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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

This issue of Legal Insights is a significant milestone as it is the first time that we have published a 28-page newsletter since we commenced publishing in March 2004. This is partly due to the fact that Lee Shih and Chee Kheong have written two detailed articles which discuss some of the changes that will be introduced under the long awaited Companies Bill 2013.

In "*Questioning the Royalty*", Maniam and Mariam provide a commentary on a landmark decision by the Federal Court on custom duties. Harold explains the Singapore High Court's reasons for holding that doctors are under an inherent ethical duty to charge fair and reasonable fees in the *Dr Susan Lim Case*.

"*The Tale of the Stick and the Coil*" is an interesting article by Joshua on a case that involved a claim of proprietary rights over the design of joss sticks. In *"A Comedy of (Costly) Errors"*, Claudia discusses a case where the Court of Appeal held the Government of Malaysia to be a trespasser on a large tract of valuable land in Kuala Lumpur.

Also featured are interesting articles on court adoption procedures in West Malaysia by Ezane and statutory adjudication by Jocelyn, while Li Hoong weighs the pros and the cons of the Minimum Retirement Age Act 2012.

Last but not the least, we continue our Landmark Case Series with an article by Pei Yee and Gopi which traces the origins of the Anton Piller Order.

We hope that our readers will find the contents of this issue of Legal Insights interesting.

Best Wishes and Thank You.

LEE TATT BOON
Editor-in-Chief
& Senior Partner

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SENIOR ASSOCIATES

We are pleased to announce that Jocelyn Lim Yean Tse and Fariz Abdul Aziz have been promoted to Senior Associates as of 1 July 2013. We extend our heartiest congratulation to each of them.

Jocelyn is a member of our Dispute Resolution Division. She graduated from the University of Northumbria in 2007. Her main areas of practice are construction disputes and drafting of construction-related contracts.

Fariz is a member of our Corporate Division. He graduated from Kings College London in 2006 and was called to the Malaysian Bar in 2009. His main practice areas are oil and gas and mergers and acquisitions.

BOOK LAUNCH

We extend our heartiest congratulations to Partners, Ivan Y F Loo and Lam Wai Loon on the publication of their book, Construction Adjudication in Malaysia by CCH Asia Pte Ltd in collaboration with our Firm.

The book was officially launched on 26 September 2013. The occasion was graced by the presence of Tun Arifin bin Zakaria, the Honourable Chief Justice of Malaysia and Professor Datuk Sundra Rajoo, the Director of the Kuala Lumpur Regional Centre for Arbitration.

The publication is the first book which deals exclusively with the Construction Industry Payment and Adjudication Act 2012 of Malaysia.

CLIENTS' FEEDBACK

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

QUESTIONING

A commentary on the Federal Court
Diraja Malaysia by Maniam

On 29 May 2013, the Federal Court handed down a decision on the question as to whether royalty costs should form part of the value of imported goods to be assessed for purposes of customs duty. This question revolved around the interpretation of Regulations 4 and 5 of the Customs (Rules of Valuation) Regulations 1999.

BACKGROUND FACTS

Nike Sales Malaysia Sdn Bhd ("Nike Malaysia") is an importer of the popular brand of footwear, apparel, sports equipment and accessories. Between January 2000 and February 2003, Jabatan Kastam Diraja Malaysia ("KDRM") conducted an audit on the declared value of the goods imported by Nike Malaysia. The audit revealed that Nike Malaysia had not included royalty costs as part of the price paid, or payable, for the goods.

KDRM was of the opinion that royalty paid to a foreign brand owner was a "transaction condition" for the imported goods for the purpose of customs valuation. KDRM alleged that Nike Malaysia had underpaid customs duty on the goods and demanded unpaid duties from Nike Malaysia amounting to RM2,675,344.19.

Nike Malaysia lodged an appeal to the Director-General of KDRM, which was dismissed. Nike Malaysia then appealed the decision to the High Court.

THE BUSINESS TRANSACTION

The import of goods by Nike Malaysia into Malaysia involved several legal entities, namely the brand owner, Nike International Limited ("Nike International"), the exporters who were unrelated third party manufacturers and the buying agents, Nike Inc ("Nike USA") and Nissho Iwai America Corporation ("Nissho").

Nike Malaysia would place purchase orders with Nike USA, which would then pass the purchase orders to unrelated third party manufacturers. The manufacturers would then export the goods to Nike Malaysia. Invoices were issued by and payments were made through Nissho. Nike Malaysia paid royalty directly to Nike International on the basis of invoiced sales in Malaysia.

This business transaction was governed by three inter-related agreements:

(a) a Purchase Commission Agreement between Nike Malaysia and Nike USA ("Purchase Agreement");
(b) a Buying Agency and Logistics Services Agreement between Nike Malaysia and Nissho; and
(c) an Intellectual Property Licence and Exclusive Distribution Agreement between Nike Malaysia and Nike International ("IP Agreement").

Royalty was payable by Nike Malaysia to Nike International under the IP Agreement at the rate of 6% of net invoiced sales revenue of all licensed goods sold in Malaysia. Crucially, the IP Agreement expressly provided that non-payment of royalty shall not prevent or impede the sale. Clause 13.1 reads:


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MARIAM NELLY MUNANG (R)

Mariam was called to the Malaysia Bar on 13 September 2013. She will commence practice as an advocate and solicitor with Skrine shortly.

THE ROYALTY

case of Nike Malaysia v Jabatan Kastam Kuppusamy and Mariam Munang

"... in the event of non-payment of the royalty ... the licensor [Nike International] shall not prevent or impede such supplier from selling to licensee [Nike Malaysia] licensed goods ..."

THE CUSTOMS LAW FRAMEWORK

The customs value of imported goods is assessed based on the Customs Act 1967, read together with the Customs (Rules of Valuation) Regulations 1999.

Regulation 4(1) states that the customs value of imported goods "*shall be their transaction value, that is, the price paid or payable for the goods when sold for export to Malaysia, adjusted in accordance with Regulation 5.*"

Regulation 5(1)(a)(iv) then provides that in determining the transaction value, the price paid or payable for the goods shall be adjusted by adding "*royalties and licence fees ... that the buyer must pay, directly or indirectly, as a condition of the sale of the goods for export to Malaysia.*"

The issue in this case is therefore whether, on the basis of the business transaction described above, royalty should be added to the value of the goods imported by Nike Malaysia for purposes of determining the customs duty payable on those goods.

THE HIGH COURT'S DECISION

Nike Malaysia took the position that royalties should not be added to the price of the goods paid as it was not a condition of the sale of goods for export to Malaysia. The sale contract and the royalties contract were separate agreements made between different parties.

On the other hand, KDRM was of the view that royalty costs must be included because the royalties were, directly or indirectly, a condition of the sale of the goods for export to Malaysia.

Mohamad Ariff JC (as he then was) agreed with Nike Malaysia. According to the learned Judicial Commissioner, the test to determine whether the royalty paid was a transaction condition was this:

"The overriding test is whether the buyer or importer has, or has not, the obligation to pay the royalty in order to purchase or import the goods. If the obligation arises from a separate agreement that is unrelated to the sale or importation of the goods, it cannot be regarded as a condition of the sale of the goods."

By applying this test, the learned Judicial Commissioner concluded that the IP Agreement and the Purchase Agreement did not comprise a single transaction and that the royalty payable by Nike Malaysia to Nike International under the IP Agreement could not properly be taken as a "condition of the sale of the goods for export to Malaysia."

THE COURT OF APPEAL'S DECISION

On appeal, the Court of Appeal reversed the High Court's decision. It held that royalty is to be regarded as an item to be included for adjustment of the price to be paid or payable, irrespective of whether the payment of royalty is expressly stated as a condition.

The Court of Appeal found that "*... it would be legally wrong not to make an adjustment for the price paid or payable merely because it was not expressed that the respondent must pay the said royalty as a condition of the sale of goods for export to Malaysia. Such a proposition appears to be an ingenious attempt to evade the proper customs duty on the imported goods by the respondent.*"

THE FEDERAL COURT

The Federal Court considered these two questions:

Question 1: "*Whether the royalty paid by the applicant/appellant to Nike International Ltd could be considered as a condition of sale for the goods to be exported to Malaysia and as an item for the adjustment in accordance with Regulation 4 of the Customs (Rules of Valuation) Regulations 1999 read together with Regulation 5(1)(a)(iv) of the said Regulations?*"

Question 2: "*Whether the royalty is an indirect consideration by the applicant/appellant as a condition of sale for the entry of the goods to be exported into Malaysia?*"

"CONDITION" OF SALE: TWO ALTERNATIVE DEFINITIONS

Regulation 5(1)(a)(iv) was adopted from the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ("WTO Valuation Agreement"), to which Malaysia and many other countries are signatories. The Federal Court considered two leading authorities on condition for sale for purposes of imposing custom duty, namely *Deputy Minister of National Revenue v Mattel Canada Inc.* [2001] 199 D.L.R. (4^{th}) 598 ("Mattel Canada") and *Chief Executive of New Zealand Customs Service v Nike New Zealand* [2004] 1 NZLR 238 ("Nike New Zealand").

In *Mattel Canada*, the Canadian Supreme Court adopted the legal definition of "condition" as used in the law of contract. It adopted the definition provided by P.S. Atiyah in The Sale of Goods (8^{th} Edition), that a condition is a term that is *"of such vital importance that it goes to the root of the transaction"*.

The Court of Appeal of New Zealand in *Nike New Zealand* considered *Mattel Canada* but disagreed with the Canadian Supreme Court that "condition" was a legal term. Rather, the New Zealand Court of Appeal regarded it as a term used in its ordinary and common sense way to mean a prerequisite or requirement for the export of the goods. In its view, for royalty to be a condition,

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A REVIEW OF THE COMPANIES BILL 2013 – PART I

Kok Chee Kheong highlights some of the significant changes under the Companies Bill 2013

On 2 July 2013, the Companies Commission of Malaysia ("CCM") released an exposure draft of the long awaited Companies Bill 2013 ("the Bill") for public consultation. After an extension, the period for public consultation closed on 10 August 2013.

The Bill consists of 631 clauses and 12 schedules as compared to the Companies Act 1965 ("CA") which is made up of 449 sections (including those sections that are identified by a number and a capital alphabet) and 10 schedules.

The Bill will usher in many changes to the principal legislation that governs the formation, operation and regulation of companies in Malaysia. In this first of a series of articles, we will highlight some of the more significant and interesting changes that will be introduced under the Bill.

In this article, the "Act" refers to the Bill when it has been passed and comes into operation.

"the Bill dispenses with the requirement for a company (other than a company limited by guarantee) to have a constitution"

INCORPORATION RELATED MATTERS

Formation by one member

The Bill permits a company to be formed by a single person and to have only one director (Clause 13(1)). The CA requires a company to be formed by two or more persons (although shares may subsequently be transferred to a corporation so that the company becomes a wholly-owned subsidiary of another corporation).

Certificate of incorporation

Under the Bill, a certificate of incorporation will no longer be issued upon the incorporation of a company. Instead, the CCM will issue a notice of registration which, *inter alia*, is conclusive evidence that the company has been duly registered under the Act (Clause 15). A certificate of incorporation will only be issued upon application and payment of a prescribed fee (Clause 16).

Constitution

The other main incorporation documents under the CA, namely the memorandum and articles of association, are replaced by a constitution under the Bill. Interestingly, the Bill dispenses with the requirement for a company (other than a company limited by guarantee) to have a constitution (Clauses 30(1) and 37(1)). If a company elects not to adopt a constitution, the rights, powers, duties and obligations of the directors and members will be governed by the Act (Clause 30(3)).

If a company adopts a constitution, the rights, powers, duties and obligations of the directors and members will be as set out in the Act save insofar as they are modified by the constitution (Clause 30(2)). The Bill further provides that the constitution has no effect to the extent that it contravenes or is inconsistent with the provisions of the Act (Clause 31(2)).

Capacity of a company

Clause 20 of the Bill states that upon incorporation, a company shall have full capacity to carry on or undertake any business or activity, do any lawful act and do or enter into transactions (Clause 20(1)). This is a major departure from the existing regime under the CA where a company may only undertake activities which are within, and in furtherance of, the objects specified in its memorandum of association. According to Recommendation 1.10 of the Review of the Companies Act 1965 by the Corporate Law Reform Committee, this provision seeks to clothe a company with the full capacity of a natural person.

