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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

This issue of Legal Insights coincides with the demise of a world icon in the person of Nelson Mandela (1918-2013) at the age of 95. To me, Mandela is an "icon of freedom": the South African who was instrumental in bringing an end to apartheid rule in his country, a man who fought for justice and spent 27 years in jail. He was a peacemaker and the unifier of a racially divided South Africa. Mandela is, in modern times, the most vivid representation of the power of forgiveness and reconciliation. Because of what he represents, his passing should not be mourned but his life should be celebrated with the recognition that he deserves. May he rest in peace.

It is 10 years since we published the first issue of Legal Insights in March 2004. I would like to extend my appreciation to our lawyers and editorial team whose contributions have made it possible for us to achieve this significant milestone.

The year 2013 is coming to a close and we at Skrine would like to wish all our Christian friends and readers a Merry Christmas. The closure of 2013 is of course followed by the start of 2014, the brand New Year of the Horse. We take this opportunity to wish our readers and friends a Very Happy and Prosperous New Year.

Best Wishes and Thank You.

LEE TATT BOON
Editor-in-Chief
& Senior Partner

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PERSONAL DATA PROTECTION ACT 2010

Jillian recommends measures that can be taken to comply with the Act

The Personal Data Protection Act 2010 ("PDPA") came into force on 15 November 2013. Several regulations and orders were also issued in conjunction with the announcement of its enforcement date.

The transitional provisions in the PDPA require a data user (i.e. a person who processes or authorises or controls the processing of personal data) who has collected personal data prior to the enforcement of the PDPA, to comply with the PDPA within **three months** of the PDPA coming into operation. Based on a strict interpretation, any personal data collected after the PDPA came into operation would have to comply with the requirements of the PDPA.

With the PDPA in force and a short transition period for compliance, a data user may wish to consider the matters which are discussed below.

AUDIT PERSONAL DATA

An audit of all the personal data (i.e. data which can identify an individual, such as name, identification numbers, contact numbers and addresses) should be the first thing in order.

The initial audit should be carried out to weed out the essential data from the non-essential data, and consideration should be given as to whether the deletion or destruction of unnecessary data would be possible.

NOTIFICATION AND CONSENT FORMS

Once the initial audit has been completed, a data user should determine the groups of data subjects, namely the persons to whom the personal data relate, which require notification. For example, separate notification forms may be required for customers, suppliers, employees etc. as the scope of use of the personal data for each group may differ.

It would be advisable for a data user to work closely with its relevant business groups and legal advisers to determine the contents of the notification forms. When drafting a notice, the Notice and Choice Principle in the PDPA sets out a number of requirements which have to be complied with. These include the purpose of use, the third parties to whom the data may be disclosed and the contact details for submitting inquiries and complaints.

Consent for the use and processing of the personal data is also required from the data subject save where the data user intends to rely on the exceptions provided in the PDPA, such as where the processing of data is necessary for the performance of a contract to which the data subject is a party. When in doubt as to whether the exceptions apply, a data user should err on the side of caution and obtain consent from the data subject.

With respect to the form of consent acceptable under the PDPA, the Personal Data Protection Regulations 2013 ("Regulations") stipulate that consent must be capable of being recorded and properly maintained by a data user. The requirement for the consent to be recorded, if interpreted conservatively, implies that consent by way of conduct, continued use or opt-out methods may not be sufficient, as it would not be possible for the data user to record such consent. However, this would be subject to the regulator's interpretation and it remains to be seen whether implied consent, consent by way of conduct or opt-out consent would be accepted.

ACCESS, CORRECTION, INQUIRIES AND COMPLAINTS

The PDPA imposes an obligation on a data user to provide a data subject with the right to access and correct his personal data. These rights are required to be set out in the notice form. It would be advisable for a data user to appoint a designated officer who is charged with dealing with access and correction requests or any other matter relating to personal data. Although the designation of a data protection officer is not mandatory under the PDPA, from a practical standpoint, a specific person or department should be appointed as the PDPA imposes strict timelines within which requests for access and correction are to be complied with.

As complaints from data subjects are likely to be the triggers for enforcement actions against a data user, adequate procedures should be put in place to deal with complaints and inquiries. Complaints and inquiries should be dealt with expeditiously and escalation procedures should be provided for.

SECURITY MEASURES

The Security Principle under the PDPA requires personal data to be protected from loss, misuse, modification, unauthorised or accidental access or disclosure, alteration or destruction. The PDPA also sets out the factors that should be taken into account when developing security measures, such as the nature of the personal data, the location where the data is stored and the security measures to be incorporated into equipment where the data is stored.

Personal data which are sensitive or critical and which may cause serious repercussions if lost, disclosed or damaged (such as credit card details, financial data or health-related information) should be afforded higher levels of security.

Levels of security placed on data storage equipment and databases should be looked into, as well as the access granted to personnel within the organisation. Where possible, access to personal data should be on a 'need-to-know' basis and limited to the extent necessary to perform obligations. A data user may also consider including a requirement for personnel who have access to personal data to sign non-disclosure or confidentiality agreements.

The Regulations require a data user to develop and implement a security policy in accordance with the security standards issued by the Personal Data Protection Commissioner ("Commissioner"). However no standards for security have been issued as yet.

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CONTRACTS WITH DATA PROCESSORS

Where a data user uses a data processor (i.e. a person who processes data solely on behalf of a data user) to process personal data, the PDPA requires the data user to obtain sufficient guarantees from the data processor to protect the personal data. In addition, a data user must monitor compliance with such guarantees. In practice, this means that a contract with a data processor (e.g. where information technology or administrative functions are outsourced to a third party vendor or where marketing is handled by an external agent) should contain guarantees that any personal data received will be adequately protected. Preferably, back-to-back clauses should be incorporated so that the data processor is bound by the same obligations as the data user under the PDPA.

Storage of data at remote locations or on the cloud storage platform is commonplace these days. Therefore, a data user should ensure that the contracts with its storage or cloud providers require the data processor to protect personal data in accordance with the PDPA and the data user's internal security policies.

Audit clauses and provisions granting the right to the data user to monitor and inspect its data processor's systems should also be included in the contracts.

A data user may also consider seeking indemnities in the event its data processor defaults on its obligations. However, as a breach of the PDPA attracts not only fines, but possibly, imprisonment, it should be noted that indemnities will not shield a data user from criminal liability.

RETENTION PERIODS

As the PDPA only permits personal data to be kept for *"as long as necessary"*, retention periods should be stipulated for personal data which are in the data user's possession. Retaining personal data in accordance with statutory requirements, such as the income tax retention period or the limitation period for commencing legal proceedings, would appear to be acceptable.

Retaining personal data beyond the relevant periods required by law is permissible if a data user is able to justify the retention of the data for that period (e.g. use of the data is still required, the agreement between the data user and data subject is still valid and being performed).

AWARENESS AND TRAINING

It is imperative that all members of a data user's organisation are made aware of the organisation's obligations under the PDPA.

For example, a data user's sales force must be aware that collection or use of personal data without consent and notification could potentially be in violation of the PDPA. Personnel who are tasked with dealing with data subjects should be given training on the standard operating procedures before collecting and using data, for example, by ensuring that the customer signs off on the consent and notice form and subsequently, submitting such form to the designated department for safe-keeping.

Although the PDPA does not provide for the reporting of breaches of the PDPA, it would be good practice for a data user to have an internal breach reporting system, and to take remedial action immediately upon discovery of any breach to avoid complaints being lodged with the Commissioner against the data user.

REGISTRATION AS A DATA USER

A data user who is included in any class of data users listed in the Personal Data Protection (Class of Data Users) Order 2013 ("Order") is required to register with the Personal Data Protection Commission ("Commission") within **three months** from the date that the PDPA came into force. The classes of data users are: communications, banking and financial institutions, insurance, health, tourism and hospitalities, transportation, education, direct selling, services, real estate and utilities.

Fees are chargeable for registration and it is envisaged that the registration is to be valid for 24 months, after which renewal is required.

As the grace period to apply for registration is short, a data user should submit its application without delay. If a data user falls into more than one of the classes specified, a separate application has to be filed for each class.

EXERCISE RESTRAINT

The PDPA requires that personal data be processed only for a purpose directly relating to the activity of the data user and should not be excessive. In this regard, the Privacy Commissioner for Personal Data in Hong Kong recently made a finding that the collection by a fitness centre of copies of identity cards and full birth date particulars of its members amounted to "excessive collection of personal data". The data user has indicated that it will appeal against the decision.

Aside from the PDPA's restrictions on data collection, a data user should also appreciate that the more personal data it holds, the more responsibilities it will assume in ensuring that the personal data is processed and protected in accordance with the data protection principles in the PDPA

Thus, the rule of thumb for a data user is to exercise restraint and collect only personal data which are necessary for its operations.

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AN ASSESSMENT OF THE PROPOSED RATE INCREASE

Philip Chan and Sim Miow Yean examine the legal aspects of the on-going rates controversy

INTRODUCTION

The recent proposal by Kuala Lumpur City Hall ("DBKL") to increase the assessment rates of properties in Kuala Lumpur by as much as 200-300% has raised the ire of the city dwellers. The Federal Territories Minister, Datuk Seri Tengku Adnan Mansor, justified the proposed increase in rates by stating that property prices in Kuala Lumpur have surged substantially and that the rates have not been changed for the past 21 years.

This article explains how assessment rates are calculated, when the annual values get reviewed and what legal remedies are available to an owner who is dissatisfied with the revised annual value. It also explains the consequences that could befall an owner who refuses to pay the assessment rates.

POWER TO IMPOSE RATES

The power to impose the assessment rate or rates lies in Section 127 of the Local Government Act 1976 ("LGA") which provides that a local authority may, with the approval of the State Authority, impose the assessment rate or rates within the local authority area when it is deemed necessary.

> "DBKL imposes rates assessed upon the annual value of the holding"

BASIS OF ASSESSMENT RATES

Section 130 of the LGA provides that the rates may be assessed upon the **annual value** or the **improved value** of a holding (e.g. land, with or without building, or a parcel of a sub-divided building including common property) as the State Authority may determine.

The expressions "annual value" and "improved value" are defined in Section 2 of the LGA. Broadly speaking, the "annual value" is *"the estimated gross annual rent at which the holding might reasonably be expected to let from year to year the landlord paying the expenses of repair, insurance, maintenance or upkeep and all public rates and taxes."*

"Improved value" refers to *"the price that an owner willing, and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining, for sale and purchase of the holding."*

Sections 130(2)(a) and 130(3)(a) of the LGA provide that rates on the annual value and upon the improved value of holdings shall not exceed 35% of the annual value and 5% of the improved value respectively. In Kuala Lumpur, DBKL imposes rates assessed upon the annual value of the holding instead of the improved value.

