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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

Dateline: June 2013. The second quarter of 2013 saw the start of our 50th Anniversary celebrations with a cocktail reception at Carcosa Seri Negara and the Skrine Law Conference at the Sime Darby Convention Centre. It also witnessed the long anticipated 13th General Elections which culminated in the return to power of the Barisan National, albeit with a minority popular vote.

This month saw the return of the "Haze" which has caused Malaysians and Singaporeans to vent their displeasure at their Asean counterpart, Indonesia. While we empathise with the Indonesian Government for the outbreaks that are caused by peat fires, their inability, or reluctance, to take stern measures to stop open burning for land clearing activities is disappointing as it has been recurring year in, year out, over the past decade. I believe that the open burning due to land clearing activities will be significantly reduced if the Indonesian Government imposes heavy fines or confiscates the lands of those found guilty of carrying on such activity.

The on-going saga of Edward Snowden, the fugitive US intelligence leaker, made the headlines in June 2013. This episode brings out three (3) controversial and irreconcilable issues. The first is the pledge of secrecy which equates to a declaration of trust. If the pledge is reneged, the trust is gone and if everyone who pledged secrecy dishonours their pledge, the world will be in chaos. Second is that the leak is for the greater good. But is it? The secret surveillance programme which is the subject matter of the leak apparently helped the USA to foil about 50 possible terrorist attacks in their own backyard. Therein lies the controversy … helping the terrorists against stopping the terrorists. The third concerns the hypocrisy and double standards of countries that have criticised others for carrying out surveillance of the internet whilst indulging in the same activities themselves.

Controversies aside, we are pleased to announce that our Firm has been awarded the Who's Who Legal Malaysian Law Firm for 2013. Thank you to all our readers and clients for their support.

As Hari Raya Puasa will be celebrated before we publish our next issue of Legal Insights, we wish all our Muslim friends and readers "*Selamat Hari Raya*".

Thank you.

LEE TATT BOON
Editor-in-Chief
& Senior Partner

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SKRINE 50TH ANNIVERSARY COCKTAILS

1 May 2013 was the Firm's 50th anniversary of its founding.

The Firm hosted the first of its anniversary events, the cocktails on 30 May 2013 at Carcosa Seri Negara, which was attended by about 300 clients and friends of the Firm. We were honoured by the presence of Ms Shiela Skrine, the daughter of the late Mr. John Skrine, one of our Founding Partners. Shiela travelled many miles from her home in France to grace the occasion.

The Programme included speeches by Senior Partner, Lee Tatt Boon and Consultant and a Founding Partner, Dato' Dr. Sir Peter Mooney and a performance by the Firm's Reluctant Performers, a group of lawyers. Feedback received from our guests was that it was a good night to celebrate and catch-up with each other.

MALAYSIA'S NEW OMNIBUS

Petrina Tan and Sheba Gumis provide
Act 2013 and the Islamic

The Financial Services Act 2013 ("FSA") and the Islamic Financial Services Act 2013 ("IFSA") came into operation on 30 June 2013 (with the exception of certain provisions relating to insurance and takaful matters which will be discussed later in the article). The FSA and the IFSA are the culmination the Government's effort to modernise and harmonise the various laws that govern the financial services sector in Malaysia.

OVERVIEW

The FSA and the IFSA have been characterised as "omnibus" financial legislation. The FSA, which is based on a similar framework to that of the United Kingdom Financial Services Act 2012 and the Australian Financial Services Reform Act 2001, repeals the Banking and Financial Institutions Act 1989 ("BAFIA"), the Insurance Act 1996 ("IA"), the Payment Systems Act 2003 and the Exchange Control Act 1953 and combines the regulation of the matters under the repealed legislation under a single act and licensing regime.

The IFSA repeals the Islamic Banking Act 1983 and the Takaful Act 1984 ("TA") and combines the Islamic financial and takaful services under the aforementioned acts in a similar fashion. The IFSA provides for the regulation and supervision of Islamic financial institutions, payment systems and other relevant entities. It also provides for the oversight of the Islamic money market and Islamic foreign exchange market to promote financial stability and compliance with Shariah.

The principal regulatory objectives of the FSA are to promote financial stability and protect the rights and interests of consumers of financial services and products. The objectives of the IFSA are similar but, in addition, pertain to compliance with Shariah.

Compared to the preceding legislation, there is a greater sense of regulatory control and consumer protection under the FSA and the IFSA. There is also more extensive regulation on the shareholding of licensed persons under the new legislation. Additionally, a financial ombudsman scheme is introduced for the first time in Malaysia.

REGULATION OF SHAREHOLDING

Acquisition of Interest in Shares

Similar to the BAFIA, the IA and the TA, there are requirements under the FSA and the IFSA to obtain the approval of Bank Negara Malaysia ("BNM") or the Minister of Finance ("Minister") for the acquisition of interest in shares that exceed the prescribed percentages, or result in a change in control, of a licensed person.

A "licensed person" under the FSA refers to a person who is licensed to carry on banking business, insurance business or investment banking business and under the IFSA, refers to a person who is licensed to carry on Islamic banking business, takaful business, international Islamic banking business or international takaful business.

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FINANCIAL LEGISLATION

an overview of the Financial Services Financial Services Act 2013

"Interest in shares" is defined in identical terms in Schedule 3 of both pieces of legislation and includes both legal and beneficial interest in shares. Such interest can arise when a person enters into a contract to acquire shares or has a right to have a share transferred to him. A person is also deemed to have an interest in shares where he holds shares jointly with another person. There are exceptions to this, such as where the interest is held by a person as security or as bare trustee.

Both the FSA and the IFSA require a person to obtain BNM's approval before he enters into an agreement to acquire an interest in shares which would result in him holding an aggregate interest of 5% or more of shares in a licensed person.

The FSA and the IFSA also require a person to obtain BNM's approval before entering into an agreement to acquire an interest in shares which would result in him holding an aggregate interest in shares of a licensed person of, or exceeding, any multiple of 5% or the percentage holding that triggers a mandatory offer under the Malaysian Code on Take-Overs and Mergers (i.e. 33% or the 2% creeping rule).

“ the maximum permissible interest in shares that may be held by an individual in a licensed person is 10% ”

The approval of the Minister is also required before a person enters into any agreement which will result in that person holding an aggregate of more than 50% of the interest in shares of a licensed person under the FSA or the IFSA.

It is important to note that for the purposes of determining the interests held, or to be held, by a person in a licensed person, the interests of that person are to be aggregated with shares held by his spouse, child, family corporation and persons acting in concert with him.

Control over a licensed person

Sections 88 and 100 of the FSA and the IFSA respectively require a person to obtain the approval of the Minister before taking control of a licensed person.

A person is deemed to have control if he (a) has an interest of more than 50% of shares in a licensed person; or (b) unless proven otherwise, has the power to appoint the majority of the directors of a licensed person, or to make and effect business and administration decisions of a licensed person, or is a person in accordance with whose directions, instructions or wishes the directors or senior officers of a licensed person are accustomed or under an obligation to act.

Disposal of Interest in Shares

The FSA and the IFSA also require a person who has an aggregate interest in shares of a licensed person of (a) more than 50%; or (b) 50% or less but has control over the licensed person, to obtain the approval of the Minister before entering into an agreement which would result in that person holding less than 50% interest in shares in, or ceasing to have control over, the licensed person.

Maximum Shareholding of an Individual

Both the FSA and the IFSA stipulate that the maximum permissible interest in shares that may be held by an individual in a licensed person is 10%.

The requirement in the IFSA may be waived by BNM if it is satisfied that the individual will not have the power to exercise control over the licensed person and has given a written undertaking not to exercise control over the licensed person.

On the other hand, the FSA does not confer any discretion on BNM to waive the 10% shareholding limit imposed on individuals under the FSA.

FINANCIAL GROUPS

The concept of 'financial groups' is introduced in Part VII of the FSA and Part VIII of the IFSA. BNM is empowered to exercise oversight over financial groups for the purposes of promoting the safety and soundness of a licensed person.

One of the key features of these Parts is that any company which seeks the Minister's approval to hold an aggregate interest in shares of more than 50% in a licensed person is required to apply to BNM to be approved as a "financial holding company".

A financial holding company is prohibited from carrying on any business other than that of holding investments in corporations which are primarily engaged in financial services or other services in connection with, or for the purpose of, such financial services. A financial holding company is subject to the same prudential requirements as those imposed on a licensed person. It is worth noting that BNM may require more than one company within a corporate group to be approved as a financial holding company.

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COURT IMPOSES "SELL-BY DATE" ON SECURED CREDITORS

Claudia Cheah explains a recent landmark decision which restricts a secured creditor's right to claim interest against a company in liquidation

INTRODUCTION

In the recent case of *Pilecon Realty Sdn Bhd v Public Bank Bhd & Ors and Other Appeals* [2013] 2 CLJ 893, the Federal Court considered the right of a secured creditor to claim interest against a company in liquidation.

BACKGROUND FACTS

Public Bank Berhad ("Bank") granted a banking facility to Transbay Ventures Sdn Bhd ("Transbay"). The facility was secured by a charge over a piece of land ("Charged Property") which belonged to Transbay.

Transbay defaulted in repayment and the Bank instituted proceedings in the High Court against Transbay to recover the outstanding sums. Judgment was entered against Transbay on 22 August 2003. The Bank also commenced foreclosure proceedings and obtained an order for sale of the Charged Property on 7 October 2003.

> **"a secured creditor is given a timeline of six months to sell the charged property, failing which it would not be entitled to interest"**

As Transbay failed to settle the judgment debt, the Bank commenced winding up proceedings and a winding up order was made against Transbay on 27 January 2006 ("Winding Up Order"). Thereafter, the liquidators of Transbay held a tender exercise and sold the Charged Property to one BSEL Waterfront. According to the sale and purchase agreement executed between the liquidators of Transbay and BSEL Waterfront, the sale proceeds of the Charged Property would be used to pay the redemption sum to the Bank, and the balance would be distributed to the other creditors of Transbay.

The liquidators of Transbay requested the Bank to furnish a statement of the redemption sum to enable the Bank's charge over the Charged Property to be discharged. The Bank took the position that as long as its security had not been realised, it was entitled to charge interest at the default rate prescribed in the loan agreement.

On the other hand, Pilecon Realty Sdn Bhd ("Pilecon"), an unsecured creditor of Transbay, took the view that the Bank was not entitled to charge any interest after the date of the Winding Up Order. It applied to the High Court to determine the proper basis of calculating interest on the capital sum owed to the creditors of Transbay, the date up to which interest may be computed, and the amount that Transbay has to pay to the Bank in respect of the debt owed.