"The Bill abolishes the doctrine of constructive notice"

Where a company has adopted a constitution which sets out the objects of the company, it shall be restricted from carrying on any business or activity which is not within those objects (Clause 34(2)(a)).

Existing company

In relation to a company incorporated under the CA, clause 33(c) of the Bill provides that the company's memorandum and articles of association are deemed to be the company's constitution. The Bill further provides that the company shall have unlimited capacity under clause 20. It is unclear whether this provision means that a company incorporated under the CA ceases to be bound by the object clauses specified in its memorandum of association upon the Act coming into force.

It is submitted that the objects should continue to apply to a company that is incorporated under the CA as that would be consistent with the new regime which permits a company which adopts a constitution to restrict its objects to those specified in its constitution. Perhaps this issue should be clarified in the Bill.

Common seal and incidental matters

Unlike the CA, the Bill does not impose an obligation on a

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company to adopt a common seal. Instead, it confers discretion on a company to do so (Clause 60(1)).

If a company does not adopt a common seal, it can make a contract, written or oral, through a person acting under its express or implied authority and execute documents by having the same signed by two authorised officers, i.e. a director or secretary, of whom at least one must be a director, or where the company has only one director, by that director in the presence of a witness who attests the signature (Clauses 63(1), 65(2) and 65(5)).

Amendment of constitution

The Bill provides a procedure for amending a constitution which is similar to the procedure in the CA, that is by way of a special resolution of the members in general meeting. In addition, clause 36(1) of the Bill introduces a new procedure which allows the court, on application of a director or member, to make an order to amend the constitution if the court is satisfied that it is not practicable to do so using the procedures specified in the Bill or the constitution.

DOCTRINE OF CONSTRUCTIVE NOTICE

The Bill abolishes the doctrine of constructive notice. Clause 38 provides that no person shall be deemed to have knowledge or notice of the contents of a constitution or any other document of the company by reason that the constitution or document has been registered by the Registrar of Companies ("Registrar") or is available for inspection at the registered office of the company.

> **"a (company limited by guarantee) can no longer be incorporated for profit-making purposes"**

This change not only complements the new regime that accords a company with the full capacity of a natural person but goes further in that in relation to a company which has adopted a constitution, a person who deals with that company is not deemed to have constructive notice of the objects and other provisions contained in the constitution by reason of that document being lodged with the Registrar.

COMPANY LIMITED BY GUARANTEE

The Bill introduces two radical changes to the formation of a company limited by guarantee ("CLBG"). First, the Bill only permits a CLBG to be formed as a public company and not as a private company (Clause 10(2)).

Second, a CLBG may only be formed for the purposes of providing recreation or amusement or promoting commerce and industry, art, science, religion, charity, pension or superannuation schemes or any other object that is useful for the community (Clause 44(1)). In other words, a CLBG can no longer be incorporated for profit-making purposes.

Consistent with the objectives set out above, the Bill prohibits a CLBG from paying any dividend to its members (Clause 44(2)(b)). Further, in the event that a CLBG is wound up, the Bill requires its assets to be transferred to another body that has objects similar to those of that CLBG or objects which are for the promotion of charity (Clause 44(2)(c)).

The requirements relating to a CLBG that are introduced by the Bill are not entirely new and represent a codification of the CCM's present requirements in relation to a CLBG that is formed for charitable purposes.

DISCLOSURE OF INTEREST

Clause 56 of the Bill enables a company to require a member to disclose to the company as to whether the shares which are registered in the name of that member are held by him as beneficial owner or as trustee; and in event of the latter, to provide the company with particulars sufficient to identify the beneficial owner and the nature of his interest in the shares. The new provision is substantially similar to section 69O of the CA but is wider in scope as the new provision applies to any member whilst section 69O only applies to a substantial shareholder of the company.

REGISTER OF MEMBERS

As in the case of the CA, the Bill requires a company to maintain a Register of Members. However, clause 50(1) of the Bill imposes an additional requirement for a company to notify the Registrar within 30 days from the date of (i) any change in the prescribed particulars of a member; or (ii) any person becoming or ceasing to be a member of the company; or (iii) any information received from a member that he holds shares as trustee of another person.

This requirement will ensure that the CCM's records as to the members of a company are updated promptly. It is hoped that the up-dated information will be made available in searches that are carried out on companies at the CCM.

ANNUAL RETURN

The Bill retains the obligation of a company under the CA to file

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an annual return ("AR") in each calendar year with the Registrar. The Bill introduces two new features. First, if there is no change in the prescribed particulars since the filing of the last AR, a company may lodge a statement to certify that there has not been any change since the filing of the last AR, instead of filing a new AR that replicates the same information (Clause 67(6)).

Second, the Bill gives the Registrar the right to strike a company off the register if it does not file an AR for three or more consecutive years (Clause 67(9)).

NO PAR VALUE SHARES

One of the most significant changes to be introduced under the Bill is the introduction of the no par value regime. Clause 72(1) provides that shares of a company shall have no par or nominal value. All subscription moneys received by a company for each share will be credited to the share capital account. This follows the trend set in New Zealand, Australia and Singapore and is expected to be followed by Hong Kong in 2014.

Transitional provisions for existing companies

All existing companies will be converted to the no par value regime. Upon the coming into force of clause 72 ("commencement date"), all amounts credited to the share premium account and the capital redemption reserve of an existing company will become part of the company's share capital.

The Bill also provides a 24 months' time frame for an existing company to utilise the credit in its share premium account for the purposes prescribed in the Bill, including (i) paying premium on redemption of redeemable preference shares issued before the commencement date; or (ii) paying for unissued shares which are to be issued on the commencement date as fully paid bonus shares pursuant to an agreement made before the commencement date; or (iii) paying up in part or in whole the balance unpaid on shares issued before the commencement date; or (iv) paying for shares which are to be issued in satisfaction of dividends declared before the commencement date (Clause 73(3)).

SHARE CAPITAL

Rights attached to shares

Unlike the CA, clause 68(2) of the Bill expressly provides that a holder of shares has the right to (i) one vote for every share held on a poll; and (ii) a pro-rated share of any dividend and distribution of the surplus assets by the company.

However clause 68(2) is qualified by clauses 68(3) and 69(1) which *inter alia* provide that the constitution of a company may (i) negate, alter or add to the right to dividend; (ii) permit the issue of redeemable shares; (iii) confer preferential rights to distribution or income; (iv) confer special, limited or conditional voting rights; or (v) not confer voting rights.

Hence, notwithstanding the general declaration in clause 68(2), the Bill is similar to the CA in that a company may, if so authorised by its constitution, issue different classes of shares that have different voting rights or entitlements.

Redeemable preference shares

The introduction of the no par value regime will not affect the right of a company to issue redeemable preference shares ("RPS"), which is expressly permitted under the Bill (Clauses 69(1)(b) and 70(1)). In order to do so, a company must be expressly authorised by its constitution. This requirement in effect means that a company that proposes to issue RPS is required to adopt a constitution.

As in the case of the CA, RPS can be redeemed from the profits of a company or the proceeds from a fresh issue of shares. In addition, the Bill permits RPS to be redeemed out of the share capital of a company (Clause 70(3)(c)). Two conditions must be fulfilled in order for RPS to be redeemed from share capital. First, all directors are required to make a solvency statement in relation to the redemption and second, the company must lodge the copy of the statement with the Registrar (Clause 70(5) read with clause 112).

> **"One of the most significant changes … is the introduction of the no par value regime"**

Share issuance process

Under section 132D of the CA, all issue of shares must be approved by the company in general meeting or alternatively, in the case of shares to be issued as consideration or part consideration for the acquisition of shares or assets by a company, after the expiry of at least 14 days from the date when it has notified its members in the manner prescribed in the CA of its intention to issue such shares.

The Bill permits directors to allot, or grant rights to subscribe for, shares or convert any security into shares in a company only with the prior approval by resolution of the company (Clause 74(1) read with clause 75(1)). However, the requirement for prior approval by members does not appear to be required for directors to issue shares in the following circumstances:

(i) allot shares, or grant rights, under an offer made to the members in proportion to their shareholdings by way of a rights issue or bonus issue;
(ii) allot shares to a promoter of a company in accordance with the agreement with the promoter;

(iii) where shares are to be issued as consideration or part consideration for the acquisition of shares or assets by a company, after the expiry of at least 14 days from the date when it has notified its members in the manner prescribed in the Bill of its intention to issue such shares (Clause 74(2)).

From the above, it can be seen that the procedure for issue of shares by a company under the Bill is similar to that under the CA except that the Bill dispenses with the requirement for members approval where shares are to be allotted, or rights granted, pursuant to a rights issue or a bonus issue. The dispensation of the requirement for members' approval in respect of rights issues and bonus issues will be welcomed by listed companies as it will reduce compliance costs.

Calls on partly paid shares

Under the CA, a company may differentiate between the timing and amount of calls as between shareholders only if it is permitted to do so under its articles of association. This requirement is liberalised under the Bill which permits a company to make such differentiation unless otherwise provided in its constitution (Clause 81(1)(a)).

> **"(Clause 85(1)) is potentially contentious as it appears to confer a personal right on each shareholder to a proportionate entitlement of the new shares"**

Pre-emption over unissued shares

Clause 85(1) of the Bill provides that where a company issues shares which rank equally or in priority to existing shares as regards voting or distribution rights, those shares should be offered first to the holders of the existing shares to enable the shareholders who accept the offer to maintain their proportionate shareholding in the company.

This provision is potentially contentious as it appears to confer a personal right on each shareholder to a proportionate entitlement of the new shares and may only be waived by the shareholder concerned.

It is submitted that clause 85(1) should be qualified in a manner that is similar to regulation 41 of Table A (Fourth Schedule) of the CA so that the pre-emption right should be subject to, and qualified by, any direction given to the contrary by the company in general meeting. In other words, the pre-emption rights may be waived by a resolution of the company in general meeting rather than by each shareholder in respect of the pro-rated entitlement of new shares which are to be offered to him under this pre-emption clause.

Formal procedures

The Bill retains the requirement under the CA for a company to lodge a return of allotment with the Registrar in relation to allotment of shares. However the Bill reduces the time frame for doing so from one month to 14 days (Clause 77(1)). Unlike the CA, the Bill prescribes a specific time frame, namely 14 days, within which a company is required to enter the details of the allotment of shares in its register of members (Clause 76(1)).

RESTRICTION ON TRANSFER OF STOCK

The provisions of Table A (Fourth Schedule) of the CA that govern the conversion of shares into stock and *vice versa* and for matters incidental to such conversion have been substantially incorporated into clauses 86 and 87 of the Bill.

In relation to the transferability of stock, clause 86(3) of the Bill provides that (i) the directors may fix the minimum amount of stock that is transferable; and (ii) such minimum "*shall not exceed the issued (sic) price of the shares from which the stock arose*". It appears that the second requirement seeks to safeguard the interest of the members of a company by ensuring that the transferability of stocks will not be more onerous that the shares from which those stocks arose.

It is interesting to note that there is no similar safeguard in regulation 37 of Table A of the Singapore Companies Act and accordingly, the directors of a company incorporated in Singapore which adopts regulation 37 will have an unfettered discretion to determine the minimum amount of stocks that is transferable.

If a company which proposes to convert its shares into stock has issued shares of the same class at different issue prices, the second requirement in clause 86(3) will mean that the minimum amount of stock that is to be transferable will have to be fixed at an amount that does not exceed the lowest price at which the original shares were issued as it is not possible for a company to impose different restrictions on different units of the same class of securities.

We will continue our review of the Bill in the next issue of Legal Insights.

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CORPORATE INSOLVENCY, CORPORATE REHABILITATION AND RECEIVERSHIP

Lee Shih highlights the main changes to the corporate insolvency and rehabilitation procedures under the Companies Bill 2013

The Companies Bill 2013 ("Bill"), which revamps the Companies Act 1965 ("Act"), is based on the recommendations made by the Corporate Law Reform Committee ("CLRC") back in 2008. The Companies Commission of Malaysia published a copy of the Bill for public consultation and is presently reviewing the feedback received.

This article will touch on areas of the Bill which help to reform the existing areas of receivership, winding up and schemes of arrangement. In order to better promote a corporate rehabilitation framework, the Bill also introduces the new mechanisms of the judicial management scheme and the corporate voluntary arrangement.

RECEIVERSHIP

Appointment

The receivership provisions in the Bill substantially expand on the existing provisions in the Act. Clauses 372 and 373 of the Bill set out the manner of appointing a receiver or a receiver and manager ("R&M") under an instrument or by the Court.

