party may invoke at the setting-aside or the enforcement stage if the party has chosen not to bring an appeal under Article 16(3).

It was held there are no passive remedies when it comes to

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GOING SEPARATE WAYS

Trishelea Sandosam explains a landmark Federal Court decision on voluntary separation schemes

INTRODUCTION

On 16 July 2012, a full panel comprising 5 judges of the Federal Court in *Zainon bt Ahmad & 690 others v Padiberas Nasional Berhad* (unreported) unanimously dismissed the appeal of 691 former employees of Padiberas Nasional Berhad ("Bernas") against the decision of the Court of Appeal which held that these former employees were not entitled to termination benefits pursuant to the provisions of the Bernas Employment Handbook ("the Handbook") after they mutually agreed to terminate their employment by accepting a package pursuant to a Voluntary Separation Scheme ("VSS").

FACTS

In 2003, Bernas invited applications from its employees to leave their employment under a VSS pursuant to a circular dated 12 September 2003 ("the Circular"). This VSS exercise was undertaken by Bernas as part of a restructuring exercise to improve operations and increase efficiency.

> **"a VSS is a separate and independent contract intended to mutually override and terminate an existing contract of employment"**

The Circular emphasised that the VSS was a voluntary exercise and employees were at liberty to decide whether to apply for the VSS and Bernas had the discretion to accept or reject any VSS applications made by its employees.

Under the VSS, successful applicants would be entitled to a package which included basic compensation, salary in lieu of notice and unutilised leave and medical benefits for a period of 1 year post-termination.

The Appellants applied for the VSS and were successful in their applications. They were duly paid their benefits in accordance with the Circular by the end of 2003.

Approximately 2 years after they had ceased employment with Bernas and received the benefits under the VSS, the Appellants wrote to Bernas requesting for payment of retirement/termination benefits as contained in the Handbook.

Bernas did not accede to the Appellants' request, which resulted in the latter commencing a claim in the High Court seeking, amongst others, a declaration that the Appellants were entitled to the retirement/termination benefits under the Handbook.

The Learned Judge of the High Court allowed the Appellants' claim and concluded that their right under their original employment contract still subsisted as the contract was not rescinded by Bernas or the Appellants.

On appeal, this decision was unanimously overturned by the Court of Appeal. A detailed analysis of this decision can be found in the article entitled "*Second Bite of the Cherry*", published in the Issue 1/2011 of LEGAL INSIGHTS.

LEAVE TO APPEAL

The Federal Court granted the Appellants' leave to appeal on the following question of law:

"Whether rights that arise upon the termination of an employment contract are extinguished by a termination pursuantto a Voluntary Separation Scheme Contract ("VSS") even where the VSS does not contain any of the following:

(i) an express clause that extinguishes such rights which arise only upon termination;

(ii) an express waiver of those rights by the party entitled to the benefits flowing therefrom; or

(iii) an express provision stating that the VSS now encapsulates the entirety of the rights of all parties thereto."

JUDGMENT OF THE FEDERAL COURT

In answering the question for determination in the affirmative, the Federal Court held that a VSS is a separate and independent contract intended to mutually override and terminate an existing contract of employment and the two cannot co-exist. Otherwise, the very objective of a VSS would be frustrated.

The Court applied the leading Indian decision on VSS schemes, *AK Bindal v Union of India* [2003] 2 LRI 837, where the Supreme Court stated as follows:

"The Voluntary Retirement Scheme (VRS) which is sometimes called Voluntary Separation Scheme (VSS) is introduced by companies and industrial establishments in order to reduce the surplus staff and to bring in financial efficiency … The main purpose of paying this amount is to bring about a complete cessation of the jural relationship between the employer and the employee. After the amount is paid and the employee ceases to be under the employment of the company or the undertaking, he leaves with all his rights and there is no question of his again agitating for any kind of his past rights … If the employee is still permitted to raise a grievance … even after he has opted for Voluntary Retirement Scheme and has accepted the amount paid to him, the whole purpose of introducing the scheme would be frustrated."

The Federal Court agreed with the reasoning of the Court of Appeal on Section 63 of the Contracts Act 1950 and held that the rescission of a contract by mutual agreement would result in an extinguishment of all rights and obligations under the terminated contract, even in the absence of an express provision to that effect.

