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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

This issue of the Legal Insights coincides with two much talked about international events of note. The first is that of Oscar Pistorius, the renown "*Blade Runner*" from South Africa, who was convicted of culpable homicide (manslaughter) and is awaiting sentencing for his infamous act of shooting dead his girlfriend, Reeva Steenkemp. Although Pistorius was adjudged to have killed, his attorneys in mitigation are trying to portray the "*Blade Runner*" as a victim and argued for him to serve house arrest and community service instead of being incarcerated. The prosecutor of course deferred. As the case involves a celebrity, the Judge has a difficult task. If the sentence is too light, members of the society may lose faith in the judicial system and take the law into their own hands. Hopefully, the judge will exercise her powers fairly and judiciously and the punishment meted out will reflect the gravity of the crime.

The outbreak of the Ebola epidemic in West Africa (Liberia, Guinea and Sierra Leone) is now the biggest health challenge since Aids. The statistics showed that there were 8,300 reported cases, of which 4,000 have resulted in fatalities. Alarmingly, reported cases are expected to increase to 20,000 by November 2014. Cases have now been reported in USA and Spain. The Ebola virus is first transmitted to humans who have close contact with infected animals like monkeys, bats, antelopes etc. primarily in remote villages where bush meat is a prized delicacy. The disease has been declared an epidemic by the United Nations, and with countries united to fight it, let us hope and pray that it will be controlled by the time the next issue of our newsletter is published. For our readers who want to see a dramatized version of an "*Ebola-like*" epidemic, try the movie "*Outbreak*", a 1995 Hollywood production which stars Dustin Hoffman and Morgan Freeman.

I hope you will enjoy reading this issue of our newsletter which contains many interesting articles and case commentaries. Last, but certainly by no means the least, we take this opportunity to wish our Hindu readers '*Happy Deepavali.*'

With best wishes,

LEE TATT BOON
Editor-in-Chief
& Senior Partner

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TICK! TOCK! MAKE A CLAIM BEFORE THE CLOCK STOPS

Angela Yap and Claudia Cheah explain why a clause that limits time for making a claim under a guarantee is valid

The Federal Court in the recent case of *The Pacific Bank Berhad v State Government of Sarawak* (Federal Court Civil Appeal No. 01()-8-2011(Q)) decided on an interesting issue as to whether the terms and conditions in a letter of guarantee which limit the time or restrict the period for making a claim is void under section 29 of the Contracts Act 1950 ("Act").

Section 29 of the Act provides as follows:

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

BACKGROUND FACTS

The Respondent, the State Government of Sarawak, had issued a timber licence to Niah Native Logging Sdn Bhd ("Niah Native") to extract timber. One of the conditions for the issuance of the timber licence required Niah Native to provide a letter of guarantee to the Respondent to guarantee the payment of all the royalties due to the Respondent for extracting timber at the licenced area ("Letter of Guarantee").

The Appellant issued the Letter of Guarantee in favour of the Respondent whereby the Appellant guaranteed that in the event that Niah Native defaults in the payment of royalties, the Appellant would be liable to pay the Respondent a sum not exceeding RM100,000.00. In consideration of the Appellant issuing the Letter of Guarantee, Niah Native's contractor, Syarikat Mustafa & Ngu Timber Sdn Bhd issued a Letter of Indemnity in favour of the Appellant. Both the Letter of Guarantee and the Letter of Indemnity were valid for only one year, i.e. from 25 April 1997 to 24 April 1998.

The bone of contention between the parties concerned the effect of a clause in the Letter of Guarantee which reads as follows:

"This guarantee is effective from 25th April 1997 and shall expire on 24th April 1998. All claim (sic), if any in respect of this guarantee shall be made during the guarantee period failing which it shall be deemed to have been discharged and released from all and any liability, under this Guarantee." ("Relevant Clause")

Prior to the expiry of the Letter of Guarantee, the Appellant wrote to Niah Native's contractor to enquire whether they wished to renew the Letter of Guarantee. There was no response and the Letter of Guarantee expired on 24 April 1998. Thereafter, the Appellant informed the Respondent in writing that the Letter of Guarantee had expired and was accordingly cancelled. The Respondent received the Appellant's letter but did not raise any objection or dispute the contents of the said letter.

On 20 October 1998 i.e. about six months after the expiry of the Letter of Guarantee, the Respondent made a claim against the Appellant for a sum of RM118,790.69. It was not disputed that the said sum arose from royalties which were payable during the validity period of the Letter of Guarantee. The Appellant rejected the Respondent's claim on the ground that it was made after the Letter of Guarantee had expired.

The Respondent filed a suit in the High Court against Niah Native for non-payment of royalties due under the timber licence and against the Appellant as the Guarantor under the Letter of Guarantee.

THE HIGH COURT ACTION

The Decision of the Deputy Registrar

The Respondent's claim was struck out by the Deputy Registrar upon the application by the Appellant under Order 18 rule 19 of the Rules of the High Court, 1980 ("RHC"), on the ground that Section 29 of the Act did not apply to the facts of the case.

> **"the making of a claim and the enforcement of a right are two different things"**

The Decision of the High Court Judge

On appeal by the Respondent, the High Court Judge ordered the matter to be determined by an issue of law framed under Order 14A of the RHC, namely, whether Section 29 of the Act applies to the terms and conditions stipulated in the Letter of Guarantee that require all claims to be made during the one year guarantee period.

The High Court Judge found that the Relevant Clause had the effect of limiting the period during which the Respondent may enforce its right against Niah Native under the Letter of Guarantee. Thus, the High Court Judge held that the Relevant Clause was void under Section 29 of the Act and ordered the Appellant to pay the sum of RM100,000.00 with interest to the Respondent.

The Appellant appealed to the Court of Appeal against the said decision.

THE DECISION OF THE COURT OF APPEAL

The Appellant's appeal was dismissed by the Court of Appeal by a majority decision.

The majority decision agreed with the High Court Judge that the terms and conditions of the Letter of Guarantee had the effect of limiting the Respondent's ability to enforce its right to make a claim to a one year period, when in fact the Respondent should be entitled to a six year period under the Limitation Ordinance of Sarawak.

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The majority decision approved and followed the principles in *New Zealand Insurance Co Ltd v Ong Choong Lim (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185 and the commercial 'common sense approach' in *MBf Insurance Sdn Bhd v Lembaga Penyatuan dan Pemuliharaan Tanah Persekutuan (FELCRA)* [2008] 2 MLJ 398 which held that where the breach had occurred during the validity period of guarantee, the fact that the claim was made outside of the validity period of the guarantee did not render the claim bad or invalid.

The dissenting Judge, Dato' Hishamudin Mohd. Yunus JCA, took the view that the making of a claim and the enforcement of a right are two distinct matters. The claim or demand must be made following a breach, within the prescribed time frame and validly taken. It is only when the claim or demand is not satisfied that the enforcement of a right i.e. suing by judicial proceedings arises. His Lordship held that since the limitation of time stipulated in the Relevant Clause only related to the making of a demand and was not concerned with the Respondent's right to enforce the claim, the said clause was not in breach of Section 29 of the Act.

Aggrieved by the decision of the Court of Appeal, the Appellant applied for leave to appeal to the Federal Court.

THE DECISION OF THE FEDERAL COURT

Leave was granted by the Federal Court to the Appellant on the following question of law:

"Whether the terms and conditions in the Letter of Guarantee which limit the time or restrict the period for making the claim is (sic) void?"

The Federal Court answered the above question in the negative and allowed the appeal. The main reasons for Federal Court's decision are summarised below:

(1) The language of the Letter of Guarantee was clear and as such, its plain and ordinary meaning must be given. The issue of whether or not a prior demand is a condition precedent to the creation of liability in a guarantee depends on the precise terms of the contract. In this regard, a distinction has to be made between limiting a right and limiting the enforcement of a right. In this case, the Relevant Clause only limits the time when a right to sue or a cause of action would accrue to the Respondent. In short, once the right to sue or cause of action accrued, it did not affect the six year limitation period within which the Respondent may sue.

(2) Section 29 of the Act is in *pari materia* with the old Section 28 of the Indian Contracts Act ("ICA"). In this regard, the Indian courts have consistently held that the old Section 28 of the ICA only invalidates agreements which limit the time within which a person has to enforce his rights, and not agreements which determine when a right arises or the time when a right will arise. The Federal Court took note of the fact that Section 28 of the ICA has been amended and that the new Section 28(b) would invalidate a clause such as the Relevant Clause. However, Section 29 of the Act did not contain a provision which is similar to the new Section 28(b) of the ICA.

(3) It is commonplace for parties to contract to regulate or modify their rights in the event of breach and the rights of accrual of any cause of action in any way they deem fit. In this case, it was clear that parties had expressly agreed that for liability on the part of the Appellant to arise, a claim (demand) must be made during the guarantee period upon an event of default.

(4) *New Zealand Insurance* and *MBf Insurance* are distinguishable on the facts. Further, the commercial 'common sense' approach in *MBf Insurance* is not in accordance with the principles that parties are free to agree on terms governing when and how their right of action will arise. If the parties have agreed on a cut-off date for a demand to be met, then that would represent the business common sense between the parties. Further, the courts should be mindful in following the said cases as they both involved insurance contracts, which are *uberrimae fidei* contracts.

(5) The English law governing guarantees is instructive in that the law requires that a demand be made under a guarantee, though not as a precondition of liability, but as a notice to claim, unless such requirement for notice to claim or demand is waived by the parties.

ANALYSIS

The decision of the Federal Court in *Pacific Bank* is noteworthy. The Federal Court has drawn a distinction between a provision which limits the time for making a claim and one which limits the time within which a claim may be enforced and has determined that a clause which limits the time for making a claim is not invalidated by Section 29 of the Act. Thus, a party who seeks to exercise his rights under a guarantee must comply with any time period stipulated therein for making a claim or demand as failure to do so may result in the loss of the right to enforce the guarantee, even though the liability had been incurred during the validity period of the guarantee.

It will be interesting to see whether the Malaysian Courts will apply the principles laid down in *Pacific Bank* to uphold the validity of similar time limitation clauses that may be contained in other forms of commercial contracts.

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AUDITORS BEWARE

Lee Shih explains a significant case on auditors' duties

The Court of Appeal in *CIMB Investment Bank Bhd v Ernst & Young & Another Appeal* [2014] 6 CLJ 438 held that in carrying out statutory audits under the Securities Industry Act 1983 ("SIA"), the auditors of a fund management company owed a duty of care to the company's investors.