> **“ the Bill appears to omit other instances under the common law where a Court may appoint a receiver or R&M ”**

Clause 372(2) of the Bill expressly sets out the agency status of a receiver appointed under a power conferred by an instrument (and presumably, the final version will also spell out the corresponding status of an R&M). The present legal position is that a receiver or R&M becomes an agent of the debtor company by virtue of the inclusion of provisions to that effect in the debenture under which he is appointed. The codification of the agency status of the receiver and R&M helps to remove some of the present ambiguities on the status of the receiver or R&M. It makes clear the ability of the receiver or R&M to contract on behalf of the company or do any act as an agent of the company to enable him to perform his functions.

In the case of a Court appointment, clause 373 of the Bill lists out three specific grounds upon which the Court may appoint a receiver or R&M, which are essentially where the company has failed to pay a debt due to a debenture holder, or the company proposes to sell the secured property in breach of the charge, or it is necessary to do so to preserve the secured property.

However, the Bill appears to omit other instances under the common law where a Court may appoint a receiver or R&M, such as where there is a management deadlock or oppressive conduct by the majority shareholders. It is hoped that these omissions will be clarified in the final version of the Bill so that these common law rights of appointment will not be abrogated.

Personal Liability of the Receiver and R&M

The original recommendation by the CLRC in its Final Report was for the receiver or R&M to be personally liable for debts incurred by him unless there is a specific agreement to the contrary between the contracting parties. However, clause 378 of the Bill does not make this clear and in fact imposes personal liability for such debts incurred by him in the course of receivership "*notwithstanding any agreement to the contrary*", thereby not allowing the parties to contract out of this provision.

Further, the wordings which impose personal liability described above appear to conflict with clause 379(2) which purports to give effect to the CLRC's recommendation that the "*terms of a contract … may exclude or limit the personal liability of the receiver …*"

It is hoped that the final Bill will resolve these conflicting provisions and carry into effect the CLRC's recommendation.

Powers of Receiver and R&M

Clause 380 of the Bill introduces a welcomed codification of the express powers of a receiver or R&M which are set out in the Seventh Schedule of the Bill. Presently, a receiver or R&M would have to derive his powers solely from the provisions of the debenture under which he was appointed, and it is not uncommon to encounter situations where the powers listed in the debenture are inadequate or ambiguous.

This codification of a minimum list of default powers exercisable by a receiver or R&M is in line with the approach taken in the United Kingdom, Australia and New Zealand.

WINDING UP

Presentation of a Petition

Clause 447(1)(a) of the Bill increases the threshold of a debt for the statutory demand from RM500 to RM5,000 in order for a company to be deemed unable to pay its debts for the purposes of a compulsory winding up.

This higher threshold attempts to balance the need to ensure that the amount is not too high as to preclude small creditors from initiating legitimate claims whilst being high enough to avoid trivial claims.

Further, clause 447(2) of the Bill states that a winding up petition must be filed within six months from the expiry date of the

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statutory demand. The aim of this is to reduce the possibility of the statutory demand being abused and to prevent the threat of a winding up petition from continuing to hang over the debtor company for an inordinately long period of time.

Void Dispositions

The void disposition provision as contained in clause 453 of the Bill makes it clear that any disposition of property by the company, other than an exempt disposition, made after the presentation of a winding up petition shall be void, unless the Court otherwise orders. Similar to the equivalent Australian provision, the intent of this amended provision is to list out certain exempt dispositions which would not require a validation order.

However, the specified exempt dispositions contained in clause 453(2) do not significantly eliminate the need to obtain a validation order as it covers only a disposition by a liquidator or an interim liquidator of the company. The present wording of the void disposition provision in the Bill would still disallow a payment out of a bank account of the company made in good faith and in the ordinary course of business.

“ the Bill increases the threshold of a debt for the statutory demand from RM500 to RM5,000 ”

Powers of Liquidators

The powers of the liquidator in a court winding up situation are set out in clause 468 read with the Eleventh Schedule of the Bill. Part I of the Eleventh Schedule lists out the powers that the liquidator may exercise with the authority of the Court or the committee of inspection (“COI”) while Part II of the Eleventh Schedule lists out all the powers that may be exercisable with, or without, the aforesaid authority.

In particular, the Bill permits a liquidator to carry on the company’s business so far as necessary for the beneficial winding up of the company for a period of 180 days after the making of the winding up order. Thereafter, the liquidator is required to obtain the authority of the Court or the COI to continue with the carrying on of such business. This is a welcomed increase from the present period of only 4 weeks allowed for under the Act.

Termination of Winding Up

Under the Act, the only way in which a winding up order can be brought to an end is through an order for a stay of winding up under section 243. In considering whether to grant a stay, the Court would take into account factors such as the interests of the creditors and liquidator and whether it is conducive or detrimental to commercial morality.

In addition to the power to stay a winding up under clause 476, the Bill introduces a new clause 477 which allows the Court to terminate the winding up of a company. In determining whether to terminate a winding up, the Court may consider various factors, such as the satisfaction of the debts, the agreement by both parties, or other facts as it deems appropriate. This appears to allow for an easier route to bring to an end the winding up where the debtor company has satisfied the debts owing to the petitioning creditor.

SCHEME OF ARRANGEMENT

The scheme of arrangement provisions remain largely the same except for three of the more significant changes reflected in the Bill.

“ the Bill permits a liquidator to carry on the company’s business ... for a period of 180 days after the making of the winding up order ”

Additional Safeguard of Independent Assessment

Clause 432 introduces an additional safeguard to the scheme of arrangement framework by allowing the Court, upon application, to appoint an approved liquidator to assess the viability of a proposed scheme. This would enable an independent professional in the field of insolvency to determine the viability of the scheme and take into account the interests of all the stakeholders. It is to be noted that this is not a mandatory requirement and the applicant company is not obliged to take such a step from the outset. Thus, the initiative lies with the other stakeholders in a proposed scheme to seek such an appointment.

Extension of the Restraining Order

For the extension of a restraining order, clause 434(2) provides that the Court may grant a restraining order for a period of not more than 90 days and may “*extend this period for another two hundred seventy days*” if certain requirements are met. This appears to be an attempt to give effect to the CLRC’s

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recommendation that the maximum period of a restraining order should be a year.

However, it is submitted that the present drafting could be made clearer as to whether each extension of the restraining order after the initial 90 days would be limited to a maximum period of 90 days, subject to the maximum extension of 270 days. A literal reading of clause 434(2) suggests that after the initial 90-day period, the Court may extend the restraining order for a further 270 days. As it is in the interest of all stakeholders that a scheme of arrangement should be finalised without undue delay, it is hoped that this issue will be clarified in the final Bill.

Restraining Order Will Not Extend to Regulators

Clause 434(7) makes it clear that a restraining order which restrains further proceedings against the company except by leave of the Court will not apply to any proceeding taken by the Registrar of Companies or the securities market regulator.

> **“ a restraining order will not have the effect of restraining further proceedings against any person other than the applicant company ”**

Further, clause 434(8) states that a restraining order will not have the effect of restraining further proceedings against any person other than the applicant company. So for instance, the directors of a company who are subject to legal proceedings on a guarantee given by them for the applicant company's debts will not be able to rely on the restraining order granted in respect of the company.

JUDICIAL MANAGEMENT

The judicial management mechanism, modeled after the Singapore model, is a new component under the Bill to provide a further option to rehabilitate a financially distressed company. It allows for an application by a company or a company's creditors for an order to place the management of a company in the hands of a qualified insolvency practitioner. A moratorium which gives temporary respite to the company from legal proceedings by its creditors is put in place automatically both during the time of the application for a judicial management order until the making or dismissal of such an application and during the period that the judicial management order is in force.

Requirements for the Grant of a Judicial Management Order

The Court is empowered under clause 392 of the Bill to grant a judicial management order if and only if -

(a) it is satisfied that the company is or will be unable to pay its debts; and
(b) it considers that the making of the order would be likely to achieve one or more of the following purposes:

   (i) the survival of the company, or the whole or part of its undertaking as a going concern;
   (ii) the approval of a compromise or arrangement between the company and its creditors;
   (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

The judicial management order shall, unless discharged, remain in force for 180 days and may be extended on the application of the judicial manager for another 180 days.

Protection of Debenture Holder's Rights

The CLRC had made recommendations to protect a debenture holder's right to appoint an R&M in the situation where a judicial management order is sought. Accordingly, clause 395(1)(b) of the Bill requires the notice of a judicial management application to be provided to any person who has appointed, or may be entitled to appoint, an R&M of the whole or a substantial part of the company's property. However, clause 395(1)(b) limits the type of qualifying R&M as one appointed under the terms of a debenture secured by a floating charge or by a floating charge and one or more fixed charges. It does not seem to apply to a situation where the security is by way of a fixed charge only and is unclear as to whether it applies to a receiver as well.

This provision is significant as clause 396 of the Bill effectively provides a veto right to a person who is entitled to appoint a qualifying R&M. Clause 396(1)(b) of the Bill provides that the Court shall dismiss a judicial management application if the making of the order is opposed by a person who has appointed, or is entitled to appoint, such a receiver or R&M.

The reasoning behind such a veto right is that it is thought not necessary to make a judicial management order when an R&M could achieve substantially the same objectives and clause 396(1)(b) preserves the right of the debenture holder to appoint an R&M.

Approval of Judicial Manager's Proposals

When a judicial manager is appointed, clause 407 of the Bill provides that he has 60 days (or such longer period as the Court may allow) to send to the Registrar, members and creditors of the company a statement of his proposals for achieving the purposes for which the order was made and to lay a copy of this statement before a meeting of the company's creditors.

As a meeting of the creditors must be summoned on not less than 14 days' notice, the judicial manager effectively only has 46 days to come up with the proposal to rehabilitate the company. Therefore, there is the view that the Bill's 60-day period may in reality be too short unless the Court is more flexible in allowing for more time for the preparation of this statement of proposals.

Clause 408(2) of the Bill requires a judicial manager's proposals to be approved by a majority of 75% in value of the creditors present and voting either in person or in proxy whose claims have been accepted by the judicial manager. Once approved by the required majority, the proposals shall be binding on all creditors of the company whether or not they had voted in favour of the proposals.

CORPORATE VOLUNTARY ARRANGEMENT

The corporate voluntary arrangement ("CVA") is modeled after the corresponding provisions under the UK Insolvency Act. The CVA is a procedure which allows a company to put up a proposal to its creditors for a voluntary arrangement. The implementation of the proposal is supervised by an independent insolvency practitioner who would report to the Court on the viability of the proposal. There is minimal Court intervention in the process.

> **"The judicial management mechanism .... provides a further option to rehabilitate a financially distressed company"**

Initiation of CVA

To initiate a CVA, the directors would have to submit to the nominee, being a person who is qualified to be appointed as an approved liquidator, a document setting out the terms of the proposed voluntary arrangement and a statement of the company's affairs.

Under clause 422 of the Bill, the nominee shall then submit to the directors a statement indicating whether or not in his opinion:

(a) the proposed CVA has a reasonable prospect of being approved and implemented;
(b) the company is likely to have sufficient funds available for it during the proposed moratorium to enable to the company to carry on its business; and
(c) that meetings of the company and creditors should be summoned to consider the proposed CVA.

Under clause 421 of the Bill, once the directors have received a positive statement from the nominee, they can then file this statement with the Court together with the other necessary documents, such as the nominee's consent to act and the document setting out the terms of the proposed CVA.

Moratorium and Required Majority to Approve the Proposal

Upon the filing of the relevant documents pursuant to clause 421, the Ninth Schedule of the Bill provides that a moratorium commences automatically and shall remain in force for a period of 28 days.

Clause 423 of the Bill also provides that once the moratorium is in force, the nominee is to summon a meeting of the company and its creditors within the period specified in the Eighth Schedule of the Bill. The reference in clause 423 to the Eighth Schedule appears to be a typographical error and that the correct reference should be to the Ninth Schedule of the Bill.

Under the Ninth Schedule, such a meeting of the company and creditors must be called within 28 days of the date of the filing of the documents in Court. At the company's meeting, a simple majority is required to pass a resolution to approve the proposed CVA while at the creditors' meeting, the required majority is 75% of the total value of the creditors present and voting in person or by proxy.