According to Sani Habibu Muhammad and Mohd Bakri ibn Ishak in *Comparative Analysis of Property Rate Charge between Local Authorities in Peninsular Malaysia*, the multiplier rates imposed on holdings in the Kuala Lumpur area as of 2013 are as follows -

Classification	Rate (Annual Value)
Residential (Traditional Village)	2%
Residential (within 36 miles)	6%
Commercial (within 36 miles)	12%
Vacant Land for Commercial (within 36 miles)	10%
Vacant Land for Residential (within 36 miles)	7%
Residential (outside 36 miles)	6%
Commercial (outside 36 miles)	12%

VALUATION LIST

Section 137(1) of the LGA requires a Valuation List to be prepared by the valuation officer appointed by the local authority. The Valuation List determines the annual value of the holding. Section 137(3) requires the Valuation List to be updated once every 5 years or within such extended period as the State Authority may determine.

The Valuation List shall contain the information prescribed under Section 137(1) of the LGA, namely: (a) the name of the street or locality in which such holding is situated; (b) the designation of the holding either by name or number sufficient to identify it; (c) the names of the owner and occupier, if known; and (d) the annual value or improved value of the holding.

Section 137(2) of the LGA provides that the Valuation List together with the amendments made under Section 144 of the LGA shall remain in force until it is superseded by a new Valuation List.

Notwithstanding Section 137(3) of the LGA which provides that the Valuation List is to be renewed every 5 years or within such extended period as the State Authority may determine, the preparation of a New Valuation List is still at the discretion of the State Authority or in this instance, the Federal Territories Ministry. As stated by the Federal Territories Minister, the Valuation List has not been revised for 21 years.

Notice of a new Valuation List and the place where such list may be inspected must be given to the public under Section 141(1) of the LGA by way of advertisement in two local newspapers (one of which is to be in the National Language) and the *Gazette*.

Any person claiming to be the owner or occupier of the holding or the agent of such person is permitted under Section 141(2) of the LGA to inspect and make extracts of the Valuation List without charge.

Where the valuation has increased, the local authority is required under Section 141(3) of the LGA to give notice of when the local authority will proceed to revise the Valuation List in the following manner: (a) advertisement in two local newspapers (one of which is to be the National Language); (b) the *Gazette*; and (c) notice to owner or occupier of the holding.

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The date of revision of the new Valuation List shall not be less than 42 days from the date of the notification in the *Gazette*. In the instant case, the notices of the proposed rate increase in Kuala Lumpur were given on 18 November 2013 and the revised rates are expected to come into force on the 1 January 2014, thereby fulfilling this requirement.

OBJECTIONS TO THE NEW VALUATION LIST

A person may object in writing to the local authority at any time, not being less than 14 days before the revision of the Valuation List takes effect, if he is aggrieved on any of the grounds set out in Section 142(1) of the LGA, namely that -

(a) any holding for which he is rateable is valued beyond its rateable value;
(b) any holding valued is not rateable;
(c) any person who, or any holding which, ought to be included, has been omitted from the Valuation List;
(d) any holding is valued below its rateable value; or
(e) any holding which has been jointly or separately valued ought to be valued otherwise,

Section 142(2) requires all objections to be enquired into and the persons making them to be given an opportunity to be heard in person or by an authorised agent at the enquiry.

Pursuant to the notices given to the owners in Kuala Lumpur, DBKL invited objections to be made on or before 17 December 2013 which is not less than 14 days before the date on which the revised Valuation List is to take effect.

CONFIRMATION OF THE NEW VALUATION LIST

Section 143(1) of the LGA provides that the local authority, with the approval of the State Authority, is to confirm the Valuation List (with or without revision) on or before 31 December of the year preceding the year in which the Valuation List is to come into force and the list so confirmed is deemed to be the Valuation List until it is superseded by another Valuation List.

It has been reported in *The Star* on 29 November 2013 that the Federal Territories Minister has announced that the revised property valuation notices will remain unchanged, thereby indicating that the DBKL will proceed to confirm the new Valuation List without revision. Thus, from 1 January 2014, owners will receive their assessment bills which reflect the new rates. However, it has also been announced that owners may wait until March 2014 to pay the new assessment rates, pending the outcome of DBKL's consultations with the stakeholders on the increase.

Section 143(3) of the LGA is important in two respects. First, it provides that the local authority is not required to hear and determine all objections to the Valuation List before confirming it. Secondly, it provides that the new valuation in respect of which an objection has been received will not come into force, and in lieu thereof the old rate will apply until the objection has been heard and determined. Hence, for owners who have objected and whose objections are not heard by 31 December 2013, the old rates will be continued to be payable.

AMENDMENT TO THE VALUATION LIST

The Valuation List may be amended pursuant to Section 144(1) of the LGA where by reason of -

(a) a mistake, oversight or fraud, the name of any person or the particulars of any rateable holding which ought to have been inserted in or omitted from the Valuation List, has been omitted from or inserted in the Valuation List, as the case may be, or any rateable holding has been insufficiently or excessively valued or for any other reason whatsoever any rateable holding has not been included in the Valuation List;
(b) any building erected, modified, altered, demolished or rebuilt or other improvements made upon a rateable holding, the value thereof has been increased;
(c) any building, or part of a building, being demolished or any other works being carried out on the rateable holding, the value thereof has been decreased;
(d) any rateable holding which has been included in a joint valuation and which in the opinion of the valuation officer ought to have been valued separately or otherwise;
(e) the issue of any new titles in respect of any holdings; or
(f) any change to the rateable holding effected by any law relating to planning as a result of which the value of the holding has been increased or decreased.

The valuation officer may in any of the aforesaid circumstances amend the Valuation List and rates shall be payable in respect of the holding in question in accordance with the Valuation List so amended.

Section 144(2) of LGA requires notice to be given to all persons interested in the amendments of a time, not less than 30 days from the date of service of such notice, at which the amendment is to be made. A person who is aggrieved on any of the grounds specified in Section 142 by any proposed amendment to the Valuation List under Section 144(1) may object by giving notice in writing to the local authority not less than 10 days before the time specified in the notice. Such person must also be given an opportunity to be heard in person or by an authorised agent.

Any amendment made in the Valuation List under Section 144 of the LGA is required to be confirmed by the local authority.

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AN ASSESSMENT OF THE PROPOSED RATE INCREASE

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APPEAL PROCESS

Any person who has lodged an objection under Sections 142 or 144 of the LGA and is dissatisfied with the local authority's decision thereon may appeal to the High Court under Section 145(1) of the LGA. The appeal is to be filed within 14 days from the date of the receipt by the person of the local authority's decision. Additionally, the amount of the rate appealed against must be paid to the local authority.

The decision of the High Court in the appeal on any question of fact is final but either party may appeal to the Federal Court on questions of law under Section 145(5) of the LGA.

The Federal Court case of *Majlis Perbandaran Subang Jaya v The Alice Smith Schools Association* [2011] 2 MLJ 442 illustrates the application of the appeal process.

The Appellant as a local authority had increased the annual value of the Respondent's holding. The Respondent objected to the increase under Section 142 of the LGA. The Appellant then appointed an independent valuer to conduct a valuation of the holding to determine its annual value. The valuer determined the value using the "comparison method". The Appellant accepted the valuation and about 2 years later, increased the rate based on the valuation by the independent valuer. The Respondent was not satisfied and appealed to the High Court under Section 145(1) of the LGA.

The Judicial Commissioner in the High Court rejected the "comparison method" of valuation by the independent valuer and held that the appropriate valuation method should be the "contractor's test".

The Appellant appealed the decision of the High Court to the Federal Court on a point of law and succeeded in setting aside the High Court's decision. The Federal Court was of the view that the Judicial Commissioner was wrong in preferring one method of valuation over the other.

The Federal Court held that the Judicial Commissioner could reject the valuation only if it was shown that the valuation officer had wrongly exercised his discretion or had contravened the law by acting in excess of the powers given by the LGA. The Federal Court also found that the valuation officer had exercised due care and diligence in arriving at the value of the holding.

NON-PAYMENT OF RATES

The actions which a local authority may take to recover arrears in payment of rates are set out in Sections 147 to 156 of the LGA. They include the right to issue a warrant of attachment which gives the local authority power, *inter alia*, to seize any movable properties found in the holding where arrears are due regardless of who they belong to. The provisions also give power to officer who executes the warrant to break into any building during daytime to effect the attachment.

If the arrears and costs are not paid within 7 days of the attachment, the movable properties attached may be sold to recover the arrears. Where the property is of a perishable nature or the expense of keeping it in custody will exceed its value, such property may be sold immediately. The proceeds of sale of the properties attached are to be applied in satisfaction of the arrears with interest thereon at the rate of 6 per centum and costs.

If the arrears cannot be fully recovered through attachment of moveable property within the holding, the local authority may apply to the Registrar of the High Court for an order for the attachment and sale of the holding in respect of which the arrear has accrued.

CONCLUSION

There is no doubt that DBKL has the right under the LGA to increase the annual value of holdings within its jurisdiction through the process of reviewing the Valuation List. In some instances, the annual value proposed, such as a proposed annual value of RM42,000.00 for a semi-detached house in Damansara Heights, does not seem unreasonable.

While the Federal Territories Minister may justify the drastic hikes of up to 200-300% on the basis that the rates have remained unchanged for the past 21 years, it is scant consolation for property owners who are now suddenly forced to stump out a much higher amount on payment of rates. Recent newspaper reports suggest that DBKL appears to be willing to consider a lower increase in the assessment rates. If DBKL takes the view that the proposed annual values are reasonable and likely to withstand challenge, one alternative to appease the public may be to reduce the multiplier rate imposed on the annual value of the holding under Section 130 of the LGA, e.g. by reducing the multiplier rate for residential property from 6% to say 4%.

Going forward we can probably expect two things. First, the local authority will review the Valuation List on a more regular basis to avoid a recurrence of this public relations disaster. Secondly, other local authorities are likely to follow suit. Indeed, the Selangor Government has on 30 November 2013 announced its intention to do so.

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Philip and Miow Yean extend their appreciation to Ng Choon Yon, a pupil in SKRINE, for his assistance in the preparation of this article.

Editor's Note: The Federal Territories Minister announced on 19 December 2013 that the multiplier rates for commercial properties and residential properties will be reduced from 12% and 6% to 10% and 4% respectively. He also announced that further rebates will be given to disabled property owners, retirees and owner-occupied premises and that the new rates will not apply to low and middle-cost properties.

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FOREIGN ANTI-CORRUPTION LAWS – ARE YOU COMPLIANT?

Yeong Hui explains the need to comply with foreign anti-corruption laws that have extraterritorial effect

With the coming into effect of the UK Bribery Act 2010 ("UK Bribery Act") in July 2011 and the broadening enforcements by the US authorities under the US Foreign Corrupt Practices Act 1977 ("FCPA"), companies, in particular multinationals, need to be concerned not only with the anti-corruption laws of the country in which they operate but also foreign laws which have extraterritorial effect and are applicable to them.