The liquidators in turn, sought the Court's directions as to whether the Bank was entitled to charge interest at the contractual rates on the amount owed by Transbay after the date of the Winding Up Order to the date of full payment.

THE DECISION OF THE HIGH COURT

The High Court ruled that interest was claimable up to the date of the Winding Up Order if the Bank had brought itself within the liquidation. On the facts of the case, the Court held that the Bank stood outside the liquidation as it had not submitted a proof of debt to the liquidators. Therefore, the High Court decided that the Bank was entitled to charge interest at the contractual rate on the amount owed by Transbay after the date of the Winding Up Order up to the date of full payment of the debt.

THE DECISION OF THE COURT OF APPEAL

On appeal by Pilecon, the Court of Appeal unanimously held that the High Court had erred in extending the interest beyond the six month limit prescribed by Section 8(2A) of the Bankruptcy Act 1967 ("BA"). The Court of Appeal ruled that the Bank was only entitled to interest for a maximum of six months from the date of the Winding Up Order.

THE DECISION OF THE FEDERAL COURT

The Bank appealed to the Federal Court on the following questions of law -

(1) *Whether the statutory right of a chargee under the National Land Code to rely on his security to obtain full satisfaction of the indebtedness owed to him, is restricted by Section 8(2A) of the BA where:*

  (i) *such security is provided by a company which is later wound up under the provisions of the Companies Act 1965; and*

  (ii) *the security was not realised within six months of the winding up order;*

(2) *Does Section 8(2A) of the BA apply in a company liquidation situation where the secured creditor relies on his security for full satisfaction?*

Pilecon filed a cross appeal to the Federal Court on the following question of law –

Whether a secured creditor is entitled to any interest in respect of its debts after the making of a winding up order if it does not realise its security within 6 months from the date of the winding up order.

According to Zaleha Zahari FCJ, the issue in this case is whether

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Section 8(2A) of the BA is to be limited in its application to secured creditors in a bankruptcy situation or whether it is also applicable to secured creditors in a winding up situation. Section 8(2A) of the BA provides as follows –

"Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realise his security within six months from the date of the receiving order."

The Federal Court observed that prior to the introduction of Section 8(2A), a secured creditor was permitted under Section 8(2) of the BA to realise or otherwise deal with his security in the same manner as he would have been entitled to as if a receiving order had not been made against a debtor. In the opinion of the Federal Court, this provision enabled a secured creditor to delay the realisation of his security to the detriment of the unsecured creditors of the debtor.

According to the Court, the rationale for the introduction of Section 8(2A), as explained by the Minister in moving the amendments to the BA in the Dewan Rakyat, is to prevent secured creditors from taking an inordinately long time to realise the secured property, thereby resulting in the debtor having to bear interest on the secured debt until the secured property is sold. Such delay would be unfair to the unsecured creditors and the debtor as it would reduce the balance available for distribution to the unsecured creditors.

The Federal Court then stated that although a secured creditor was free to deal with his security under Section 8(2) of the BA, the introduction of Section 8(2A) required a chargee to realise the secured property within six months of the receiving order, failing which the secured creditor would not be entitled to claim any interest.

The Federal Court held that Section 8(2A) of the BA was clear and unambiguous and that in the absence of an express provision, there was no reason to limit its application only against a bankrupt and not to a debtor which is being wound up. Based on the construction of Sections 4(1) and (2) of the Civil Law Act 1956 and Sections 291(1) and (2) of the Companies Act 1965, the Federal Court held that Section 8(2A) of the BA applied to a secured creditor in a winding up situation.

Based on the foregoing reasons, the Federal Court answered the two questions of law posed by the Bank in the affirmative and dismissed the Bank's appeal.

The Court then answered the question posed by the Pilecon in the negative. Their Lordships held that under Section 8(2A) of the BA, a secured creditor is given a timeline of six months to sell the charged property, failing which it would not be entitled to interest. As the Bank had realised the charged property some two years and six months after the winding up of Transbay, it had not met the statutory limit of six months under Section 8(2A). As such, the Bank was not entitled to any interest. The Federal Court also held that the Court of Appeal had erred in allowing the Bank to claim interest for six months.

ANALYSIS

This decision of the apex court is significant as it prohibits a secured creditor from recovering interest on a debt owed by a company which has been wound up after the date of the winding up order, unless the secured property is realised within six months from the date of winding up of the company.

> **"The six-month time-frame to realise a secured property may be insufficient in many instances"**

Although this decision concerned the sale of immovable property charged under the National Land Code 1965, it is likely that the principles laid down by the Federal Court would also apply to the sale by a chargee, or his agent, of secured property under a debenture after a winding up order has been made against the chargor. This may be the position even if the chargee, or his agent, purports to dispose of the property as attorney of the chargor under an irrevocable power of attorney after the winding up order has been made. These issues however await definitive rulings by the Malaysian courts.

The six-month time-frame to realise a secured property may be insufficient in many instances, in particular where a secured property is required to be sold by public auction through the judicial process. Furthermore, in certain cases more than one auction may be required before the secured property is successfully sold.

To avoid the operation of Section 8(2A) of the BA, a secured creditor should not commence proceedings to wind up a debtor until it has disposed of the secured property. However, this strategy is not foolproof as the debtor could be wound up in proceedings initiated by other creditors of the debtor and thereby bring the six month time-frame under Section 8(2A) of the BA into play.

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CHAPTER 11

Lee Shih highlights some features of Chapter 11 of the US Bankruptcy Code

Lehman Brothers. WorldCom. General Motors. Enron. These companies are among the largest bankruptcies in US history and they held a total of US$900 billion in assets at the time of filing for protection under Chapter 11 of the US Bankruptcy Code.

While a company seeking relief under Chapter 11 is often seen as entering 'bankruptcy' or insolvency, it will be shown that the Chapter 11 process is more akin to a debt restructuring mechanism rather than liquidation. The aim of this process is to allow the company to have some breathing space to reorganise its affairs and to then exit its financial distress.

This article will touch on some of the interesting features of the Chapter 11 framework while also drawing parallels with the debt restructuring mechanism of a scheme of arrangement under section 176 of the Companies Act 1965 ("Act").

PROCEDURE

A typical Chapter 11 process is initiated through the debtor company filing a petition with a bankruptcy court setting out a list of its creditors and a summary of its assets and liabilities. The debtor has a legal right to initiate the procedure subject to the court determining that the petition was filed in 'good faith' primarily for the purposes of reorganising its debts.

> **" an automatic moratorium would stay legal proceedings against the company and enforcement of judgments and security without leave of the bankruptcy court. "**

Technically, there is no requirement of 'insolvency.' For instance, in 1995, the Dow Corning Corporation filed for Chapter 11 protection from creditors when it faced massive personal injury suits involving silicone-gel breast implants. It emerged from Chapter 11 only after nine years.

DEBTOR IN POSSESSION

Unlike liquidation which involves a liquidator taking over the management of the company, in a Chapter 11 scenario, the control of the debtor remains with its management through the concept of 'debtor in possession.' A trustee is rarely appointed to oversee the debtor's operations. The rationale behind this concept is the belief that the management represents the most economical and efficient means to reorganise since they would have the most knowledge of the company's affairs.

As a safeguard, the debtor will be subjected to oversight by the bankruptcy court and the United States Trustee (a representative of the Department of Justice responsible for overseeing bankruptcy cases). Generally, a committee of creditors would also be appointed to act in a supervisory role.

MORATORIUM

Upon the filing of the Chapter 11 petition, an automatic moratorium would stay legal proceedings against the debtor and enforcement of judgments and security without leave of the bankruptcy court. The stay is effective during the entire time the petition is pending but creditors and other parties may apply to lift or modify the stay.

This is similar to the moratorium enjoyed under a restraining order granted pursuant to section 176(10) of the Act although there is no automatic grant of a restraining order. Instead, the requirements under section 176(10A) must be met for the grant of a time-limited restraining order as well as for any extension of this order.

PROPOSALS TO CREDITORS

Under Chapter 11, the debtor has the exclusive right to formulate the plan of reorganisation for 120 days from the date of filing and this exclusivity period can be extended up to a maximum of 18 months.

In contrast, in a scheme of arrangement, the company, any creditor, any member or the liquidator (where the company is being wound up) can apply to the High Court to initiate the scheme of arrangement process.

DISCLOSURE STATEMENT

Before the debtor solicits approval for the restructuring plan, it must provide creditors with a disclosure statement that has been approved by the bankruptcy court as containing adequate information to allow a reasonable hypothetical creditor to be able to consider the plan.

This is very similar to the scheme of arrangement requirement of the explanatory statement under section 177 of the Act. The explanatory statement must provide the creditors with sufficient or material information to make a meaningful decision. However, the explanatory statement is not subject to the added safeguard of requiring approval by the Court before its issuance to the creditors.

CLASSIFICATION OF CREDITORS AND VOTING

Chapter 11 requires creditors to be classified into classes on the basis that claims that are substantially similar should be classified together. This is similar to a scheme of arrangement scenario.The creditors of each class would need to vote in favour of the plan by a majority in number and two-thirds in amount of those actually voting (while in a scheme of arrangement, the approval threshold is higher in that a majority in number and three-fourths in value is required). The minority is bound by the class vote.

UNDUE PREFERENCES

Similar to winding up, the US Bankruptcy Code gives a debtor certain powers to avoid or recover certain transfers of property.

LEE SHIH

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Generally, a debtor can avoid such transfers made within 90 days before the filing of the petition to a creditor on account of a pre-existing debt if such a transfer allows the creditor to receive more than it would have received compared to other creditors. These are called preferences.

A debtor can also avoid fraudulent transfers made within one year before the filing of the petition. In this context, a fraudulent transfer is one which is made with the intent to hinder, delay or defraud a creditor.

CHERRY-PICKING

Under the US Bankruptcy Code, the debtor generally has the power to pick which contracts or leases by which it wants to be bound following its reorganisation. Further, under certain circumstances, the company can adopt its favourable contracts and then assign them regardless of whether the contracts themselves prohibit such an assignment.

The Bankruptcy Code prescribes deadlines within which different types of contracts may be rejected. The debtor is not required to perform the obligations under the rejected contracts but will be liable for "rejection damages" that arise from its non-performance of the obligations under such contracts.