> **"The corporate voluntary arrangement ... is a procedure which allows a company to put up a proposal to its creditors for a voluntary arrangement"**

If more time is needed for the stakeholders to decide, and in order to extend the moratorium period beyond the initial 28-day period, a meeting can be summoned to extend the moratorium for not more than 60 days if there is approval of 75% majority in value of the creditors and with the consent of the nominee and the members of the company.

CONCLUSION

The Bill brings many welcomed changes in revamping the corporate insolvency and rehabilitation framework in Malaysia. It is hoped that the final Bill will reflect the feedback and comments received through the public consultation process.

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A COMEDY OF (COSTLY) ERRORS?

Claudia Cheah discusses the long-drawn saga of Semantan Estates

INTRODUCTION

In November 2012, the Federal Court rejected a motion for leave to appeal against a decision of the Court of Appeal which was filed by the Government of Malaysia. The Court of Appeal had on 18 May 2012, declared the Government of Malaysia a trespasser of 263.272 acres of prime land in the Kuala Lumpur enclave of Jalan Duta, on which stands the National Hockey Stadium, the National Tennis Complex, the Institute of Islamic Understanding Malaysia, the Federal Territory Mosque, the National Archives, the Inland Revenue Office Complex and several other government buildings.

The decision of the Federal Court finally puts to rest a protracted legal battle arising from a land acquisition proceeding that started 56 years ago.

BACKGROUND FACTS

The origins of this case can be traced back to the pre-Merdeka era, to the year 1956. The Selangor Government declared that 225 acres of land belonging to the Plaintiff, Semantan Estates (1952) Sdn Bhd, was required for a public purpose, to wit, a Diplomatic Enclave. This was done by a gazette notification (Gazette 577/56) issued under section 6(i) of the Land Acquisition Enactment Cap 140 ("Enactment").

> **"The matter has reached this stage entirely by reason of the respondent's fault"**

At the hearing before the Collector on 20 November 1956, the area of the land to be acquired was shown to be 250 acres instead of 225 acres. The Plaintiff requested for a final plan of the land to be acquired and raised various objections. At the next hearing on 27 November 1956, the Plaintiff claimed compensation of RM13,000 per acre. The Plaintiff also forwarded to the Collector a letter which stated that Anglo (Thai) Corporation Ltd of Singapore was an interested party in that it had an option to purchase 63 acres of the land. The Collector awarded RM5,282 per acre. The total compensation awarded for 250 acres amounted to RM1,320,500 ("Award").

On 3 December 1956, the Collector took possession of the 250 acres of land. The Plaintiff informed the Collector that they received the payment awarded under protest and that they required the Collector to refer the matter to the court.

Another notification was gazetted on 22 January 1958 (Gazette 61/58), whereby the Selangor Government stated that they would withdraw the acquisition of approximately 22 acres of land from the acquisition made under Gazette 577/56. Later, on 25 February 1958, the Selangor Government declared that an additional area of 60 acres 2 roods 27.5 poles was required for a public purpose, namely for extensions of the Diplomatic Enclave. The Collector then took possession of the 60 acres land without holding any enquiry or paying any compensation.

By a letter dated 3 May 1958 to the Plaintiff's solicitors, the Collector admitted that the Award was invalid and the enquiry on 27 November 1956 was a nullity. The Collector further gave notice that the Government intended to take 202 acres 2 roods and 16 poles of land and an enquiry for the acquisition was scheduled on 18 June 1958. After several postponements, the enquiry was abandoned on 24 March 1959.

By a letter dated 1 August 1958 to the Attorney-General, the Plaintiff's solicitors proposed that all procedural matters be settled in the manner set out in its letter. The State Legal Adviser agreed to the proposal by a letter dated 29 May 1959. By agreement of parties, a reference was made to the High Court in *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue* (1960) 26 MLJ 300 ("Semantan No. 1"). At the hearing, the Collector admitted that the Award was invalid and contained a fatal defect.

Ong J held that the conditions in section 22 of the Enactment, which sets out the procedures for a land reference to the court, must be complied with before the Collector can make a reference and the Court has jurisdiction to act on it. The learned Judge held that it was not possible for the parties by agreement between themselves to waive irregularities so as to confer jurisdiction on the Court. Accordingly, his Lordship held that he had no jurisdiction under the Enactment to entertain the reference by the Collector.

In his judgment, the learned judge also criticised the Collector, stating that *"The matter has reached this stage entirely by reason of the respondent's fault. The proper steps which should have been taken have not been taken."*

By a letter dated 27 February 1961, the Plaintiff's solicitors requested the Collector to make an award in respect of proceedings initiated on the acquisition of the 202 acres or alternatively, if the Collector insisted that the Award was valid, to pursue the matter in the High Court under section 22(i) of the Enactment. The Plaintiff also requested the Collector to make an award in respect of the acquisition of the additional 60 acres.

In its reply letter dated 14 March 1961, the Collector claimed that the Award was valid and that the Plaintiff had received compensation for 263.272 acres of land. The Collector also added that if the Plaintiff wished to refer the matter to court, the Plaintiff should obtain the necessary leave to enlarge time for it to do so under section 22(iv) of the Enactment.

On 18 February 1963, the Ruler-in-Council granted 263.272 acres of land to the Federal Land Commissioner, which was then divided into 38 separate titles and registered in the name of the Federal Land Commissioner. Subsequently, the relevant authorities proceeded to build various government buildings on the land.

In the early 1980s, the Plaintiff applied for an order of *mandamus* against the Collector to complete the acquisition proceedings in accordance with the Land Acquisition Act 1960. The Plaintiff's application was eventually dismissed by the Supreme Court.

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THE HIGH COURT ACTION

Subsequently in 1989, the Plaintiff filed an action against the Government of Malaysia ("Defendant") for trespass, claiming that the taking of possession of the land was unlawful and wrongful. The Defendant argued that the Plaintiff was estopped from challenging the validity of the Award as it had by its letter dated 1 August 1958, agreed to settle all procedural matters and to proceed with the assessment of the quantum of compensation. In addition, the Defendant contended that the Plaintiff had also received the full amount of compensation awarded.

The Plaintiff's action was initially struck out by the High Court on the application of the Defendant but was reinstated on the Plaintiff's appeal to the Supreme Court.

The parties then proceeded with full trial at the High Court, which delivered its decision on 31 March 2010 (*Semantan Estates (1952) Sdn Bhd v Kerajaan Malaysia* [2011] 2 CLJ 257).

The High Court found that the Defendant had not taken the 263.272 acres of land from the Plaintiff lawfully as the Award made was not in substantial conformity with the Enactment and there was no enquiry or award made in respect of the other 60 acres of land. The High Court ruled that the Defendant has remained in wrongful possession of the land and awarded mesne profits as damages to be assessed by the Senior Assistant Registrar.

Dissatisfied with the High Court's decision, the Defendant appealed to the Court of Appeal.

THE DECISION OF THE COURT OF APPEAL

By giving a conjunctive consideration to the letters exchanged between the parties, the Court of Appeal found that the letters were written for the purposes of trying to resolve the problems relating to the land acquisition and did not constitute a settlement agreement between the parties. As such, the Defendant could not rely on these letters as evidence that the Plaintiff had agreed to waive the irregularities in the acquisition proceeding, particularly when Ong J had held in *Semantan No. 1* that the parties could not by an agreement, waive irregularities in procedure so as to seek a reference and confer jurisdiction on the court outside the scope of the Enactment.

On the facts, the Court of Appeal found that the Plaintiff accepted the payment awarded under protest and had continuously and persistently protested against the Award by letters and law suits.

The Court of Appeal held that the Collector had clearly not complied with various provisions of the Enactment, such as the failure to (i) cause the land to be marked out, measured and a plan made thereof under section 8; (ii) give the Plaintiff at least 21 days' notice of the date of the enquiry under section 9(ii); (iii) apportion the compensation among all the persons known or believed to be interested in the land, as required under section 11(1), after being informed that Anglo (Thai) Corporation Ltd was an interested party by virtue of an option to purchase 63 acres of the land; and (iv) hold any enquiry under any written law after purportedly taking possession of the 60 acres of the land.

The Court of Appeal also held that the Defendant was estopped from asserting that the Award was valid as the Collector had admitted by letter that the acquisition was invalid and the enquiry pursuant to which the Award was made, a nullity. The Collector had further admitted at the hearing in *Semantan No. 1* that the Award was invalid and contained a fatal defect. Further, Ong J's judgment in *Semantan No. 1* is binding on the parties, thus attracting the application of issue estoppel and *res judicata.*

In the premises, the Court of Appeal unanimously held that the Defendant had not lawfully acquired the land from the Plaintiff and hence, was a trespasser. Pursuant thereto, the Court of Appeal affirmed the High Court's decision and dismissed the appeal with costs.

As the Defendant's motion for leave to appeal to the Federal Court was dismissed, the decision of the Court of Appeal is final.

CONCLUSION

The Court of Appeal's decision has put the Government of Malaysia in a quandary.

First, it is difficult to see how the Government, which has been declared a trespasser of the Plaintiff's land, will be able, or willing, to return the land to the Plaintiff as numerous buildings, including the National Archives and the iconic Federal Territory Mosque, have been constructed on the land.

Second, the land involved has grown to become one of the most valuable tracts of real estate in Kuala Lumpur. It has been reported in *The Edge* (1 July 2013) that the land is now worth approximately RM4.6 billion based on a conservative valuation of RM435 per sq. ft. The same report further states that a property valuer engaged by the Plaintiff has estimated that the quantum of damages for trespass to the land is close to RM1.6 billion.

The series of errors made by the Collector in the land acquisition proceedings and the failure to hold any enquiry in respect of 60 acres of land, compounded by the Government's failure to take steps expeditiously to resolve the dispute with the Plaintiff, may end up being a costly lesson that is to be borne by the Malaysian taxpayers.

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THE (AWESOME OR TIRESOME) MINIMUM RETIREMENT AGE ACT 2012

Li Hoong considers the criticisms against the new legislation

Prior to the coming into operation of the Minimum Retirement Age Act 2012 ("MRAA"), an employer could impose any retirement age that it deemed fit in its employment contracts, subject only to the employee's agreement upon employment. Given the unequal bargaining status between employers and employees, employers were essentially given a free rein to impose any retirement age that they deem fit. This led to some employers discriminating on the basis of gender by imposing a different retirement age for men and women.

The MRAA came into force on 1 July 2013 and introduced a minimum retirement age in Malaysia of 60 for all employees, regardless of gender. The MRAA allows the Minister of Human Resources to increase the minimum retirement age in the future.

Unlike the Employment Act 1955, the definition of "employees" under the MRAA is very broad. It includes any person, who has entered into, and works under, a contract of service with an employer irrespective of his wages, except for the persons specified in the Schedule to the MRAA, namely:

- Employees of the Federal Government, Government of any State, statutory bodies or local authorities whether employed on a permanent, temporary or contractual basis;
- Probationers;
- Apprentices;
- Non-citizen employees;
- Domestic servants;
- Part-time employees whose average hours of work do not exceed 70% of the normal hours of work of full-time employees;
- Students employed on a temporary contract basis;
- Employees employed on a fixed term contract of service, inclusive of any extension, of not more than 24 months; and
- Any person who has retired at the age of 55 years or above and has been re-employed subsequently.

The main effect of the MRAA is that employers and employees can no longer mutually agree that employees will retire at any age below 60. All existing retirement age clauses which provide for a retirement age that is less than 60 will be void and substituted with the retirement age of 60. Employers and employees cannot contract out of the MRAA. Any term in an employment contract which provides that the MRAA or its provisions will not apply and will be void.

Employers must bear in mind that the MRAA does not introduce a retirement age for employees who are not currently subject to any retirement age. If a contract of employment is silent as to the employee's retirement age and it has never been the employer's practice to retire employees at a certain age, the coming into force of the MRAA will not enable such an employer to retire the employee at the age of 60. It is therefore still vital for employers to include a clause on the applicable retirement age in their employment contracts.

When entering into fixed term employment contracts with employees who are close to the retirement age, employers should bear in mind that the MRAA applies to all fixed term employment contracts that are for a period of more than 24 months (including extensions). In the event of termination or non-renewal of such fixed term contracts, it is possible for employees to claim that the termination or non-renewal of their fixed term contracts was on the basis of their age and that there was non-compliance with the MRAA. It would therefore be prudent not to enter into fixed term contracts for a period of more than 24 months, and to ensure that there is a sufficient break following the expiry of any 24 month fixed term contract before entering into a fresh fixed term contract with an employee.