This appellate decision is significant as it confirms the tests to be applied to ascertain whether auditors owe a duty of care to the company's investors. On the facts of this case, the auditors' agreement to conduct an SIA audit for a fund manager created a special relationship between the auditors and the company's investors which gave rise to a common law duty of care on the part of the auditors to undertake a proper audit in the course of carrying out their statutory duty.

BACKGROUND FACTS

SJ Asset Management Sdn Bhd

The appeal centred on SJ Asset Management Sdn Bhd ("SJAM"), a licensed fund management company under the SIA and the Capital Markets and Services Act 2007 ("CMSA"). The appellants in one appeal were clients, or in other words investors, of SJAM. In the second appeal, the appellant had caused its clients to invest in SJAM. SJAM held, administered and managed various investments of the appellants.

SJAM had engaged the respondent auditors to perform the necessary statutory audits under the Companies Act 1965 ("CA") and under the SIA. Pursuant to their engagement, the auditors produced audit reports.

Following complaints against SJAM, the Securities Commission ("SC") investigated SJAM, revoked its capital market services license and eventually wound up SJAM.

The appellants, in turn, appointed their own accountants to investigate the accounts of SJAM. Based on their accountants' findings of fraud in the management of the funds of the clients, the appellants commenced the High Court action against the auditors based on negligence. The appellants' contentions were that they had relied on the auditors' audit reports to make, advise on or facilitate investments in SJAM.

Preliminary Issues for Determination by the High Court

In the High Court action (reported in *CIMB Investment Bank Bhd v Ernst & Young and Another Case* [2014] 3 CLJ 322), the Court heard an application for the determination of the issue on whether the auditors owed a duty of care to the appellants in the two situations that arose in this case.

The first situation was when the auditors were carrying out the statutory audits in accordance with the CA for SJAM and issuing the CA audit reports. The second situation, and what was more significant in this appeal, was when the auditors were carrying out the statutory audits in accordance with the SIA for SJAM and issuing the SIA audit reports.

The High Court decided in favour of the auditors and found that the auditors owed no duty of care to the appellants in both situations. For the CA audit reports, it was held that CA audit reports were not intended for the appellants, as investors of the company, but were meant for SJAM and its shareholders in the general meeting. As for the SIA audit reports, it was held that they were not meant for making investment decisions but to enable SJAM to furnish such information to the SC.

Therefore, the appellants' claims were dismissed. The appellants appealed to the Court of Appeal.

> **" in carrying out statutory audits under the … SIA … the auditors of a fund manager company owed a duty of care to the company's investors "**

FINDINGS ON THE DUTY OF CARE

Guiding Principles on Establishing a Duty of Care

The Court of Appeal was guided by the Federal Court decision in *The Co-operative Central Bank Ltd v KGV & Associates Sdn Bhd* [2008] 2 CLJ 545 in accepting the guidelines laid down by the House of Lords in *Her Majesty's Commissioners of Customs and Excise v Barclays Bank* [2007] 1 AC 181.

The Federal Court in *Co-operative Central Bank* acknowledged that three general tests could be used to determine whether a duty of care existed in cases that involved economic loss.

The first is the 'assumption of responsibility' test as to whether the defendant assumed responsibility for what he said and did *vis-à-vis* the claimant, or is to be treated by the law as having done so. The second is the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it was fair, just and reasonable to impose a duty of care on the defendant towards the claimant. The third is the incremental test.

Against this backdrop, the Court of Appeal found that the High Court had determined the existence of the duty of care solely on the basis of the threefold test. In applying this test, the High Court had ruled that the appellants had failed to satisfy the 'sufficient

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proximity' element. The Court of Appeal held that instead, the High Court should have applied the guidelines in *Barclays Bank*, in particular, the first test of assumption of responsibility.

Duty of Care on the Part of the Auditors

The application of the assumption of responsibility test would mean that:

(a) reliance on the auditors' report is no longer an essential ingredient to establish a duty of care;
(b) no anterior relationship between the appellants and the auditors is necessary to satisfy the ingredients of foreseeability and proximity; and
(c) the ingredient relating to proximity is satisfied so long as the assumption of responsibility may be inferred by reason of the existence of a special relationship.

“ The focus of the SIA audit included the safeguarding of the assets of the appellants held by SJAM ”

The Court of Appeal drew a distinction between the CA audit and the SIA audit and found that Parliament could not have intended for both audits to be for the same purpose. There would be a difference in the scope and approach of the SIA audit as compared to the CA audit.

The focus of the SIA audit included the safeguarding of the assets of the appellants held by SJAM. The report by the auditors would serve to alert the SC and/or the relevant government authority to take such further action as is required. If in the course of the audit, the auditors come across a transaction or an accounting entry that does not comply with the provisions of Division 3 of Part VII of the SIA, the auditors had a duty to look deeper. The auditors could not ignore the irregularity or breach. Therefore, the SIA audit framework is a critical means of both ensuring compliance and detecting non-compliance by SJAM in relation to the management of the appellants' assets.

The Court of Appeal also disagreed that any breach of the SIA provisions could only be enforced by the SC. Further, this was an appropriate case where the legislative framework in the SIA could be a basis to found the claim for breach of the common law duty of care arising from the careless performance of a statutory duty.

In concluding that the auditors owed a duty of care, the Court of Appeal stressed that the appellants were in an unusual situation whereby their funds and investments were in the hands of a trustee fund manager (SJAM) but over which funds they had no control. The auditors' agreement to conduct the SIA audit for SJAM with knowledge or imputed knowledge of the unusual situation in which the appellants were placed, gave rise to a duty on the part of the auditors to undertake a proper audit in the course of carrying out their statutory duty. This obligation created a relationship between the auditors and the appellants so as to give rise to a common law duty of care.

If the auditors had not breached their duty of care, the SIA audit reports would have been qualified and the irregularity in the accounts of SJAM would have been reported to the SC. Such a report to the SC, in turn, would have caused the SC to take the appropriate action thereby causing SJAM to cease trading and consequently, diminish the losses of the appellants. However, because the audit reports that were produced by the auditors were 'clean', the SC took action much later and the ensuing winding up of SJAM was correspondingly delayed, thereby causing substantially more losses to the appellants.

The Court of Appeal therefore ruled that the auditors owed a common law duty of care to the appellants. The Court of Appeal ordered that the matters be remitted to the High Court for the trial on the issue of the liability of the auditors, if any, to the appellants.

CONCLUSION

This decision is significant in confirming that auditors who carry out a statutory audit under the SIA for a fund management company owe a duty of care to the investors of that company. Although the SIA has been repealed and replaced by the CMSA, it is likely that a similar duty of care on the part of the auditors would arise under the CMSA.

It is also likely that the Court would still impose such a duty in favour of the investors of the company even if the auditors build disclaimers into such a statutory audit (whether under the SIA or CMSA) to exclude liability or obligations to third parties.

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JOINING THE CROWD

Kok Chee Kheong examines the proposed equity crowdfunding framework

The Securities Commission of Malaysia ("SC") released a consultation paper on 21 August 2014 to seek feedback from the public on the Proposed Regulatory Framework for Equity Crowdfunding. After the consultation period closed on 5 September 2014, the SC issued a Public Response Paper on 22 September 2014 to respond to the feedback received on the consultation paper.

This article provides an overview of crowdfunding and the framework proposed by the SC for the introduction of equity crowdfunding in Malaysia ("ECF framework").

WHAT IS CROWDFUNDING?

Crowdfunding is a way of raising funds, primarily through the internet, by obtaining small sums of money from a large number of people. The UK Crowdfunding Association ("UKCFA") traces the origins of crowdfunding back to 1997 when fans of Marillion, a rock band, raised US$60,000 through the internet to enable the band to perform concerts in the United States.

> "Crowdfunding is a way of raising funds ... by obtaining small sums of money from a large number of people"

According to the UKCFA, there are three types of crowdfunding: donation/reward crowdfunding, debt crowdfunding and equity crowdfunding.

Donation/Reward Crowdfunding

Donation crowdfunding is a form of crowdfunding whereby a person donates money to a cause without receiving any return, except for the satisfaction of having contributed to a cause which he believes in. On 4 June 2014, the online edition of The Straits Times reported that blogger, Roy Ngerng, raised S$81,000 from more than 1,000 donors within five days through donation crowdfunding by posting a plea on his blog for assistance to defray the legal expenses in defending a defamation suit by Singapore Prime Minister, Lee Hsien Loong.

Like donation crowdfunding, reward crowdfunding is often motivated by the donor's desire to support a cause; the difference being that in the case of reward crowdfunding, the donor receives a form of reward, such as event tickets, gifts or coupons, in return for his donation.

Debt Crowdfunding

Debt crowdfunding is a form of fundraising whereby investors advance money to the promoter of a project. Debt crowdfunding may be on an interest or non-interest bearing basis.

Equity Crowdfunding

In equity crowdfunding, an investor receives shares or stocks in return for his investment in the enterprise which promotes the business. The value of the investment is likely to rise or fall in tandem with the fortunes of the enterprise's business.

THE ECF FRAMEWORK

The ECF framework applies only to equity crowdfunding and not to the other forms of crowdfunding. It seeks to provide an alternative and non-traditional means of funding to small and medium enterprises, particularly those that require funding to develop innovative ideas.

The ECF operator

Equity crowdfunding will be carried out in Malaysia through an operator of a web-based platform which will host the equity offerings by issuers ("ECF operator"). An ECF operator will be regulated as a registered electronic facility ("REF") under Subdivision 4 of Division 2 of Part II of the Capital Markets and Services Act 2007 ("CMSA"). At an appropriate juncture the ECF operator may be converted from an REF to an approved stock exchange under the CMSA.

In addition to hosting offerings, an ECF operator will provide a public communication channel to facilitate discussions about the offerings on its platform, as well as ancillary services, such as screening and preparing of standardised documents.

An ECF operator must ensure that only qualified investors participate on the platform. It is expected to carry out background checks on an issuer who will be required to provide certain financial documents to the ECF operator.

The issuer

An issuer which proposes to issue securities under the ECF framework must be a locally incorporated private company (other than an exempt private company) which may be controlled by Malaysians or non-Malaysians. Certain companies, such as listed companies and their subsidiaries, companies with no business plans and companies which have already raised RM5.0 million paid-up capital on an ECF platform, will not be allowed to raise funds through the ECF platform.

The shares must be a primary offering (i.e. the issue of new shares) and not the sale of issued shares by existing shareholders. The shares may be ordinary shares or preference shares and both may be offered in the same offering. However, an issuer is not allowed to be hosted concurrently on more than one ECF platform.