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The Court further held that a contract which is rescinded by agreement is discharged and cannot be revived and it is not intended that after an employee leaves employment under a VSS, they can return and seek benefits contained in their terms and conditions of employment.

The Court disagreed with the Appellants' contention that retirement/termination benefits survived rescission of the employment contract pursuant to a VSS, thus entitling the Appellants to receive the retirement/termination benefits over and above the benefits under the VSS. It was noted by the Court that the Appellants were well aware of the fact that benefits provided to them under the VSS did not include the retirement/termination benefits.

The Court further observed that under the VSS, the Appellants had the choice to apply for the scheme or to continue in their employment with Bernas and as they had exercised their option and accepted the benefits provided under the VSS on their own volition, no question of unfairness arises.

The view of the Federal Court was clearly summed up in the following statement, *"….. an employee who on his own will, accepts the benefits of the VSS, resigns, signs a full and final settlement and walks away cannot then turn around and ask for any other benefits."*

> **"This decision … brings much needed clarity to the law pertaining to VSS schemes"**

CONCLUSION

Voluntary/Mutual Separation Schemes have become increasingly prevalent in recent times and various organisations have resorted to such schemes, particularly in tough economic climates, to reduce their workforce and increase productivity and efficiency without resorting to retrenchment exercises. However, the legal implications of such schemes have not been deliberated by Malaysian case law in the past.

This decision of the Federal Court is the first of its kind in Malaysia to discuss the effect of a mutual termination of employment under a VSS and brings much needed clarity to the law pertaining to VSS schemes. It is also one of the few reported decisions on the effect of Section 63 of the Contracts Act 1950 which deals with the effect of novation, rescission and alteration of contracts.

The commercial practicality of this decision is to be commended as it ensures that organisations are not disinclined to implement these schemes for fear of ex-employees re-agitating their rights even after accepting generous compensation packages under such separation schemes. This decision is also in line with long established principles of contract law which prevent parties who enter into legal arrangements, with free consent, and make a promise in consideration for certain benefits, from reneging on their promises after enjoying the benefits pursuant to a contract.

Bearing in mind the crux of this judgment that all rights and obligations under a contract terminated by mutual agreement come to an end, employers who still wish to enforce post-termination clauses such as non-solicitation and confidentiality clauses against their ex-employees should insert express clauses saving such rights in their VSS documentation.

It is hoped that this decision will see a rise in Voluntary/Mutual Separation Schemes, which arguably offer a better alternative to retrenchment as they afford much needed flexibility to businesses which seek to downsize, and enable employees to opt to cease their employment on mutually beneficial terms.

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LEGISLATION UP-DATE : GAME-CHANGERS

The Financial Services Bill 2012 and the Islamic Financial Services Bill 2012 were passed by the Malaysian Parliament on 19 December 2012. These Bills will be submitted for Royal Assent by the Yang Di-Pertuan Agong and will come into operation on a date to be determined by the Minister of Finance.

The provisions of the Financial Services Bill 2012 will replace the Exchange Control Act 1953, the Banking and Financial Institutions Act 1989, the Insurance Act 1996 and the Payment Systems Act 2003 and those of the Islamic Financial Services Bill 2012 will replace the Islamic Banking Act 1983 and the Takaful Act 1984.

ALIGNING ARBITRATION IN INDIA WITH INTERNATIONAL PRACTICE

A commentary on a recent landmark decision of the Supreme Court of India by Jocelyn Lim

INTRODUCTION

The decision of the Supreme Court of India in *Bharat Aluminium Co. v Kaiser Aluminium Technical Service Inc.* [2012] 6 Madras Law Journal 630, was much awaited by the international arbitration community. It changed the landscape of arbitration law in India, and further aligned and harmonised the Indian Arbitration and Conciliation Act 1996 of India ("the Act") with the UNCITRAL Model Law of International Arbitration ("Model Law").

In this case, the Indian Supreme Court overruled its earlier judgments, such as *Bhatia International v Bulk Trading* [2004] 2 SCC 105 which held that Part I of the Act (which contains provisions relating to interim relief, appointment of arbitrators, setting aside of arbitral awards, etc.) applied to international arbitrations which are seated outside India.