THE PERILS OF DISREGARDING THE MRAA

If an employer contravenes the MRAA and retires an employee before the age of 60, the employer would commit an offence, and on conviction, would be liable to a fine not exceeding RM10,000.00.

> "The MRAA … introduced a minimum retirement age in Malaysia of 60 for all employees"

An employee who is retired before the age of 60 may seek redress by making a written complaint to the Director General of Labour within 60 days of his premature retirement. The Director General will then conduct an inquiry to determine whether or not there is *prima facie* evidence than the complainant has been prematurely retired by the employer. If the Director General is satisfied that the complainant was prematurely retired, he may direct the employer to either:

(a) reinstate the complainant and pay all backwages from the date of premature retirement to the date of reinstatement; or
(b) pay the complainant compensation in lieu of reinstatement, not exceeding the amount of total wages of the complainant calculated from the date of premature retirement to the date that the complainant attains the age of 60.

If the Director General of Labour dismisses the complaint, the employee may either appeal to the High Court or make a representation under Section 20 of the Industrial Relations Act ("IRA") for dismissal without just cause or excuse within 30 days of communication of the dismissal of the complaint.

If the Director General decides that the complainant was prematurely retired and makes a direction accordingly, the employee is not entitled to bring a further claim for the remedy for dismissal without just cause or excuse under the IRA. In such a case, the employer may appeal to the High Court.

LEE LI HOONG

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If an employee has made both a complaint to the Director General of Labour and a representation under Section 20 of the IRA, the Director General will not conduct an inquiry on the complaint made by the employee.

An employer who fails to comply with the direction of the Director General of Labour on a complaint of premature retirement would commit an offence and would on conviction, be liable to a fine not exceeding RM10,000.00. In addition, the employer may be ordered by the Court to pay the employee any amount directed by the Director General to be payable.

If the employer fails to comply with such a Court order, the Court may issue a warrant to levy the employer's property for the amount ordered to be paid by way of distress and sale of the employer's property or a warrant issued under Section 283 of the Criminal Procedure Code that can be executed in any place within Malaysia.

AWESOME OR TIRESOME?

Detractors of the MRAA who argue that it is tiresome oft raise concerns that the introduction of the minimum retirement age of 60 will have an implication on fresh graduates or young employees who find themselves unable to enter into or progress within organisations as vacancies that would previously have been created following the retirement of older employees are delayed. In the pre-MRAA case of *Sistem Penerbangan Malaysia Bhd v Kesatuan Kakitangan Eksekutif Sistem Penerbangan Malaysia* [1996] 1 ILR 704, the company successfully argued in the Industrial Court that the retirement age of 55 ought to be retained as increasing the retirement age could lead to the stagnation and frustration of junior employees who cannot be promoted so long as the senior positions are not vacated by senior staff who only retire at 60. However, studies have shown that there is no evidence that increasing the employment of older persons will reduce the employment opportunities or increase the unemployment of youth (see: Gruber, Milligan, and Wise "*Social Security Programs and Retirement Around the World: The Relationship to Youth Employment, Introduction and Summary*" January 2009, National Bureau of Economic Research Working Paper 14647).

Some may also question why a standard minimum retirement age has been fixed by MRAA for all employees without taking into consideration various factors which the Industrial Court has stressed in *Han Chiang High School v National Union of Teachers in Independent Schools* [2003] 3 ILR 297, must be carefully considered when a retirement age is fixed, such as:

1. the nature of the work assigned to the employees;
2. the nature of the wage-structure to which they are subject;
3. the retirement benefits and other amenities to which they are entitled;
4. the climate of the place where they work;
5. the age of superannuation which is fixed in comparable concerns or industries in the same region; and
6. the existing practice prevailing in the same concern in this regard, if any.

In this respect, it should be noted that employers may apply to the Minister of Human Resources for exemption from all or any of the provisions of the MRAA and the Minister has the power to grant such exemptions to any employer or class of employers, with or without conditions. It is therefore possible for employers to raise the aforementioned factors and to seek exemption from the MRAA by, for example, arguing that the nature of the work undertaken by its employees require a certain amount of physical output, mental and physical alertness or that it may even be hazardous to the health and safety of employees to retain them beyond 55 years of age.

Although it is unfortunate, it also cannot be denied that the perception is that the productivity of older employees decline with age and employers may therefore be reluctant to embrace a minimum retirement age. Some of the disadvantages associated with older workers include inflexibility in completing tasks, reluctance to participate in training, difficulty in maintaining up–to-date skills, and unease or unwillingness to learn new technologies (see: Wood, Robertson, and Wintersgill "*A Comparative Review of International Approaches to Mandatory Retirement*" 2010, Department for Works and Pensions Research Report No 674). Older employees also cost more as they are likely to be earning higher salaries as compared to their younger counterparts. Employers' healthcare costs are also likely increase with an aging workforce.

Even if these perceived disadvantages are true, it must be remembered that the introduction of a minimum retirement age does not prevent the dismissal of such older employees on the basis of poor performance. On the contrary, organisations must inevitably benefit from making employment decisions based on its employees' competence rather than chronological age.

CONCLUSION

Love it or loathe it, the MRAA is here to stay. Considering the genuine concern that the cost of living is rising at a pace that far exceeds the retirement savings plan of the common man on the Malaysian streets, the MRAA will undoubtedly be considered awesome by those who are not ready to retire before 60.

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ROUGH JUSTICE

Jocelyn Lim examines three cases that explain the philosophy behind the statutory adjudication regime

The statutory adjudication process was first introduced in the United Kingdom through the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") which became law on 1 May 1998. Ever since then, similar statutory provisions have been introduced in other jurisdictions, such as Australia, New Zealand and Singapore, and most recently, Malaysia. The Construction Industry Payment and Adjudication Act 2012 ("CIPAA") was passed by the Malaysian Parliament in March 2012 and received the Royal Assent on 18 June 2012. However, as of the date of publication of this article, the CIPAA has yet to come into operation.

In the United Kingdom, the statutory adjudication process has become the key dispute resolution process for construction disputes, with the effect of reducing the number of disputes being referred to arbitration or court for final resolution. While the adjudication process has undoubtedly been a success in the United Kingdom, thanks in part to the rigorous approach taken by the English courts in its readiness to enforce adjudication decisions summarily, this came with a price. As HHJ Seymour QC put it in *RSL(SW) Ltd v Stansell Ltd* [2003] EWHC 1390:

"The price, which Parliament and to a large extent the industry has considered justified, is that the procedure adopted in the interests of speed is inevitably somewhat rough and ready and carries with it the risk of significant injustice. The risk can be minimised by Adjudicators maintaining a firm grasp on the principles of natural justice and applying them without fear or favour."

This article examines three important English decisions which demonstrate how the rules of natural justice are applied within the constraints of the statutory adjudication process.

BOUYGUES (UK) LTD v DAHL-JENSEN (UK) LTD[1]

Bouygues (UK) Ltd ("Bouygues"), the main contractor, retained Dahl-Jensen (UK) Ltd ("Dahl-Jensen") as the mechanical subcontractor for the building works at Cornwall House, King's College, London. The subcontract dated 25 June 1998 ("Subcontract") provided for disputes resolution by adjudication under, *inter alia*, the HGCRA.

Disputes arose between the parties resulting in the termination of Dahl-Jensen's employment under the Subcontract. Dahl-Jensen left the site. Bouygues employed a third party to complete the subcontract works.

On 20 August 1999, both Bouygues and Dahl-Jensen issued notices to adjudicate and the parties subsequently agreed that Bouygues' claim should be treated as a counterclaim to Dahl-Jensen's in the adjudication. Mr. Gard was appointed as the adjudicator. Having considered the statements of case and the numerous documents submitted by the parties, the adjudicator published his adjudication decision. There was no oral hearing.

In his award, the adjudicator erroneously included an amount due to Dahl-Jensen which should have been retained under the Subcontract pending the issue of certificates of completion under the main contract ("the Retention Sum"). Despite the error having been brought to the attention of the adjudicator, the adjudicator refused to revisit his adjudication decision.

Dahl-Jensen enforced the adjudication decision by way of summary judgment. Bouygues argued that in making the error the adjudicator had exceeded his jurisdiction and therefore the adjudication decision could not be enforced. The High Court judge granted the summary judgment holding that the adjudicator had not been in excess of jurisdiction, in that he had answered the right question but in the wrong manner, and that the adjudication decision could not be interfered with. Bouygues appealed.

Despite the acknowledgement of the error made by the adjudicator, the appeal was dismissed by the Court of Appeal and Dahl-Jensen's claim for summary judgment was upheld. Lord Justice Chadwick said this:

"The first question raised by this appeal is whether the adjudicator's determination in the present case is binding on the parties … The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error … if the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity … in the present case the adjudicator did confine himself to the determination of the issues put to him. This is not a case in which he can be said to have answered the wrong question. He answered the right question. But, as is accepted by both parties, he answered that question in the wrong way. That being so, notwithstanding that he appears to have made an error that is manifest on the face of his calculations, it is accepted that, subject to the limitation to which I have already referred, his determination is binding upon the parties."

The mere fact that the decision itself might be unfair is not a ground for resisting enforcement. The adjudicator determined the issues which were put before him by the parties. There was no breach of the rules of natural justice as the parties were given a reasonable opportunity to be heard.

CARILLION CONSTRUCTION LTD v DEVONPORT ROYAL DOCKYARD LTD[2]

Carillion Construction Ltd ("Carillion") was retained by Devonport Royal Dockyard Ltd ("Devonport") as the subcontractor to carry out the upgrading of 9 Dock which included replacing the dock walls and base and construction of 4 new buildings. The contractual completion date was 21 March 2001. The parties also entered into an alliance agreement which provided that the payment mechanism under the subcontract was to be calculated on a target costs basis with a gain/pain share element. All in all, the target cost was integral to the calculation of the amount payable to Carillion.

There were substantial delays during the course of the works as a result of design issues for which Carillion was not responsible. Subsequently, a dispute arose between the parties as to whether

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any further sums were due to Carillion in respect of the subcontract works and in particular, the calculation of the target costs. The dispute was eventually referred to adjudication. Carillion sought, *inter alia*, for the payment of £10,451,237.61 in respect of further amount due to it and as damages for breaches of the relevant subcontracts, as well as a bonus of £1,500,000.

Cause papers between the parties ran up to hundreds of pages. The parties also sent lengthy letters to the adjudicator and served numerous witness statements, expert reports and appendices which in total amounted to about 29 lever arch files of materials. No oral hearing was held.

In his decision, the adjudicator awarded, *inter alia*, the payment of £10,451,237.61 and the bonus of £1,500,000 to Carillion. The adjudicator also awarded Carillion £1,199.905 as interest. The adjudicator directed Devonport to pay Carillion within 7 days. Devonport did not do so and challenged the adjudication decision on, *inter alia,* the basis that (i) the adjudicator disregarded certain submissions that was made in relation to the calculation of the target costs; (ii) the adjudicator disregarded Devonport's additional defects claim; and (iii) the adjudicator failed to allow the parties to submit on the 20% deduction made thereto. Devonport argued that the adjudicator's decision was made on an unfair basis in breach of the natural justice.

In dismissing Devonport's challenges, Jackson J set out the following four basic principles:

(1) The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish);

(2) The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law;

(3) Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision; and

(4) Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice.

On appeal, Chadwick LJ upheld the High Court's decision and further stated that:

"It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator … It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice" … the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case … The need to have the "right" answer has been subordinated to the need to have an answer quickly."

The principles in this case have been consistently applied in subsequent cases. It is clear that, unless the breach of natural justice is material, as long as the adjudicator has considered each of the parties' arguments, errors arising from the adjudicator's decision will not be a breach of natural justice so long as the adjudicator had answered the right question referred to him.

KIER REGIONAL LTD v CITY & GENERAL (HOLBORN) LTD[3]

Kier Regional Ltd ("Kier"), a building contractor, entered into a contract dated 6 November 2001 to carry out refurbishment and rebuilding works at the site of the Former Patent Office Library in London for City & General (Holborn) Ltd ("C&G"). The contract sum was £11,650,000. There were delays and Kier contended that the sum which was due to it on the final account amounted to approximately £30 million.