> "The Chapter 11 procedure allows a great deal of flexibility for the resuscitation of a financially distressed company"

Chapter 11 therefore provides the debtor with wide-ranging powers with which it can reject, adopt or assign contracts. This power, especially when combined with the ability to sell assets and borrow money, enables the company to address its operational needs.

INCENTIVES FOR LENDER FINANCING

The Bankruptcy Code gives lenders incentives to provide financing to the debtor (called Debtor in Possession or DIP financing). DIP financing is unique from other financing methods in that it usually has priority over existing debt, equity and other claims. The lender may be given a lien over assets that are not pledged to other lenders. The bankruptcy court may also authorise liens superior to certain priority claims in the bankruptcy process or even grant new senior liens on collateral already pledged to another party.

'QUICK-RINSE' BANKRUPTCY

The term 'quick-rinse' bankruptcy generally describes a pre-packaged bankruptcy where the debtor has negotiated a plan and solicited votes even before the filing of the Chapter 11 petition. An example of this is Chrysler in 2008, where it entered and exited Chapter 11 in less than two months with the sale of most of its assets to a new entity. Similarly, General Motors in 2009 exited Chapter 11 in just over a month, having also sold most of its assets to a new General Motors entity and shedding almost US$90 billion in debt.

CONCLUSION

The Chapter 11 procedure allows a great deal of flexibility for the resuscitation of a financially distressed company with the breathing space of a moratorium. However, criticisms have been levelled against the fact that the persons who caused the company to petition for relief continue to be the same ones in control; akin to leaving the fox in charge of the hen house.

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ANNOUNCEMENT

WHO'S WHO AWARD 2013

The Partners are pleased to announce that SKRINE was named the recipient of the Malaysian Law Firm of the Year 2013 by Who's Who Legal: The International Who's Who of Business Lawyers, a UK based publication. The firm previously won the award in 2008, 2009, 2010 and 2011.

THE END OF THE EVERGREENS?

Joshua Teoh examines the Indian Supreme Court decision in the Novartis Case

INTRODUCTION

On 1 April 2013, the Supreme Court of India in *Novartis AG v Union of India & Others* [2013] 3 Madras Law Journal 421 rejected the appeal of Novartis AG ("Novartis") against the Indian patent office's refusal to patent the beta crystalline form of a chemical compound called Imatinib Mesylate, a therapeutic drug for chronic myeloid leukaemia and certain kinds of tumours, marketed under the trade names "Glivec" or "Gleevec".

In this landmark decision, the Supreme Court has imposed strict requirements on the practice of "evergreening" pharmaceutical products in India. "Evergreening" is a common practice in the pharmaceutical industry. It describes a practice whereby a patentee seeks to extend the patent life of his current invention by making modifications or changes to that invention and thereafter applying to patent his modified invention, thereby extending the duration of protection of the original invention.

THE ZIMMERMANN PATENT

Several derivatives of a compound known as N-phenyl-2-pyrimidine-amine, including a free base called Imatinib, were patented in the United States in 1996 under US Patent No. 5,521,184 ("Zimmermann Patent") and in Europe in 2000 under European Patent No. EP-A-0564409 ("European Zimmermann Patent"). These derivatives were invented by Jürg Zimmermann of CIBA Geigy which later merged with Sandoz to form Novartis.

> **"the amended section 3(d) sets up a second tier of qualifying standards for chemical substances and pharmaceutical products"**

The N-phenyl-2-pyrimidine-amine derivatives, including Imatinib, are capable of inhibiting certain protein kinases, especially protein kinase C and PDGF (platelet-derived growth factor)-receptor kinase and thus have valuable anti-tumour properties and can be used in the preparation of pharmaceutical compositions for anti-tumoral drugs and drugs against atherosclerosis.

NOVARTIS' PURPORTED INVENTION

A key feature of the *Novartis* case is Imatinib Mesylate, a salt derived by adding methanesulfonic acid to Imatinib, one of derivatives under the Zimmermann Patent. Novartis claimed that they are the first to achieve the **beta crystalline form** of Imatinib Mesylate ("the subject product") through a two-stage invention, which begins with producing the salt, Imatinib Mesylate, and later developing the beta crystalline form of the salt.

On 17 July 1998, Novartis filed an application for the grant of a patent for the subject product at the Chennai Patent Office. In the application, Novartis claimed that the subject product has, among others, the following properties: (i) more beneficial flow properties; (ii) better thermodynamic stability; and (iii) lower hygroscopicity than the alpha crystal form of Imatinib Mesylate.

Novartis further claimed that the above mentioned properties make the subject product "new" as it "stores better and is easier to process", has "better processability" and has a "further advantage for processing and storing".

HISTORY OF NOVARTIS' PATENT APPLICATION

Although the Novartis' Indian patent application was only made on 17 July 1998, it claimed for a priority date of 18 July 1997, which is the date on which Novartis first applied for grant of patent for the subject product in Switzerland.

At the time when Novartis filed its patent application in India, the law in that country with regard to product patent was in a transitional stage where pharmaceutical products were not patentable. This caused the Novartis' patent application to lay dormant under an arrangement called "the mailbox procedure" until the relevant law had been amended to allow its patentability.

The Novartis application for patent was taken out of the "mailbox" for consideration only after the amendments made to the Indian Patents Act 1970 ("the Act") had taken effect from 1 January 2005. However, before it was taken up for consideration, the patent application had attracted five pre-grant oppositions from five different parties.

The Assistant Controller of Patents and Designs heard all five oppositions on 15 December 2005 and rejected Novartis' patent application for the subject product through five separate, though similar, orders handed down on 25 January 2006. The Assistant Controller held, among others, that:

(1) the subject product was anticipated by prior publication, such as the Zimmermann Patent;
(2) the subject product was obvious to a person skilled in the art in view of the disclosure provided in the Zimmermann Patent specifications; and
(3) the subject product's patentability was disallowed by section 3(d) of the Act.

Subsequently, Novartis filed writ petitions to challenge the decision of the Assistant Controller at the Madras High Court, but the matters were transferred to the Intellectual Property Appellate Board ("IPAB") upon its formation and dealt with by way of appeals. Upon hearing the appeals, the IPAB reversed the findings of the Assistant Controller on the issues of anticipation and obviousness.

However, the IPAB held that the patentability of the subject product was hit by section 3(d) of the Act which requires a higher standard of inventive step, and that the subject product was also barred by section 3(b) of the Act which prohibits the grant of patent by reason that it could create havoc in the lives

JOSHUA TEOH

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of poor people due to the high pricing of the subject product. Nevertheless, the IPAB held that the process for preparing the subject product could be patented.

Dissatisfied with the IPAB's decision to reject granting a patent for the subject product itself, Novartis filed a direct appeal to the Supreme Court of India. The Supreme Court also decided to concurrently hear the appeal of two other parties, NATCO Pharma Ltd and Cancer Patients Aid Association, against the IPAB's decision to grant a patent to Novartis for the process for the preparation of the subject product.

AMENDMENTS TO THE INDIAN PATENTS ACT 1970

Prior to 1 January 2005, section 5 of the Act in essence barred the grant of patent to substances intended for use, or capable of being used, as food or medicine or drugs, or prepared or produced by chemical processes. As such, Novartis' patent application was considered only after the Act had been amended by the Government of India to comply with the terms of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

Among the amendments which came into effect from 1 January 2005, the most significant one was the deletion of section 5 of the Act. This amendment opened the doors to the patenting of food, medicine and drug products. Other crucial amendments made to the Act include replacing sections 2(1)(j) and 2(1)(ja) and adding words and an explanation paragraph to section 3(d).

> **"not all advantageous or beneficial properties are relevant but only those that have therapeutic efficacy"**

Section 2(1)(j) *inter alia* provides that an "invention" is a product or process that involves an inventive step and is capable of industrial application, that is, it is capable of being made or used in an industry.

According to Section 2(1)(ja), an "inventive step" is a feature of an invention that involves technical advancement from existing knowledge, or has economic significance, or both, and that makes the invention not obvious to a person skilled in the art.

Section 3 sets out various matters that are not regarded as inventions within the meaning of this Act, of which paragraph (d) provides that "*the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.*"

The explanation paragraph that was added to Section 3(d) of the Act states that for the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.

ISSUES BEFORE THE INDIAN SUPREME COURT

The issues before the Supreme Court included, among others, the following questions:

(1) How section 3(d) interplays with sections 2(1)(j) and 2(1)(ja) of the Act;
(2) Whether the subject product qualifies as an "invention" within the meaning of sections 2(1)(j) and 2(1)(ja); and
(3) If the subject product qualifies as an "invention" under sections 2(1)(j) and 2(1)(ja), whether its patentability could still be denied on the ground that section 3(d) pulls it out of the category of "invention".

The issue as to the applicability or otherwise of the controversial section 3(b) which precludes the grant of a patent on grounds of hardship that may be caused to end-users who are not financially well-off, was not pursued in the Supreme Court.

THE INDIAN SUPREME COURT'S FINDINGS

The Supreme Court ("the Court") had no doubt that the amendment to section 3(d) of the Act was meant to deal with chemical substances, and more particularly, pharmaceutical products. The Court was of the view that the amended section 3(d) sets up a second tier of qualifying standards for chemical substances and pharmaceutical products for the purpose of leaving the door open for true and genuine inventions but also at the same time, to check any attempt at repetitive patenting or extension of the patent term on spurious grounds. Nevertheless, the Court viewed section 3(d) as representing the "patentability" concept which is separate and distinct from the "invention" concept.

In determining whether the subject product was truly an invention of its own, the Court found that the active ingredient of the subject product, namely Imatinib Mesylate, had its genesis from the Zimmermann Patent. It was discovered that the subject product was launched by Novartis in the United States market under the name Gleevec on the basis of the Zimmermann

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MONETISING YOUR INTELLECTUAL PROPERTY

Sri Richgopinath examines the Malaysian Government's proposals to introduce the securitisation of IP

The conventional method of monetising intellectual property (IP) is through its exploitation either by way of creating licenses to use the IP for a fee or selling the rights in the IP for a value. Given the extent of revenue that may be derived from exploiting an IP, many corporations spend millions of Ringgit annually in research and development of IP with expectations of reaping the benefits from future commercialisation and exploitation of the IP. Therefore, there is now a growing consensus that intangible assets such as IP may be more valuable as compared to tangible assets, such as land and building.