Limits on fund-raising

An issuer will only be permitted to raise up to RM3.0 million in a 12 month period and a total of RM5.0 million through the ECF

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platform. An issuer's own capital contribution and funding through private placements will not be taken into account in determining whether the RM5.0 million threshold has been reached. Subject to the aforesaid financial limits, an issuer is allowed to accept an oversubscription provided that it has reserved the right to do so, and has disclosed to investors as to how it proposes to use the oversubscribed amount.

The above limits will not apply to an issuer which is a microfund, i.e. an entity that provides small amounts of funding to seed-stage businesses. However, the following restrictions apply to a microfund – it must be a venture capital company that is registered with the SC; it must have a specified investment objective; and it can only raise funds from sophisticated investors.

Safe harbour

The SC has stated that it is working with the Companies Commission of Malaysia to create a safe harbour provision to address the possibility that a private company may be precluded by section 15 of the Companies Act 1965 from offering its shares to the public.

“ a retail investor will only be allowed to invest a maximum of RM5,000 per issuer ”

Disclosure document

The offering of shares on an ECF platform will not require the SC's approval and will be exempted from the prospectus requirements under the CMSA. Instead, an issuer must lodge a standardised disclosure document with the ECF operator when it applies to host its offering on the platform. The disclosure document will include basic information about the issuer and the offering, e.g. its objective, targeted investment amount and the offer period. The information will be provided on a self-declaratory basis.

The investor

Equity crowdfunding will be accessible to both sophisticated investors, i.e. accredited investors, high-net worth entities and high-net worth individuals, as specified in Part 1 of Schedules 6 and 7 of the CMSA, and to retail investors, i.e. those who are not sophisticated investors.

There will be no limit as to the amounts which a sophisticated investor can invest, but a retail investor will only be allowed to invest a maximum of RM5,000 per issuer and a total amount not exceeding RM50,000 in a 12 month period. An angel investor who is not a sophisticated investor is subject to the same limit per issuer but may invest a total of RM500,000 in a 12 month period.

An investor will be required to self-declare to the ECF operator that he complies with the relevant investment restrictions and to acknowledge the investment risks before he invests. To safeguard the issuer, an investor who is in breach of his investment restriction will not be allowed to withdraw his investment.

Investor safeguards

To safeguard investors, the SC proposes to adopt the '*all or nothing*' (AON) model, whereby an issuer will only be entitled to the proceeds raised on an ECF platform if it has successfully raised the targeted investment amount, instead of the '*keep-it-all*' (KIA) model, where an issuer will be entitled to receive the proceeds raised even if it falls short of the targeted investment amount.

A cooling-off period is proposed to enable an investor to withdraw his investment within six business days of making his investment. An investor will also be given the right to opt-out of his investment within two weeks if a material adverse change occurs which affects the issuer or the project.

To give effect to the above safeguards, an ECF operator is required to hold the amounts raised in a trust account until the specified conditions for the release of funds are met.

To provide a measure of liquidity in investments, the SC will allow investors to dispose of their shares through an ECF platform during a window period of two weeks for every six months in a year.

CONCLUSION

As acknowledged by the SC, investing in private companies comes with attendant risks; in particular, that the project or issuer may fail, the lack of an active secondary market for the issuer's shares and the inability to obtain a return due to the issuer's refusal to declare dividends. Time will tell whether equity crowdfunding will develop into a vibrant alternative market for private companies to raise capital in Malaysia.

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THE TEN STEPS

Lam Wai Loon and Serene Hiew provide a step-by-step guide on the statutory adjudication process

INTRODUCTION

After more than 1½ years since the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") received Royal Assent on 18 June 2012, the CIPAA finally came into force on 15 April 2014. The Minister of Works made a set of regulations, the Construction Industry Payment and Adjudication Regulations 2014 ("Regulations"), which came into effect on the day that the CIPAA came into force. The Regulations are intended to supplement the CIPAA for the better carrying out of the provisions of the CIPAA.

Shortly after the CIPAA came into force, the Kuala Lumpur Regional Centre for Arbitration ("KLRCA"), the sole designated Adjudication Authority under the CIPAA, issued a set of rules and procedure called the KLRCA Adjudication Rules and Procedure. These rules and procedures are to facilitate the efficient administration of adjudication cases and other matters by the KLRCA under the CIPAA. In addition, the KLRCA has provided a set of forms to assist and guide intended participants in the adjudication process under the CIPAA. These forms are contained in Schedule 1 of the KLRCA Adjudication Rules and Procedure.

> **"stakeholders … must be vigilant in ensuring that the requirements … under the CIPAA are complied with"**

EXEMPTED CONTRACTS

Before proceeding to discuss the adjudication process, it is important to note that the Construction Industry Payment and Adjudication (Exemption) Order 2014 ("Exemption Order") exempts two categories of Government construction contracts from the statutory adjudication regime under the CIPAA.

The first category of exempted contracts is set out in Schedule 1 of the Exemption Order. These contracts are exempted entirely from the operation of the CIPAA, and cover any Government contract for construction work that (a) is carried out urgently and without delay due to natural disaster, flood, landslide, ground subsidence, fire and other emergency and unforeseen circumstances; or (b) relates to national security or security related facilities, including the construction of military and police facilities, military bases and camps, prison and detention camps, power plants and water treatment plants.

The second category of exempted contracts is contained in Schedule 2 of the Exemption Order. It is only a partial exemption in that it gives the parties to Government construction contracts with a contract sum of RM20 million or less, a longer period for service of certain documents, such as the payment response, adjudication response and adjudication reply, than the time frames provided under the CIPAA. This exemption is in force until 31 December 2015.

RETROSPECTIVE OR PROSPECTIVE?

It is unclear whether the CIPAA covers construction contracts made before the CIPAA came into force, and if it does, whether it also covers disputes which arose prior thereto.

Pending the resolution of this issue by our courts, the KLRCA has issued the KLRCA CIPAA Circular 01 dated 23 April 2014 which states that it would administer and appoint adjudicators for adjudication cases in respect of any payment disputes "*which arose under a construction contract on or before 15 April 2014, regardless of whether the relevant construction contract was made before or after 15 April 2014*".

THE TEN-STEP ADJUDICATION PROCESS

The adjudication process under the CIPAA is highly regulated, and stakeholders who seek recourse through this process must be vigilant in ensuring that the requirements in terms of time, form and substance provided under the CIPAA are complied with. These requirements are necessary to ensure that adjudication cases under the CIPAA can be disposed of in an economical and expeditious manner. The adjudication process, commencing from the filing of the payment claim until the delivery of an adjudication decision, is summarised below.

Step 1

A party who claims payment of a sum which has not been paid in whole, or in part, under a construction contract is entitled to serve on the other party, i.e. the non-paying party, a payment claim under section 5 of the CIPAA. The payment claim must include the information prescribed in section 5(2) of the CIPAA, such as the amount claimed, the payment due date and the provision of the construction contract to which the payment relates. A sample payment claim form is provided in Form 1 of Schedule 1 of the KLRCA Adjudication Rules and Procedure.

Service of a payment claim is important as a party is not allowed to commence adjudication proceedings under the CIPAA without a payment claim having been validly served on the non-paying party.

Step 2

Having received the payment claim, the non-paying party has an option as to whether to respond to the payment claim or not. Pursuant to section 6(4) of the CIPAA, a non-paying party who does not respond to a payment claim is deemed to have disputed the entire payment claim.

A non-paying party who chooses to respond must do so within ten working days from the date of receipt of the payment claim.

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He may (a) dispute the entire payment claim; or (b) admit the entire claim; or (c) admit part of the claim, and dispute the rest. The non-paying party is required to make payment to the extent that the claim has been admitted.

A sample payment response form is provided in Form 2 of Schedule 1 of the KLRCA Adjudication Rules and Procedure.

Step 3

Upon the expiry of the period provided for the service of the payment response, the unpaid party or the non-paying party may commence adjudication by serving a notice of adjudication on the other party. The party who serves the notice of adjudication is the claimant, and the other party, the respondent. The notice of adjudication must be in writing and contain the nature and description of the dispute and the remedy sought and any supporting documents.

Pursuant to Rules 2 and 4 of the KLRCA Adjudication Rules and Procedure, the claimant is required to register the adjudication case with the KLRCA and to deliver a copy of the notice of adjudication to the Director of the KLRCA. The claimant must pay a registration fee of RM250.00 to register the adjudication case with the KLRCA.

Samples of the notice of adjudication and registration form are provided in Forms 3 and 3A respectively of Schedule 1 of the KLRCA Adjudication Rules and Procedure.

Step 4

Within ten working days from the service of the notice of adjudication, the parties may attempt to agree on an adjudicator to adjudicate their dispute. If the parties fail to reach an agreement, then either party or both parties may issue a written request to the Director of the KLRCA to appoint an adjudicator. The Director of the KLRCA is required to make the appointment within five working days of receipt of the request.

The adjudicator appointed by the parties or by the Director of the KLRCA may then propose and negotiate his terms of appointment, including his fees and expenses, with the parties. The adjudicator is not obliged to accept the appointment if the parties cannot reach an agreement with him on the terms of appointment. If the adjudicator and the parties cannot reach an agreement, or the adjudicator rejects or fails to accept the appointment within ten working days from the date he was notified of his appointment, then the parties may proceed to appoint another adjudicator.

An adjudicator who accepts the appointment must indicate his acceptance within ten working days from the date he was notified of his appointment. Upon acceptance of his appointment, the adjudicator must submit to the KLRCA a declaration in writing that (a) there is no conflict of interest in respect of his appointment; (b) he will act independently, impartially and in a timely manner and avoid incurring unnecessary expense; (c) he will comply with the principles of natural justice; and (d) there are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence. The adjudicator is also required to send a copy of his terms of appointment and fees to the Director of the KLRCA within seven days of his acceptance of the appointment.

Step 5

Within 14 days after acceptance of his appointment, the adjudicator is to issue a direction to order the parties to deposit with the Director of the KLRCA, in advance as security, the KLRCA's administrative fees, any applicable Government taxes and a reasonable proportion of the adjudicator's fees and expenses.

Step 6

The claimant is required to serve an adjudication claim on the respondent within ten working days from the date of receipt of the acceptance of appointment by the adjudicator and to provide a copy of the same to the adjudicator. The adjudication claim must contain the nature and description of the dispute and the remedy sought, together with any supporting documents. A sample adjudication claim form is provided in Form 7 of Schedule 1 of the KLRCA Adjudication Rules and Procedure.

In addition, the claimant must deliver a copy of the adjudication claim to the KLRCA within seven working days from the date of service of the adjudication claim on the respondent. Unless otherwise directed by the Director of the KLRCA, the claimant is not required to provide the supporting documents to the KLRCA.