There were a number of adjudications between the parties. In adjudication no. 2, the adjudicator awarded Kier an extension of time of 28 weeks. This was in addition to an extension of time of 31 weeks previously granted by the contract administrator. Following that, Kier made an application for loss and expense amounting to £1,330,012. Nevertheless, the interim certificate of valuation no. 32 issued by the contract administrator did not include the loss and expenses in respect of the extension of time awarded in adjudication no. 2.

Dissatisfied with the sums in interim certificate of valuation no. 32, Kier initiated adjudication proceedings no. 3 against C&G. Having considered the parties' arguments, the adjudicator delivered his decision on 28 October 2004. Kier was awarded a total of £719,295.40.

However, the adjudicator, in making the decision in favour of Kier, considered the 2 expert reports tendered by C&G as evidence in evaluating the loss and expense of Kier to be irrelevant. He found that these 2 expert reports were new evidence which were not known by the parties at the time when the dispute had crystallised and therefore, the adjudicator did not take the reports into consideration.

C&G refused to pay Kier. Kier applied for summary judgment in respect of its claim. During the hearing, Kier's solicitors raised a

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COURT ADOPTIONS IN WEST MALAYSIA

Ezane Chong explains the requirements for a court adoption in West Malaysia

Earlier this year, it was reported in *The Star* that the Malaysian police had successfully busted a baby-trafficking syndicate under two operations code-named *Ops Pintas Sayang I* and *Ops Pintas Sayang II*, rescuing 10 and 22 children respectively from their adoptive parents.

It was also reported that these syndicates offered pregnant foreign women from Thailand, Indonesia and Bangladesh between RM2,500 and RM4,500 for their babies. These babies would then be sold to mostly childless couples for between RM18,000 and RM30,000 each, together with the original birth certificates. This type of "easy adoption" is ostensibly hassle free - the adoptive parents merely need to sign some papers, pay for the child and the child is theirs. Only that they are not. Not legally anyway.

IMPLICATIONS OF EASY ADOPTIONS

The crippling of this baby-for-sale syndicate has left 32 frightened children in the care of welfare homes, separating them from their distraught adoptive parents, whilst these parents were being hauled up for questioning by the police for illegal adoption.

> "There are only two ways of legally adopting a child in Malaysia … a "registrar adoption" (or) a "court adoption""

Apart from the immediate and long term trauma which may be suffered by these young children as a result of being removed from their adoptive parents who are possibly the only parents they know and love, comes the devastating legal implications of adopting a child through improper channels. A child not adopted through the proper adoption process will be stateless because there is no legal documentation of where the child is from. Not considered a Malaysian, that child cannot go to school, apply for a MyKad or a passport or secure a job, own property or even get married.

So how can a prospective parent or parents ensure that the child they adopt is legally theirs?

LEGAL ADOPTIONS IN MALAYSIA

There are only two ways of legally adopting a child in Malaysia.

The first is an adoption made under the Registration of Adoption Act 1952. Commonly known as a "registrar adoption" or "departmental adoption", this type of adoption is done via the National Registration Department ("NRD"). The prospective parents, who can be either Muslims or non-Muslims, will need to take care of the child for at least 2 years before they may apply to register the adoption of their prospective child at the NRD. The adoptive parents of a child adopted by way of a registrar adoption only have custodial rights over the adopted child, with responsibilities to care, maintain and educate him/her. That child will not have a right to inherit any property of their adoptive parents if the latter die intestate.

The second, typically known as a "court adoption" is an adoption made through the court process, under the Adoption Act 1952.

This article discusses the legal process that governs court adoptions in West Malaysia.

COURT ADOPTIONS

Pre-conditions

Before a prospective parent or parents may adopt via the court process, the following pre-conditions must be satisfied:

(1) the applicant or applicants or in the case of a joint-application, one of the applicants has attained the age of 25 years and is at least 21 years older than the child whom he/she proposes to adopt;

> "The guardian ad litem will visit the applicant(s) and the child at their home and interview the applicant(s)"

(2) the applicant(s) must ordinarily be a resident of West Malaysia and the child must likewise, be a resident;

(3) the child must have been in the continuous care and custody of the applicant(s) for at least 3 consecutive months immediately preceding the date of the adoption order; and

(4) the applicant(s) must have given not less than 3 months written notification to the Social Welfare Department in the state where the applicant(s) resides of the intention to adopt the child.

An adoption order will not be made in any case where the sole applicant is a male and the child in respect of whom the application is made is a female unless the court is satisfied that there are special circumstances which justify, as an exceptional measure, the making of such an order.

Consent

The written consent of every person who is a parent or guardian of the child must be obtained. This is usually the biological mother and father of the child named in the child's birth certificate. If only the mother's name appears on the child's birth certificate, then consent of the biological father is not required.

Consent may be dispensed with if the court is satisfied that the

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parent or guardian of the child has abandoned, neglected or persistently ill-treated the child.

Consent of the applicant's spouse is also required, unless the application is made jointly.

Documentation requirements

The original birth certificate of the child to be adopted must be produced.

In the case of a joint application by a lawful husband and wife, a certified true copy of their marriage certificate must be provided.

Legal procedure

The standard procedure usually entails 2 court hearings.

At the first hearing, the court will appoint a guardian *ad litem*, who will usually be an officer from the Social Welfare Department of the state where the child or applicant(s) resides. The guardian *ad litem* will visit the applicant(s) and the child at their home and interview the applicant(s). Usually 2 visits are made. The guardian *ad litem* then prepares a report to court.

The second hearing will be fixed no earlier than 3 months after the date of the first hearing.

The personal attendance of the applicants, the child, the guardian *ad litem* and the parent(s) or guardian of the child are required at the second hearing.

Attendance of the child can be dispensed with if the court is satisfied from the report by the guardian *ad litem* that special circumstances exist which render it inexpedient or unnecessary for the child to be present. In the case of any other party, for example, the biological parents, attendance may be dispensed with if the court is satisfied that such party cannot be found or is incapable of giving consent.

If the guardian *ad litem*'s report is in favour of the adoption and all other matters are in order, for example, all the necessary dispensation orders have been obtained, then an adoption order will be made on the second hearing date.

Once an adoption order under the Adoption Act 1952 has been made, a replacement birth certificate will be issued which

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ROUGH JUSTICE

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preliminary objection against the admission of supplementary documents lodged by C&G's solicitors. The judge dismissed Kier's preliminary objection. The judge took the view that, although the supplementary documents should have been served within the specified time, it had not taken anyone by surprise. The Court was not willing to allow technical breaches to stand in the way of justice and the supplementary documents were received in evidence.

The main issue was this: *"That the Adjudicator at paragraph 3.2(d) of the decision (page 6) wrongly refused to pay any regard to two expert reports submitted by C&G in its response to the reference. As a result the process leading to the decision was manifestly unfair and the decision is a nullity."*

C&G's solicitors submitted that the failure of the adjudicator to take into consideration the 2 expert reports amounts to "the plainest case" of breach of the rules of natural justice. On the other hand, Kier's solicitors characterised the production of the new evidence at a late stage of the adjudication proceedings as "defence by ambush".

Jackson J held that the case was certainly not one of the "plainest case" of breach of natural justice as submitted by C&G's solicitors. In fact, His Lordship held that *"the error allegedly made by the Adjudicator is not one which could invalidate his decision. It can be seen from the decision as a whole that the Adjudicator considered each of the arguments advanced by C&G in its written response. At worst, the Adjudicator made an error of law which caused him to disregard two pieces of relevant evidence, namely the expert reports … In the light of the Court of Appeal's decision in Carillion, that error would not render the Adjudicator's decision invalid."*

For this reason, Kier's application for summary judgment was allowed.

CONCLUSION

Undeniably, "rough justice" is the feature that underpins the statutory adjudication process. The mere fact that the adjudication decision is wrong is not, without more, sufficient to constitute a breach of natural justice.

The English principles on the rules of natural justice as demonstrated in the aforesaid three cases would be instructive to our adjudicators when conducting adjudication proceedings under the CIPAA. They will also provide guidance to our courts when called upon to determine whether an adjudicator has acted in breach of the rules of natural justice.

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[1] [2001] 1 All ER (Comm) 1041
[2] [2005] All ER (D) 202 (Nov)
[3] [2005] EWCA Civ 1358

THE TALE OF THE STICK AND THE COIL

Joshua Teoh considers the adequacy of the examination procedure under the Industrial Designs Act 1996

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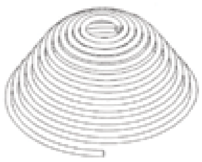
INTRODUCTION

In the unreported cases of *Koay Kar Kheng v Rong Qiang Incense (M) Sdn Bhd* (Suit No. 25IP-9-07/2012) and *Koay Kar Kheng v Seong Leong (M) Sdn Bhd* (Suit No. 25IP-10-07/2012), the High Court of Malaya revoked and expunged Industrial Design Registration No. 05- 00975-0101 for the design of incense stick ("Stick Design") and Industrial Design Registration No. 06-00853-0101 for the design of incense coil ("Coil Design") (collectively "Purported Designs") from the Register of Industrial Designs ("Register") by reason that the Purported Designs were not new on the respective priority dates of 15 November 2005 for the Stick Design and 7 November 2006 for the Coil Design.

THE PURPORTED DESIGNS	
	
Registration No. 05- 00975-0101 in Class 99 for the Stick Design	Registration No. 06-00853-0101 in Class 99 for the Coil Design

THE APPLICATIONS BEFORE THE HIGH COURT

The applications to the High Court for the relief to revoke and expunge the Purported Designs from the Register were both initiated by a trade association, Persatuan Pedagang-Pedagang Barang-Barang Sembahyang Malaysia ("the Association"), whose members consist of incense traders and manufacturers in Malaysia. These applications were filed following the refusal of the registered proprietors to heed the repeated requests from the Association to voluntarily de-register the Purported Designs.

Furthermore, the applications were necessary following the issuance of a warning notice in a Chinese national newspaper by the proprietors of the Purported Designs claiming exclusive rights over the Purported Designs which left many incense traders and manufacturers feeling worried and anxious about their ability to freely continue in the trade.

THE FINDINGS OF THE HIGH COURT

In both applications before the High Court, the Association produced evidence of prior designs in Malaysia in the form of photographs, advertisements, publications and a documentary film featuring incense sticks and coils that are identical to the Purported Designs. Such evidence also showed that the prior designs had been in existence long before the priority dates of the Purported Designs. Relying on these prior designs, the Association submitted that the Purported Designs were not new at their respective priority dates and should be revoked and expunged from the Register under Section 24(1)(a) and/or Section 27(1)(a) of the Industrial Designs Act 1996 ("IDA").

In support of its reliance on Section 24(1)(a) of the IDA, the Association submitted that it is a person aggrieved by the Purported Designs remaining in the Register without sufficient cause or wrongfully remaining in the Register. The Association, whose purpose is to protect the interests of incense traders and manufacturers, was a party that was clearly affected by the registration of the Purported Designs and as such, was entitled to seek an order from the Court to expunge the Purported Designs from the Register.

The Association also submitted that the Court had the jurisdiction to revoke and expunge the Purported Designs under Section 27(1)(a) of the IDA which allows any person to apply to the Court to revoke the registration of an industrial design on the ground that the industrial design has been disclosed to the public prior to the priority date of the application for registration of that industrial design.

Upon examining the evidence of the prior designs produced by the Association, the Court held that the novelty of both the Purported Designs were defeated when it was shown that they were substantially similar to the prior designs. The Court opined that the Purported Designs need not be identical to prior designs for them to lose their novelty and that their difference with the prior designs in immaterial details or features commonly used in the relevant trade will not render them new.

Accordingly, the Court held that the Purported Designs were liable to be revoked and expunged from the Register. It was also held that the Association could rely on either Section 24(1)(a) or Section 27(1)(a) or both, of the IDA, as the Association qualified as a person aggrieved by, or interested in, the Purported Designs. Furthermore, the Court observed that when comparing the Purported Designs with the prior designs, the Court should only be concerned with the appearance of these designs and not their dimensions.

OVERVIEW OF THE EXAMINATION PROCEDURE

The IDA does not permit an industrial design to be registered unless it is new. However, under the current examination procedure, an applicant for the registration of an industrial design would only need to satisfy the procedural requirements

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DOCTORS WITH SHARP SCALPELS BEWARE !