Traditionally, corporations use their tangible assets as security to obtain financing from financial institutions. The Prime Minister announced at the 2013 Budget Speech delivered on 28 September 2012 that *"Efforts will also be undertaken to enable SMEs to further expand their businesses by using intellectual property rights (IPR) as a collateral to obtain financing. For this, a valuation model will be created to enable IPR to be valued and commercialised in the market as well as utilised as collateral to obtain financing from financial institutions."* Since then, there has been a growing momentum in the discussions to amend the existing IP related legislation to recognize securitisation of IP.

"once the amendments and proposed amendments come into operation … corporations can use their IP as collateral to obtain financing"

INDUSTRIAL DESIGNS

The first piece of legislation to introduce amendments that enable IP to be used as collateral is the Industrial Designs (Amendment) Act 2013 which will come into operation on 1 July 2013. The amendments to Sections 29 and 30 of the Industrial Designs Act 1996 provide that a registered industrial design may be the subject of a security interest in the same way as other personal or movable property. It also provides for such an interest to be recorded in the Register of Industrial Designs.

Steps have also been taken by the Government to review several other IP-related Acts and amendments are likely to follow suit.

PATENTS

The Intellectual Property Corporation of Malaysia (MyIPO), in its Consultation Paper of June 2012 on the Proposed Amendments to the Patents Act 1983, stated as follows:

"Intellectual Property is a personal property and it can be subject to a charge, mortgage etc. Realising the potential of IP as a financial instrument, MyIPO proposed to give this due recognition for future dealings in financial transaction. The amendment to the Patents Act introduced the concept of mortgage and this is reflected in Section 3 and Section 36(1) of the Act.

A mortgage or charge security need not be registered to be valid, but there are advantages from registration, which has been provided for, in the proposed amendments to the Patents Act. It is recommended that the ambit of registration of a securitized IP be left broad. That is to say recognition must be had to the concept of 'mortgage' as well as 'charge' and in addition to that 'liens', 'pledges' and 'hypothecations'. This would essentially reflect as broadly as possible and in as flexible manner as possible the various manner in which securitization may be contemplated by people in commerce and recognized in law, which in essence is the objective of the move for IP monetization."

TRADE MARKS

MyIPO also published another Consultation Paper of July 2012 on the Proposed Amendments to the Trade Marks Act 1976 where the following was stated:

"Intellectual Property is recognized as a personal property and it can be subject to a charge, mortgage etc. Realising the potential of IP as a financial instrument, MyIPO proposed to give this due recognition for future dealings in financial transaction. As a regulatory and registration body, MyIPO plays a role in IP securitization by providing a recordal system of registrable transactions. MyIPO has identified the following transactions as registrable transactions which can be recorded or registered with the Registrar:

(a) Grant of a license
(b) An assignment of a registered trade mark or any right in it
(c) Grant of any security interest (whether fixed or floating) over a registered trade mark or any right in or under it
(d) Making of personal representative of an assent in relation to a registered trade mark or any right in or under it
(e) An order of the court or other competent authority transferring a registered trade mark or any right in or under it."

OTHER INITIATIVES

In line with the Prime Minister's proposal in his Budget 2013 speech, an Intellectual Property Financing Fund scheme amounting to RM200 million will be established. The scheme will be offered through Malaysian Debt Ventures Berhad where the Government will provide a 2% interest rate subsidy and guarantee of 50% through Credit Guarantee Corporation Malaysia Berhad.

The Prime Minister has also stated that the Government will allocate RM19 million under Budget 2013 to MyIPO to conduct training programmes for local IP evaluators as well as to create a

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market platform for IP-rights.

The Multimedia Development Corporation (MDeC) announced on 27 April 2012 that it has finalized a study on IP Valuation Model which may assist financial institutions on methodology to be adopted in valuing IP. This study was carried out by MDeC in close collaboration with MyIPO.

Therefore, it appears that once the amendments and proposed amendments come into operation and the policies are implemented, corporations can use their IP as collateral to obtain financing from financial institutions.

ASSET-BACKED SECURITIES

One interesting aspect of IP securitisation which has been adopted in other jurisdictions is the use of IP as collateral for the issuance of asset-backed securities. It may be possible that once financial institutions in Malaysia recognize the potential of IP as a highly valuable intangible asset, the market for IP securitisation in Malaysia may extend to the creation of such IP asset-backed securities.

The Bowie Bonds were one of the earliest high profile IP asset-backed securities to be issued. In 1997, David Bowie through his investment banker, David Pullman, issued 10-year asset-backed bonds on the basis of future royalties from 25 of David Bowie's albums (about 287 songs). The transaction generated US$55 million which David Bowie obtained upfront in exchange of him forfeiting 10 years' worth of royalties.

> **“ it may be possible for an IP to be used as the underlying asset for an asset-backed securitisation transaction ”**

Another well-known IP asset-backed securities transaction was by Dunkin' Brands which owns Dunkin' Donuts and Baskin-Robbins franchises. In 2006, Dunkin' Brands raised US$ 1.7 billion by selling bonds backed by future royalties that it will receive from its franchisees.

In Malaysia, the Securities Commission already has in place *Guidelines On The Offering Of Asset-Backed Securities* (ABS Guidelines) since 2004. The ABS Guidelines regulate the issuance and offer for subscription or purchase of asset-backed securities. Paragraph 4.01 of the ABS Guidelines sets out the criteria that must be fulfilled for an asset to be used as security in a securitisation transaction. These criteria include the following:

(1) The assets must generate cash flow;
(2) The originator must have a valid and enforceable interest in the assets and in the cash flows of the assets prior to any securitisation transaction;
(3) There are no impediments (contractual or otherwise) that prevent the effective transfer of the assets or the rights in relation to such assets from the originator to a SPV. For example, any regulatory or contractual consent which is required to effect the transfer of such assets from the originator to a SPV must be obtained;
(4) No trust or third party's interest appears to exist in competition with an originator's interest over the assets; and
(5) Where the interest of an originator in the assets is as a chargee, the charge must have been created more than six months before the transfer.

Therefore, it appears that it may be possible for an IP to be used as the underlying asset for an asset-backed securitisation transaction if all relevant criteria in the ABS Guidelines are fulfilled. However, this will be subject to the Securities Commission's recognition that such transaction is possible. At the moment, it is not known whether such a transaction will be permitted by the Securities Commission and even if permitted, whether separate or enhanced guidelines will be issued for IP asset-backed securities.

CONCLUSION

It is not known at this juncture whether steps are being taken to amend the Copyright Act 1987 to enable copyright in works to be used as security.

The Government's concerted efforts through MyIPO and other agencies in acknowledging the potential of IP as assets that are capable of being used as security are much welcomed. In an age where a corporation's intangible assets may be worth more than its tangible assets, it is timely for IP securitisation to be introduced in Malaysia.

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FOREIGN INVESTMENT IN MYANMAR

To' Puan Janet Looi provides an investor's guide to Myanmar

INTRODUCTION

Myanmar has in the past year undergone substantial political and economic changes. Alongside this transformation, new liberalising legislative frameworks have been enacted and some others have been proposed. This presents an unprecedented opportunity for foreign investment into Myanmar. Notwithstanding, some considerable hurdles remain.

FOREIGN INVESTMENT PROTECTION

The centrepiece of reform for foreign investment is the Foreign Investment Law ("FIL"), approved in November 2012 by President Thein Sein. The key guarantees and incentives as set forth in the FIL are as follows:

- Foreign investors are permitted to own 100% of businesses which are not in the restricted or prohibited lists;
- Businesses set up under the FIL enjoy an initial 5-year tax holiday;
- Foreign investors may lease land for their business;
- Repatriation of profits after taxes and relevant funds is allowed through banks prescribed by the Myanmar Investment Commission ("MIC") in the relevant foreign currency and at the prevailing official exchange rate. Further approval for repatriation is required from the Central Bank of Myanmar.

FOREIGN EXCHANGE

Since April 2012, the Central Bank of Myanmar has replaced the fixed exchange rate with a managed floating exchange rate to better reflect market conditions. Further, in August 2012, the Foreign Exchange Management Law was enacted to allow foreign currency to be more freely exchanged. In March 2013, Myanmar's Parliament announced plans to phase out the use of Foreign-Exchange Certificates, which served as proxies for the US dollar, within 90 days from 1 April 2013.

INTELLECTUAL PROPERTY

Intellectual property ("IP") laws in Myanmar are at present obsolete. The current laws in force date back more than a century which includes the Copyright Act of 1911 and the Merchandise Act 1889. Nevertheless, it is possible at present to register trademarks at the Yangon Registration Office of the Settlements and Land Records Department.

BUSINESS STRUCTURES AND APPROVALS

Business Structures

Under the FIL, a foreign investor may seek to conduct business in Myanmar in any of the following manners:

- As a 100% foreign-owned entity;
- By way of a joint venture with a Myanmar citizen or the Myanmar Government; or
- By way of a "system contained in a contract approved by both parties".

MIC Permit

A foreign investor must submit an investment proposal to the MIC who may then issue a permit approving the proposal ("MIC Permit"). In reviewing the proposal, the MIC will take into account the following:

- Conformity with the Basic Principles – the investment will be permitted if it assists to achieve one or more of the prescribed objectives, including socio-economic ones like provision of employment opportunities, promotion of exports or reduction of reliance on imports, development of high technology or modern industries and promotion of regional development;
- Financial credibility of the foreign investor;
- Economic justification, taking into account factors such as foreign exchange earnings and requirements, employment prospects and contribution towards national income;
- Technological appropriateness;
- Environmental, social and economic impact on Myanmar and its citizens; and
- Compliance with other laws.

After the proposal is approved by the MIC, the MIC Permit will be issued within 90 days from the date of approval.

Permit to Trade

The foreign investor must apply to the Directorate of Investment and Company Administration to incorporate or register a foreign company and obtain a Permit to Trade pursuant to the Myanmar Companies Act 1914 ("MCA").

Minimum Capital Requirements

Upon obtaining the Permit to Trade, the MCA states that the foreign investor must invest a minimum capital between approximately USD50,000 to USD167,000, depending on the type of business activity.

The FIL, on the other hand, does not set out the minimum amount of capital that must be invested by the foreign investor. Rather, it provides the MIC with discretion to determine the minimum capital that must be invested by the foreign investor, based on the nature of the business.