Indeed, recent prosecutions for breach of the FCPA see the US authorities exhibiting an increased interest in foreign corporations, particularly in the Asia Pacific region, and some high dollar-value enforcement actions have been taken against such corporations. In this regard, six of the twelve corporate FCPA settlements in 2012 involved business operations in the Asia Pacific region and this trend does not appear to be abating in 2013.

LEGAL REQUIREMENTS AND OBLIGATIONS

The FCPA prohibits, among other things, bribery of foreign government officials in order to obtain or retain business. The US Department of Justice ("DOJ") in this regard targets not only domestic US concerns (which include all US incorporated companies and any company that has its principal place of business in the US or is listed on any US stock exchange as well as all US nationals, citizens and residents), but also any officers, directors, employees, agents (which may include foreign subsidiaries) and shareholders acting on behalf of the US companies. As a result, officers working in a Malaysian-based US enterprise can end up before the US courts for bribing a Malaysian public official in Malaysia.

In addition, foreign companies which do not meet the above description may also be prosecuted for foreign bribery that has a connection to the US. The threshold for this territorial jurisdiction is very low, requiring as little as wire transfers to bank accounts in the US, as evidenced by a recent prosecution involving a Japanese multinational.

The UK Bribery Act, which criminalizes bribery of any person (including not only local and foreign local officials but also private entities), gives the UK courts jurisdiction over individuals and companies in cases where, among other things: (a) the person committing the offence has a close connection to the UK (which includes, among others, UK citizens, ordinary residents and incorporated companies); and (b) the company, whether local or foreign, carries on business in the UK and pays or promises bribes through an associated person anywhere in the world (including, but not limited to, any consultant, agent, employee or subsidiary). Therefore, a foreign company which conducts business in the UK may be convicted by the UK courts if its employees or employees of its subsidiary pay bribes to someone anywhere in the world.

ANTI-CORRUPTION ENFORCEMENT

The past few years have seen several enforcement actions by the US authorities involving corrupt practices in Malaysia.

A French-based telecommunications company was faced with FCPA charges in 2010 when a Malaysian joint venture, in which it was the majority shareholder, allegedly paid bribes to employees of a government-linked company. The objective was to obtain confidential information relating to a public tender which it ultimately won. For this and other offences in other countries, criminal fines amounting to US$92 million were imposed by the US Securities & Exchange Commission ("SEC"). In addition, the company was forced to disgorge US$45,372,000 which it had earned as profits and interest in those transactions.

The Malaysian Anti-Corruption Commission ("MACC") also investigated this matter which resulted in the conviction of a former account leader of the Malaysian subsidiary of the French company for offences under the Malaysian Anti-Corruption Act 1997 ("MACC Act"). The government-linked company concerned and another Malaysian telecommunications company suspended the French telecommunications giant from participating in tenders, contracts or joint ventures for one year.

The DOJ and SEC also announced late last year an FCPA enforcement action against a US conglomerate for its alleged engagement in corrupt practices in more than a dozen countries in Asia and the Middle East, including Malaysia. The fines and penalties in the enforcement action amounted to approximately US$26.8 million. One of the complaints was that the wholly owned Malaysian subsidiary of the US conglomerate had used intermediaries to pay the employees of its customers when bidding on contracts. Payments were made to approximately twenty-six employees of customers, one of whom was an employee of a government-controlled entity. The subsidiary inaccurately described these expenses as 'commissions' and failed to maintain policies sufficient to prohibit such payments. As a result, the US conglomerate's books and records were misstated.

As regards the UK Bribery Act which came into effect two years ago, several individuals have been prosecuted by the Crown Prosecution Service for bribery of public officials. The UK Serious Fraud Office ("SFO"), the government department primarily responsible for investigating and prosecuting serious and complex fraud and corruption, has recently in August 2013, filed its first case against 4 British nationals for alleged contravention of the UK Bribery Act in relation to investments in Cambodia. As it was reported recently that the SFO is currently investigating 8 cases, more prosecutions may be in the pipeline.

COMPLIANCE PROGRAMMES

Because of the devastating financial consequences and reputational damage to a business if there are UK Bribery Act or

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TO BE OR NOT TO BE (REGISTERED), THAT IS THE QUESTION

Harold and Sarah Kate consider the GST registration dilemma of small businesses in Malaysia

We have all heard about the Goods and Services Tax ("GST") that was announced by the Prime Minister during the reading of the 2014 Budget on 25 October 2013. GST will be implemented at a rate of 6% effective from 1 April 2015 to replace sales tax and service tax. With this announcement, the GST countdown to 1 April 2015 has begun, rendering it necessary for all businesses to consider the impact of GST and prepare for its implementation. This includes the critical issue of registration under the GST regime.

REGISTRATION

The Goods and Services Tax Bill 2009 ("GST Bill") provides for two kinds of registration under the GST regime: mandatory and voluntary. According to the Ministry of Finance, only about 22% of businesses in Malaysia will be subject to mandatory registration under the proposed GST model. The remaining 78% may choose to voluntarily register for GST or be excluded altogether from the GST regime.

This article provides an overview of the key concepts of supply and registration for GST under the GST Bill and discusses the issues that need to be considered by the majority of small and medium enterprises in order to make an informed decision on whether to register or not to register for GST.

> " GST will be implemented at a rate of 6% effective from 1 April 2015 "

MANDATORY REGISTRATION

It has been proposed by the Government that any person who makes a taxable supply for business purposes where the taxable turnover of that supply exceeds the threshold of RM500,000 must register under the GST regime. So, what is a taxable supply and how is the taxable turnover to be calculated?

SCOPE OF SUPPLY

In general, supply for GST purposes covers all forms of supply of goods and services in return for consideration, whether monetary or in kind. A taxable supply may either be standard rated or zero-rated.

Standard rated supply : A standard rated supply is a taxable supply of goods or services that is subject to a positive GST rate (currently proposed at 6%). Examples of standard rated supply are the sale of cars and computers, as well as advertising and consultancy services.

Zero-rated supply : A zero-rated supply is a taxable supply that is subject to a GST rate of zero per cent. Some examples of zero-rated supply are agricultural products, sugar, salt, plain flour, cooking oil, poultry, eggs, fish, prawn, livestock supplies (cattle, goat, sheep and swine), international services and exports of goods and services.

Deemed supply : Any supply of goods and services without consideration may nevertheless be subject to GST if it is deemed by legislation to be a taxable supply. Some examples of deemed supplies are: (i) business gifts with a value of more than RM500; (ii) disposal of business assets without consideration; (iii) private use of business assets; and (iv) supply of services to connected persons.

Disregarded supply : In certain circumstances, a taxable supply although made with consideration may be disregarded for the purposes of GST. Some examples of disregarded supplies which are found in the GST Bill are: (i) supply of goods or services between members of a GST group; (ii) supply of goods within or between warehouses under the Warehousing Scheme; (iii) supply of finished goods by an approved toll manufacturer to his overseas principal or to a local buyer on behalf of his overseas principal under the Approved Toll Manufacturer Scheme; and (iv) supply of goods within and between designated areas (Langkawi, Labuan and Tioman).

Exempt supply : An exempt supply is a supply of any goods or services that may from time to time be exempted by way of a ministerial order published in the Gazette from being chargeable to GST. Some examples of exempt supply of services that have been identified are the provision of public transportation (except airport and limousine taxis), toll highways, private health services and private education. Examples of exempt supplies of goods are the sale of residential properties, land for agricultural purpose and land for general use (government building and burial ground).

TAXABLE TURNOVER

Taxable turnover is defined in the GST Bill as the total value of taxable supplies for a period of 12 months, excluding the amount of GST.

Taxable turnover for GST registration purposes is to be derived by adding up all taxable supplies (standard rated, zero rated and deemed supply) made by any person for a period of 12 months, excluding the value of -

(1) capital assets disposed;
(2) imported services; and
(3) disregarded supplies made (a) under the Warehousing Scheme; or (b) under the Approved Toll Manufacturing Scheme; or (c) within or between designated areas (i.e. Langkawi, Labuan and Tioman).

Save for the above three categories of disregarded supplies mentioned above, all the other disregarded supplies provided for under the GST Bill are required to be taken into account when calculating the taxable turnover of a business.

Below are some examples dealing with the taxable turnover for GST registration purposes.

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Example 1

Ferry Journey Sdn Bhd provides ferry services to members of the public travelling between the mainland and an island. Stalls are set up by the company on the ferry to sell cooked food and souvenirs. The determination of the taxable turnover for Ferry Journey Sdn Bhd will only include the supply of cooked food and souvenirs (standard rated supplies) as the ferry services falls under exempt supplies.

Example 2

Mixco Sdn Bhd makes the following supplies during a period of 12 months -

(i) Supply of advertising services (standard rated supply) – RM250,000;
(ii) Disregarded supplies made within Labuan – RM150,000;
(iii) Disregarded supplies made to members of the same group – RM100,000;
(iv) Supply of imported services – RM100,000;
(v) Business gifts with a total value of RM20,000; and
(vi) Disposal of capital assets – RM50,000.

“ only about 22% of businesses in Malaysia will be subject to mandatory registration ”

In this example, Mixco Sdn Bhd is not subject to mandatory registration under the GST regime because its total taxable turnover has not exceeded the threshold of RM500,000 as only the supplies amounting to RM370,000 under items (i), (iii) and (v) are to be included in determining its total taxable turnover.

CALCULATING THE TWELVE MONTH PERIOD

There are two ways of determining the taxable turnover for a period of 12 months: the historical method and the future method.

Historical method : This method is based on the total value of all the taxable supplies in any month plus the value of the taxable supplies for the 11 months immediately preceding that month.

Future method : Under this method, taxable turnover is determined by looking at whether there are reasonable grounds to believe that the value of taxable supplies in any month plus the projected value of taxable supplies for the following 11 months after that month will exceed the threshold of RM500,000.

If a person applies the historical method and finds that he does not exceed the threshold, the person **must** then apply the future method to see if the threshold would be exceeded. This is illustrated in Table 1.

May 2015 – March 2016 (11 months)	April 2016	May 2016 - March 2017 (11 months)
RM350,000	RM50,000	RM550,000 *The business has signed written contracts for taxable supplies for this amount*
Historical method RM350,000+RM50,000 = RM400,000 *Threshold not exceeded, need not register*		
	Future method RM50,000+RM550,000 = RM600,000 *Threshold exceeded, must register*	

Table 1

VOLUNTARY REGISTRATION

It is not mandatory for a business to be registered for GST where the taxable turnover for its taxable supply does not exceed the threshold of RM500,000. However the business may choose to voluntarily apply to register for GST. A business which registers voluntarily must however remain registered for a minimum period of two years. As such, it is advisable for a business to weigh the benefits and difficulties that will flow as consequences of registering for GST. Issues that a business should consider are set out below.