Step 7

The respondent is required to serve an adjudication response on the claimant and the adjudicator within ten working days of receipt of the adjudication claim. The adjudication response is to answer the adjudication claim and be accompanied by any supporting documents. A sample adjudication response form is provided in Form 8 of Schedule 1 of the KLRCA Adjudication Rules and Procedure.

In addition, the respondent is required to deliver a copy of the adjudication response to the KLRCA within seven working days from the date of service of the adjudication response on the claimant. Unless otherwise directed by the Director of the KLRCA, the respondent is not required to provide the supporting documents to the KLRCA.

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THE PREGNANT PAUSE

Foo Siew Li explains how getting pregnant may put the brakes on a woman's career in the private sector

INTRODUCTION

In the highly commended landmark decision in *Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and Ors* [2012] 1 CLJ 769, the High Court held that the refusal to employ a woman on the grounds of pregnancy alone is a form of gender discrimination and unconstitutional under Article 8 of the Federal Constitution. An appeal by the Government against this decision was subsequently withdrawn and the matter was laid to rest, or so it seemed.

Barely three years later, the Court of Appeal in the recent case of *AirAsia Berhad v Rafizah Shima binti Mohamed Aris* [2014] MLJU 606 held that a provision in a training agreement which does not restrain marriage and/or prohibit pregnancy if the training is completed in the manner stipulated in the agreement, does not discriminate against the rights of women.

This article explains the salient points of this Court of Appeal decision, which sets the current landscape of the rights of women in the workforce in the private sector in Malaysia.

BACKGROUND FACTS

AirAsia Berhad is the Appellant in this appeal. Rafizah Shima binti Mohamed Aris, is the Respondent, and was an employee of the Appellant.

On 19 October 2006, the Respondent executed a training agreement to undergo an Engineering Training Programme ("Training Agreement") for a period of four years with the Appellant. A material term in the Training Agreement was Clause 5.1(4) which reads as follows:

"Clause 5.1

It is a fundamental term and condition of the Agreement that none of the following events or circumstances shall occur after execution of this Agreement. The occurrence of any of the following events and circumstances shall constitute a repudiatory of the Agreement:

…….

(4) (This clause is only applicable to female Engineering Trainee) when Engineering Trainee gets pregnant during the Course."

In June 2010, in the course of the training period, the Respondent informed the Appellant that she was pregnant but wished to continue her training as she was only due to deliver at the end of 2010. Arising from this, the Appellant terminated the Training Agreement and the Respondent's employment on 1 July 2010.

The Appellant filed a civil suit at the Sessions Court for breach of the Training Agreement and claimed the sum of RM92,000.00 as agreed liquidated damages from the Respondent. On 18 April 2012, summary judgment was entered against the Respondent in the Sessions Court for the said sum. However, the Respondent's appeal against the decision was allowed by the High Court.

THE DECISION OF THE HIGH COURT

Meanwhile, the Respondent filed an originating summons ("Respondent's OS") in the High Court on 17 April 2012 seeking, amongst others, a declaration that Clause 5.1(4) of the Training Agreement was illegal, null and void as the said clause had the effect of discriminating against the Respondent's rights as a married woman and contravened Article 8 of the Federal Constitution of Malaysia ("Federal Constitution") and the Convention to Eliminate All Forms of Discrimination Against Women ("CEDAW"). The Appellant applied to strike out the Respondent's OS.

On 12 October 2012, the High Court granted the order sought in the Respondent's OS and dismissed the Appellant's application to strike out the Respondent's OS.

> **" a provision .. which does not … prohibit pregnancy if the training is completed …. does not discriminate against the rights of women "**

ARTICLE 8

Article 8 of the Federal Constitution, the provision on equality in the Federal Constitution, provides as follows:

"8. Equality

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."

CEDAW

CEDAW is a landmark international Convention that affirms the principles of human rights and equality for women around the world. It defines what constitutes discrimination against women, and sets up an agenda for national action to end such discrimination. A key principle under CEDAW is the obligation of the state to implement the Convention and thus give effect to the

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Convention at the domestic level.

Malaysia is a signatory to CEDAW and acceded to the Convention on 5 July 1995, but has yet to expressly incorporate the provisions of CEDAW into domestic law by an act of Parliament.

THE DECISION OF THE COURT OF APPEAL

There were initially two related appeals emanating from the decisions of the High Court. The first arose from the High Court's decision to allow the Respondent's OS and the second, from the dismissal of the Appellant's application to strike out the Respondent's OS. At the commencement of the hearing of the appeals, the Appellant withdrew the second appeal.

Beatrice

The Court of Appeal considered the Federal Court case of *Beatrice AT Fernandez v Sistem Penerbangan Malaysia & Anor* [2005] 2 CLJ 713. In *Beatrice*, the applicant was a flight stewardess who had served MAS for 11 years. The terms and conditions of her service were governed by a collective agreement between the MAS Employees Union and MAS.

One of the clauses of the collective agreement required an air stewardess to resign if she became pregnant or face termination. The applicant became pregnant but refused to resign. MAS then terminated her services. The Federal Court, concurring with the Court of Appeal and upholding the High Court's decision, held that a constitutional safeguard such as the right to equality fell within the domain of public law and as such, applied only to the contravention of individual rights by a public authority.

In the present appeal, the Court of Appeal was of the view that the High Court judge had erred in law and in fact in disregarding the Federal Court's decision in *Beatrice*, which was a decision of the apex court in Malaysia. The Court of Appeal held that the constitutional safeguard in the right to equality does not apply to private entities such as the Appellant in the present instance. Hence, the Court of Appeal held that the Training Agreement, which deems a female employee who becomes pregnant during the training period to have committed a repudiatory breach of the Training Agreement is valid and enforceable.

Noorfadilla

The Court of Appeal considered in detail the High Court's decision in *Noorfadilla*. In *Noorfadilla*, the plaintiff had successfully applied to the Hulu Langat District Education Office for a teaching position. However, the appointment was revoked when she informed an officer of the Hulu Langat Office that she was pregnant.

The main issue before the court in *Noorfadilla* was whether the defendants' refusal to allow a pregnant woman to be employed as a teacher would tantamount to gender discrimination and a violation of Article 8(2) of the Federal Constitution. The High Court clarified the meaning of the terms "equality" and "gender discrimination" and held that the CEDAW has the force of law and is binding on its member states, including Malaysia.

However, contrary to the views of the High Court in *Noorfadilla*, the Court of Appeal in the instant case held that CEDAW does not have the force of law in Malaysia in view of the fact that it has not been domesticated, i.e. its provisions had not been enacted into any local legislation.

Hence, the Court of Appeal concluded that Clause 5.1(4) of the Training Agreement does not discriminate against the rights of women and does not restrain marriage and/or prohibit pregnancy if the Respondent completes her training in accordance with the Training Agreement.

CONCLUSION

An online article by Bloomberg on 20 August 2014 reports that according to data compiled by the World Bank, Malaysia has the lowest rate of female participation in the workforce in Southeast Asia, with only about 46.8% of women aged between 15 to 64 years being employed in 2012. A 2012 World Bank study further shows that attaining a higher female participation rate could provide Malaysia with a growth dividend of about 0.4 percentage points a year.

While the public law aspect of *Noorfadilla* remains applicable to cases that involve Government authorities and agencies as respondents, this recent decision has cast doubt on *Noorfadilla* insofar as it relates to the legal status of CEDAW in Malaysia. While this decision appears to be a step backwards in relation to the protection of women against discrimination at the workplace, perhaps it could be the impetus for the Malaysian Government to initiate steps to domesticate CEDAW and thereby unleash the power of women in the workforce in Malaysia.

The cloud could just have a silver lining.

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THE 'IF' AND 'WHEN' OF A 'PAY-WHEN-PAID' CLAUSE

A commentary on Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd by Janice Tay

The decision in *Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd* [2014] 5 MLJ 145 provides guidance on the approach adopted by the Federal Court in construing '*pay when paid*' or '*back to back*' clauses in Malaysia.

BACKGROUND FACTS

Bina Jati Sdn Bhd ("Bina Jati"), a sub-contractor, entered into a sub-contract with Globe Engineering Sdn Bhd ("Globe"), the main contractor, to supply and install fire protection works for a construction project ("Sub-Contract"). Globe subsequently terminated the Main Contract on the ground that the employer had not paid their claims and the Sub-Contract also came to an end.

THE LEGAL ISSUES

Disputes arose on the construction of certain provisions in the documents which governed payment and the effect of these provisions on the termination of the Sub-Contract. The relevant parts of these provisions are as follows:

> **" whether a provision is a 'pay-when-paid' clause or a 'pay-if-paid' clause is a matter of construction "**

1. Clause 11(b) of the Sub-Contract which reads, "*Within seven (7) days of receipt by (Globe) from the Employer of the amounts included under on (sic) Architect's Certificate … (Globe) shall notify and pay to (Bina Jati) the total value certified therein …*" ("Clause 11(b)");

2. Paragraph 14 of the Letter of Award which reads, "*Payments - Back to back basis. Within seven (7) days upon (Globe) receiving from the (Employer) …*" ("Paragraph 14"); and

3. Clause 19 of the Sub-Contract which reads, "*If for any reason (Globe's) employment under the Main Contract is determined (whether by (Globe) or the Employer …), then, the employment of (Bina Jati) under this Sub-Contract shall thereupon also be determined …*" The clause then sets out Bina Jati's entitlement to be paid for services and materials supplied up to the date of termination of the Sub-Contract ("Clause 19").

On appeal by Bina Jati, three questions were posed to the Federal Court, namely:

1. Whether Clause 11(b) and Paragraph 14 are '*pay-<u>when</u>-paid*' or '*paid-<u>if</u>-paid*' clauses? The former merely fix the time for payment, whereas the latter make payment subject to, or conditional upon, actual receipt of such moneys by Globe from the employer;

2. Whether the payment obligations in Clause 11(b) read together with Paragraph 14 are discharged or come to an end upon termination of the Sub-Contract pursuant to Clause 19?; and

3. Upon the termination of the Sub-Contract, whether Bina Jati's entitlement to payment under Clause 19 is subject to, or conditional upon, actual receipt of such payment by Globe from the employer?

DECISIONS OF THE HIGH COURT AND COURT OF APPEAL

The High Court decided that Clause 11(b) and Paragraph 14 were '*pay-when-paid*' clauses. The Court took into account that there was no express provision in those clauses which restricted Bina Jati's rights to pursue its claim against Globe such that Bina Jati would not be paid if Globe was not paid.