FOREIGN INVESTMENT RESTRICTIONS

Prohibited and Restricted Activities under the FIL

The Foreign Investment Rules issued by the Ministry of National Planning and Economic Development together with the

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Notification No. 1/2013 issued by the MIC on 31 January 2013 state the present policy. Areas of interest to foreign investors include the following:

- Agriculture

(i) Foreign investment in the agriculture sector is generally allowed (subject to Government approval and the terms and conditions imposed by the relevant Ministry) except for agricultural activities (including livestock breeding) that require small amounts of capital, stand-alone traditional farming, home-based livestock breeding or traditional livestock breeding without modern technology, deep sea off-shore fishing in territorial waters and fishing in lakes, ponds and in the sea close to shore.

(ii) Foreign investment in the production and marketing of mixed and native seeds may only be made by way of a joint venture with local citizens.

> **“ The centrepiece of reform for foreign investment is the Foreign Investment Law ”**

- Broadcasting and media

(i) Foreign investors are prohibited from jointly conducting business with local citizens in the printing and broadcasting media industry and from publishing publications in the ethnic languages of Myanmar.

(ii) Foreign investment is allowed in publishing newspapers in foreign languages, books on science and arts, film, television, radio and cinemas subject to the terms and conditions imposed by the Ministry of Information.

- Construction

(i) In general, investment in infrastructure and building development, including construction of infrastructure and development of residential and office buildings and industrial zones, may only be made with participation from local citizens.

(ii) Construction of office buildings are further subject to conditions by the Ministry of Construction, including build-operate-transfer terms in the case of a 100% foreign venture or the vesting of the local citizen's right to use land as shares in a joint venture.

- Electricity

(i) The generation of electricity under 10 megawatts is prohibited to foreign investment.

(ii) Foreign investors may only invest in the production of electricity through hydropower and coal, subject to the approval of, and by way of joint venture with, the Government on a build-operate-transfer basis.

- Franchising – foreign investors may only invest as a franchisor.

- Oil and gas - foreign investment in the oil and gas industry is subject to the approval of the Government and to further terms and conditions imposed by the Ministry of Energy; the drilling of shallow oil wells up to the depth of 1000 feet is specifically prohibited. The venture may also be subject to environmental impact assessments.

- Retailing – foreign investment in retail (with the exception of cars and motorcycles) will only be allowed after 2015 subject to an investment of at least USD3,000,000 and will not benefit from tax exemptions under the FIL. From 2015, retail remains generally prohibited except for (a) departmental stores and hypermarkets above 50,000 square feet; (b) supermarkets between 12,000 and 20,000 square feet; and (c) retail of food, beverage and medicinal herbs within a single store between 2,000 to 4,000 square feet.

  The first two exceptions cited above are further subject to conditions, such as priority in the purchase of domestic products, a minimum of 40% local equity in joint ventures and are located outside the geographical vicinity of existing retail outlets operated by local citizens.

- Health Services

(i) Subject to the terms and conditions imposed by the Ministry of Health, foreign investors may invest in private hospitals, specialist hospitals and clinics, manufacture of pharmaceuticals and medicine and research, clinical trials and laboratory services.

(ii) Foreign investors may invest in the manufacture and marketing of vaccines in joint venture with the Government.

(iii) Foreign investment is prohibited in relation to private specialist traditional hospitals, trading of raw ingredients for traditional medicine and the cultivation of indigenous traditional medicinal plants, ambulance services and care centres for the elderly.

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NO SANCTION REQUIRED FOR BANKRUPT TO APPEAL AGAINST BANKRUPTCY ORDERS

A commentary on Ho Ken Seng v Progressive Insurance Sdn Bhd by Shantini Guna Rajan

INTRODUCTION

On 10 January 2013, the Federal Court (FC) in *Ho Ken Seng v Progressive Insurance Sdn Bhd* [2013] 2 MLJ 335 authoritatively resolved the issue as to whether an undischarged bankrupt is required to obtain the prior sanction of the Director General of Insolvency ("DGI") to appeal against bankruptcy orders made against him.

BRIEF FACTS

The Respondent filed a Bankruptcy Notice for the sum of RM2,835,179.38 against the Appellant, upon which a Bankruptcy Petition was subsequently filed and served on the Appellant. On 28 February 2005, the Appellant applied to strike out or set aside the Bankruptcy Notice and the Bankruptcy Petition. The Appellant's application was dismissed by the Senior Assistant Registrar. The Appellant appealed to the Judge in Chambers against the Senior Assistant Registrar's decision.

Meanwhile, in August 2007, the Respondent obtained a Receiving Order and Adjudication Order against the Appellant. Subsequently, the Appellant appealed to the Judge in Chambers against the grant of the Receiving Order and Adjudication Order. Both of the appeals by the Appellant to the Judge in Chambers were dismissed.

Thereafter, the Appellant filed a Notice of Appeal to the Court of Appeal ("CA"). In turn, the Respondent applied to strike out the Notice of Appeal on the grounds that the Appellant had no *locus standi* to pursue the appeal by reason of section 38(1)(a) of the Bankruptcy Act 1967 ("the Act").

DECISION OF THE COURT OF APPEAL

The CA, by a majority decision, allowed the Respondent's application to strike out the Notice of Appeal. It held that the Appellant's act of filing and prosecuting the appeals fell within the ambit of section 38(1)(a) of the Act and thus required the sanction of the DGI.

The majority judgment adopted the line of reasoning in *Re Low Kok Tuan Ex parte Arab-Malaysian Merchant Bank Ltd* [1997] 4 CLJ 185 and *Bathamani Suppiah v Southern Finance Company Bhd* [2002] 2 CLJ 650. The majority distinguished *Re Khoo Kim Hock* [1974] 2 MLJ 29 on grounds that it did not apply to an appeal by a bankrupt as in the present case, but only to an annulment of a bankruptcy order under sections 92(1) and 105(1) of the Act. The CA also held that section 38(1)(a) should prevail over section 92 as the former is specific whereas the latter is a general provision.

On the other hand, the dissenting judge held that the test in *Re Khoo Kim Hock* applies to enable a bankrupt to challenge all orders made by a bankruptcy court including appeals without the need to obtain the sanction of the DGI.

DECISION OF THE FEDERAL COURT

The Appellant obtained leave to appeal to the Federal Court ("FC") on the following question of law –

"Whether an undischarged bankrupt when exercising his right under Section 92(2) of the Bankruptcy Act 1967 to appeal any order made by the Court under its bankruptcy jurisdiction is required to obtain the previous sanction of the Director General of Insolvency pursuant to Section 38(1)(a) of the Act."

In essence, the issue before the FC related to the interplay between section 38(1)(a) and section 92(2) of the Act, namely, whether a bankrupt may bring an appeal falling within the latter section without first obtaining the sanction of the DGI pursuant to section 38(1)(a).

The relevant provisions of the Act are as follows -

Section 38(1)(a):

"(1) Where a bankrupt has not obtained his discharge —

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;"

Section 92(2):

"(2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable."

The FC observed that the majority judgment of the CA had been influenced by the Court of Appeal's decision in *Perwira Affin Bank Bhd v Sardar Mohd Roshan* [2009] 4 CLJ 34 in two respects. First, the Court of Appeal in that case had interpreted the expression *"any action"* in section 38(1)(a) to include, amongst others, the filing of a notice of appeal. Second, it had held that a bankrupt did not have the *locus standi* to continue with a civil claim which had been initiated by him before he was adjudicated bankrupt.

The CA in this case had proceeded on the premise that the Court of Appeal's findings on the issue of *locus standi* in *Perwira Affin Bank Bhd v Sardar Mohd Roshan* remained intact as it was not specifically dealt with by the Federal Court in *Sardar Mohd Roshan Khan v Perwira Affin Bank* [2010] 2 CLJ 661, which reversed the Court of Appeal's decision on another ground. The FC was of the view that the majority decision had failed to appreciate that the Federal Court in *Sardar Mohd Roshan Khan v Perwira Affin Bank* had implicitly rejected the Court of Appeal's findings on the issue of *locus standi*.

The FC acknowledged that there were two diverging lines of

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case authorities in relation to section 38(1)(a) of the Act, namely *Bathamani Suppiah and Re Low Kok Tuan* which held that the sanction of the DGI is required for an appeal to be brought under section 92(2) and *Re Lim Tai Nian, ex p Kewangan Utama Bhd* [2002] 1 CLJ 41 and *Re Khoo Kim Hock* which held otherwise.

It was held in *Bathamani Suppiah* that *Re Khoo Kim Hock* merely stated that sanction of the DGI is not required for an application to review, rescind or vary a bankruptcy order under section 92(1) or section 105(1) and was silent on the bankrupt's capacity to appeal, thus, sanction of the DGI must be obtained in order to appeal against a bankruptcy order.

On the other hand, *Re Lim Tai Nian*, which was cited but not duly considered by the CA, was extensively quoted by the FC. The learned judge in *Re Lim Tai Nian* who supported the decision in *Re Khoo Kim Hock* and disagreed with the views expressed in *Re Low Kok Tuan and Bathamani Suppiah*, *inter alia* held as follows –

(1) On the authority of *Re Khoo Kim Hock*, an appeal by an undischarged bankrupt is not caught by section 38(1) and therefore did not require the prior sanction of the DGI;

(2) Section 92 of the Act is substantially similar to section 108 of the English Bankruptcy Act where it has been held in *In re Baron* that a bankrupt could appeal without any sanction; and

(3) Given that the DGI would invariably have supported the issue of the receiving and adjudicating orders by the bankruptcy court, it would be perverse to expect him to sanction an appeal against the very orders that he had supported.

After careful and anxious deliberation of the two cases, the FC held that it was inclined to follow the reasoning in *Re Lim Tai Nian* and expressly overruled the decisions in *Bathamani Suppiah*, *Re Low Kok Tuan* and any other cases that follow them.

Further, the FC opined that section 38(1)(a) ought not to be given too wide an interpretation in that whilst the word 'action' includes civil action and civil proceedings, it should be limited to new, separate actions and not the action which gave rise to the bankruptcy. The FC also held that, save and except for the saving provision (which relates to personal injury claims by a bankrupt), section 38(1)(a) should be limited to a new chose in action that could affect the assets or proprietary rights of a bankrupt intended for distribution to his creditors.

The FC also stressed that it would be most unfair and unconscionable to require a bankrupt to obtain the sanction of the

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SKRINE 50TH ANNIVERSARY CONFERENCE

The second of the anniversary events, the Skrine Conference, was held on 13 June 2013 at the Sime Darby Convention Centre. It was a whole day event, attended by about 230 guests.