Suppliers and customers of the business

A business should consider whether its current or foreseen suppliers will be GST registered or not.

If its suppliers are GST registered and charge standard rated GST, the business would benefit from GST registration as it will be able to claim back the GST incurred on the purchases from the GST registered supplier. On the other hand, if the business is not GST registered, it would be precluded from passing the GST charges onward to its customers. In this situation, the business may then have to either absorb the GST that it has paid to its suppliers, or increase the price of its goods and services and risk losing customers.

If a business supplies products which are zero rated supplies, it would benefit from GST registration as it would be able to claim back the GST that it had incurred in the production of the zero rated supplies.

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CHERRY-PICKING YOUR CREDITORS

Lee Shih explains a significant Federal Court decision on schemes of arrangement

The Federal Court in *Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd & 6 others* (Federal Court Civil Appeal No. 02(f)-91-11/2012(B)) ("*Dataran Mantin Case")* has set out the definitive test on what constitutes a class of creditors within the meaning of section 176 of the Companies Act 1965 ("Act").

The decision also clarifies that section 176 of the Act allows a company to confer preference on one group of creditors while excluding another group altogether, thereby giving a company some flexibility to cherry-pick the creditors that it wishes to enter into a compromise or arrangement with.

BRIEF FACTS

Dataran Mantin Sdn Bhd ("Dataran Mantin") was a property development company involved in a joint venture luxury condominium project ("Project") with its wholly-owned subsidiary, Mico Vionic Sdn Bhd ("Mico Vionic"). Mico Vionic was the registered proprietor of the land on which the Project was being built ("Project Land"). OCBC Bank had extended credit facilities to Dataran Mantin which were secured by a charge over the Project Land and a fixed and floating charge over the assets of Dataran Mantin.

Construction of the Project commenced in December 2004 but was abandoned in April 2007 when it was approximately 35% completed.

An unsecured creditor, Perkhidmatan Keselamatan Laksamana (M) Sdn Bhd, filed a winding up Petition against Dataran Mantin in 2009 and Provisional Liquidators were appointed. While these winding up proceedings were still on foot, several purchasers of the condominium units in the Project formulated a scheme of arrangement for Dataran Mantin pursuant to section 176 of the Act.

The scheme provided for a white knight company to acquire the Project and the Project Land from OCBC Bank. The white knight would complete the development of the Project and use a portion of the profits to satisfy the debts of the Project creditors, which was defined as the secured creditor of the Project, namely OCBC Bank, the unsecured creditors of the Project and the purchasers of the condominium units of the Project. The scheme excluded all the other secured and unsecured creditors of Dataran Mantin. The scheme was supported by the Provisional Liquidators of Dataran Mantin.

In June 2011, these purchasers obtained a Court Order under section 176 of the Act sanctioning this scheme ("Sanction Order"). Subsequently, several unsecured creditors who were excluded from the scheme filed an application to set aside the Sanction Order.

In November 2011, the High Court allowed the setting aside application and on the same day, ordered the winding up of Dataran Mantin. The appeal by the Provisional Liquidators and the purchasers who initiated the scheme was allowed by the Court of Appeal and the Sanction Order was reinstated.

Leave was granted to the unsecured creditors of Dataran Mantin who were excluded from the scheme to appeal to the Federal Court on two questions of law.

TEST FOR CLASS OF CREDITORS

The first question of law before the Federal Court was as follows:

"Who in law would constitute a class of creditors within the meaning of section 176 of the Act?"

The Federal Court expressly adopted the established principle in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 and answered that a class of creditors would be "all creditors of a company whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest".

The Federal Court also cited with approval other English authorities of *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 and *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480. It is useful to have the definitive test on the classification of creditors now set out here in Malaysia.

PARI PASSU PRINCIPLE DOES NOT HAVE TO APPLY

The second question of law posed before the Federal Court (as amended by the Federal Court) was whether section 176 of the Act could confer preference on one group of creditors while excluding another group altogether where the company is in the process of being wound up.

> **“ a scheme of arrangement can depart from the *pari passu* principle ”**

The Federal Court considered the three arguments by the appellants that the scheme, in effect, was an undue preference (in breach of section 293 of the Act), that it gave preference to unsecured creditors over priority creditors (in breach of section 292 of the Act) and that it breached the *pari passu* rule.

The Federal Court found no undue preference as the Project Land was not the property of Dataran Mantin (the company which faced the pending winding up proceedings at that time) but was owned by Mico Vionic. The only asset of Dataran Mantin was the shares it held in Mico Vionic.

The Federal Court also further found no breach of section 292 of the Act and that a scheme of arrangement can depart from the *pari passu* principle. The Federal Court applied the principles laid down by the Singapore Court of Appeal in *Hitachi Plant Engineering & Construction Co Ltd and another v Eltraco International Pte Ltd and another appeal* [2003] 4 SLR 384 where it was held that a departure from the *pari passu* principle should be allowed in other corporate rescue mechanisms, such as a scheme of arrangement, which falls outside the insolvency regime.

The Federal Court then answered the second leave question in the

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affirmative, thereby allowing a company to confer preference on one group of creditors to the exclusion of another from a scheme under section 176 of the Act even when a company is in the process of being wound up.

CHERRY-PICKING

One interesting aspect of this appeal was the complaint that the scheme only took care of the creditors of Dataran Mantin in relation to the Project (i.e. certain unsecured creditors of Dataran Mantin) but not the other non-Project creditors of Dataran Mantin (i.e. the remaining unsecured creditors of Dataran Mantin).

In essence, the issue was whether a company in a scheme under section 176 should be allowed to 'cherry-pick' the specific creditors to be placed into a class (i.e. only the unsecured creditors of Dataran Mantin for the Project) or whether a class must include all the creditors who share the specified characteristics (e.g. all the unsecured creditors of Dataran Mantin).

The Federal Court held that section 176 of the Act allows for such cherry-picking of creditors. This aspect of the decision mirrors the issue which was before the English Court of Appeal in *Sea Assets Limited v Perusahaan Perseoran (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [2001] EWCA Civ 1696 ("*Garuda Indonesia*").

In *Garuda Indonesia*, the Indonesian national airline company, which was registered in England as an overseas company, applied for a scheme of arrangement. Certain unsecured creditors would have their debts restructured under the terms of the scheme while two other categories of unsecured creditors would be kept outside the scope of the scheme. These excluded creditors were, for instance, essential trade creditors from whom the airline would have to continue to obtain goods and services to continue its operations. These excluded creditors could therefore claim their debts in full against the airline.

It was argued that a class of creditors cannot be constituted by a process of arbitrary selection by the company, that there must be something that can be called a class which is identified by the sharing of objectively recognisable common characteristics and that the class must include all the creditors who share those characteristics.

The English High Court and Court of Appeal found that both the language of the English provision and the statutory purpose did not support such an interpretation. The proposer of a scheme is free to select the creditors to whom a scheme of arrangement should be put, provided that the rights of the creditors and the effect of the scheme on those rights are not so dissimilar as to make it impossible for those creditors to consult together with a view to acting in their common interest.

Although the Federal Court did not refer to *Garuda Indonesia* in the *Dataran Mantin Case*, it did refer to *Re Hawk Insurance Co Ltd* (*supra*) where a similar test was applied. According to the Federal Court, the Project creditors of Dataran Mantin could be recognised as a distinct class of creditors as their rights were not so dissimilar as to render it impossible for them to consult together with a view to advancing their common interest. The Court also opined that it would have been impossible for the Project creditors of Dataran Mantin to consult with the other unsecured creditors of Dataran Mantin as their interests were not common.

Further, the Federal Court had also considered the fact that the excluded creditors of Dataran Mantin could not be said to be really prejudiced by the scheme. The Project Land was owned by Mico Vionic and was charged to OCBC Bank. The amount owing to OCBC Bank far exceeded the value of the Project Land. If the scheme were to be set aside, the Project Land would be auctioned off and there would not be any surplus sale proceeds to be paid to Mico Vionic and the creditors of Dataran Mantin.

Although not expressly referred to by the Federal Court, this reasoning is consistent with the principles set out in the English Court of Appeal case of *In re Tea Corporation Ltd* [1904] 1 Ch 12 (*"Tea Corporation"*). *Tea Corporation* is authority for the proposition that it is not necessary for a company to consult any class of creditors or contributories who are not affected by a scheme, either because their rights are untouched or because they have no economic interest in the company.

So for instance, a class of creditors or shareholders may have no economic interest in a company because the assets of the company were insufficient to generate a return to them in liquidation and therefore need not be included in the scheme (see further examples in the English cases of *In re myTravel Group Plc* [2004] EWHC 2741; [2004] EWCA Civ 1734 and *In re Bluebrook and others* [2009] EWHC 2114).

CONCLUSION

The Federal Court's decision in the *Dataran Mantin Case* will allow a company to have greater flexibility in determining the particular group of creditors with whom it wishes to deal with through the statutory procedure under section 176 of the Act so long as these creditors have similar rights that will enable them to consult together with a view to advancing their common interest and that the creditors who have been excluded from the scheme do not share such similar rights even though they may share other common characteristics with the scheme creditors, such as being unsecured creditors of the company.

Further justification for this cherry-picking of creditors can also be found where certain creditors may have no economic interest in the company, particularly in the case of an insolvent company. Hence, these creditors can be excluded from a proposed scheme.

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A REVIEW OF THE COMPANIES BILL 2013 – PART II

Kok Chee Kheong continues the review of the Companies Bill 2013

We commenced our review of the Companies Bill 2013 ("Bill") in Legal Insights 3/13. We now continue the review.

SHARE CERTIFICATES

The Bill introduces a new regime in relation to the issue of share certificates by a company. As a general rule, clause 98(1) provides that a company shall within 60 days after allotment or registration of a transfer or receipt of a request from a shareholder of a private company under clause 97(2), send a share certificate to every holder of the shares which states the name of the company, the class and the number of shares held by that person. The obligation to issue share certificates does **not** apply to –

(1) shares which are transferable under a system for electronic trading approved by a stock exchange (clause 98(2)), that is, shares which are listed on Bursa Malaysia and are transferable by book entry under the scripless trading system operated by Bursa Malaysia Depository Sdn Bhd; or

(2) shares of a private company unless it is expressly provided otherwise by the constitution of a private company or an application is received by a company from its shareholder (clause 97(2)).

> **"The Bill introduces a new regime in relation to the issue of share certificates by a company"**

Where a share certificate has been issued in respect of shares, clause 98(3) prohibits a transfer of such shares from being registered unless the form of transfer is accompanied by the share certificate or by evidence of its loss or destruction.