The High Court's decision was overturned by the Court of Appeal. Their Lordships were unanimous in their view that the provisions were clearly and unambiguously '*pay-if-paid*' clauses which precluded Bina Jati from being paid if Globe had not been paid by someone higher up the chain.

> **" it must be a 'universal truth' that … goods and services supplied must be paid for "**

THE DECISION OF THE FEDERAL COURT

It was common ground that Clause 11(b) and Paragraph 14 could be construed only in two different ways, as '*pay-when-paid*' or '*pay-if-paid*' clauses. What was not common ground was how the standard of proof is to be satisfied.

Having said that, the task was rendered more difficult in view of the conflicting decisions by the Court of Appeal in *Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd* [2010] 3 MLJ 7 and *Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd* [2008] 3 MLJ 204.

Both *Antah Schindler* and *Asiapools* concerned the interpretation of provisions which were similar to Clause 11(b). The Court of Appeal in *Antah Schindler* decided that the clause in contention was a *'pay-when-paid' clause but held in Asiapools that the relevant clause was a 'pay-if-paid'* clause.

In determining the first question, the Federal Court held that upon its proper construction, Clauses 11(b) and Paragraph 14 were '*pay-when-paid*' clauses that merely fixed time for payment and not '*pay-if-paid*' clauses. As such, Globe was not absolved from its liability to pay the amount certified and attributable to the work executed by Bina Jati.

After analysing the different approaches in construing similar clauses in the United States, the United Kingdom, Hong Kong and Singapore, the apex court of Malaysia concluded that the standard of proof to determine whether a provision is a '*pay-when-paid*' clause or a '*pay-if-paid*' clause is a matter of construction. The Court gave three reasons in support of this conclusion.

First, the provisions in the Sub-Contract as to the time for payment of an interim certificate are relevant. These provisions provided that an interim certificate would be issued monthly to Globe and the employer had 30 days to pay the sum certified to Globe. In the opinion of the Court, Clause 11(b) could only have been so crafted to address the contingency of delay in payment by the employer to Globe.

Second, the Court, in laying down the guiding principles, said that one must start on the premise that it must be a '*universal truth*' that, as between contracting parties, goods and services supplied must be paid for. To rebut this presumption, there must be clear unequivocal provisions in a contract which show that liability was contingent. The Court also opined that the burden of proof rests on the party who alleges that payment is on an '*if*' basis. As the Sub-Contract did not contain such provisions, the Court held that the liability of Globe could not be contingent.

" the burden of proof rests on the party who alleges that payment is on an 'if' basis "

The Court further held that contingent liability was impliedly refuted by Clause 19 which expressly provided that Bina Jati would be paid the value of the sub-contract work completed up to the date of termination of the Sub-Contract.

Further, the Federal Court observed, *per obiter dicta*, that if, upon a proper construction, it is clear and unambiguous that a '*pay-when-paid*' clause is in fact a '*pay-if-paid*' clause, then the '*pay-when-paid*' clause is enforceable as a '*pay-if-paid*' clause.

In view of the finding that Clause 11(b) (read together with Paragraph 14) was not a '*pay-if-paid*' clause, the Federal Court held, in respect of the second question, that all rights and liabilities were governed by Clause 19 upon termination of the Sub-Contract.

As regards the third question, the Federal Court took the view that upon termination of the Sub-Contract, Bina Jati's entitlement to be paid in accordance with Clause 19 was not contingent upon actual receipt by Globe of such payment from the employer and therefore, effect had to be given thereto.

Accordingly, the Federal Court allowed Bina Jati's appeal. The orders of the Court of Appeal were set aside and orders of the High Court restored.

ANALYSIS

The Federal Court's decision in *Globe Engineering* is helpful as it provides guidance as to the standard of proof that applies in determining whether a contractual provision is a '*pay-when-paid*' clause or a '*pay-if-paid*' clause.

From a practical perspective, the coming into operation of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") has given rise to some uncertainty as to the extent to which this decision remains instructive as section 35(1) of the Act renders void any '*conditional payment provision*' (including one where a party's obligation to make payment is conditional upon that party having received payment from a third party) under a construction contract.

In view of section 35(1) of CIPAA, it is clear that the Federal Court's decision will not be relevant to construction contracts made after 15 April 2014, i.e. the date on which CIPAA came into operation. However, it remains a moot point as to whether section 35(1) will apply to construction contracts that were entered into before CIPAA came into operation.

Notwithstanding the above, the decision remains relevant for the interpretation of '*pay-when-paid*' and '*pay-if-paid*' clauses in construction contracts that are exempted from the operation of CIPAA under the Construction Industry Payment and Adjudication (Exemption) Order 2014. Examples of such contracts are Government contracts for work to be carried out urgently due to natural disasters and other emergencies and unforeseen circumstances, and those that relate to national security.

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THE MALAYSIAN FRANCHISE INDUSTRY – A REGULATORY PERSPECTIVE

Leela Baskaran provides a primer on franchising in Malaysia

The recent public offering of 7-Eleven (one of the world's most successful franchises) in Malaysia which was oversubscribed by almost 5 times illustrates that franchising is a thriving and lucrative industry in Malaysia. This together with the recently concluded Franchise International Malaysia 2014, the largest annual franchising exhibition and conference in South-East Asia made us think it would be timely to have a short article on the regulatory regime for the franchise industry in Malaysia.

WHAT IS THE LAW AND WHO ADMINISTERS IT?

The franchise industry in Malaysia is regulated by the Franchise Act 1998 ("the Act") which came into force on 8 October 1999. The Act was amended by the Franchise (Amendment) Act 2012 which came into force on 1 January 2013 ("the Amendment Act").

The Act is administered by the Franchise Development Division of the Ministry of Domestic Trade Cooperatives and Consumerism under which there are Development, Registration, Administration and Enforcement Units ("Franchise Registry").

> **"the franchisor needs to register the franchise with the Franchise Registry"**

WHEN DOES AN AGREEMENT COME WITHIN THE ACT?

The Act applies to the sale and operation of any franchise which is or will be operated in Malaysia regardless of whether the offer to sell or buy the franchise is made and accepted within or outside Malaysia.

So when is an agreement considered a franchise? What is the legal definition of a franchise? The Act provides a comprehensive definition of a franchise. Essentially, a franchise is an agreement by which the franchisor grants the franchisee the right to operate the franchisee's business according to the franchisor's franchise system and allows the franchisor to maintain the right to administer continuous control over the franchisee's business operations to ensure compliance with the franchise system.

This is different from a license where there is no operating system imposed on the licensee or control over the way in which the licensee's business is operated. It is partly for these reasons that there is more regulation of a franchise agreement as compared to a license agreement.

What is clear is that it does not matter what the title of the agreement is. As found by the High Court in the case of *Munafsya Sdn Bhd v Proquaz Sdn Bhd* [2013] 2 CLJ 189, it does not matter that the word franchise is not used anywhere in the agreement; the court will look at the terms of the agreement as a whole, the conduct of the parties and the background of the agreement to determine whether it is a franchise. In *Dr Premananthan Vasuthevan v Permai Polyclinics Sdn Bhd* [2013] 1 LNS 1048, the High Court found that notwithstanding the reference to the franchise fee in the agreement, there was no franchise system or exercise of continuous control over the franchisee's business, and therefore no franchise agreement existed.

WHAT DOES A FRANCHISOR OR FRANCHISEE NEED TO DO?

Franchise system and intellectual property

A franchisor must first reduce his "franchise system" into writing in the form of operation manuals and training manuals. The franchisor also needs to prepare his disclosure documents which should include full particulars of his franchised business, a list of all fees and other financial obligations to be imposed on the franchisee, initial investments the franchisee needs to make, obligations of franchisee and franchisor, territorial and intellectual property rights to be granted to franchisee and financial statements of the franchisor. The franchisor is also required to register his trade marks (including service marks) before applying for registration of the franchise under the Act.

Register the franchise

Before selling or offering to sell the franchise to any person in Malaysia, the franchisor needs to register the franchise with the Franchise Registry. The main requirement when applying for registration is to provide full disclosure regarding the franchise. With the Amendment Act coming into force, there is now a compulsory requirement for all franchisees to register their franchise. All applications for registration are to be made through the online franchise registration system, Malaysian Franchise Express (MyFEX).

A local franchisor who fails to register his franchise commits an offence under the Act and is liable, in the case of a body corporate, to a maximum fine of RM250,000 for a first offence and RM500,000 for a second or subsequent offence. Failure to register may render the franchise agreement null and void for being unlawful, as illustrated in the case of *SP Multitech Intelligent Homes Sdn Bhd v Home Sdn Bhd* [2010] MLJU 1845 where the franchise agreement was found to be unlawful and void *ab initio* and the franchisor was ordered to refund all payments and benefits received to the franchisee.

The Amendment Act makes it an offence, subject to the same fines as set out above, for any person to assume or use the term "franchise" or any of its derivatives in relation to its business without approval of registration by the Registrar.

Proof of track record

One of the requirements when a franchisor applies for registration

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is that he must submit audited accounts for the last 3 years of operation of the franchised business which show the successful operation of at least one outlet. Therefore, a franchisor needs to have operated the franchised business for at least 3 years through self-owned outlets before granting franchises. It is possible to apply for an exemption, although the grounds for exemption are not clear.

Timely provision of documents to franchisee

Once the franchisor has obtained registration, he can enter into the franchise agreement with the franchisee. There is a compulsory requirement for the franchisor to submit to the franchisee a copy of the franchise agreement and disclosure documents at least 10 days before the signing of the franchise agreement. Failure to comply is an offence.

“ a franchisor (must) have operated the franchised business for at least 3 years through self-owned outlets before granting franchises ”

THE FRANCHISE AGREEMENT

Mandatory provisions

The franchise agreement must be in writing and include certain provisions specified in the Act. Failure to include these provisions will render the franchise agreement null and void. For instance, the franchise agreement is required to include a cooling off period of not less than 7 working days during which the franchisee has the option to terminate the agreement and obtain a full refund of all monies paid to the franchisor, save for an amount to cover expenses incurred by the franchisor to prepare the agreement.

The stipulated minimum term of a franchise agreement is 5 years. Where the franchisor requires the franchisee to make any payment for the purpose of the promotion of the franchise, the franchisor must establish a promotion fund to be managed under a separate account and used solely for the promotion of the subject matter under the franchise.

The franchisee needs to provide a written guarantee not to disclose confidential information or carry on any business similar to the franchise business for the duration of the agreement and 2 years thereafter which extends not only to the franchisee but also its directors, employees and spouses and immediate family members of the directors. The prohibition against similar business overrides section 28 of the Contracts Act 1950 which (subject to specified exceptions relating to partnerships and sale of the goodwill in a business) renders any agreement which restrains a person from exercising a lawful profession, trade or business to be void to the extent of that restraint.