Briefly, the pertinent points of the decision in *Bharat Aluminium* are as follows:

(1) The seat of arbitration as provided by the arbitration agreement will determine the applicable law of arbitration;

(2) Part I of the Act does not apply to an arbitration which is seated outside India;

(3) Where arbitration is seated outside India, a party cannot file a civil suit in an Indian court in relation to the subject matter of the arbitration agreement to obtain interim relief;

(4) In relation to an arbitral award made in an arbitration seated outside India, the jurisdiction of the Indian courts is limited only to the enforcement of the award under the Act.

The Supreme Court, however, clarified that its decision in *Bharat Aluminium* would only apply to arbitration agreements executed on or after 6 September 2012.

BRIEF FACTS

Bharat Aluminium Co. ("Balco") and Kaiser Aluminium Technical Services, Inc. ("Kaiser") entered into an agreement on 22 April 1993 whereby Kaiser agreed to supply and install a computer based system for Shelter Modernization at Balco's Korba Shelter ("Agreement").

Clauses 17 and 22 of the Agreement essentially provide that:

(a) A dispute arising out of the Agreement shall, at first instance, be settled amicably by negotiation between the parties, failing which the dispute shall be settled by arbitration in accordance with English Arbitration Law;

(b) The arbitration shall be held in London, England and be conducted in the English language;

(c) The Agreement shall be governed by Indian Law and the arbitration proceedings shall be governed by English Law.

Disputes arose between the parties with regards to the performance of the Agreement. Balco claimed for the return of its investment in the modernization programme, loss, profits and other sums. Kaiser claimed for the unclaimed instalments plus interest and damages for breach of intellectual property rights. Negotiations between parties were unfruitful, resulting in Kaiser issuing a request for arbitration to Balco on 13 November 1997.

The disputes were referred to arbitration which was held in England. The arbitral tribunal made two awards dated 10 November 2002 and 12 November 2002 ("Arbitral Awards") in favour of Kaiser. Dissatisfied with the Arbitral Awards, Balco applied to the Court of the District Judge of Bilaspur for both the Arbitral Awards to be set aside pursuant to Part I, Section 34 of the Act.

On 27 July 2004, the District Judge of Bilaspur held that the setting aside applications filed by Balco were untenable and dismissed the applications. Dissatisfied with the decision of the District Judge, Balco appealed to the High Court of Judicature of Chattisgarh, Bilaspur ("High Court Appeals").

> **"the Indian Parliament had taken the Model Law into account (and) adopted the territorial principle"**

On 10 August 2005, the Division Bench of the High Court dismissed the High Court Appeals. It held that the applications by Balco to set aside the Arbitral Awards pursuant to Part I, Section 34 of the Act were not maintainable. Balco appealed to the Supreme Court.

THE APPELLANT'S ARGUMENTS

Balco advanced, *inter alia*, the following arguments in support of its contention that Part I of the Act applies to arbitration which takes place outside India:

(a) The omission of the word "*only*" which is found in Article 1(2) of the Model Law, from Section 2(2) of the Act was an indication of deviation from the territorial principle under Article 1(2) of the Model Law and clearly signifies that Part I of the Act applies to a foreign-seated arbitration. Balco further argued that such omission clearly indicates that the Act "*has not adopted or incorporated the provisions of Model Law*" but has merely "*taken into account*" the Model Law. Therefore, the territorial principle under the Model Law should not be applicable within the context of the Act.

(b) It is evident from the provisions of the Act, in particular Section 2(1)(e), Section 2(5), Section 2(7), Section 20 and Section 28, that the Act is not '*seat centric*'. It was further argued that, if the application of Part I of the Act is limited to arbitration

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which takes place in India, not only will it lead to reading words into various provisions of the Act but also render those provisions redundant.

(c) Further, such limitation will restrict parties to a foreign-seated arbitration from approaching the Indian courts to seek interim relief under Part I, Section 9 of the Act, thus leaving parties to a foreign-seated arbitration without a remedy.

FINDINGS OF THE SUPREME COURT

No deviation from Model Law

The Supreme Court disagreed with Balco's submissions. The Supreme Court held that the omission of the word "*only*" from Section 2(2) of the Act was not an indication of deviation from the territorial principle under the Model Law. The Court highlighted that at the time of enactment of the Act, the Indian Parliament had taken the Model Law into account, thereby adopted the territorial principle and limited the application of Part I of the Act to domestic-seated arbitrations.