Where shares to be transferred are accompanied by a share certificate, the company is not required to issue a new certificate to the transferee unless it is required to do so under clause 98(1) or a request has been received from the transferee (Clause 98(4)).

Clauses 100(1) and 100(2) are substantially in *pari materia* with sections 89(1) and 89(2) of the New Zealand Companies Act 1993 ("NZCA"). Clause 100(1) provides that, in the absence of evidence to the contrary, the entry of a name of a person in the register of members ("Register") as shareholder is *prima facie* evidence that legal title to the share is vested in that person. This provision is essential in view of the fact that clauses 97(2) and 98(2) of the Bill require only certain companies to issue share certificates.

Clause 100(2) provides that the company may regard the registered shareholder as the only person who is entitled to: (i) exercise the voting right attached to the share; (ii) receive notices; (iii) receive a distribution, if any, in respect of the share; and (iv) exercise any other rights and powers attached to the share.

Clause 100(3) accords rights which are similar to those set out in clause 100(2) to members of a company that does not have share capital, i.e. a company limited by guarantee ("CLBG"). There is no corresponding provision in the NZCA.

RECTIFICATION OF REGISTER

If the name of a person has been wrongly entered in, or omitted from, the Register, the court may, upon the application of the person aggrieved, order (i) the Register to be rectified by the company; (ii) payment of compensation by the company, or an officer of the company who is in default, for any loss sustained; or (iii) both rectification and payment of compensation (clause 102). This provision is adopted from section 102 of the NZCA and is narrower in scope than section 162 of the Companies Act ("CA") which, in addition to conferring powers on the court to rectify the Register if a person's name has been entered therein or omitted therefrom "without sufficient cause", also confers power to rectify the Register if default is made, or if unnecessary delay occurs, in entering therein the fact that a person has ceased to be a member.

TRANSFER OF SHARES

Formal requirements

Similar to the CA, the Bill requires a transfer of shares to be effected by the lodgement of an instrument of transfer (Clause 104(1)). The CA refers to a "proper instrument of transfer in the prescribed form" whereas the Bill sets out the requirement in greater detail by referring to "*a proper duly executed and stamped instrument of transfer.*"

The Bill expressly states that in order to effect a transfer of shares, the company is to enter the name of the transferee on the Register (clause 104(2)).

The Bill also sets out the obligations of the company in relation to the transfer of shares in great detail. Clause 105(1) requires the company to enter the name of the transferee on the share register (*sic*) within 30 days after the receipt of the instrument of transfer unless –

(1) the Act, or the company's constitution, permits the directors to refuse or delay the registration for reasons stated;

(2) the directors resolve within 30 days of receipt of the transfer to refuse or delay the registration and the resolution sets out the full reasons for doing so; and

(3) notice of the resolution, including the reasons for refusing or delaying the registration, is sent to the transferor and transferee within seven days of the resolution being passed.

Subject to the constitution of the company, the directors may refuse or delay the registration of a transfer of shares under clause 105(1) if the holder of the shares has failed to pay an amount due

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in respect of those shares, whether by way of consideration for the issue of the shares or in respect of any sum payable by the holder in accordance with the constitution (Clause 105(2)).

If a company refuses to register a transfer of shares, the court may, upon application of the transferor or transferee, order the company to register the transfer if the court is satisfied that the application is "well-founded" (Clause 106). There is no corresponding provision in the CA.

TRANSMISSION OF SHARES

As the Bill does not require a company (other than a CLBG) to have a constitution, clause 109 of the Bill contains detailed provisions to regulate the transmission of shares. Although expressed differently, the provisions are substantially similar to regulations 25 and 26 of the Fourth Schedule (Table A) of the CA ("Table A").

LIEN ON SHARES

For the same reason as in the case of transmission of shares, the Bill includes detailed provisions to deal with liens on shares and the procedure by which such security may be enforced. The provisions of clause 110 are substantially similar to regulations 9 to 12 and 22 of Table A. A significant difference is that the lien under Table A applies only to partly paid shares whereas clause 110(2) permits a company (other than a listed company) to extend the lien to fully paid shares by including a provision to such effect in its constitution.

SOLVENCY STATEMENT

The Bill introduces the concepts of a "solvency test" and "solvency statement", which are adopted from the United Kingdom Companies Act 2006 ("UKCA 2006"), the Singapore Companies Act and the NZCA.

Purpose

Before a company undertakes a redemption of preference shares, provision of financial assistance, reduction of capital or a share buy-back, its directors are required to make a solvency statement to confirm that the company satisfies the solvency test in relation to the transaction (clause 112(1)).

Solvency test

In relation to the redemption of preference shares, provision of financial assistance or reduction of capital, clause 111(1) provides that the solvency test is satisfied if –

(1) immediately after the transaction, there will be no ground on which the company could be found to be unable to pay its debts;

(2) either (i) it is intended that the company commences winding up within 12 months after the transaction and that it will be able to pay its debts in full within 12 months after the commencement of winding up; **or** (ii) in any other case, the company will be able to pay its debts as they fall due during the 12 months immediately following the date of the transaction; and

(3) the assets of the company exceed its liabilities as at the date of the transaction.

In the case of a share buy-back, the solvency test is satisfied if the share buy-back does not result in the company being insolvent or its capital being impaired at the date of the solvency statement (clause 111(2)). The test to be applied in determining whether a company is deemed insolvent or its capital is deemed impaired as aforesaid is set out in clause 111(3).

> **"The Bill … introduces an alternative means of effecting a capital reduction without the need for confirmation by the court"**

The Bill also requires a director to inquire into the company's state of affairs and prospects and to take into account all liabilities of the company, including contingent liabilities, when he forms an opinion for the making of a solvency statement (clause 112(2)).

REDUCTION OF CAPITAL

The Bill retains the existing provisions of the CA on capital reduction. In addition, it introduces an alternative means of effecting a capital reduction without the need for confirmation by the court.

Clause 116 allows a company, whether private or public, to reduce its share capital by passing a special resolution to that effect if it satisfies the solvency test. There is no requirement to satisfy the solvency test where the reduction is to cancel capital which is lost or no longer represented by available assets (clause 116(3)).

To adopt this method of capital reduction, a company must comply with the relevant procedures set out in sub-clauses (1), (4), (5) and (6) of clause 116 which includes, *inter alia*, (i) passing

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A REVIEW OF THE COMPANIES BILL 2013 – PART II

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a special resolution to reduce its share capital; (ii) providing the prescribed particulars to the Director General of the Inland Revenue and the Registrar within seven days of the resolution being passed; and (iii) the issuance of a solvency statement by all directors of the company within the relevant prescribed time frame.

Clause 117 confers the right on an affected creditor to object to the proposed reduction by filing an application in court for an order that the resolution be cancelled. Such application is to be filed within six weeks from the date of the resolution.

The reduction of capital under this new procedure will take effect when the resolution has been lodged with the Registrar and he has recorded the information in the appropriate register (clause 118(3)). Where any objections to the proposed reduction have been filed in court, these applications have to be dismissed or withdrawn before the resolution can be lodged with the Registrar (clause 118(2)).

“ The Bill introduces the concepts of a “solvency test” and “solvency statement” ”

While the Bill requires a company to make the solvency statement available for inspection at its registered office by creditors for six weeks from the date of the resolution, the company is not obliged to notify its creditors of the resolution, whether before or after it has been passed. This is a significant weakness in the new capital reduction procedure as creditors may not be aware that such a resolution has been passed until the time frame for objecting to it has lapsed.

The new procedure for a capital reduction under clause 116 is modelled after the provisions of the UKCA 2006 but the latter apply only to private companies. These new provisions are welcomed as they will substantially reduce the cost of undertaking a capital reduction.

FINANCIAL ASSISTANCE

The Bill retains the provisions in the CA that prohibit a company from providing financial assistance in connection with the purchase of its own shares or shares in its holding company, as well as the exceptions where financial assistance is permitted.

In addition, the Bill clarifies the prohibition by expressly prohibiting a company from providing financial assistance, directly or indirectly, to reduce or discharge a liability incurred by a person in acquiring the shares in the company or its holding company (clause 122(2)).

The Bill also introduces three new exceptions to the general prohibition. First, it allows a company whose activities are regulated by any written law relating to banking, finance or insurance or are subject to the supervision of the Securities Commission (such as a stockbroking company) to provide loans, guarantees or other security in the ordinary course of its business where the loan is made on ordinary commercial terms as to rate of interest, the terms of repayment of principal and payment of interest, the security to be provided and otherwise (clause 122(3)). The CCM should clarify whether this exception applies to financial institutions that provide Islamic finance and takaful operators.

Second, the Bill permits the giving of financial assistance by a company for the acquisition of shares in its holding company, or for the purpose of reducing or discharging a liability incurred for such an acquisition, where its holding company is a company incorporated outside Malaysia. This new exception will be welcomed by foreign holding companies as it will enable their Malaysian subsidiaries to participate in leveraged buy-outs (clause 122(4)).

Third, clause 125(1) allows a company, by way of a special resolution, to provide financial assistance for the acquisition of its shares or those of its holding company if the conditions set out therein are satisfied. Among the conditions are the following –

(1) before the assistance is provided, the directors must resolve that the giving of the assistance is in the best interest of the company and the terms on which the assistance is to be given are fair and reasonable to the company;

(2) the directors who vote in favour of the resolution must make a solvency statement on the day on which the board resolution is passed;

(3) the aggregate of the assistance rendered that has not been repaid does not exceed 10% of the share capital received by the company for its shares and its reserves, based on its most recent audited financial statements;

(4) the company receives fair value in connection with the provision of the assistance; and

(5) the assistance is given not more than 12 months after the date of the solvency statement.

The directors are also required to set out in full, the grounds for their conclusion under sub-paragraph (1) of the preceding paragraph (clause 125(2)) and to provide the documents and particulars enumerated in clause 125(4), such as the name of the person to whom the assistance is given and the nature, terms and amount of the assistance, to each member within 15 days of the assistance being given.

Consequences of breach

Clause 122(7) of the Bill *inter alia* preserves the right of a

company or other person to recover the loan or losses suffered in consequence of a contravention of the prohibition against financial assistance. Clause 123 augments the foregoing by stating that the validity of the financial assistance made in contravention of the provisions of the Bill and of any contract or transaction made in connection therewith shall not be affected only by reason of the contravention.

SHARE BUY-BACK

The provisions in section 67A of the CA in relation to share buy-backs are substantially retained in the Bill, that is, only a company whose shares are listed on Bursa Malaysia is allowed to purchase its own shares.