Harold Tan explains the Singapore Court's decision in Lim Mey Lee Susan v Singapore Medical Council

The key question that arose in *Lim Mey Lee Susan* v *Singapore Medical Council* [2013] SGHC 122 was whether doctors who practice medicine in Singapore are under an ethical obligation to charge a fair and reasonable fee for their services. This question was answered in the affirmative by the High Court of Singapore that comprised a panel of three judges.

THE FACTUAL BACKGROUND

The Appellant in the case, Dr. Susan Lim, is a registered medical practitioner in Singapore whose primary area of practice is general surgery. In or around 2001, the Appellant began treating a member of the royal family of Brunei ("Patient") for breast cancer. The Appellant was the Patient's principal physician and was responsible for the Patient's overall care until the Patient's demise on 19 August 2007.

The arrangement between the parties with regard to the Patient's medical fees was that such fees would be paid for by the Government of Brunei. For her services and the services rendered by other doctors from January to June 2007, the Appellant issued 94 invoices. The total quantum of the fees charged in those invoices covered 110 treatment days and amounted to approximately S$24 million.

> **" a doctor is under an ethical obligation not to take advantage of his patients (whether monetarily or otherwise) "**

The Bruneian authorities were dissatisfied with the invoices which they considered excessive and lodged a complaint with the Ministry of Health of Singapore. A series of discussions ensued, which ultimately led to the Respondent in this case, the Singapore Medical Council, issuing to the Appellant in July 2009 a notice of inquiry containing 94 charges of professional misconduct under section 45(1)(d) of the Medical Registration Act (Cap 174, 2004 Rev Ed).

THE CHARGES AGAINST THE APPELLANT

The Disciplinary Committee ("DC") appointed by the Respondent to conduct a hearing on the charges, convicted the Appellant on all 94 charges of professional misconduct proffered against her. The DC, in its decision, grouped the 94 charges into 2 broad categories:

(a) The first 83 charges were for allegedly invoicing the Patient medical fees that were far in excess of and disproportionate to the services rendered by the Appellant and her medical team.

(b) The remaining 11 charges were for allegedly invoicing the Patient medical fees that were far in excess of and disproportionate to the services rendered as well as falsely representing that such fees had been invoiced by and/ or would be payable to certain named doctors, when the Appellant knew, or ought to have known, that such representation was not true in so far as she had added a significant and undisclosed markup to the actual fees charged by those doctors.

On finding the Appellant guilty of all 94 charges, the DC ordered that the Appellant:

(i) be suspended from practice for a period of 3 years;
(ii) pay the maximum financial penalty of S$10,000;
(iii) be censured in writing;
(iv) undertake, on her return to practice, not to charge her patients more than a fair and reasonable fee for her services; and
(v) pay the costs of the disciplinary proceedings.

APPEAL TO THE SINGAPORE HIGH COURT

Dissatisfied with the decision of the DC, the Appellant appealed against her conviction to the Singapore High Court. The Appellant's appeal was unanimously dismissed by the three judges who comprised the panel.

In coming to its decision, the court dealt with five principal issues in its written judgment of over 150 pages, the findings of which are summarised below.

(1) The court began by answering the key question as to the meaning of a "profession". In the context of the medical profession, the court found that given a doctor's specialised knowledge and training, and his corresponding duty to utilise these skills with conscience and dignity in the patient's best interest, a doctor is under an ethical obligation not to take advantage of his patients (whether monetarily or otherwise). This ethical obligation includes an obligation to charge a fair and reasonable fee for services rendered, and excessive overcharging would constitute a breach of this obligation. In the court's opinion, this ethical obligation operates over and above contractual and market forces, and is not superseded by a valid fee agreement between the parties.

(2) The court went on to hold that a doctor's ethical obligation to charge a fair and reasonable fee for services rendered is an inherent one and would bind a doctor even if such obligations had not been published in any legislation or ethical code at the material time.

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THE ANTON PILLER ORDER: A SEARCH WARRANT IN DISGUISE?

Kuek Pei Yee and Sri Richgopinath trace the origins of the Anton Piller Order

INTRODUCTION

"Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say, 'Get out'. … But the order sought in this case is not a search warrant. It does not authorise the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: it brings pressure on the defendants to give permission. It does more. It actually orders them to give permission – with, I suppose, the result that if they do not give permission, they are guilty of contempt of court."

The above *dicta* was pronounced by Lord Denning MR, with the concurrence of Ormrod LJ and Shaw LJ, in *Anton Piller KG v Manufacturing Processes Ltd and Others* [1976] 1 All ER 779, 782-783; a case that has gone down in the annals of English legal history for introducing "a search warrant in disguise".

> **"the order sought … only authorises entry and inspection by the permission of the defendants"**

An Anton Piller Order has some resemblance to search warrants, as it compels the Defendant *in personam* to permit entry and inspection of its premises and records. While the Order does not accord the Plaintiff the right to forcefully enter the Defendant's premises without his permission, the reality is that a refusal of permission by the Defendant will be at his peril of being in contempt of Court and further, having adverse inferences being drawn against him in the suit at hand.

THE ANTON PILLER CASE

In the *Anton Piller Case*, the Plaintiff was a reputable German manufacturer of electric motors and generators. The Plaintiff had designed and was on the verge of launching a new frequency converter called "the silent block". Manufacturing Processes Ltd was the Plaintiff's agent and dealer in the United Kingdom, and by virtue of that relationship, came into possession of confidential information relating to "the silent block".

As the story goes, two little birds whispered into the Plaintiff's ear that Manufacturing Processes Ltd had been liaising covertly with certain other German companies to produce a copycat of "the silent block" using the Plaintiff's confidential information. If a copycat of "the silent block" was allowed to hit the market before or contemporaneously with their own, the Plaintiff feared that their business would be ruined. The Plaintiff was determined to immediately reclaim possession of its confidential information and to prevent any further use or dissemination of such information.

Further, the Plaintiff was concerned that any documents showing the Defendants' wrongdoing should be secured and preserved for purposes of the trial. As such, it sought an injunction from the court to compel the Defendants to deliver up the confidential information and other documents.

As the Plaintiff also feared that the Defendants would destroy the documents or send them out of the jurisdiction, such that none existed by the time that discovery was had in the suit, it applied, *ex-parte*, for an interlocutory injunction and a "search and seizure" order against the Defendants. The Court of first instance granted the interlocutory injunction, but refused to make any order pertaining to the "search and seizure". The Plaintiff appealed to the Court of Appeal which allowed the appeal.

THE ANTON PILLER ORDER

It is clear from Lord Denning MR's pronouncement that an Anton Piller Order does not authorise the Plaintiffs or anyone else to enter the Defendants' premises against their will or with the use of any force. It only authorises entry and inspection by the permission of the Defendants. However, it brings pressure to the Defendants to give permission. In fact, it actually orders them to give permission and if they do not, they may be guilty of contempt of court.

His Lordship further observed as follows:

This may seem to be a search warrant in disguise. But it was fully considered in the House of Lords 150 years ago in East India Co v Kynaston and held to be legitimate. Lord Redesdale said ((1821) 3 Bli 153 at 163):

> *'The arguments urged for the Appellants at the Bar are founded upon the supposition, that the Court has directed a forcible inspection. This is an erroneous view of the case. The order is to permit; and if the East India Company should refuse to permit inspection, they will be guilty of a contempt of the Court … It is an order operating on the person requiring the defendants to permit inspection, not giving authority of force, or to break open the doors of their warehouse.'*

Although the case cited was not concerned with documents but was in relation to the value of a warehouse which could not be obtained without an inspection, His Lordship took the view that the distinction drawn by Lord Redesdale affords ground for thinking that there is jurisdiction to make an order that the Defendants 'do permit' when it is necessary in the interests of justice.

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PRINCIPLES AND GUIDELINES FOR GRANTING THE ORDER

Lord Denning MR held that such an Order can be made by a judge *ex-parte* but should only be made where:

(1) It is essential that the Plaintiff should have inspection so that justice can be done between the parties;
(2) If the Defendants are forewarned, there is a grave danger that vital evidence will be destroyed, lost, hidden or taken beyond the jurisdiction so that the ends of justice are defeated; and
(3) The inspection would do no real harm to the Defendants or their case.

Consistent with this, Ormrod LJ opined that such an Order should only be made when there is no alternative way of ensuring that justice is done and laid down three essential pre-conditions for making such an Order:

(1) There must be an extremely strong *prima facie* case;
(2) The damage, potential or actual, must be very serious to the Plaintiff; and
(3) There must be clear evidence that the Defendants have in their possession incriminating documents or things and that there is a real possibility that they may destroy such material before any *inter partes* application can be made.

> **“There must be an extremely strong *prima facie* case”**

The Court of Appeal further provided safeguards against abuse of such an Order and placed the responsibility upon the Plaintiff's solicitors for ensuring that the Order is carried out meticulously and carefully with the fullest respect for the Defendants' rights. This safeguard has been further developed in subsequent cases, and the Court now requires the Order to be executed by a "supervising solicitor" from a firm independent of the Plaintiff's solicitors.

In serving and executing the Order, the supervising solicitor should explain the Order to the Defendants and give them the opportunity to consult their own solicitors. If the Defendants wish to apply to discharge the Order as having been improperly obtained, they must be allowed to do so. If the Defendants refuse permission to enter or to inspect, the Plaintiff must not force its way in. It must accept the refusal and bring it to the Court's attention, if need be, on an application to commit.

Subsequent to the *Anton Piller Case*, the law on the granting of such an *ex-parte* Order was further developed and led to the issue of *Practice Direction (Mareva Injunctions and Anton Piller Orders)* [1994] 4 All ER 52. This Practice Direction sets out detailed guidelines to assist judges and those who apply for such Orders to enable a consistent approach to be adopted in relation to the form and execution of such Orders.

THE MALAYSIAN SCENE

The *Anton Piller Case* was first cited with approval in *Lian Keow Sdn Bhd v C Paramjothy & Anor* [1982] 1 MLJ 217, a case concerning a claim for land held in trust for the Plaintiff, wherein the Court granted an order to prevent the first defendant from destroying the trust deed and file relating to the said land.

To date, the Malaysian Courts have not issued any Practice Direction in respect of Anton Piller Orders. However, this does not mean that a successful applicant is at liberty to formulate his own contents and mode of execution of the orders granted. The Malaysian Court of Appeal in *Arthur Anderson & Co v Interfood Sdn Bhd* [2005] 6 MLJ 239 held that, notwithstanding the absence of such practice direction, "… *it should not be assumed that in Malaysia a successful applicant for an Anton Piller order is at liberty to formulate his own contents and mode of execution of the order granted. That is because even before the issuance of the 1994 Practice Direction the English courts had embedded guidelines and safeguards when granting such relief.*"

The Court of Appeal, citing English cases, went on to affirm the High Court decision of *Makonka Electronic Sdn Bhd v Electrical Industry Workers' Union & Ors* [1997] MLJU 93 which sets out the requirements and safeguards pertaining to the application, grant and execution of Anton Piller Orders in the following terms:

The Anton Piller order is a valuable procedure and ought to be preserved. The efficacy, however, of the Anton Piller procedure depends very much on all the parties seeking a fine balance to protect their respective interests and rights. A solicitor acting for an applicant must remember at all times that he is an officer of the court, and to ensure that the application he is putting forward contains adequate safeguards of the basic rights of the other party. It is not that he is obliged to act for the other party, but that he is bound to ensure the procedure is not abused. He must put forward a reasonable application if it is to be entertained. He should for example ensure:

(1) That there is full and frank disclosure of all relevant information and evidence to justify the issue of the order.
(2) The order must be drawn such that it extends no further than the minimum necessary to achieve the preservation of evidence which may be otherwise removed or destroyed.

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QUESTIONING THE ROYALTY

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there had to be a combination of two features. First, the royalty had to be payable to the manufacturer or to another person as a consequence of the export of the goods. Second, the party to whom the royalty was payable must have control of the situation that goes beyond the ordinary rights of a licensor that gives it the ability to determine whether the export to the country in question could or could not occur.

Thus *Mattel Canada* and *Nike New Zealand* presented the Federal Court with different definitions of a "condition" of sale.

OPINION OF THE WTO TECHNICAL COMMITTEE

The Federal Court also considered Advisory Opinion 4.13 ("Advisory Opinion") of the Technical Committee on Customs Valuation ("TCCV") established under the WTO Valuation Agreement.

The Advisory Opinion was consistent with the approach adopted by the Canadian Supreme Court in *Mattel Canada*. According to the TCCV, where the requirement to pay royalty results from a separate agreement unrelated to the sale for export of the goods, royalty is not a condition of the sale of the goods. Therefore, it should not be added to the price actually paid or payable as an adjustment for the purpose of assessment of customs duty.