The Supreme Court, in deciding whether Section 2(2) of the Act applies to foreign-seated arbitrations, held that the omission of the word '*only*' merely indicates that the Model Law has not been bodily adopted. It does not mean that the territorial principle has not been accepted by the Act. The Supreme Court noted that the word "*only*" was also omitted from the corresponding provision in other jurisdictions and held that a plain reading of Section 2(2) of the Act, which reads as "*this Part shall apply where the place of arbitration is in India*", makes it clear that Part I of the Act does not apply to foreign-seated arbitrations. Hence, the application of Part I of the Act is limited to domestic-seated arbitration.

"Seat Centric"

The Supreme Court rejected Balco's submission that the relevant provisions of the Act indicates that the Act is not "*seat centric*" and therefore made it clear that Part I is limited to domestic-seated arbitrations. The Supreme Court held that the relevant provisions should be interpreted in light of the intention of the Indian Parliament at the time of enactment of the Act that the territorial principle should be put at the forefront of interpretation. Coupled with the clear wordings of Section 2(2) of the Act, there is no doubt that the Act is "*seat centric*".

It follows that interpretation of the relevant provisions of Part I should be in the context of Section 2(2) of the Act. Thus, the arguments put forward by Balco for interpreting the relevant provisions of Part I of the Act to be applicable to foreign-seated arbitrations were devoid of merit.

The Supreme Court highlighted the distinction between "seat" and "venue" of arbitration. The former refers to the legal localisation of an arbitration whereas the latter refers to the convenient geographical locality for hearings of the arbitration. The Supreme Court, in choosing to follow the long line of established cases in England, held that the seat of arbitration will inevitably be the law which governs the conduct and supervision of the arbitration proceedings.

Interim relief not maintainable

Having considered that Part I of the Act does not apply to foreign-seated arbitrations, the Supreme Court then confirmed that, as far as foreign-seated arbitrations are concerned, no application for interim relief is maintainable under Part I, Section 9 or any other provision of Part I of the Act. Similarly, no application to set aside a foreign-seated arbitral award is maintainable under Part I, Section 34 of the Act in India.

In coming to its decision, the Supreme Court overruled the decisions of *Bahtia International v Bulk Trading S.A. and Another* [2004] 2 SCC 105 and *Venture Global Engineering v Satyam Computer Services Ltd and Another* [2008] 4 SCC 190. The Supreme Court recognised that the proposition accepted in those cases which empowered the Indian courts to grant interim reliefs and to set aside foreign-seated arbitral awards amounts to giving extra-territorial jurisdiction to the Indian court which was not the intention of the Indian Parliament when the Act was enacted. That proposition also undermined the underlying spirit of the Model Law which is premised on the territorial principle.

The Supreme Court was of the opinion that the non-application of Part I of the Act does not mean that parties to a foreign-seated arbitration are left without a remedy. They could still seek relief from the courts of the country where the seat of arbitration is located.

COMMENTARY

The decision of the Supreme Court is welcomed by the international arbitration community. It affirms the doctrine of minimal intervention by the Indian courts in a foreign-seated arbitration, putting arbitration in India in line with internationally accepted standards.

The principles in *Bharat Aluminium* apply prospectively to arbitration agreements executed after 6 September 2012. Hence, the full impact of this Supreme Court decision will most likely be felt only a few years from now. Arbitration proceedings based on arbitration agreements executed before that date, even if they are commenced after 6 September 2012, will still be governed by the old principles enunciated in the cases of *Bhatia International* and *Venture Global Engineering*.

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PUTTING A VALUE TO IT

Maroshini K Morgan explains a recent decision of the Federal Court on stamp duty

In *Pemungut Duti Setem, Pulau Pinang v Malaysia Smelting Corporation Berhad* [2012] 5 CLJ 273, the Federal Court was called upon to consider the principles that are to be applied by the Stamp Office in assessing the stamp duty chargeable on a share transfer form in respect of shares in a loss making company.

BACKGROUND FACTS

Rahman Hydraulic Tin Sdn Bhd ("Company") was a private limited company with a paid-up capital of RM97,232,142 which comprised of 97,232,142 ordinary shares of RM1 each. The Company was a loss making company and its entire paid-up share capital was held by Anggun Pintas Sdn Bhd ("Vendor").

Following an open tender exercise, the Vendor sold the entire paid-up share capital of the Company to Malaysia Smelting Corporation Bhd ("Respondent") for a purchase price of RM15,000,000.