The Plenary Session entitled "Growth and Competitiveness in Malaysia: A Blueprint for Sustainable Transformative Development" featured panellists Y.B. Senator Datuk Paul Low, Honourable Minister in the Prime Minister's Department, Dr. Nungsari Ahmad Radhi, Executive Director, Khazanah Nasional Berhad and Professor Edmund Terence Gomez of the Department of Administrative Studies and Politics, Faculty of Economics and Administration, University of Malaya.

Other sessions included SKRINE's South East Asia Practice Group discussion on investments in Myanmar, Laos, Cambodia, Philippines, Vietnam and Malaysia by a panel of distinguished lawyers from those jurisdictions; and sessions on the Personal Data Protection Act, the Construction Industry Payment and Adjudication Act, Shipping, Employment and Trade Remedies. On the whole, we received positive feedback on the sessions from the attendees.

A NUCLEAR WEAPON IN LAW?

Loshini Ramarmuty traces the origins of the Mareva injunction

INTRODUCTION

"We are told that an injunction of this kind has never been granted before. It has never been the practice of the English courts to seize the assets of a defendant in advance of judgment, or to restrain the disposal of them … It seems to me that the time has come when we should revise our practice."

With this bold statement, Lord Denning MR, with the concurrence of Roskill LJ and Ormrod LJ, introduced the modern-day freezing injunction, which has come to be known as the "Mareva injunction", into the English legal system.

THE MAREVA CASE

The Mareva injunction derived its name from the case of *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA) ("the Mareva").

The plaintiffs were the owners of a vessel, the Mareva. They let it to the defendant charterers for a trip out to the Far East and back. The vessel was to be put at the disposal of the charterers at Rotterdam. Hire was payable half-monthly in advance at the rate of US$3,850 a day from the time of delivery.

> **" the essence of the Court's jurisdiction is the existence of a real risk that a defendant would remove his assets from the jurisdiction "**

The defendants sub-chartered the vessel to the President of India. Under that voyage charter the vessel was loaded at Bordeaux with a cargo of fertiliser consigned to India. The Indian High Commission, in accordance with its obligations under the voyage charter, paid 90% of the freight amounting to £174,000 to a bank in London to the credit of the charterers. The charterers paid the plaintiffs the first two instalments of the half-monthly hire out of those moneys but failed to pay the third instalment.

It was evident from the exchange of telexes that the charterers were not in a position to pay. They said they were unable to fulfil any of their obligations under the charter and had no alternative but to cease trading.

The plaintiffs treated the defendants' conduct as a repudiation of the charter. They issued a writ and applied for service out of the jurisdiction. The plaintiffs believed that there was grave danger that the moneys in the defendants' bank account in London would be dissipated and accordingly, applied for an ex-parte injunction to restrain the disposal of those moneys. The High Court granted an interlocutory injunction for a limited period of time which they refused to extend. The plaintiffs appealed.

The Court of Appeal was satisfied that there was a danger that the defendants may dispose of their assets which would result in the shipowners not getting their charter hire. Lord Denning MR stated:

"There is money in a bank in London which stands in the name of these charterers. The charterers have control of it. They may at any time dispose of it or remove it out of this country. If they do so, the shipowners may never get their charter hire … In the face of this danger, I think this court ought to grant an injunction to restrain the charterers from disposing of these moneys now in the bank in London until the trial or the judgment in this action."

The grant of the injunction by the Court of Appeal in the Mareva in effect prevented the defendants from removing their assets out of the Court's jurisdiction before the trial and thereby preserved those assets for the benefit of the plaintiffs in the event that they succeeded in their claim against the defendants.

According to the learned judge, the jurisdiction of the English courts to grant a Mareva injunction is found in Section 45 of the English *Supreme Court of Judicature (Consolidation) Act 1925* which *inter alia* permits the High Court to grant an injunction by an interlocutory order in all cases in which it appears to the court to be just or convenient to do so. This power has been preserved in Section 37(1) of the English *Senior Courts Act 1981* (previously called *the Supreme Court Act 1981*).

THE ORIGINS OF THE FREEZING INJUNCTION

Although the issue of a pre-trial injunction to restrain a defendant from disposing of his assets pending trial was viewed as a novel development in English law, a remedy of this nature has long existed in some civil law jurisdictions in Europe, such as in France, where an injunction of this nature is known as *saisie conservatoire*.

In his historical and comparative survey of the development of the procedure for the seizure of assets before judgment in *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners)* 1978 QB 644, Lord Denning MR highlighted that the seizure of a defendant's assets before judgment was not a new procedure in England as a process of "foreign attachment" had existed in market towns like London, Bristol, Exeter and Lancaster since the eighteenth century. According to the learned Master of the Rolls, this process enabled a plaintiff to attach the assets of a defendant which are located within the jurisdiction of the court if the defendant is outside the jurisdiction when legal proceedings are commenced against him.

THE PREQUEL

What may have been lost in the mists of time is the fact that although the freezing injunction in modern times has come to be described as a "Mareva" injunction, the Mareva itself was not the first case where such an order was granted.

The decision in the Mareva was preceded by about one month

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by *Nippon Yusen v Karageorgis and another* [1975] 1 WLR 1093 where the Court of Appeal (comprising Lord Denning MR, Browne LJ and Lane LJ) reversed the decision of the High Court and granted an injunction in favour of a Japanese shipowner to restrain two Greek charterers from removing funds in a bank account in London pending trial. In fact, the statement quoted in the introduction to this article was made by Lord Denning MR in *Nippon Yusen*.

THE REQUIREMENTS

Over time, the Courts in England have laid down and refined the requirements that have to be fulfilled in order for a Mareva injunction to be granted. These requirements are discussed below.

Good Arguable Case

The plaintiff must satisfy the Court that he has a "good arguable case". In *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Nidersachsen* [1984] 1 All ER 398, Mustill J explained that a "good arguable case" is "*one which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success.*"

> **" the Mareva injunction can be used to ensure that a plaintiff is not left with a worthless judgment "**

Real Risk of Dissipation

The plaintiff must provide evidence to show that there is a real risk that the defendant would dissipate his assets with the intention of frustrating the enforcement of a prospective judgment. The test for the risk of dissipation is an objective one and is an assessment of whether the judgment may be rendered worthless.

Just and Convenient

The plaintiff must also satisfy the Court that it is 'just and convenient' to grant the injunction. The main consideration that underpins this requirement is for the Court to be satisfied that the likely effect of granting the injunction is to promote justice and not otherwise. In *Pressurefast Ltd v Hall and Brushett Ltd* (Court of Appeal (Civ Div) Transcript No. 336 of 1993 (March 9, 1993)), Leggatt LJ stated as follows:

"In my judgment, whether or not Mrs Justice Ebsworth paid sufficient regard to the hardship which the continuance of the Mareva injunction would wreak upon the defendants, it is plain from affidavits subsequently sworn that its effect has exerted considerable hardship on the defendants, going beyond merely preventing them from disposing of their assets so as to defeat the plaintiffs' claim. The interference with their lives and businesses, so long as the injunction was imposed, in my judgment went beyond what was appropriate for the legitimate protection of the plaintiffs."

From the above discussion, it is clear that the Court will consider the totality of the circumstances surrounding the case before proceeding to grant a Mareva injunction.

EXTENDING THE LIMITS

Two common features of the early cases on Mareva injunctions are that they involved shipping disputes and defendants who were located outside England.

The use of the Mareva injunction was soon extended beyond the realm of shipping disputes to other areas of commercial disputes. For example, such injunctions were granted in relation to a fatal accident case in *Ruth Allen v Jamba (Nigeria) Airways* (unreported) and a bank's claim against a defaulting borrower in *Chartered Bank v Daklouche* [1980] 1 All ER 205.

One of the early cases that involved a defendant who was domiciled in England was *Barclay-Johnson v Yuill* [1980] 3 All ER 190. In this case, the defendant submitted that the court should not grant a Mareva injunction against an English national domiciled in England as its jurisdiction to grant such an injunction was restricted to preventing foreign nationals from removing assets out of the jurisdiction.

The defendant's argument was rejected by the Court. According to Megarry V-C, the essence of the Court's jurisdiction is the existence of a real risk that a defendant would remove his assets from the jurisdiction. As such, the learned judge held that there was no reason why the Court's jurisdiction should be confined to foreign defendants and that the grant of a Mareva injunction was not barred merely because the defendant was not a foreigner or a foreign-based person.

However, the learned judge acknowledged that the defendant's nationality, domicile and place of residence could be material in determining whether there was a real risk of the assets being removed from the jurisdiction.

Any doubt as to the jurisdiction of the English Courts to grant a

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THE UEFA FINANCIAL FAIR PLAY REGULATIONS

Kok Chee Kheong examines the nuts and bolts of the break-even requirement

The UEFA financial fair play regulations have received their fair share of media coverage. Any fan of European football will be aware that the financial fair play regulations will come into force from season 2013/14 and require football clubs to fulfil a break-even requirement.

This article examines in further detail the elements of the break-even requirement in the financial fair play regulations.

RATIONALE

The break-even requirement is contained in the UEFA Club Licensing and Financial Fair Play Regulations ("Regulations"), the most-recent being the 2012 Edition.

The rationale for the financial aspects of the Regulations include the following –

- to improve the economic and financial capability and transparency and credibility of clubs;
- to protect creditors and ensure that clubs settle their liabilities punctually;
- to introduce rationality and greater discipline in club football finances;
- to encourage clubs to operate on the basis of their own revenues;
- to encourage responsible spending; and
- to protect long-term viability and sustainability of European club football.

> **“ all licensees that have qualified for a UEFA club competition must comply with … the break-even requirement ”**

THE AFFECTED CLUBS

Commencing from season 2013/2014, every club that qualifies to compete in any UEFA club competition will be required to obtain a licence from its licensing authority which confirms that the club concerned has satisfied the relevant criteria set out in the Regulations, including the break-even requirement. Hence, not every football club in Europe will be required to comply with the break-even requirement but only those that qualify to compete in the UEFA Champions League or the Europa League.

Further, clubs that have less than €5 million of relevant income and relevant expenses for each of the two reporting periods preceding the year in which they are to compete in a UEFA club competition and those that qualify to compete in the Europa League based on 'sporting merit', namely the three clubs that are admitted on the basis of the UEFA Respect Fair Play Assessment, are exempted from complying with the break-even requirement.

THE BREAK-EVEN REQUIREMENT

The cornerstone of the break-even requirement is contained in Article 57 of the Regulations which *inter alia* states that *"all licensees that have qualified for a UEFA club competition must comply with … the break-even requirement …"* Details of the break-even requirement are set out in Articles 58 to 63 and Annex X of the Regulations.