Any provision in a franchise agreement purporting to bind a franchisee or franchisor to waive compliance with any provision of the Act is void and unenforceable.

Conduct and operation of the franchise

A franchisor and franchisee are required to act in an honest and lawful manner, and pursue best franchise business practice in the operation of the franchise.

Termination of the franchise agreement

A franchise agreement may only be terminated for “good cause” as defined under the Act. An example of what constitutes a “good cause” is the failure by the franchisee or the franchisor to remedy a breach of the franchise agreement or any other relevant agreement entered into between them within the period (being not less than 14 days) stated in a written notice given by the non-defaulting party.

Notice and opportunity to remedy is not required in circumstances where the franchisor or franchisee makes an assignment of rights for the benefit of creditors or other similar disposition, becomes bankrupt or insolvent, voluntarily abandons the franchised business, is convicted of a criminal offence which substantially impairs the goodwill associated with the franchisor’s trade mark or other intellectual property or repeatedly fails to comply with the terms of the franchise agreement.

Renewal and extension of a franchise agreement

The franchisor must renew or extend a franchise agreement where a franchisee applies for an extension by giving written notice to the franchisor no less than 6 months prior to the expiration of the franchise term, provided there is no breach of the existing franchise agreement by the franchisee. The franchise agreement is to be renewed on terms which are similar to, or no less favourable than, the terms in the existing franchise agreement.

It is an offence under the Act for a franchisor to refuse to renew a franchise agreement without compensating a franchisee either by a repurchase of the franchise or by other means at a price to be agreed between the franchisor and franchisee unless the franchisor (at least 6 months prior to the expiration date of the

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THE FINAL WORD

Ezane Chong discusses the effectiveness of a postnuptial agreement

The Singapore Court of Appeal in the case of *Surindar Singh v Sita Jaswant Kaur* [2014] SGCA 37 recently held that a settlement agreement, which included provisions for the division of matrimonial assets, between a former husband and wife after an interim judgment of divorce was issued, was a "binding" agreement.

The settlement agreement, which in essence was a postnuptial agreement, was signed after a mediation session where both parties were represented by lawyers. As the children of the marriage were by then adults, the mediation process focused on the issues of maintenance and division of matrimonial property.

In according conclusive weight to the settlement agreement, the Court of Appeal overturned the ruling of the High Court where the judge awarded equal share of the matrimonial assets of about SGD7.4 million, to each party. Division according to the settlement agreement gave the husband the lion's share of the matrimonial assets, i.e. 58.9%, while the wife received 41.1%.

> **"there were no ... grounds to justify the conclusion that holding the parties to their agreement would cause injustice"**

The Court of Appeal held that as there were no good and substantial grounds to justify the conclusion that holding the parties to their agreement would cause injustice and since the distribution effected by the settlement agreement was not inequitable, the Court of Appeal upheld the agreement.

DISTRIBUTION UNDER SINGAPORE LAW

The starting point with respect to the division of matrimonial assets under Singapore law is section 112 of the (Singapore) Women's Charter ("the Charter") which confers powers on the court to order the division of matrimonial assets in such proportions as the court thinks "*just and equitable*" having had regard to "*all the circumstances of the case*".

The circumstances include the matters enumerated under the list of factors set out in section 112(2) of the Charter. Whether there is "*any agreement between the parties with respect to the ownership and division of matrimonial assets made in contemplation of divorce*" is expressly set out as one of the factors which the court must consider (section 112(2)(e)).

The other factors include the extent of contributions made by each party in money or money's worth towards acquiring the matrimonial assets, contributions made to the welfare of the family, debts owing by either party for their joint benefit and for the benefit of any children of the marriage, the needs the children, if any, any benefit enjoyed by one party to the exclusion of the other, and the giving of financial or non-financial assistance and support to the other which aids the other in the carrying out of his or her occupation or work.

DISTRIBUTION UNDER MALAYSIAN LAW

The law governing marriage and divorce in Malaysia is primarily contained in the Law Reform (Marriage and Divorce) Act 1976 ("the Act").

The court's power, when granting a decree of divorce, to order the division between the parties of any assets acquired during the marriage, is provided under section 76 of the Act. In this regard, a distinction is drawn between the assets acquired by the joint efforts of both parties to the marriage, and those acquired by the sole effort of one party.

Jointly acquired assets

Where the assets are jointly acquired, the court is directed to incline towards equality of division, having regard to the following matters:

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(b) any debts owing by either party which were contracted for their joint benefit; and

(c) the needs of the minor children, if any, of the marriage (section 76(2)).

Assets acquired solely by one party

Where the assets are solely acquired by one spouse, the factors to be taken into consideration are:

(a) the extent of the contributions made by the party who did not acquire the assets to the welfare of the family by looking after the home or by caring for the family; and

(b) the needs of the minor children, if any, of the marriage,

and subject to those considerations, the court may divide the assets or the sale proceeds in such proportions as it thinks reasonable but in any case the acquirer shall get a greater proportion (section 76(3)).

Referral of agreements to court

Unlike section 112(2) the Charter, sections 76(2) and 76(3) of our Act makes no reference to "*any agreement between the parties with respect to the ownership and division of matrimonial assets made in contemplation of divorce*" as a factor to be considered by our courts in determining the division of matrimonial assets.

However, there is express provision in section 56 of the Act, for "*any agreement or arrangement made or proposed to be made*

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between them, being an agreement or arrangement which relates to, arises out of, or is connected with the proceedings for divorce which are contemplated", to be referred to court to enable the court to express an opinion as to its reasonableness.

In *Lim Thian Kiat v Teresa Haesook Lim nee Teresa Haesook Dean & Anor* [1997] 5 CLJ 358, a deed of separation ("Deed") was entered into between a husband and his wife, which settled the wife's claims to matrimonial properties and maintenance. By this Deed the parties agreed that its terms would be incorporated into a joint petition for divorce in the event that either spouse demands for a divorce.

The husband eventually petitioned for divorce and made an application for the court to determine, under section 56 of the Act, the subsistence and validity of the Deed. The wife attempted to vary the terms of the agreement on matrimonial assets but the court found that the Deed was valid and binding on the parties as the terms were arrived at voluntarily with the advantage of the wife possessing adequate legal advice.

> **" there is express provision … for "any agreement … which relates to … proceedings for divorce which are contemplated", to be referred to court "**

PRENUPTIAL AGREEMENTS v POSTNUPTIAL AGREEMENTS

The difference between a prenuptial agreement and a postnuptial agreement is that a prenuptial agreement is a contract entered into prior to marriage, usually when the couple are still in love and filled with hopes of marital bliss, whereas a postnuptial agreement is a contract executed after the wedding vows have been exchanged and often, when the marriage has already broken down.

So whilst both prenuptial and postnuptial agreements essentially serve the same purpose in that both seek to settle the couple's affairs and assets in the event of divorce, there is a difference in terms of the degree of weight which the courts may attach to them.

The Court of Appeal in *Surindar Singh* added that a postnuptial agreement relating to the division of matrimonial assets may be given more weight than a prenuptial agreement because the circumstances surrounding the execution of a postnuptial agreement are very different from those relating to a prenuptial agreement. Parties to a postnuptial agreement would have already been appraised of their respective rights and obligations towards each other and be in a better position to make a more accurate estimation of the value of the assets owned by them either jointly or separately and to assess each party's financial or non-financial contributions to the acquisition of those assets, based on their knowledge of facts which only they are truly privy to.

However, the Court of Appeal was quick to point out that the weight to be allocated to any agreement, whether prenuptial or postnuptial, would still depend on the precise circumstances. Where parties had properly and fairly come to an agreement with the benefit of legal advice, the court will generally attach "significant weight" to it.

NO CONTRACTING OUT

Notwithstanding the above, it is important to note that parties to a marriage cannot oust the jurisdiction of the court or contract out of statutory provisions and any clause in a postnuptial (or prenuptial) agreement attempting to do so will be bad under law and not be tolerated (*Tan Kai Mee v Lim Soei Jin* [1981] 1 MLJ 271).

In clarifying what it meant when it ruled in *Surindar Singh* that the settlement agreement between Mr. Singh and Ms. Kaur was "binding", the Court of Appeal said:

"*In this judgment, we use the phrase "binding agreement" … to mean a settlement contract that is validly formed in accordance with the legal requirements of the common law of contract, but it should be noted that if such a contract is caught by s 112(2) of the Charter, it will not be directly enforceable. … If there is a binding agreement between the parties with respect to the ownership and division of matrimonial assets made in contemplation of divorce, that will be a relevant factor in the court's determination of what is a just and equitable division of matrimonial assets under the Charter.*"

Although it is possible for postnuptial agreements to carry significant and even conclusive weight, it appears that the Singaporean and Malaysian courts, guided by the principles of justice and fairness, still retain the power to decide how matrimonial assets should be divided.

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OLD WINE IN A NEW WINESKIN?

Sara Lau discusses the recent amendments to the Prevention of Crime Act 1959

"The power of the executive to cast a man into prison without formulating any charge known to the law and particularly to deny him the judgement of his peers is in the highest degree odious and the foundation of all totalitarian governments" – Winston Churchill

Malaysia is no stranger to the spectacle of detention without trial. While such an act is condemned by human rights watchdogs worldwide and outlawed by international human rights standards, Malaysia has had this practice firmly entrenched by virtue of the Emergency (Public Order and Crime Prevention) Ordinance and the more infamous Internal Security Act 1960 ("ISA") until 16 September 2011, when the Malaysian Prime Minister, Datuk Seri Najib Razak announced the repeal of both pieces of legislation in a historic moment for Malaysia.

Less than three years later, the same Government passed the Prevention of Crime (Amendment and Extension) Act 2014 ("Amendment Act") to amend the Prevention of Crime Act 1959 ("PCA"). The Amendment Act introduced, amongst others, the right to detain a person without trial and the use of electronic monitoring devices. The primary reason cited for the amendments is to give the police the ability to detain hard core criminals when crime was at an all-time high in the country.

In its original form, the PCA, which had hitherto been an obscure legislation, allows the police to detain a person ("person concerned") for up to 71 days pending the outcome of investigations as to whether or not the person concerned is to be placed under police supervision and restricted residence (collectively "supervision order") for periods of up to five years at a time.

In comparison, the ISA, empowered the Minister of Home Affairs ("Minister") to detain a person without trial indeterminately for periods of up to two years at a time. With the introduction of powers of detention under the Amendment Act, the question that arises is whether the PCA is a reincarnation of the ISA.