The Respondent submitted the share transfer form, Form 32A, dated 22 November 2004 to the Stamp Office for stamping. The Form 32A stated that 97,232,142 ordinary shares of RM1 each in the Company were being transferred by the Vendor to the Respondent for the abovementioned purchase price.

> **"the par value is merely a face value which may not reflect the actual value of the shares"**

The Deputy Collector of Stamp Duty valued the shares at RM97,232,142 based on the par value of RM1 per share and assessed the stamp duty on the Form 32A at RM291,699. The Respondent objected to the assessment and contended that the duty should be RM45,000, based on the purchase price of RM15,000,000.

The Deputy Collector rejected the Respondent's objection, relying primarily on Item 32(b) of the First Schedule of the Stamp Act 1949 ("Item 32(b)"), which states:

"(b) On sale of any stock, shares or marketable securities, to be computed on the price or value thereof on the date of transfer, whichever is the greater."

The Deputy Collector also relied on paragraph 3.2 of the Stamp Office's Guidelines on the Stamping of Share Transfer Instruments for Shares that are Not Quoted on the Kuala Lumpur Stock Exchange ("Guidelines") which states:

*"For cases of companies incurring losses, **the Par Value** or Net Tangible Assets or sale consideration whichever is the highest is to be used for the purpose of computation of the stamp duty payable."*

The Appendix to the Guidelines also contains an example that expressly stated that the stamp duty payable would be calculated based on par value where the par value of the shares transferred is higher than the sale consideration.

Dissatisfied with the decision of the Deputy Collector, the Respondent appealed to the High Court by way of a Case Stated under Section 39 of the Stamp Act 1949.

DECISION OF THE HIGH COURT

The questions for determination by the High Court were:

(1) Whether the par value of RM1 per share (RM97, 232,142 for the entire share capital) of the company is the actual value of the company's shares?

(2) If not, what is the value of the company's shares at the date of the transfer?

(3) What is the duty chargeable on the Form 32A?

In essence, the issue was whether stamp duty is to be assessed on the aggregate of the par value of the shares or the purchase price of RM15,000,000.

The High Court dismissed the appeal, holding that the par value was the actual value of the shares. The Respondent appealed to the Court of Appeal.

DECISION OF THE COURT OF APPEAL

The Court of Appeal answered the first of the questions posed to the High Court in the negative. Abdul Wahab Patail JCA opined that the par value is "only a face value, while the value of a company waxes and wanes according to its performance and outlook."

The Court noted that no evidence was produced that anyone else was willing to pay more than RM15,000,000 for the shares in the Company.

As to the second question, the Court of Appeal noted that the shares of a company represent units of shareholding in a company and that the value of each share is the value of the company divided by the number of shares issued. The Court held that the most widely-accepted approaches to determine the value of a company are the comparable worth method, the asset valuation method and the financial performance method. As no evidence had been adduced of any comparable company and its valuation and as the Company was not a going concern with an income stream or bright business outlook, the only method left to be considered was the asset valuation method.

The Court held that the price obtained in an arm's length transaction between a willing buyer and a willing seller who are

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not otherwise obliged or pressed to buy or sell, would be an accurate reflection of the asset value.

The Court noted that there was no dispute as to whether the open tender sale was at arm's length or not, or whether the Vendor was hard pressed to sell. The Court then concluded that, based on the best available evidence, the value of the shares on the date of transfer was the purchase price of RM15,000,000. Accordingly, the Respondent's appeal was allowed.

DECISION OF THE FEDERAL COURT

The Collector of Stamp Duties was granted leave to appeal to the Federal Court against the decision of the Court of Appeal.

The sole question to be determined by the Federal Court was whether, for the purpose of determining the stamp duty payable on the Form 32A, the value of the Company's share is the nominal value of RM1 per share or the value based on the balance sheet of the Company as at 31 December 2003.

> **"the fact that the purchase price was arrived at pursuant to an open tender exercise indicated that such price represented the market value"**

The Federal Court held that the par value was not indicative of the actual value of the shares for the purpose of ascertaining stamp duty. It noted that Form 32A did not state that the value of each share is RM1 but rather that the par value of each share is RM1.

The Federal Court concurred with the Court of Appeal that the par value is merely a face value which may not reflect the actual value of the shares once a company commences business as it may make profits or incur losses or its assets may appreciate or depreciate.