THE MONITORING PERIOD

Article 59 of the Regulations requires a football club to be assessed over a monitoring period that covers three reporting periods, that is, the reporting period ending in the calendar year in which the club is to compete in a UEFA club competition ("T") and the reporting periods ending in the two calendar years immediately preceding that year ("T-1" and "T-2" respectively).

For season 2013/2014, the first monitoring period will cover only two reporting periods, namely the reporting periods ending in 2012 and 2013.

THE BREAK-EVEN RESULT

The break-even result, as defined in Article 60(1), is the difference between relevant income and relevant expenses for a reporting period. If a football club's relevant expenses are less than its relevant income for a reporting period, then the club has a break-even surplus. If a club's relevant expenses exceed its relevant income, then that club has a break-even deficit for that reporting period.

The aggregate break-even result is the sum of the break-even results in each reporting period covered by the monitoring period. If the aggregate break-even result is positive (equal to zero or above) then that club has an aggregate break-even surplus for the monitoring period. Conversely, if the aggregate break-even result is negative (below zero), the football club has an aggregate break-even deficit for the monitoring period.

RELEVANT INCOME AND RELEVANT EXPENSES

As mentioned above, the break-even result is determined by netting off relevant expenses from the relevant income for a reporting period.

The relevant income of a football club comprise gate receipts (including season and matchday tickets for all competitions, friendly matches and tours as well as membership fees), broadcasting rights for all competitions and friendly matches including tours, sponsorship and advertising (including revenue from sponsors, pitch-perimeter and other board advertising), commercial activities (including merchandising, food and beverage sales, conferencing and lottery sales) and other operating income (such as rental income and dividends) plus profit or income from disposal of player registration (i.e. transfer of players), finance income and surplus from disposal of certain tangible fixed assets.

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The relevant expenses include cost of sales from all activities (such as catering, merchandise, medical care, kits and sports materials), employee benefit expenses (including wages, bonuses, social security contributions and medical care) and other operating expenses (including match expenses, rental costs, administration and overhead expenses) plus amortisation or costs of acquiring player registrations, finance cost and dividends.

Depreciation and impairment of tangible fixed assets, amortisation/impairment of intangible fixed assets (other than player registrations), expenses on youth and community development activities, finance costs for construction of tangible fixed assets (e.g. stadium redevelopment) are excluded from relevant expenses.

Income and expenses from non-footballing operations which are clearly and exclusively unrelated to the activities, locations or brand of a football club are to be excluded from the calculation of relevant income and relevant expenses.

The Regulations require transactions with related parties to be carried out at a fair value (i.e. between knowledgeable willing parties in an arm's length transaction) and a club may be required to make adjustments to the value attributed to these transactions to reflect the fair value thereof.

EXCEPTIONS AND ACCEPTABLE DEVIATIONS

A football club that has a break-even deficit for a monitoring period is not automatically deemed to be in breach of the break-even requirement as the Regulations recognise certain exceptions and acceptable deviations.

A football club that has a break-even deficit for a monitoring period is entitled under Article 60(6) to demonstrate that the aggregate deficit is reduced by a break-even surplus (if any) in the two reporting periods prior to T-2, that is T-3 and T-4.

Article 61 sets out acceptable deviations whereby a football club which has a break-even deficit is nonetheless deemed to have complied with the break-even requirement. Firstly, a club which incurs a break-even deficit not exceeding €5 million for a monitoring period is deemed to have complied with the break-even requirement.

Secondly, a club which incurs an aggregate break-even deficit in excess of €5 million for a monitoring period is deemed to have complied with the break-even requirement if the excess is covered wholly by contributions from the equity participants of the club and/or related parties provided that such deficit does not exceed €45 million for the monitoring periods assessed in seasons 2013/2014 and 2014/2015 and €30 million for the monitoring periods assessed in seasons 2015/2016, 2016/2017 and 2017/2018.

Article 61 also provides that lower thresholds of acceptable deviations will be announced by UEFA for subsequent seasons.

In order for contributions by equity participants and/or related parties to be acceptable, Part D of Annex X of the Regulations stipulates that the contributions must be provided entirely by the aforementioned persons. Further, contributions by equity participants must be effected through share capital or share premium accounts.

Contributions by related parties may also be in the form of unconditional gifts, such as a debt waiver, that increase the club's equity without any repayment obligation.

FULFILLING THE BREAK-EVEN REQUIREMENT

To fulfil the break-even requirement, Article 63(1) requires a football club to achieve a break-even surplus for the reporting periods T-1 and T-2 without any of the following indicators being present: (i) the auditor's report for T-1 having expressed concerns on the viability of the club as a going concern; (ii) the annual financial statements for T-1 disclosing a net liabilities position that has deteriorated as compared to the corresponding statements for T-2; (iii) the football club having reported a break-even deficit for either or both the reporting periods T-1 and T-2; and (iv) the football club having overdue payments towards any other football club as a result of transfer activities or towards its employees or social/tax authorities as of 30 June of the year that the relevant UEFA competition commences.

Even if one of the aforementioned indicators exist, the break-even requirement is deemed to be fulfilled under Article 63(2) if the club has (a) an aggregate break-even surplus for reporting periods T, T-1 and T-2; or (b) an aggregate break-even deficit for reporting periods T, T-1 and T-2 which is within the acceptable deviation, after having taken into account the surplus (if any) for the reporting periods T-3 and T-4.

SANCTIONS

A football club that fails to fulfil the break-even requirement specified in Article 63 may be subject to sanctions by the UEFA Club Financial Control Body that range from a warning, reprimand, fine, deduction of points, withholding of revenues from a UEFA competition, prohibition from registering new players in a UEFA competition, restriction on the number of players that a club may register for a UEFA competition, disqualification from a competition in progress, exclusion from future competitions to the withdrawal of a title or award.

Annex 11 sets out various factors which the UEFA Club Financial

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THE END OF THE EVERGREENS?

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Patent itself. For the purposes of obtaining approval to market Gleevec to consumers, Novartis had stated in its application to the relevant U.S. food and drug safety authorities that Imatinib Mesylate was covered under the Zimmermann Patent. The Court noted that Novartis had used its European Zimmermann Patent to stop another drug company, NATCO Pharma Ltd, from selling in the United Kingdom a generic drug called VEENAT 100 capsules, which like Gleevec, has Imatinib Mesylate as its active ingredient. The Court also found that several scientific publications in 1996 had made reference to Imatinib Mesylate and its anti-tumoral properties.

In view of the matters described above, the Court found Imatinib Mesylate to be a known substance. The Court was unable to see how Imatinib Mesylate could be said to be novel or not obvious to a person skilled in the art, having observed that the compound came into being through the invention in the Zimmermann Patent. Consequently, the Court held that the active ingredient of the subject product, Imatinib Mesylate, did not pass the test of "invention" laid down in sections 2(1)(j) and 2(1)(ja) of the Act.

The Court then proceeded to consider whether the subject product could be accepted to be new. The Court found the subject product to be a new form of a known substance found in the Zimmermann Patent. Consequent upon such finding, the Court proceeded to consider whether the subject product would satisfy the test in section 3(d) of the Act which requires a new form to differ significantly in efficacy as compared to other known forms. In relation to medicines, the Court adopted a restrictive interpretation of "efficacy" in section 3(d) and held that not all advantageous or beneficial properties are relevant but only those that have therapeutic efficacy.

The Court took the view that properties which are inherent to a particular form would not qualify as enhancing the efficacy of a known substance. The Court acknowledged that the properties claimed of the subject product, namely more beneficial flow properties, better thermodynamic stability and lower hygroscopicity, may be important but had nothing to do with enhanced therapeutic efficacy. Accordingly, the Court ruled that such properties were inherent to the form.

Similarly, the Court refused to accept that a 30% increase in bioavailability, which is the degree or rate at which drug is made available in the human body, may necessarily lead to an enhancement of therapeutic efficacy. Furthermore, there was no evidence offered to indicate that the subject product would produce an enhanced or superior efficacy (therapeutic) on a molecular basis over what could have been achieved with Imatinib free base. Accordingly, the Court found that the pharmacological effects of the subject product are equally possessed by Imatinib in free base form. Thus, the subject product failed to pass the test in section 3(d) of the Act.

The Court observed that in cases of new chemical products, especially pharmaceuticals, it may not necessarily mean that the product must be something new altogether or not existing before. Such product may be something "different from a recent previous" or "be regarded as better than what went before" or "in addition to another or others of the same kind". In cases where the product claimed for is a new form of a known substance with known efficacy, then the relevant product must, in addition to sections 2(1)(j) and 2(1)(ja), pass the test of enhanced therapeutic efficacy under section 3(d) read with the explanation paragraph thereto.

In closing, the Court was also critical of the fact that Novartis was in fact marketing Imatinib Mesylate that was not in the beta crystalline form which they sought to patent and as such, appeared to be attempting to patent a product that it was not actually selling.

CONCLUSION

The amendments to the Act have opened the doors in India to allow patenting of food and medicine products, which are in essence chemicals, whilst at the same time, providing sufficient safeguards to prevent any abuse of such allowance.

The decision by the Supreme Court has effectively applied the provisions in the amended Act, especially section 3(d), to prevent the attempted "evergreening" practice by Novartis to patent a known compound, Imatinib Mesylate, in a different form which has no new or different therapeutic properties as compared to the earlier form of the same compound.

The standard set by the Supreme Court in relation to the test of enhanced efficacy under section 3(d) of the Act shows that not any kind of improvement to a known chemical substance would render it patentable, despite the improved form being novel. To pass the test of enhanced efficacy, the new form of a known substance must show new useful properties which are not inherent to its earlier form. Further, in the case of a pharmaceutical drug, the new useful properties that it possesses must be therapeutic in effect.

This decision of the Supreme Court does not sound the death knell for the practice of "evergreening" of pharmaceutical products in India but sets significantly higher thresholds that have to be satisfied before a patent will be granted for the modified product.

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MALAYSIA'S NEW OMNIBUS FINANCIAL LEGISLATION

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CONSUMER PROTECTION

Both the FSA and the IFSA contain numerous provisions on consumer protection, the majority of which are contained in Part VIII of the FSA and Part IX of the IFSA.

These Parts introduce a new definition of "financial consumer", which refers to any person who uses, has used or may be intending to use, any financial service or product *inter alia* (a) for personal, domestic or household purposes; or (b) in connection with a small business as may be specified by the Bank.