EXTENDED SCOPE OF THE PCA

The first thing to note is that a new preamble has been added into the PCA. It reads:

"Whereas action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;

And Whereas Parliament considers it necessary to stop such action;

Now, therefore, pursuant to Article 149 of the Federal Constitution, IT IS ENACTED by the Parliament of Malaysia as follows: …"

This new preamble is extraordinarily similar to the preamble in the now abolished ISA. The substantial similarity between the preambles is the first indicator that the ISA is making a return into Malaysian law.

In addition, the PCA, which originally applied only to West Malaysia, has been extended to Sabah and Sarawak by the Amendment Act.

DETENTION

More significantly, the Amendment Act introduced a new Part IV A to the PCA to deal with matters relating to detention orders. The cornerstone of Part IV A is section 19A(1), which reads:

"The Board may, after considering the report of the Inquiry Officer submitted under section 10 and the outcome of any review under section 11, direct that any registered person be detained under a detention order for a period not exceeding two years, and may renew any such detention order for a further period not exceeding two years at a time, if it is satisfied that such detention is necessary in the interest of public order, public security or prevention of crime."

> **"both statutes … disregard the fundamental presumption that a person is "innocent until proven guilty"**

Section 8(1) of the ISA stated as follows:

"If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order … directing that that person be detained for any period not exceeding two years."

Under the ISA, the power to renew the detention is found in section 8(7) which allows the Minister to extend the duration of detention for further periods not exceeding two years at a time.

The material reproduction of these controversial provisions of the ISA in the PCA is a second indicator that ISA has indeed returned.

REGISTRABLE CATEGORIES

As mentioned above, before the enforcement of the Amendment Act, a supervision order may be issued against the person concerned if there are reasonable grounds for believing that he is *"a member of any of the registrable categories"*. The amendments made to the PCA under the Amendment Act now permit a detention order ("detention order") to be made against the person concerned on the same grounds.

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The expression *"registrable categories"* refers to nine categories of activities prescribed in the First Schedule of the PCA, such as triad activities, unlawful societies, human trafficking and drug trafficking. In particular, paragraph 2 of the First Schedule lists as a registrable category, *"Persons who belong to or consort with any group, body, gang or association of two or more persons who associate for purposes which include the commission of offences under the Penal Code."*

Paragraph 2 was introduced into the PCA by the Prevention of Crime (Amendment of First and Second Schedule) Order 2014 and is significantly wider in scope than the original provision which reads, *"Persons who belong to any group, body, gang or association of five or more persons who associate for purposes which include the commission of offences involving violence or extortion."*

It is to be noted that in order for a person to be regarded as a registrable person under paragraph 2 of the PCA, it is not necessary for an offence to be committed under the Penal Code; it will suffice that the person concerned *"consorts"* with at least one other person for purposes which include the commission of offences under the Penal Code.

The ISA had a vague but wider provision under section 8(1) which allowed the Minister to detain a person if he is satisfied that such detention is necessary to prevent that person from *"acting in any manner prejudicial to the security of Malaysia … or to the maintenance of essential services therein or the economic life thereof."*

While the powers of detention under the PCA are narrower in scope than the ISA, both statutes share a common feature in that they disregard the fundamental presumption that a person is "innocent until proven guilty".

POWERS UNDER THE LEGISLATION

Section 9(1) of the PCA imposes a duty on the Inquiry Officer to conduct an inquiry and issue a report as to whether there are reasonable grounds for believing that the person concerned is a member of any of the registrable categories.

The Inquiry Officer will submit a report containing his findings and the grounds to the Prevention of Crime Board ("Board") and provide his findings (without the grounds) to the person concerned under section 10 of the PCA. If the Board is satisfied, after considering the findings of the Inquiry Officer, that there are sufficient grounds for believing that the person concerned is a member of any registrable category, the Board may issue a supervision order or a detention order against the person concerned. A copy of the Board's decision must be furnished to the person concerned.

A person concerned who is dissatisfied with the findings of the Inquiry Officer or the decision of the Board may request the Board to review the same. The right to seek a review of the Board's decision may be an illusory safeguard as it is unlikely that the Board will revise its own decision.

DECISION-MAKING BODIES

A major difference between the ISA and the PCA is that under the former, the power of detention is vested solely in the Minister, whereas the corresponding power under the PCA is vested in a five-member Board which includes a Chairman who *"shall be or have been, or be qualified to be, a judge of the Federal Court, the Court of Appeal or a High Court"*.

One of the main arguments put forth by the Government that the PCA is not the ISA dressed in a new outfit is that under the PCA, the Minister does not have any decision-making authority. Instead, all decision-making authority lies with the Board.

While the vesting of the powers of detention in the Board appears to offer a greater degree of check and balance as compared to the ISA, the fact remains that the Government retains significant control over the process as the Board is required under the PCA to exercise its powers based on the findings contained in the report prepared by the Inquiry Officer, who is an appointee of the Minister.

It is to be noted that section 9(5) of the PCA does not permit the person concerned to be represented by an advocate and solicitor at the inquiry except when his own evidence is being taken and recorded by the Inquiry Officer.

It appears from section 10(3) of the PCA that the Board in making its decision does so only in consideration of the Inquiry Officer's report. The PCA does not expressly confer power on the Board to make its own substantive findings or inquire into the accuracy or veracity of the Inquiry Officer's report. There is no provision which enables the Board to meet with or question the person concerned. In a nutshell, the Board does not appear to possess any inquisitorial powers.

As the Board's presence is to counter possible abuse of power by the executive arm of the Government, the lack of clarity as to its powers under the PCA raises doubts as to how effective it will be in discharging this important function.

JUDICIAL REVIEW

Section 19A(2) of the PCA states that the decision of the Board to make or renew a detention order is subject to review by the

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THE IMPORTANCE OF BEING EARNEST, A TRAGIC TALE FOR DEFAULTING PURCHASERS

Ji Voon discusses a case that established the law on forfeiture of deposits in Malaysia

The decision of the Privy Council in *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 laid to rest the question as to whether a vendor is entitled to forfeit a deposit paid on a contract for the sale of real property following its non-completion due to the default by the purchaser, notwithstanding that the vendor is not in a position to prove actual damage flowing from the purchaser's breach of the contract.

BACKGROUND FACTS

By a contract dated 25 May 1962 ("Contract"), Linggi Plantations Ltd ("Vendor") agreed to sell 1,488 acres of estate land to AN Karuthan Chettiar ("original purchaser") for $3,775,000.

By clause 1 of the Contract, it was, *inter alia*, acknowledged that the Vendor's agent had received a sum of RM377,500 amounting to 10% of the purchase price "*by way of deposit and part payment*" prior to the execution of the Contract.

Subsequently, the original purchaser assigned his rights and obligations under the Contract to Jagatheesan who passed away before the appeal to the Federal Court in this case. The executrix of Jagatheesan's estate continued those proceedings on behalf of the creditors of the estate. In this article, the expression "Purchaser" refers to Jagatheesan and where appropriate, to his estate, represented by the executrix.

The Contract required the Purchaser to pay the balance of the purchase price by 24 August 1962. However, the completion did not take place in due time and the Vendor notified the Purchaser that the Contract was at an end and forfeited the deposit under clause 5 of the Contract which, *inter alia*, provided that if the purchase is not completed due to any default of the Purchaser, the Vendor would be entitled, by notice in writing, to declare the Contract to be at an end and "*the sum of $377,500 … referred to in clause 1 hereof shall be forfeited to the vendor to account of damages for breach of contract.*"

The Purchaser commenced proceedings against the Vendor in the High Court for a refund of the deposit. During the hearing, the Purchaser called evidence that no damage had been suffered by the Vendor who did not call any evidence to rebut the Purchaser's evidence.

THE LEGAL MATRIX

The issues in this case concerned the construction of clauses 1 and 5 of the Contract and the application of sections 65 and 75 of the Contracts (Malay States) Ordinance 1950 ("Ordinance") to these provisions.

Section 65 of the Ordinance requires, *inter alia*, a party who rescinds a voidable contract to restore to another party to the contract, any benefit which the first mentioned party has received from that other party.

On the other hand, section 75 provides, *inter alia*, that where a contract stipulates an amount to be paid in case of a breach, the non-defaulting party is entitled, whether or not actual damage or loss is proved, to receive from the defaulting party, reasonable compensation not exceeding the amount or penalty so stipulated.

It is to be noted that sections 65 and 75 of the Ordinance are identical to sections 64 and 74 respectively of the Indian Contracts Act ("ICA").

DECISION OF THE HIGH COURT

The High Court ruled in favour of the Vendor. According to Gill J (as he then was), the Vendor could forfeit the deposit when the Contract is terminated in accordance with the terms of the Contract. According to the learned judge, the phrase at the end of clause 5 "*to account of damages for breach of contract*" meant liquidated damages. His Lordship further held that neither section 65 nor section 75 of the Ordinance applied to the forfeiture of deposits.

DECISION OF THE FEDERAL COURT

The Federal Court reversed the decision of the High Court. According to Ong CJ, the words at the end of clause 5 of the Contract meant that in the event of non-completion by the Purchaser, the Vendor was entitled to claim more than the amount of deposit if the damages or loss exceeded the sum of $377,500 and that equally, the Purchaser was entitled to a refund of such part of the deposit which exceeded the damage proved.

Suffian FJ was of the view that there was ambiguity in clause 5 and that such ambiguity should be resolved in favour of the Purchaser. Accordingly, His Lordship held that the sum of $377,500 was not "*earnest money*" and therefore liable to be refunded on a strict interpretation of the Contract.

Both Ong CJ and Suffian LP held that section 75 of the Ordinance applied to the circumstances of this case. Ong CJ further held that section 65 applied and that the deposit was a benefit under the Contract and had to be returned by the Vendor upon its recission of the Contract. Suffian FJ did not agree with this point.

The Federal Court allowed the Purchaser's appeal and ordered the Vendor to refund the sum of RM377,500 to the Purchaser.

DECISION OF THE PRIVY COUNCIL

The Vendor appealed to the Privy Council.

According to Lord Hailsham LC, who delivered the judgment of the Board of the Judicial Committee of the Privy Council, the appeal raised three points:

(1) Whether on the true construction of the Contract, the Vendor

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was entitled to forfeit the whole deposit notwithstanding its inability to prove that it had suffered damage by reason of the Purchaser's failure to complete his obligations under the Contract;

(2) Whether section 75 of the Ordinance applies to the forfeiture in question so as to entitle the Purchaser to recover his deposit notwithstanding his default; and

(3) Whether section 65 of the Ordinance applies to the forfeiture in question so as to oblige the Vendor to return the deposit on termination of the Contract as a benefit received thereunder.