In answering the questions on appeal, the Federal Court stated that the interpretation of Regulations 4 and 5 cannot be an isolated and domestic exercise. Mindful of Malaysia's obligations under the WTO Agreement, the Federal Court gave due regard to the Advisory Opinion issued by the TCCV. It observed that *Mattel Canada* was not only consistent with the Advisory Opinion but also with the approach in the United Kingdom, Australia, India and Singapore, all of which are WTO member countries. In this respect, *Nike New Zealand* was viewed as inconsistent with the international approach and as such, an exception.

The Federal Court stressed the principle of strict interpretation in relation to revenue or taxing statutes. It referred to the Supreme Court case of *National Land Finance Co-operative Society Ltd v Director-General of Inland Revenue* [1994] 1 MLJ 99 which held that in taxation matters, courts would refuse to adopt a construction which would impose liability where doubt exists.

In view of Clause 13.1 of the IP Agreement, the Federal Court stated that the obligation to pay royalty arose from a separate agreement that was unrelated to the sale for export of the goods to Malaysia. Accordingly, it took the view that royalties paid by Nike Malaysia under the IP Agreement should not be included for duty purposes as it did not have to pay royalty in order to purchase the goods from the supplier. The Federal Court then answered both the questions posed in the negative and set aside the orders of the Court of Appeal and reinstated the High Court orders.

PUSHING THE ENVELOPE

A year after *Mattel Canada* was decided, the Federal Court of Appeal of Canada in *Reebok Canada v Deputy Minister of National Revenue, Customs and Excise* [2002] F.C.J. No. 518 extended the principles laid down in *Mattel Canada* by holding that royalty payment will not necessarily be a transaction condition even in a case where both the sale contract and royalty contract are made between the same parties.

According to the Court in *Reebok Canada*, the outcome will depend on the wording of the agreements. In this case, the Court held that the royalty payment was not a transaction condition even though the royalty contract and the sale contract were made between the same parties as the agreements did not contain provisions which entitled the seller to be relieved of his obligation to sell the goods if the buyer did not make the royalty payment.

ANALYSIS

The decision of the Federal Court in *Nike Malaysia* is a landmark decision. It authoritatively determines that for the purposes of determining the customs duty payable on goods, royalty paid is not to be included in the price paid, or payable, for the goods in the following circumstances:

(1) the royalty is payable to a party who is not the exporter of the goods;
(2) the royalty is payable under an agreement that is separate and distinct from the agreement for the sale of goods; and
(3) the payment of the royalty is not a condition for the sale and export of the goods.

The decision by Mohamad Ariff JC which was approved by the Federal Court was followed in *Colgate-Palmolive Marketing Sdn Bhd v Ketua Pengarah Kastam* [2011] 1 LNS 1878 and *Levi Strauss (Malaysia) Sdn Bhd v Ketua Pengarah Kastam, Malaysia* [2011] 1 LNS 1581 (both decided by Mohd Zawawi Salleh J) where the royalty and the purchase price of the products were separate and independent transactions between different parties. These High Court decisions have very recently been upheld by the Court of Appeal.

In August 2013, the decision of the Federal Court was followed in the unreported cases of *EMI (Malaysia) Sdn Bhd v Ketua Pengarah Kastam* (Suit No: R-25-517-2010) and *Persatuan Industri Rakaman Malaysia v Ketua Pengarah Kastam* (Suit No: R-25-516-2010).

The decisions of the High Court and the Federal Court in *Nike Malaysia* are to be commended as they adopt the Advisory Opinion of the TCCV and align the determination of customs duty with the practices in other WTO member countries, such as the United Kingdom, Australia, India and Singapore.

It will be interesting to see whether the Malaysian Courts will adopt the principles laid down in *Reebok Canada* in a situation where the facts are substantially similar to that case.

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DOCTORS WITH SHARP SCALPELS BEWARE !

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(3) After reviewing the findings of the DC in respect of each and every charge brought against the Appellant, the court concluded that there was sufficient evidence to make out all the 94 charges of professional misconduct in the form of overcharging. The Court held on the facts of the case that the fees charged by the Appellant were grossly excessive and that many invoices raised by the Appellant were issued in an unsystematic, arbitrary and, ultimately, opportunistic manner. By way of an example, the evidence revealed that the Appellant had in one instance invoiced the Patient for S$211,000 for an "urgent intravenous therapy for tumour of spine" when the treatment had been carried out by another doctor who only charged S$400 for that treatment.

(4) The court also held that there was sufficient evidence to make out the 11 charges alleging (in addition to overcharging) false misrepresentation on the part of the Appellant in having falsely represented to the Patient and/or the Patient's representatives that the 11 impugned invoices represented fees due to third party doctors. In each of these 11 cases, the Appellant issued invoices which read *"Professional Fees for Dr …"*. In none of these invoices was there any express or implied reference to any input by the Appellant herself, and yet the Appellant had added a significant undisclosed mark-up of fees in the invoices. The court nevertheless found the Appellant not to have deliberately falsified the invoices.

"This ethical obligation includes an obligation to charge a fair and reasonable fee for services rendered"

(5) Finally, the court held that the sentence meted out by the DC on the Appellant commensurate with the gravity of the professional misconduct in the case. The court agreed with the DC's view that it did not think it appropriate to remove the Appellant's name from the register of medical practice given the fact that the Appellant:

(i) did not, in the context of the 11 invoices for fees payable to third party doctors, deliberately falsify any of those invoices;
(ii) had displayed exceptional care to the Patient; and
(iii) is an exceptionally skilled doctor who has brought credit to Singapore.

CONCLUSION

The decision of the High Court of Singapore is final under Section 55(10) of the Medical Registration Act (Cap 174, 2004 Rev Ed) and is not subject to further appeal.

This case is significant as it is the first reported case in Singapore of a doctor having been found guilty of professional misconduct for overcharging a patient excessively for medical services rendered. There are no similar cases reported in Malaysia.

The finding by the Singapore courts that a medical practitioner, as a professional, is bound by an inherent ethical obligation to *inter alia* charge fair and reasonable fees for services rendered, and that the ethical obligation overrides the doctor's commercial obligations and interest, may bring forth interesting implications to other professions, such as architects, engineers and lawyers.

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Editor's Note: The disciplinary proceedings in this case were commenced against the Appellant under the Medical Registration Act (Cap. 174, 2004 Rev. Ed). The Act has since been amended pursuant to Medical Registration (Amendment) 2010 Act. If proceedings had been commenced after the Amendment Act came into operation, the maximum financial penalty that may be imposed against a medical practitioner would be S$100,000 instead of S$10,000.

COURT ADOPTIONS IN WEST MALAYSIA

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names the adoptive parent(s) as the child's new parent(s). A child adopted through the court process is deemed to be a child born to the adoptive parent, or parents in lawful wedlock.

CONCLUSION

Parents who adopt using the proper methods need not fear that they may, someday, have their child forcibly taken away from them by the authorities, as was the case with the 32 children 'rescued' under *Ops Pintas Sayang I* and *Ops Pintas Sayang II*. It may be easier or faster to buy a baby illegally, but in the long run the price to pay may be extremely high, and sadly, it is often the child who has to pay this price.

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PADDLING WITH THE DRAGONS

The Skrine Dragons' Racing Season for 2013 consisted of 2 events. The first event was the 28th Sabah Dragon Boat Race that took place on 15 June 2013 at Likas Bay, Sabah. This competition drew more than 35 national and international dragon boat crews. It was the Dragons' first experience at racing in the open sea.

Amidst crashing waves and white sands, the Dragons fielded a 12-man boat in the 200 metres Mix Team Category and sprinted to a respectable 3rd place finish in the Heats. Overall, the Dragons ranked 9th out of the 18 teams that took part in the 200 metres Mix Team Category event.

The Dragons then hosted the 2nd Skrine Regatta on 28 September 2013 at the Putrajaya Water Sports Complex. The Regatta brought together more than 300 people and 6 dragon boat corporate teams comprising the Bursa Bulls, EY Tritons, HSBC Water Lions, KPMG Vikings, PwC Dragons and the Skrine Dragons.

Each team raced 3 times in a 350 metres Mix Team category race. After a morning of adrenaline, passion and fun, the Skrine Dragons emerged as Grand Finals Champions followed closely by the KPMG Vikings and PWC Vikings. EY Tritons won the Minor Finals, followed by HSBC Water Lions and Bursa Bulls.

The 2nd Skrine Regatta was made more meaningful as the event raised RM30,000 for the National Autism Society of Malaysia. Our heartfelt thanks to all the corporate teams for their generous contribution to a worthy cause.

Paddles up!








THE ANTON PILLER ORDER:

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(3) *The application includes first alternative prayers for orders to produce and deliver specific evidence. Only upon the respondents' failure to produce and deliver such evidence would the other orders of the Anton Piller order (sic) are to come into effect. This would offer a "less draconian unless necessary" approach, and by specifying the evidence to be produced avoid fishing expeditions and unnecessary invasion into unrelated information.*

(4) *That the application contains clear and specific undertakings that the order will be served by a solicitor who will at the same time supply a copy of the application and all affidavits and documents put before the judge in making the application; explain its exact terms to the respondent; advise him to seek immediate legal advice and that he has a reasonable time to do so.*

(5) *That the application contains clear undertakings for damages, and that the evidence obtained will not be used in any other proceedings without the consent of the court.*

(6) *As a further safeguard, to have a separate solicitor to supervise the execution by the applicants' solicitors, and persons who are to accompany him are to be named in the order so that they may be identified by the respondent (see Vapormatic Co Ltd v Sparex Ltd [1976] 1 WLR 939).*

"there is a grave danger that vital evidence will be destroyed, lost, hidden or taken beyond the jurisdiction"

CONCLUSION

The Anton Piller Order is a powerful and effective tool which can be employed in cases where the Plaintiff is faced with a real risk that evidence would be destroyed by the Defendants. It has been described by Donaldson LJ in *Bank Mellat v Nikpour* [1985] FSR 87 as "*one of the law's two nuclear weapons.*"

Due to the draconian nature of the Order, the Courts are understandably circumspect in granting it. To quote Ormrod LJ, *"The proposed order is at the extremity of this court's powers"*. Therefore, it is of no surprise that the application, grant and execution of such an Order are subject to stringent requirements and safeguards to ensure that the rights of the parties are observed and justice is delivered.

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THE TALE OF THE STICK AND THE COIL

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and regulations prescribed under the IDA in order to qualify for the registration sought by him.

When submitting an application for registration, an applicant must comply with, among others, Section 14(1) of the IDA which stipulates *inter alia* that an application for the registration is to be: (i) made in the prescribed form and filed at the Industrial Designs Registration Office; (ii) accompanied by the prescribed number of representations of the article to which the application relates; (iii) contain a statement of novelty in respect of the design to which the application relates; and (iv) accompanied by the prescribed filing fee.

The examination procedure is set out in Section 21 of the IDA and imposes a duty on the Registrar to confirm whether the application complies with the formal requirements prescribed under the IDA and the Industrial Designs Regulations 1999. If the requirements under Section 21 of the IDA are complied with, the Registrar is to register the industrial design applied for and issue a certificate of registration under Section 22 of the IDA. Such certificate of registration is *prima facie* evidence of the validity of the registration.

"the novelty of both the Purported Designs was defeated when it was shown that they were substantially similar to the prior designs"

CONCLUSION

It appears that the pre-registration examination of an industrial design under the IDA caters only for formality examination. There is no provision in the IDA for any substantive examination to verify the novelty of the industrial design for which registration is sought as the Registrar would, among others, accept at face value the representations in the statement of novelty submitted by the applicant. Consequently, the nature of the examination procedure prescribed under the IDA would potentially allow industrial designs which are not novel to be registered, such as the case of the Purported Designs.

Notwithstanding the weakness in the examination procedure under the IDA, the public and trade are not left without recourse against the consequences of the registration of an industrial design that is not novel as they can seek recourse under Section 24 or Section 27 to revoke and expunge such a design from the Register.

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LEGAL INSIGHTS

A SKRINE NEWSLETTER

This newsletter is produced by the LEGAL INSIGHTS' Editorial Committee. We welcome comments and feedback on LEGAL INSIGHTS. You may contact us at skrine@skrine.com for further information about this newsletter and its contents.

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