The new provisions confer power on BNM to specify standards on business conduct to a financial service provider to ensure that a financial service provider is fair, responsible and professional when dealing with financial consumers.

Section 124 of the FSA and Section 136 of the IFSA prohibit a financial service provider from engaging in any business conduct set out in Schedule 7 of the FSA and the IFSA. Examples of prohibited business conduct include misleading and deceptive conduct, exerting undue pressure in relation to the provision of any financial service, demanding payments from a financial consumer for unsolicited financial services or colluding with any other person to fix or control the features or terms of any financial service or product to the detriment of a financial consumer, other than any tariff or premium rates or policy terms which have been approved by BNM.

Interestingly, Schedules 8 and 9 of the FSA highlight specific matters relating to insurance business in the context of consumer protection, such as pre-contractual duty of disclosure for consumer and non-consumer insurance contracts. Similar provisions are found in Schedules 8 and 9 of the IFSA in relation to contracts for consumer and non-consumer takaful contracts.

As of 30 June 2013, Schedule 8 of both the FSA and the IFSA have come into effect. These schedules set out the mandatory terms of insurance policies and takaful certificates. However, Section 129 and Schedule 9 of the FSA and all but two of the provisions of Schedule 9 of the IFSA have yet to come into operation. These provisions lay down the requirements in relation to pre-contractual disclosure and representations for insurance and takaful contracts.

FINANCIAL OMBUDSMAN SCHEME

One of the key changes to strengthen consumer protection under the FSA and the IFSA is the establishment of a financial ombudsman scheme to ensure effective and fair handling of complaints and to resolve disputes in connection with financial services or products.

Each financial service provider is required to be a member of the financial ombudsman scheme and to comply with the terms of its membership. The operational details of the scheme, including the type of disputes that may be referred, eligible complainants, membership requirements, procedures, fees charged and awards are to be set out in regulations.

The FSA and the IFSA expressly prohibit a dispute that has been referred to the financial ombudsman scheme from being lodged with the Tribunal for Consumer Claims under the Consumer Protection Act 1999. This demarcation of jurisdiction between the financial ombudsman scheme and the Tribunal for Consumer Claims avoids multiplicity of claims and disparity between decisions.

CONCLUSION

The FSA and the IFSA reflect a commitment on the part of the Malaysian Government to create a more robust and well-regulated legal framework for financial services. It is laudable that the protection of consumer rights is accorded due recognition, perhaps taking the cue from the Lehman Brothers mini-bonds saga in Singapore which saw mom and pop investors lose their hard-earned savings as a result of investing in sophisticated structured financial products.

It is also interesting to note that under the IFSA, Islamic financial institutions which have hitherto been subject to a light-touch regulatory framework, are now placed on a substantially more level playing field with their counterparts under the FSA.

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NO SANCTION REQUIRED

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DGI to challenge the very action which disables and incapacitates him and that to do so may tantamount to denying him of his right of access to justice and probably his constitutional right of appeal.

CONCLUSION

In unanimously answering the leave question in the negative, the FC has restored certainty in this area of law and relieved an undischarged bankrupt who seeks to appeal against any bankruptcy order obtained against him from the additional burden of having to obtain the prior sanction of the DGI.

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FOREIGN INVESTMENT IN MYANMAR

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- Hotels and tourism

(i) 100% foreign investment is only allowed for higher tier hotels above three (3) stars. For investment in the lower tiers, the foreign investor must invest by way of a joint venture with local citizens.

(ii) Foreign investors may invest in casinos subject to Government approval and which access is restricted to foreigners only.

- Transportation

(i) Air – domestic and international air transport may only be operated by foreign investors in joint venture with local citizens. Furthermore, air transport services together with related industries such as airport services, aircraft leasing and maintenance, and the sale of aircraft parts are subject to the approval of the Government and the terms and conditions imposed by the Ministry of Transport.

(ii) Land – rail, freight and related services are prohibited to foreign investment while other land transportation services may only be conducted by foreign investors in joint venture with the Government.

(iii) Maritime – waterway transport services may only be conducted in joint venture with local citizens or the Government while the construction of shipyards and maritime agency services may only be conducted in joint venture with the Government.

Restricted Industries under the State-Owned Economic Enterprises Law 1989

Certain industries, such as teak, forest plantations, oil and gas, precious gems, reserved fisheries, postal and telecommunication services, air and railway transport, banking and insurance, broadcasting, metals, electricity and security and defence, are deemed to be restricted industries under the State-Owned Economic Enterprises Law 1989. A foreign investor may only invest in such industries by way of a joint venture with the Myanmar Government in a Special Company under the Special Companies Act 1950. Furthermore, application for the MIC Permit must be submitted by the relevant Government Ministry as opposed to the foreign investor.

LAND USAGE

The process to lease land and the rights thereto differs depending on the type of land:

- *Land administered or owned by the government or its departments and organisations, and private land owned by citizens*

The MIC may approve the lease of land from any of the aforesaid persons, subject to prior approval from the Government. It may permit an initial lease of up to 50 years depending on the requirement of the business and the amount of capital invested. If the foreign investor wishes to continue the business, the MIC may permit an extension of the lease for two consecutive 10-year periods. It is possible for longer leases to be obtained where the investment is made in less developed and accessible regions in Myanmar.

- *Vacant, fallow and virgin lands*

A foreign investor may lease these lands for the carrying out of agricultural or livestock breeding businesses on a commercial scale or for economic development work related thereto. An application is to be made to the Central Management Committee for Vacant, Fallow and Virgin Land. Pursuant to the Vacant, Fallow and Virgin Land Management Law, the foreign investor may lease the land for an initial period of up to 30 years. Subject to the type of business and the amount of capital invested, subsequent leases may be permitted if the foreign investor wishes to continue the business.

LOOKING FORWARD

As Myanmar prepares to assume the role of chair of ASEAN in 2014, it continues to pursue its reform agenda. In the area of foreign exchange, the Central Bank of Myanmar is in the midst of drafting regulations to the Foreign Exchange Management Law that seeks to further liberalise the restrictions on foreign currency. From the viewpoint of intellectual property, the World Intellectual Property Organisation has reported that it is currently assisting Myanmar in drafting new IP laws.

To add to the already radical turn in Myanmar's economic agenda, Myanmar's Parliament had in March 2013 agreed to set up a commission to review the 2008 constitution to allow some form of self-governance by its ethnic minorities so as to bring an end to conflicts that have plagued Myanmar for decades. A resolution of these age old disputes may very well bring Myanmar to another level of attraction for foreign investment.

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Janet extends her appreciation to her pupil, Judson Lim, for his invaluable assistance in the preparation of this article.

A NUCLEAR WEAPON IN LAW?

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Mareva injunction against defendants who are domiciled, resident or present within the jurisdiction has since been laid to rest as the jurisdiction to do so is now expressly provided for in Section 37(3) of the English *Senior Courts Act 1981*.

THE MALAYSIAN POSITION

The first case in Malaysia to recognise the jurisdiction of the courts to grant a Mareva injunction is *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260, a decision of the Federal Court.

Based on a liberal interpretation of the expressions "cause" or "matter" in Section 3 of the Malaysian *Courts of Judicature Act 1964*, Raja Azlan Shah CJ (as His Highness then was) held that the High Court in Malaysia has the jurisdiction to grant a Mareva injunction under Paragraph 6 of the Schedule to the *Courts of Judicature Act 1964* which confers various powers on the High Court including:

"Power to provide for the interim preservation of property the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a lis pendens or in any other manner whatsoever."

Thereafter, the Malaysian Courts have in appropriate circumstances granted Mareva injunctions. Among the cases where such injunctions were granted are *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62, *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Osman & Ors* [1985] 2 MLJ 236, *Salcon Engineering Sdn Bhd v PRM Energy Systems (M) Sdn Bhd* [1993] 3 MLJ 64 and *Puteh Aman Power Sdn Bhd v Bittersweet Estates (Sabah) Sdn Bhd* [2012] MLJU 834.

CONCLUSION

The Mareva injunction is a powerful and useful tool. It has been described by Donaldson LJ in *Bank Mellat v Nikpour* [1985] FSR 87 as "***one of the law's two nuclear weapons***", the other being the Anton Piller Order.

In appropriate circumstances, the Mareva injunction can be used to ensure that a plaintiff is not left with a worthless judgment. However, as a Mareva injunction can have severe repercussions on the person against whom it is made, the role of the courts in scrupulously ensuring that the prerequisites are satisfied before granting a Mareva injunction cannot be overstated.

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THE UEFA FINANCIAL FAIR PLAY REGULATIONS

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Control Body may consider in deciding on the sanction to be imposed. An interesting proviso is Paragraph 2 of Annex XI which applies to the monitoring periods for seasons 2013/14 and 2014/15. This provision states that a football club that reports an aggregate break-even deficit that exceeds the acceptable deviation will not, in principle, be sanctioned if it satisfies both the following conditions –

- it reports a positive trend in the annual break-even results; and
- it proves that the aggregate break-even deficit is due only to the annual break-even deficit of the reporting period ending in 2012 which in turn, is due to contracts with players undertaken prior to 1 June 2010 (excluding contracts that have been re-negotiated after that date).

CONCLUSION

The Regulations were first agreed in principle in 2009. Football clubs have been given ample time to prepare for the introduction of the break-even requirement in season 2013/14. Even then, UEFA has adopted a soft-touch approach by providing various exceptions and acceptable deviations in the Regulations so that clubs can gradually wean themselves off third party support to become self-sustaining entities.

Although the objectives of the financial aspects of the Regulations are laudable, the Regulations are of limited application as they only apply to football clubs that qualify to compete in the UEFA Champions League or Europa League.

To ensure the long term sustainability of European football clubs in general, national football associations should consider adopting some form of financial regulation for their domestic leagues. Presently only football clubs that compete in the French *Ligue 1* and the German *Bundesliga* are subject to some form of financial regulation.

On 11 April 2013, the clubs in the English Premier League ratified new financial regulations to curb over-spending by Premier League clubs. Commencing from season 2013/14, a Premier League club must control their players wage bill and will not be allowed to incur losses above £105 million over the next three football seasons. A club that breaches the financial controls will face sanctions that could include deduction of points.

It remains to be seen whether clubs in the other European football leagues, such as the Spanish *La Liga*, Italian *Serie A* and Dutch *Eredivisie*, will follow suit.

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LEGAL INSIGHTS

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