On the first point, the Privy Council upheld the High Court's ruling (save for Gill J's construction of the phrase "*to account of damages for breach of contract*" in clause 5 of the Contract as a reference to liquidated damages). The Privy Council followed the decision in an English case, *Howe v Smith* (1884) 27 Ch. D 89, and interpreted the phrase to mean that the Vendor in forfeiting the deposit "*must give credit for the amount of the deposit paid before he claims damages in excess of (that) amount*".

" a reasonable sum paid ... by way of a deposit is forfeitable ... without proof of loss or damage suffered "

The Privy Council also placed emphasis on the phrase in clause 1 of the Contract which described the sum of $377,500 as a payment "*by way of deposit and part payment*". In the Board's view, the Contract meant unambiguously that in the event of a notice of termination being issued under clause 5 as a result of the Purchaser's failure to complete the transaction, the Vendor would be at liberty to forfeit the deposit and claim for any damage which it has suffered over and above the amount of the deposit, after giving credit for the amount of the deposit.

On the second point, the Privy Council supported the decision of an Indian court in *Naresh Chandra Guha v Ram Chandra Samanta and Others* A.I.R. 1952 Cal. 93 where PM Mookerjee J observed that a long series of decisions in the Indian Courts had consistently held that section 74 of the ICA did not apply to the forfeiture by a vendor of a reasonable deposit in a contract for the sale of land.

The Privy Council held that although section 74 of the ICA and section 75 of the Ordinance were intended to cut through the technical rules of English law relating to liquidated damages and penalties, these rules developed separately from, and did not apply to, the law relating to deposits.

Lord Hailsham LC referred to *Howe v Smith* where Fry LJ said:

"*It (the deposit) is not merely part payment, but is then also an earnest to bind the bargain so entered into, and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract.*"

The learned Lord Chancellor also referred to the judgment by Cotton LJ in *Howe v Smith* where the latter, adopting the words of James LJ in *Ex Parte Barrell* LR 10 Ch 512, described a deposit in the following terms:

"*The deposit ... is a guarantee that the contract shall be performed. If the sale goes on ... it goes in part payment of the purchase money for which it is deposited; but if on default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then ... he can have no right to recover the deposit.*"

His Lordship further expressed the view that the expressions "deposit" and "earnest money" whenever used, bear the same meaning. The learned judge also observed that "*there is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land.*"

As the Board had, in relation to the first point, concluded that the sum of $377,500 was paid as a true deposit, section 75 of the Ordinance would not apply and the sum was liable to be forfeited as a result of the failure by the Purchaser to complete, whether or not damage is proved.

As for the third question, the Privy Council disagreed with Ong CJ and held that section 65 of the Ordinance did not apply. In the opinion of the Board, Ong CJ's view could not be sustained as it had been held in a number of cases, such as *Natesa Aiyar v Appavu Padayachi* I.L.R. 38 Mad. 178, *Naresh Chandra Guha v Ram Chandra Samanta and Others*, and *P.M. Pillay v Kampur Rubber and Tin Company Limited* (an unreported decision of the Malayan High Court), that a deposit is not a benefit received under a contract within the meaning of section 65 of the Ordinance but was "*a security that the purchaser would fulfil his contract and ancillary to the contract for the sale of land.*"

Accordingly, the Board advised the Yang di Pertuan Agung to allow the Vendor's appeal and restore the judgment of the High Court in dismissing the Purchaser's claim.

CONCLUSION

The decision of the Privy Council in *Linggi Plantations Ltd v Jagatheesan* affirmed the application in Malaysia of the principles

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THE IMPORTANCE OF BEING EARNEST

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laid down in *Howe v Smith* and the decisions of the Indian Courts on the treatment of a deposit paid for the purchase of land. It established beyond doubt that a reasonable sum paid by a purchaser by way of a deposit is forfeitable by a vendor without proof of loss or damage suffered as a result of the failure by the purchaser to complete the transaction.

Linggi Plantations Ltd v Jagatheesan also made it clear that sections 65 and 75 of the Ordinance (now Contracts Act 1950) do not apply to the forfeiture of deposits. The principles laid down in this case remain applicable to this day, notwithstanding that more than 40 years have passed since the judgment of the Privy Council was delivered on 7 December 1971.

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ANNOUNCEMENT

We are pleased to announce that Kwan Will Sen and Sheba Gumis have been promoted to Senior Associates as from 1 July 2014.

Will Sen is a member of our Dispute Resolution Division. He graduated from the University of Malaya in 2009. His practice areas include arbitration, corporate litigation and administrative law.

Sheba is a member of our Corporate Division. She graduated from Universiti Teknologi MARA in 2009. Her practice areas include mergers and acquisitions, joint-ventures and investment advisory work.

We extend our heartiest congratulations to Will Sen and Sheba. We have no doubt that they will continue to make invaluable contributions to our Firm.

OLD WINE IN A NEW WINESKIN?

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High Court. Oddly, this directly contradicts section 15A(1) which prohibits judicial review except in relation to any question of compliance with any procedural requirements under the PCA.

Section 15A(1) materially replicates section 8B(1) of the ISA which also prohibited judicial review of the Minister's decision save for questions on procedural matters.

Certain quarters, like the Malaysian Bar Council, have taken the view that the ouster of the court's jurisdiction under section 15A(1) of the PCA is confined to a supervision order but not a detention order. However, this is not borne out by paragraph 12 of the Explanatory Statement to the Prevention of Crime (Amendment and Extension) Bill 2013 which states unequivocally that the purpose of section 15A is "*to oust judicial review of* ***any act or decision of the (Board) regarding any question except on compliance with any procedural requirement*** *…*" (emphasis added)

The similarity between section 8B(1) of the ISA and section 15A(1) of the PCA is yet another indicator that the Government may be attempting to revive the ISA. However, it will be interesting to see how the Courts will reconcile the clear conflict between the provisions of section 15A(1) and section 19A(2).

SUNSET CLAUSE

The ISA remained in force in Peninsular Malaysia for 51 years and in Sabah and Sarawak for almost 48 years. Section 19F of the PCA stipulates that Part IV A, which provides for detention without trial, is to be reviewed every five years and shall cease to have effect unless, upon review, both Houses of Parliament resolve to extend the same. It is hoped that this provision will enable the detention provisions to be brought to an end in a significantly shorter time frame.

CONCLUSION

As the grounds for issuing a detention order under the PCA are narrower that those under the ISA, it would be incorrect to say that the former is nothing more than old wine in a new wineskin. However, in view of the substantial similarity in the powers conferred upon the authorities under the two pieces of legislation and the substantial replication of the provisions of the ISA in the PCA, there is a distinctly familiar flavour which suggests that the PCA has been grafted from the same vine as the ISA.

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THE TEN STEPS

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Step 8

The claimant may reply to the adjudication response within five working days from the date of receipt of the adjudication response. The claimant may provide further documents in support of the contentions set out in the adjudication reply. A sample adjudication reply form is provided in Form 9 of Schedule 1 of the KLRCA Adjudication Rules and Procedure.

The claimant is required to deliver a copy of the adjudication reply to the KLRCA within seven working days from the date of service of the adjudication reply on the respondent. Unless otherwise directed by the Director of the KLRCA, the claimant is not required to provide the supporting documents to the KLRCA.

Step 9

Unless the parties agree to an extension of time, the adjudicator must make and deliver his decision within 45 working days from the date of service of the adjudication response or the adjudication reply, whichever is later, or the expiry of the prescribed period for the service of adjudication response, if no adjudication response is received. If the adjudicator delivers his decision outside the 45 working day period, or any extended period agreed by the parties, the adjudication decision is null and void. However, the adjudicator may withhold releasing his decision until the full amount of his fees and expenses have been deposited by the parties with the Director of the KLRCA.

The adjudication decision must be in writing and be reasoned unless the requirement for reasons is dispensed with by the parties. The adjudicator must make a determination in his decision as to (i) the adjudicated amount, if any; (ii) the amount of costs payable to the winner; and (iii) the time and manner of payment. A sample format of an adjudication decision is provided in Form 15 of Schedule 1 of the KLRCA Adjudication Rules and Procedure.

Step 10

A copy of the adjudication decision is to be served on each party and the Director of the KLRCA. The adjudicator's fees are to be released to him upon the receipt by the Director of the KLRCA of a copy of the adjudication decision and written confirmation by the adjudicator that he has complied with the time period prescribed by section 12(2) of the CIPAA for the delivery of adjudication decision. A sample of the said written confirmation is provided in Form 16 of Schedule 1 of the KLRCA Adjudication Rules and Procedure.

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THE MALAYSIAN FRANCHISE INDUSTRY

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franchise agreement) (a) gives the franchisee written notice of non-renewal; and (b) waives any provision in the franchise agreement which prohibits the franchisee from continuing to conduct substantially the same business under another trade mark in the same area subsequent to the expiration of the franchise agreement.

In *Noraimi Alia v Rangkaian Hotel Seri Malaysia* [2009] 9 CLJ 815 it was found that the non-renewal of the franchise agreement constituted an offence and the franchisee was awarded compensation for the loss of profits that she would have received for the period of renewal expected.

ANNUAL REPORT

The franchisor is required to submit an annual report to the Registrar in the prescribed form within 6 months from the end of each financial year of the franchise business. The Registrar may cancel the registration of the franchisor if the annual report is not submitted.

CONCLUSION

The Malaysian Government is keen to promote and grow the franchise industry as increased franchising would boost the economy and encourage entrepreneurship development among Malaysians. This is evidenced by the active steps taken by the Government, such as implementing MyFEX, holding the annual Franchise International Malaysia Exhibition and Conference, launching the franchise blue print and providing support to budding franchisees in the form of micro-franchise development schemes. The regulatory regime, through compulsory registration of franchised business and submission of annual reports, enables the Government to gather much needed information on the franchise industry in Malaysia and at the same time monitor and protect franchisees.

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LEGAL INSIGHTS

A SKRINE NEWSLETTER

SKRINE WAS FOUNDED ON 1ST MAY 1963 AND IS TODAY ONE OF THE LARGEST LAW FIRMS IN MALAYSIA. SKRINE IS A FULL-SERVICE FIRM DELIVERING LEGAL SOLUTIONS, BOTH LITIGATION AND NON-LITIGATION, TO NATIONAL AND MULTINATIONAL CLIENTS FROM A BROAD SPECTRUM OF INDUSTRIES.

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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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