The provisions of the Bill clarifies section 67A of the CA in the following respects –

(1) the shares purchased through a share buy-back are deemed to be cancelled immediately upon purchase, unless they are held as treasury shares (clause 126(4));

> **“ the directors may authorise a distribution when they are satisfied that the company will satisfy the solvency test ”**

(2) the company’s name is to be entered in the Register as the holder of the treasury shares (clause 126(5));

(3) in addition to the existing rights under section 67A of the CA to resell the treasury shares, distribute them as share dividends or transfer them pursuant to an employee share scheme, the Bill permits a company to cancel treasury shares or deal with them in such manner as the Minister may prescribe (clause 126(6)); and

(4) the treasury shares are entitled to participate in a bonus issue of fully paid shares declared by the company and such bonus shares are to be treated as though they had been purchased by the company at the time they were allotted (clause 126(10)).

Where directors cancel any shares purchased or held as treasury shares, the distributable profits of the company are to be reduced by the cost of those shares. When treasury shares are purchased at different times and at different prices, it may be difficult to identify the price paid for the particular shares which are to be cancelled. It would be helpful if this issue is clarified by the CCM.

DIVIDEND

Insofar as payment of cash dividend is concerned, section 365(1) of the CA provides that “*No dividend shall be payable to the shareholders of a company except out of profits …*” What constitutes “*profit*” is largely based on case law.

Clause 130(1) substantially reiterates section 365(1) by providing that a company may only make a distribution to its shareholders out of the company’s profits available for the purpose. However, clause 130(2) clarifies that “profits available for distribution” refers to a company’s “*accumulated profits so far as (it is) not previously utilised by distribution or capitalisation, less its accumulated losses, so far as not previously written off in reduction or reorganisation of capital duly made.*”

Clause 130(2) will prohibit a company from declaring a dividend so long as it has incurred accumulated losses which have not been duly written off. It is a radical departure from the practice under the CA which, among others, permits dividends to be paid out of current year profits without regard to losses incurred in the previous years, i.e. *nimble dividends*, and from unrealised profits on a revaluation of fixed assets.

Procedure for making distribution

Clause 131(2) provides that the directors may authorise a distribution when they are satisfied that the company will satisfy the solvency test immediately after the distribution is made. In this case, the solvency test is satisfied if the company is able to pay its debts as and when they fall due in the normal course of business (clause 130(3)).

The Bill imposes an obligation on the directors to refrain from proceeding with the distribution if, after authorising the same, they cease to be satisfied on reasonable grounds that the company will satisfy the solvency test immediately after the distribution is made (clause 131(4)).

Clawback

The Bill introduces a provision that enables the company to recover from a shareholder any distribution made in excess of the amount that could properly have been made unless the shareholder has received the distribution in good faith and without knowledge that the company did not satisfy the solvency test.

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

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FIGHTING THE GOOD CHOCOLATE FIGHT

Melissa Long explains how the Court of Appeal resolved a dispute between chocolate manufacturers

INTRODUCTION

Following the recent Court of Appeal decision in *Chocosuisse Union des Fabricants Suisses & Ors v Maestro Swiss Chocolate Sdn Bhd* [2013] 6 CLJ 53, this case commentary highlights certain aspects of the decision on the tort of extended passing-off and actions brought pursuant to the Geographical Indications Act 2010 ("GIA").

BACKGROUND FACTS

The Appellants were Chocosuisse Union Des Fabricants Suisses de Chocolat, Kraft Foods Schweizs and Nestle Suisse SA. The former is a Swiss co-operative society for Swiss chocolate manufacturers. The latter two are Swiss manufacturers and exporters of various Swiss chocolate products under the "Toblerone" and "Nestle" brand.

On the Respondents' end were Maestro Swiss Chocolate Sdn Bhd and 3 of its related companies. They manufactured and marketed a line of 'VOCHELLE' chocolate and chocolate related products that bore a "Maestro SWISS" house mark on its packaging.

The Appellants' objected to the use of the words "Maestro SWISS" on the Respondents' locally manufactured chocolate products as they felt that the words would lead the public to believe that the Respondents' chocolates were Swiss chocolates.

Extended Passing Off

The Appellants relied upon the principles of 'extended passing off', founded on the English cases of *Bollinger & Ors v Costa Brave Wine Co Ltd* [1960] 1 RPC 16 (commonly known as the *Spanish Champagne* case) and *Erven Warnick BV v Townend & Sons (Hull) Ltd* [1979] 2 All ER 927 (the *Advocaat* case). In the classic form of passing off, trader X is aggrieved by trader Y misrepresenting trader Y's own goods as that of trader X. In the extended form of passing off, the complainant may be one of several traders mutually and non-exclusively sharing in the goodwill and reputation of a special trade name, who is seeking to protect that goodwill and reputation from goods that have been falsely ascribed with that special trade name.

It is imperative that in the minds of the public, the special trade name distinguishes its class of goods from other similar goods as that class of goods is believed to have distinctive qualities. In the *Spanish Champagne* case, champagne traders successfully prevented the defendant's Spanish sparkling wine from being labelled as 'champagne' in England as 'champagne' was recognised by the English public as being produced in the Champagne district of France.

In the present case, the Appellants mounted their claim for extended passing off on the goodwill and reputation of "Swiss chocolate" in that "Swiss chocolate" connotes chocolate made in Switzerland and is recognised as high quality and premium chocolate. On the strength of the reputation and goodwill of "Swiss chocolate", the First Appellant along with 2 other Swiss chocolate manufacturers had successfully brought a claim for extended passing off in England against Cadbury Limited for the use of "Swiss chalet" in relation to chocolate. This case was reported in *Chocosuisse Union des Fabricants Suisse de Chocolat and Others v Cadbury Limited* [1998] RPC 117 (Chancery Division) and [1999] RPC 826 (Court of Appeal).

Geographical Indications Act 2000

The Appellants further claimed that the Respondents were also in breach of the GIA. Section 5 of the GIA provides:

"(1) Any interested person may institute proceedings in the Court to prevent, in respect of geographical indications—

(a) the use in the course of trade of any means in the designation or presentation of any goods that indicates or suggests, in a manner which misleads the public as to the geographical origin of the goods, that the goods in question originate in a geographical area other than the true place of origin;"

> **"The Court of Appeal ... held that the Appellants' claim for extended passing off was established"**

The term 'geographical indication' is defined in Section 2 of the GIA as *"an indication which identifies any goods as originating in a country or territory, or a region or locality in that country or territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin"*.

Locus Standi

One of the notable issues that arose in this case was whether the First Appellant had the necessary *locus standi* to bring the action for extended passing off. The Respondents contended that the First Appellant (a trade association) was not in itself in the chocolate trade and therefore did not share in the goodwill of "Swiss chocolate".

HIGH COURT DECISION

On Extended Passing Off

The High Court found that "Swiss chocolate" had goodwill attached to it in Malaysia which the Swiss chocolate manufacturers were entitled to protect. It was found that the Malaysian public considered "Swiss chocolate" to mean chocolates made in Switzerland and recognised this class of chocolates as high quality and premium chocolates.

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Nevertheless, the High Court ruled that the tort of extended passing off was not established as the Respondents had not represented their products as "Swiss chocolates", and that no reasonable person would be confused by "Maestro SWISS" into believing the Respondents' chocolates originated from Switzerland.

Amongst its reasons, the High Court cited that (i) "Maestro SWISS" was part of all the Respondents' corporate names and served as a corporate logo; (ii) the visual appearance of the Respondents' packaging did not focus on the "Maestro SWISS" words (noting that the "VOCHELLE" mark was dominant and striking and that the "Maestro SWISS" words were given less prominence); and (iii) the packaging identified the Malaysian origin of the chocolates.

On Geographical Indications Act 2000

The High Court held that the use of "Maestro SWISS" did not violate the GIA as it was not used or presented as a geographical indication on the Respondents' packaging, unlike indications such as "Sabah tea" or "Sarawak pepper".

On Locus Standi

As regards the First Appellant's *locus standi*, the High Court accepted the Respondents' contention that the First Appellant had no relevant goodwill in the instant case as it was not in the chocolate business and therefore did not have standing to sue for passing off. The High Court referred to the UK Court of Appeal's decision in *Chocosuisse v Cadbury* in this finding.

COURT OF APPEAL DECISION

On Extended Passing Off

The Court of Appeal reversed the decision of the High Court and held that the Appellants' claim for extended passing off was established as there was a likelihood of confusion in the minds of the members of the public that the Respondents' chocolate products come from the distinctive group of "Swiss chocolates".

In coming to its conclusion, the Court noted that the details of Malaysian origin on the Respondents' products were on the back portion of the packaging and that members of the buying public do not normally examine details of the manufacturer printed on the back.

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FOREIGN ANTI-CORRUPTION LAWS

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FCPA compliance issues, many companies, particularly those with presence or have businesses in the US and UK, have taken steps to mitigate their risks and exposure to breaches, investigations, prosecutions and derivative litigation.

Both the FCPA and the UK Bribery Act encourage good compliance practice. The DOJ and the SEC have expressly identified the existence of a corporate compliance programme as a factor to be considered when deciding whether to bring charges.

Indeed, the UK Bribery Act goes one step further as it makes good compliance practice a **complete defence** to liability. What constitutes good compliance practice is not specifically defined in the UK Bribery Act but guidance for commercial organisations published by the UK Ministry of Justice enumerates the following six guiding principles: (1) proportionate procedures; (2) top level commitment; (3) risk assessment; (4) due diligence; (5) communication; and (6) monitoring and review. These principles are however not prescriptive, and vary according to the particular circumstances of each case (for example, the size of the organisation concerned, its area of activity, and so on).

A robust anti-corruption compliance programme must include well-written policies, procedures and codes of conduct which set out what employees must or must not do to ensure compliance with the FCPA, the UK Bribery Act as well as the MACC Act in order to avoid the company or its employees being subject to investigation, or even prosecution. These documents can also be extended to include policies on other relevant compliance related obligations, such as those relating to anti-money laundering and anti-competition, and if the company does not already have one, a whistle blowing policy and the reporting of such offences.

Another effective way to minimise risk of contravention is for all employees and even its third party service providers to be trained on what is now prohibited by the abovementioned laws. Among other things, they should be familiar with the types of corporate hospitality, entertainment and gifts which are permissible and be educated on due diligence that needs to be performed prior to engaging third party intermediaries and agents. Managers who run the organisation must also know and recognise red flags and act promptly to address concerns.

In this regard, a law firm which is well-versed in these matters can provide invaluable assistance in preparing a set of written policies, codes of conduct and procedures for internal investigations, as well as providing general advice on anti-corruption laws and establishing or reviewing compliance and training programmes.

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PINKIE PROMISE?

Grace Teoh explains why you may not need to rely on ancient oaths to protect confidential information

Lucius Annaeus Seneca once said, "If you wish another to keep your secret, first keep it to yourself". Approximately 17 centuries later, Benjamin Franklin morbidly reiterated, "Three may keep a secret, if two are dead". In (comparatively) more recent times, Marshall McLuhan was quoted as saying, "Publication is a self-invasion of privacy".