The Federal Court held that the figures from the Company's balance sheet for its financial year ended December 2003 ("Balance Sheet") was relevant for determining the value of the shares as the Balance Sheet formed the basis of the tender and the sale of the shares. The Court noted that based on the Balance Sheet, the Company's shares would not have any value as the total liabilities of the Company exceeded its total assets by about RM311,000,000.

The Federal Court found that as there was no dispute as to whether the open tender sale was at arm's length or not, the best available evidence of the value of the shares on the date of transfer was the purchase price of RM15,000,000.

The Court also noted that the fact that the purchase price was arrived at pursuant to an open tender exercise indicated that such price represented the market value. As the purchase price of RM15,000,000 was higher than the value of the shares based on the Balance Sheet, stamp duty would be assessed based on the purchase price pursuant to Item 32(b).

Accordingly, the appellant's appeal was dismissed.

CONCLUSION

The decision of the Federal Court in *Pemungut Duti Setem, Pulau Pinang v Malaysia Smelting Corporation Berhad* is to be welcomed as it authoritatively decides that the par value of the shares cannot be equated to the market value of those shares for the purpose of assessing stamp duty payable on a share transfer form for shares in a loss making company. In coming to this decision, the Federal Court has done away with a practice of the Stamp Office that is unrealistic and without commercial basis.

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SKRINE EMPLOYMENT LAW SEMINARS

The Firm hosted 2 sessions of talks on 7 September and 23 October 2012 given by the Employment Practice Group Partners, Siva Kumar Kanagasabai and Selvamalar Alagaratnam on the impact of the recent Minimum Wage Order 2012 and the Minimum Retirement Age Act 2012 on companies and organisations. The talk was well received and attended by clients and members of the business community.

SKRINE TEAM BUILDING 2012

The Firm's team building event was held at the Awana Genting Resort on 20 and 21 October 2012. A total of 70 lawyers participated in the event.

The activities started with the "Iron Man" treasure hunt which involved several hours of 'treasure hunting.' Lawyers were divided into 7 teams of 8-10 people per team. The treasure hunt comprised a mixture of puzzles and sudoku, as well as physical activities like rock climbing and mini-archery. The teams were also put through a food challenge – fear factor style. The winning team was determined through a combination of fastest overall time and the points scored for each activity.

A night of dinner and games followed. The Skrine dragon boat team put up a performance that was inspired by previous memorable Annual Dinner performances by the Partners of the Firm. Lawyers were then split into different teams for some dinner games. First up was a boat race, with each table sending a team to try to clock the fastest time for the challenge. This was followed by a quiz to identify movie sound-tracks. Next, there was a list of questions to test the teams' knowledge of the Firm. Finally, the teams had to perform an impromptu "Haka" dance ala the New Zealand All Blacks. Dinner ended with the prize giving ceremony to the winning teams.

All in all it was a great weekend.

SATELLITE WARS

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challenging jurisdiction under the IAA – a party wishing to oppose a jurisdictional award must act within the prescribed time frame.

The Singapore High Court cautioned that if a party decides to hedge its bets as the Lippo Respondents had done, the disadvantages and risks of this tactic are dire under the IAA if the outcome is an adverse award on the merits.

COMMENTARY

Failure to Set Aside and Ability to Resist Enforcement

Unlike the IAA, the Malaysian Arbitration Act permits the dissatisfied party under either a domestic or a foreign international arbitral award to oppose the enforcement of the arbitral award in the enforcement proceeding.

One interpretation of the Malaysian Arbitration Act (and one which is in line with jurisprudence from many other Model Law countries) is that, a party can always opt for either the 'active' remedy by applying to set aside an award under section 37 of the Malaysian Arbitration Act or for the 'passive remedy' by opposing the enforcement of the award in the enforcement proceeding under section 39 of the Malaysian Arbitration Act.

However, there are High Court authorities that suggest that the failure to set aside an award within the prescribed time limit may be fatal to the party's subsequent attempt to oppose enforcement (*Ngo Chew Hong Oils & Fats (M) Sdn Bhd v Karya Rumpun Sdn Bhd* [2009] 1 LNS 1321 and *Bauer (M) Sdn Bhd v Embassy Court Sdn Bhd* [2010] 1 LNS 1260).

It remains to be seen whether this will be the approach that will be confirmed by the appellate courts.

Failure to Appeal on Jurisdictional Challenge

This Singapore High Court decision on the interpretation of Article 16(3) of the Model Law does provide a useful guide on the interpretation of section 18(8) of the Malaysian Arbitration Act.

Applying the principles of the Singapore High Court decision, if a party fails to appeal to the High Court pursuant to Section 18(8) of the Malaysian Arbitration Act against the arbitral tribunal's preliminary determination that it has jurisdiction, then the party could possibly be precluded from raising a challenge on jurisdiction in either the subsequent setting aside application of the final award under section 37 of the Malaysian Arbitration Act or in enforcement proceeding under section 39 of the Malaysian Arbitration Act.

The Singapore High Court decision referred to authorities from Germany and Quebec on this point which the Malaysian courts can also draw reference from in the future.

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GOING TO THE BALLOT BOX

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An election petition is heard in a High Court which is convened as an election court. The hearing of the petition is to be completed within 6 months from the date on which the petition is presented. A petitioner who is dissatisfied with the decision of the election court may appeal directly to the Federal Court.

Grounds for an election petition are as follows: bribery, intimidation or other misconduct which may affect the outcome of the election, non-compliance with election laws and regulations, acts of corruption or illegal acts committed by a candidate or his agent or ineligibility of a candidate to participate in the election.

ELECTION OFFENCES

The Election Offences Act 1954 sets out three main types of election offences i.e. electoral offences, corrupt practices and illegal practices in relation to election agents and election expenses.

> **"Election winners are decided based on the 'simple majority' or 'first past the post' principle"**

Election offences range from tampering with the electoral roll, nomination paper, ballot paper or ballot box, corruptly inducing persons to vote for a certain candidate to employers prohibiting their employees from voting. A prosecution under the Election Offences Act 1954 may only be instituted with the sanction of the Public Prosecutor.

CONCLUSION

The 13th General Election will be a watershed for Malaysians. Will the outcome be a resounding victory for the incumbent Prime Minister, Dato' Seri Najib Tun Razak, and signify the end of the road to Putrajaya for *de facto* opposition leader, Anwar Ibrahim? Or will we witness the "Revenge of the Fallen" for this charismatic but aging opposition leader? We will find out … soon enough.

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BRIDES IN THE BATH, BABIES IN THE BACKYARD AND SINISTER SOLICITATIONS

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(possibly motivated by a desire to further delay a conveyance of land in relation to which he is thought to have misappropriated funds) continued to hound Martin with invitations to take tea, at first at his home and then at his office. Martin, obviously reluctant to oblige, yet urged by the police to give nothing away, was put to ever more desperate shifts in his attempts to avoid Armstrong. This macabre state of affairs persisted for over two months, ending with Armstrong's arrest on suspicion of attempting to murder Martin.

In the course of investigations, Mrs Armstrong's body was exhumed. She had died earlier that year (1921) of an illness which had been thought strange but not suspicious. Her remains were found to contain a large amount of arsenic, which made her final illness much more explicable. This led to Armstrong being charged for the murder of his wife. His defence amounted to suggesting that she had committed suicide.

Arsenic was found in Armstrong's possession, divided into small packets, each one amounting to a fatal dose. One such packet was found on his person when he was arrested. Evidence was led of all this, as well as of Martin's experiences. The jury convicted Armstrong, who appealed to the Court of Criminal Appeal. In dismissing the appeal, Lord Hewart, CJ, had this to say:

"There was the clearest possible evidence that the appellant, on Jan. 11, 1921, purchased a quarter of a pound of white arsenic, and that when he was arrested on Dec. 31, 1921, he had in his pocket a packet containing a fatal dose of white arsenic. In these circumstances, so soon as he stated the defence, as he at once did, that he bought and was keeping the poison for the innocent purpose of destroying weeds, it was open to the prosecution to show by means of the evidence relating to Martin that the appellant neither bought nor kept the poison for that pretended innocent purpose."

RECENT TRENDS

In this age of political correctness, it is perhaps befitting that the more recent cases on similar fact evidence have tended to focus on the application of the doctrine to civil cases – macabre and gruesome circumstances, whilst giving rise to an enjoyable *frisson* in the short term, like media reports of sexual escapades of Malaysian politicians, become less palatable with prolonged consideration.

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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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