What these three quotes have in common is the theme of *confidence*, or the protection thereof. Short of tying every single person one comes across with the legal knots of confidentiality clauses in contracts, are the law and its enforcers, the courts, sufficiently equipped to maintain the protection of confidence? Is one required to invoke the ancient oath of "pinkie promises" and "cross one's heart and hope to die" every single time one imparts information in trust?

Fortunately, the courts have yet to resort to such dire prerequisites. In the oft-cited decision of Megarry J (as he then was) in *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41, his Lordship spelt out three elements that are essential to a cause of action for breach of confidence.

> **" Generally, all information not in the public domain ... may be confidential "**

THE CASE OF COCO V CLARK

In *Coco*, the plaintiff had designed a moped and had sought the defendant company's assistance to manufacture the same, based on the plaintiff's designs. The parties had a falling out and the defendant subsequently manufactured a moped similar in design to the plaintiff's, named the Scamp moped. There were two alleged impediments to the plaintiff's action against the defendant for breach of confidence in this situation –

(i) as there was no formal contract signed between the parties, the plaintiff could not sue the defendant for breach of contract, whether under a confidentiality clause or because the contract created a confidential relationship between them; and

(ii) the defendant's defence was two-fold: that the plaintiff had not imparted any confidential information, and that the defendant had not used any confidential information in the manufacture of the Scamp moped.

Megarry J was having none of that. In his judgment, his Lordship summed up the three elements that are normally required, *sans* contractual relationships, for a case of breach of confidence to succeed. These elements are as follows -

(a) the information was of a confidential nature;
(b) the information must have been communicated in circumstances importing an obligation of confidence; and
(c) there must be an unauthorised use of the information to the detriment of the person communicating it.

"SHHH! IT'S A SECRET!"

The question then, is what would be considered secret or confidential information?

Generally, all information not in the public domain or not "notoriously known", may be confidential. Among the first things that come to mind are trade or commercial secrets such as patents and customer lists. Personal data may also be confidential information.

The English courts have yet to specify the scope of protection extended to information. In *Coco*, it was held that "trivial tittle tattle, no matter how confidential" cannot be protected. By contrast, in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No. 2)* (1984) 156 CLR 414, it was held that it may be enough that the plaintiff is concerned with the secrecy of the information, even if the information is not valuable in monetary terms. It is thus necessary for the courts to consider the facts on a case-by-case basis.

Next, how does one identify circumstances importing an obligation of confidence?

Megarry J re-emphasised Lord Greene's statement in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, that however confidential the circumstances in which the information was given, there can be no breach of confidence in revealing to others something which is already common knowledge.

In other words, to start off, one must identify the extent to which the information was known outside of the confidor and the confidant. Next, he must identify whether there was a temporary relationship of confidence between the confidor and the confidant. In *Schering Chemicals Pty Ltd v Falkman Pty Ltd* [1981] 2 All ER 321, Shaw LJ posed this as whether the confidant recognised that the information was confidential at the time he was confided in.

Finally, one must consider whether there was unauthorised use of the information.

The courts have been equivocal in expressly ignoring the requirement for "detriment" to the confidor, when considering the third element. Megarry J in *Coco* considered that there may be circumstances wherein the plaintiff suffers no apparent detriment, but wishes to keep the information confidential for other reasons.

So then why was the third element of the test posed in such a way? According to Robert L Dean in *The Law of Trade Secrets and*

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Personal Secrets; Sydney; Law Book Company, 2002, one of the answers may be that an action for breach of confidence is based on equity, and equity is used to enforce an obligation, not to compensate for a wrong. Alternatively, it may be that the courts have not ignored the requirement for "detriment", but have only viewed it with a more subjective eye, i.e. that it causes sufficient concern for the plaintiff to initiate a breach of confidence suit.

Megarry J in *Coco* hastened to add that even if the confidential information is a part of a larger set of information that has already been put in the public domain, it does not mean the defendant is entitled to use the communication as a "spring board" to publish the confidential information as well.

DIFFERENCE BETWEEN PRIVACY AND SECRECY

Is there a difference between privacy and secrecy? The English courts have sought to extend the application of the three elements in *Coco* to cover breach of privacy rights, in one form or another, but have continuously fought to draw a distinction between protecting confidentiality and protecting privacy rights.

In *Campbell v MGN Ltd* [2004] 2 AC 457, the plaintiff was an internationally famous fashion model who was frequently in the public eye. She claimed publicly that she did not take drugs or support the use thereof. The defendant, a newspaper publisher, published articles disclosing the plaintiff's drug addiction, therapy for the addiction and details of the therapy, including photographs of the plaintiff on the street as she left one of her therapy sessions. The plaintiff sued for breach of confidentiality.

The English courts struggled with the fact that the plaintiff had appeared to have voluntarily put confidential information about herself in the public domain first, and thus may have failed the second element.

The House of Lords then reviewed the threshold of Megarry J's test in *Coco* and held that the courts should consider whether a reasonable man in the position of the subject of the disclosure, not the recipient, would find the disclosure offensive. In that sense, the publication of the details of the plaintiff's therapy went beyond necessary disclosure to substantiate the articles, and the context in which the photographs were published added to the overall intrusion of the plaintiff's privacy.

In *Douglas and Ors v Hello! Ltd and Ors* [2007] 4 All ER 545, the House of Lords was once again faced with an attempt to enforce

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TO BE OR NOT TO BE

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Likelihood of triggering mandatory registration

Another salient point that a business should consider is the likelihood of there being an increase in its taxable supply in the future which will trigger mandatory registration. Based on the example in *Table 1* above, the business will be required to be GST registered when the value of the taxable supplies under the contracts that it signed during the 11 months after April 2016 causes its taxable turnover to exceed the RM500,000 threshold. In this scenario, the business has slightly more than 28 days to register itself for GST. Such a situation will likely see the business scrambling to prepare, register and implement GST within the short time frame.

Costs and responsibilities of being GST registered

The responsibilities a GST registered business attracts which would inevitably increase operational costs should also be considered by businesses. Examples of this include –

(i) keeping proper business and accounting records;
(ii) training of staff to ensure correct charging and claiming of GST;
(iii) changing of price displays and invoices to reflect GST-inclusive prices;
(iv) setting up electronic payment infrastructure to enable sales to be captured accurately; and
(v) filing of GST returns.

> **“ The responsibilities a GST registered business attracts … would inevitably increase operational costs ”**

CONCLUSION

The time is now for businesses to make preparations for the advent of the GST which will come into force in approximately 16 months. Businesses which are subject to mandatory registration will have to take steps to ensure that the implementation of GST is carried out across the fabric and fibre of the business. As for the remaining 78% of businesses in Malaysia, this is the time to assess if it is ultimately beneficial for the business to join or stay out of the GST regime. Since voluntary registration requires staying in the system for at least two years, businesses with the option should carefully consider the matter before coming to a decision.

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BREAKING UP IS HARD TO DO?

Ezane and Susanah explain why that may indeed be the case!

Neil Sedaka laments in his hit song that *"Breaking up is hard to do"*. While this may sometimes be true, getting a divorce could be even harder because the ending of a marriage can only be done subject to certain conditions and with the Court's involvement.

This article discusses the ways in which non-Muslim couples may seek to dissolve their marriage under Malaysian law.

THE LAW REFORM MARRIAGE AND DIVORCE ACT 1976

The Law Reform Marriage and Divorce Act 1976 ("**LRA**") is the legislation regulating non-Muslim marriages and divorces in Malaysia. The LRA came into force on 1 March 1982.

Under the LRA, there are 3 grounds upon which a married couple may petition for divorce, namely:-

1. Where one party to the marriage has converted to Islam (section 51, LRA);
2. Where both parties mutually consent to its dissolution (section 52, LRA); and
3. Where the marriage has irretrievably broken down (section 53, LRA).

> **"there are 3 grounds upon which a married couple may petition for divorce"**

CONVERSION TO ISLAM

Where a party to a marriage has converted to Islam, the other party who has not converted may petition for divorce. A non-Muslim marriage is not automatically dissolved upon one of the parties converting to Islam. Conversion only provides a ground for the party who has not converted to petition for divorce.

Section 51 of the LRA enables a party who has not embraced Islam to make an application to dissolve the marriage at the High Court after the expiration of three months from the date of his/her spouse's conversion. There is no impediment to the Muslim spouse appearing in the divorce proceedings in the High Court.

The High Court will also have jurisdiction to determine any applications for ancillary relief, for example, applications for maintenance or child custody, even though one spouse has already converted to Islam.

It is pertinent to note that an order for the dissolution of a non-Muslim marriage by a Syariah Court by virtue of conversion would have no legal effect in the High Court other than as evidence of the fact that the marriage had been dissolved under Islamic law. The non-Muslim marriage remains intact and continues to subsist until the High Court dissolves it.

DIVORCE BY MUTUAL CONSENT

Divorce by mutual consent is the simplest and fastest way to end one's marriage. However, this requires both parties to the marriage not only to freely consent to a divorce but also to agree on how they wish to divide the matrimonial assets, the quantum of spousal maintenance to be paid, if claimed, and arrangements involving any children of the marriage.

A joint divorce petition will be presented by both the husband and wife seeking a court order for the dissolution of their marriage on their agreed terms. The Court will usually respect the parties' wishes and make a decree dissolving the marriage on being satisfied that both parties have freely consented to the divorce and that proper provision has been made for the wife and for the support, care and custody of any children of the marriage.

BREAKDOWN OF MARRIAGE

The third way out of one's marriage would be to petition for divorce on the ground that the marriage has irretrievably broken down.

Assuming that the petitioner is the wife (and this applies equally to situations where the husband petitions for divorce), proof of breakdown can be seen in the following situations:-

(a) Where the husband has committed adultery and his wife finds it intolerable to live with him. Adultery must be proved to the satisfaction of the Court beyond reasonable doubt and the wife must show not only that her husband has been unfaithful but also that she finds it intolerable to continue to live with him.

(b) Where the husband has behaved in such a way that the wife cannot reasonably be expected to live with him. Under this ground, the Court will consider the effect of the behaviour of the husband on this particular wife and decide whether it is grave enough that the wife cannot reasonably be expected to live with him. Unreasonable behaviour can range from emotional and physical abuse to persistent nagging by one's spouse!

(c) Where the husband has deserted the wife for a continuous period of at least 2 years immediately preceding the presentation of the petition. This involves the abandonment of cohabitation coupled with the intention of deserting the wife.

(d) Where the couple has lived apart for a continuous period of at least 2 years before the presentation of the petition. A petitioner relying on this ground cannot simply rely on a 2-year separation to obtain a divorce but must also rely on particulars of the breakdown. For example, they must show that they did not socialise or have sexual relations with each other during the 2-year separation.

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Unlike joint divorce petitions, there is usually no prior agreement in place with respect to the division of matrimonial assets, spousal maintenance or arrangements involving the children. These issues will be determined by the Court, after having considered all the evidence before it.

CONDITIONS PRECEDENT TO DIVORCE

Depending on which ground is invoked, certain pre-requisites must be satisfied by a petitioner or joint petitioners, in the case of a joint petition, before a petition for divorce may be presented.

Duration of Marriage

Before a petition for divorce may be presented, the couple must have been married for at least two years (section 50, LRA). This is because the law recognises that the first 2 years of a marriage are the most critical and difficult. So unless it can be shown that there are exceptional circumstances or hardship suffered by a newlywed, he/she cannot petition for divorce within the 2-year period. Whether exceptional hardship exists is subjective and is to be judged by prevailing standards of acceptable behaviour between the spouses.

> **“Unreasonable behaviour can range from emotional and physical abuse to persistent nagging by one's spouse!”**

This requirement however, does not apply to a petitioner whose spouse has converted to Islam. In cases of conversion, the petitioner merely needs to have been married for at least 3 months from the date of the conversion.

Certification by Conciliatory Body

A spouse intending to petition for divorce on the ground that his/her marriage has irretrievably broken down must have first referred the matrimonial difficulty to a conciliatory body and obtained a certificate from that body which confirms that it has failed to reconcile the parties, unless one or more of the exceptions listed under sub-sections (1)(i)–(vi) of section 106 of the LRA. These exceptions include situations where the respondent (i) has been imprisoned for five years or more; or (ii) is suffering from an incurable mental disease; or (iii) has deserted the petitioner and the petitioner does not know the whereabouts of the respondent; and (iv) the respondent resides abroad and is unlikely to enter the jurisdiction within six months after the date of the petition.

Domicile

Both parties to the marriage must be domiciled in Malaysia at the time the petition was presented. “Malaysia” includes both East and West Malaysia.

There are three types of domicile: domicile of origin, domicile of choice and domicile of dependency.

Domicile of origin means the domicile of birth. As for domicile of choice, there are two essential elements involved in determining this, namely the fact of residence and the intention to reside in the country permanently for an indeterminate period. As regards a domicile of dependence, a woman takes the domicile of her husband upon marriage. A married couple have therefore, only one domicile and that is the domicile of the husband. A wife can abandon her husband's domicile but she has to prove that the abandonment is permanent and unequivocal before the Court can take cognizance of it.

A FOURTH WAY OUT?

One other way to put a “marriage” to an end would be to annul it. But an annulment may be obtained only under the limited circumstances provided under the LRA, such as a marriage between persons of the same gender, which renders a marriage void, or incapacity or wilful refusal to consummate a marriage, which render a marriage voidable. An annulment of a marriage is distinct from the dissolution of a marriage by divorce and falls outside the scope of this article.

CONCLUSION

So whilst getting married isn't that difficult to do, once the “I do's” have been uttered, a married man or woman can only legally leave the person he/she married with an order of Court. Breaking up is indeed hard to do.

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FIGHTING THE GOOD CHOCOLATE FIGHT

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The Court took into account the Appellants' survey evidence, albeit with caution, and held that the High Court Judge was wrong in not giving the survey evidence any consideration at all. The Court found that the survey evidence supported evidence of the Appellants' witnesses that showed likely confusion in the minds of the public.

The Court also concluded that other evidence showed the Respondents' conscious use of "Maestro SWISS" to give the impression of a link to Switzerland, notably that it was placed on the front of the product packaging in the red and white colours of the Swiss flag.

On Geographical Indications Act 2000

The Court of Appeal disagreed with the decision of the High Court that "Maestro SWISS" as used did not constitute a geographical indication.

The Court nonetheless held that the Appellants claim under the GIA failed due to Section 27(2) of the GIA, as "Maestro SWISS" pre-dated the date of commencement of the GIA on 15 August 2001.

" The Court nonetheless held that the Appellants claim under the GIA failed due to Section 27(2) of the GIA "

Section 27(2) provides:

"In respect of a geographical indication in existence before the commencement of this Act, no suit or proceedings shall be brought under this Act for anything done before the commencement of this Act."

It is unclear from the judgment whether the Court decided this on the basis that "Maestro SWISS" had only been used by the Respondents prior to the GIA, or whether it was because "Maestro SWISS" existed and was first used prior to the GIA. In the event of the latter, it would mean that the words "*anything done before the commencement of this Act*" apply to any geographical indication used prior to the GIA despite continued use post-GIA.

On Locus Standi

The Court of Appeal held that the First Appellant had *locus standi* in the extended passing off action on account that its members share a common interest in protecting the designation "Swiss chocolates". As a result, the Court held that the First Appellant belonged to the class entitled to share in the goodwill of "Swiss chocolates". The Court referred to dicta from *Chocosuisse v Cadbury* (Chancery Division) in which Laddie J stated "*Those entitled to use the word share a common interest in protecting its purity as a designation applied to a particular type of goods but in no real sense does it belong to an individual trader.*"

Interestingly, the court of first instance in *Chocosuisse v Cadbury* followed previous authority in deciding that Chocosuisse could bring proceedings only on its own behalf on account that membership may be affected if "Swiss chocolate" became unprotectable in England. The approach meant that Chocosuisse did not have *locus* to sue in a representative capacity i.e. on behalf of its members.

When the case went to appeal, the UK Court of Appeal similarly held that Chocosuisse did not have *locus* to sue in a representative capacity as it did not have the same interest as its members did in the proceedings. In addition, the Court took the view that Chocosuisse did not have *locus* to sue in its own right as the trade association did not have the business interest or goodwill necessary to bring the action for passing off against Cadbury. In other words, Cadbury's actions in contention did not 'pass off' any goodwill belonging to Chocosuisse in its own capacity as a trade association.

It would appear to this author that our Court of Appeal has taken a different approach in relation to the *locus standi* of a trade association if its members share in the goodwill and reputation of a designation.

CONCLUSION

The Court of Appeal's decision reaffirmed the tort of extended passing off in preventing traders from misusing distinctive designations which have goodwill and reputation attributable to a distinguishable class of goods.

The grapevine reports that the parties have applied for leave to appeal to the Federal Court. It is hoped that leave will be granted so that the disputes between the parties will be resolved with finality by the apex court of Malaysia. In particular, authoritative rulings on the interpretation of Section 27(2) of the GIA and the *locus standi* of a trade association to commence an action for extended passing off would be welcomed by the legal and business fraternities in Malaysia.

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PINKIE PROMISE?

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breach of privacy rights *vide* a claim for breach of confidentiality. The appellant was the magazine "*OK!*", which had contracted for the exclusive right to publish the photographs of the wedding of celebrities, Michael Douglas and Catherine Zeta-Jones. The respondent was the appellant's rival "*Hello!*", which had published photographs surreptitiously taken by an unauthorised photographer.

The House of Lords first identified the confidential information: the photographs, or rather, the exact graphical representation of the wedding. Other publications were perfectly entitled to publish descriptions of the Douglases' wedding, but only *OK!* was entitled to publish the exact graphical representation of the wedding as that was what *OK!* had paid the Douglases £1m for. The fact that the information happened to be in relation to the Douglases' private life was irrelevant.

The House of Lords went on to consider the circumstances of the Douglases' wedding. Although the fact that the Douglases would be wed was in the public domain, the transaction between the Douglases and *OK!* was for each photograph taken by *OK!* to be treated as a separate piece of information that only *OK!* had the right to publish. To that effect, the Douglases had arranged for strict security and imposed an obligation of confidence on its guests in respect of *any* photographs of the wedding. These arrangements were not to protect the privacy of the Douglases' wedding, but to protect the commercial interests of *OK!*. As such, it had imparted the necessary circumstance of confidence which bound, among others, the unauthorised photographer and *Hello!*

> **"trivial tittle tattle, no matter how confidential" cannot be protected**

THE SITUATION BACK HOME

The Malaysian courts have greeted this development in the law with great gusto. Apart from having long adapted the use of the three elements in *Coco* to suits for breach of confidentiality by employees and in other commercial contractual relationships, the Malaysian courts appear to have welcomed the English courts' decisions in *Campbell* and *Douglas*, to extend the protection to privacy rights, with open arms.

In *Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 4 CLJ 397, the first defendant was the surgeon who successfully removed the plaintiff's haemorrhoids. During the procedure, the first defendant had taken photographs of the plaintiff's nether regions without her consent, for medical purposes.

The High Court cited Lord Greene in *Saltman* and found that the photographs of the plaintiff's nether regions ought to be reasonably inferred as information that had the necessary quality of confidence as it involved her modesty, decency and dignity. There was an obligation of confidence as there was a doctor-patient relationship, thus the first defendant was duty-bound to maintain the strictest confidence of those photographs.

The High Court went one step further and, citing the Court of Appeal in *Maslinda Ishak v Mohd Tahir Osman & Ors* [2009] 6 CLJ 653, held that the invasion of privacy rights is an actionable tort under Malaysian common law.

Taking this cue to set a new line of precedents, the High Court in *Sherinna Nur Elena bt Abdullah v Kent Well Edar Sdn Bhd* [2011] MLJU 150 held that it is desirable that the law develops the tort of breach of privacy.

In *Sherinna*, the plaintiff was a beauty queen who discovered that her photographs and image were used without her authorisation on the packaging, as well as advertisements, of the defendant's products. The plaintiff averred that she had a right to privacy, and that she had copyright in her own photograph and image. In response to the defendant's submission that common law did not recognise privacy rights, the High Court cited, among others, *Douglas*, *Lee Ewe Poh* and *Maslinda Ishak*, in support of the implicit recognition of privacy rights in common law.

To this end, the High Court in *Lew Cher Phow & Ors v Pua Yong Yong & Anor* [2011] MLJU 1195 observed that recent case law indicates that the Malaysian courts are leaning in favour of recognising the right to privacy, especially given that the courts have to move with the change in times. The High Court went one step further, and held that the right to privacy is a fundamental right entitled to protection.

AN AMARANTHINE LANDMARK CASE?

Adopting the *dicta* of the High Court in *Sherinna*, the law on the invasion of privacy in Malaysia must necessarily evolve, especially with the internet era of Facebook and YouTube, where lives can be destroyed by such unwanted invasion of privacy with just a click of a button.

One wonders whether Megarry J in *Coco* had the power of foresight when his Lordship cited Lord Greene in *Saltman*; did his Lordship envision the speed at which trigger-happy social media users could lose protection of their confidential information by sharing it indiscriminately with the click of a button without giving sufficient forethought to the consequences of doing so until the information has blazed into the public domain, beyond all hopes of being salvaged?

It would be fair to say that *Coco* is not merely a landmark case that is consigned to the annals of legal history. It will continue to be cited and applied in the foreseeable future, in the dawn of breach of privacy laws, the advent of social media, and the unfortunate lack of common sense and foresight in the population.

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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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