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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

During his key note address at the 36th General Assembly of the ASEAN International Parliamentary Assembly in Kuala Lumpur on 8 September 2015, the Prime Minister of Malaysia, Dato' Sri Mohd Najib bin Tun Abdul Razak confirmed that Indonesia has ratified the ASEAN Agreement on Transboundary Haze Pollution ("Agreement") in January 2015.

The ratification of the Agreement by Indonesia means that all ten Member States of ASEAN have ratified the Agreement.

As the month of September progressed, the haze pollution in Malaysia has worsened, with air quality index in various parts of Malaysia hitting the unhealthy to very unhealthy levels, forcing the closure of schools in areas which are badly affected by the haze.

On 23 September 2015, *The Star* reported that Indonesia had suspended or revoked the licences of four Indonesian-owned plantation companies for causing forest fires through allegedly illegal land clearing activities. It is further reported on 27 September 2015 that Joko Widodo, the President of Indonesia, has ordered the immediate construction of a network of canals to ensure that fire-prone peat-lands are not drained so as to become highly inflammable during the dry season.

Brunei and Singapore have likewise been badly affected by the haze, resulting in harsh verbal exchanges between officials of the latter and Indonesia. The Singapore Government has even gone so far as to initiate investigations against an Indonesian company under its Transboundary Haze Pollution Act 2014.

It is hoped that, consistent with its ratification of the Agreement, the Indonesian Government will take immediate and concrete steps to tackle the haze problem which has become a recurring annual nightmare for its ASEAN neighbours.

I hope that you will find the articles and case commentaries in this issue of Legal Insights interesting.

With Best Wishes,

Kok Chee Kheong
Editor-in-Chief

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ANNOUNCEMENTS

The Partners extend a warm welcome to Richard Khoo Boon Hin and Nor Suhaila Abdul Latif who have been admitted as Partners of the Firm from July and August 2015 respectively.

Richard is a graduate of Leeds Metropolitan University. He was called to the Malaysian Bar in 1995. Richard's main practice areas are advising, negotiating and drafting agreements for infrastructure, construction and engineering projects.

Suhaila graduated from Universiti Teknologi MARA in 2001. She was a Senior Associate in Skrine from 1 October 2008 to 30 September 2010. Suhaila re-joined the Firm after furthering her career in Brunei Darussalam. Her main practice areas are corporate and commercial law and Islamic finance.

The Partners also extend our heartiest congratulations to Tan Shi Wen and Lee Ai Hsian on their promotion to Senior Associates from 1 July 2015.

Shi Wen graduated from University of Manchester in 2009. She also holds a Master of Laws in International Commercial Law and a Post-Graduate Diploma in EU Competition Law. Her main practice areas are competition law, ship financing and oil and gas.

Ai Hsian graduated from the National University of Malaysia in 2010 and was called to the Malaysian Bar in 2011. Her main practice areas include corporate and commercial law, joint ventures, real estate and banking and finance.

CLIENTS' FEEDBACK

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

THE SAFEGUARD

Lim Koon Huan
provide an insight into Malaysia's

The Ministry of International Trade and Industry ("MITI") recently released its final determination on Malaysia's second safeguard investigation.

On 29 June 2015, MITI published its finding that the importation of certain grades of hot rolled steel plates (known in the industry as "HRP") from 42 countries into Malaysia was causing serious injury to the Malaysian steel market and industry ("domestic market"). HRP has a wide range of uses - from simple furniture and electrical appliances to heavy industries, such as the construction of highway bridges and shipbuilding.

Pursuant to MITI's findings, safeguard duties starting at 17.40% were imposed on imports from the 42 countries commencing 2 July 2015 to help the domestic market regain competitiveness and market share. These duties would apply for a period of three years, and would gradually reduce to 10.40% in the final year.

This decision is significant as it sees MITI imposing safeguard measures for the very first time since the enforcement of the Safeguards Act 2006 ("Act") and the Safeguards Regulations 2007 ("Regulations") on 22 November 2007. Malaysia's first safeguard investigation in 2011, which was on importation of hot rolled coils (HRC), was terminated at the preliminary determination stage.

This article discusses the salient events in MITI's second safeguard investigation.

THE ESSENCE OF A SAFEGUARD INVESTIGATION

In simple terms, safeguard duties are a trade protection measure which aims to counteract the sudden and sharp increase of imports of a particular product which cause injury to the domestic market. While increasing imports may be indicative of a thriving economy propelled by an increase of demand, the suddenness and/or sharpness of such increase in imports may leave domestic producers struggling to maintain competitiveness and market share against the imported goods.

If MITI finds that the domestic market is suffering material injury because of such imports, MITI may (i) impose safeguard duties; (ii) restrict imports by imposing a quota; or (iii) simultaneously impose safeguard duties as well as a quota on imports (section 28 of the Act).

Safeguard measures are unique in that they are a purely protectionist tool underpinned by the primary concern for the welfare of the domestic market. In contrast, anti-dumping and countervailing measures are strictly to tackle "unfair trade", though the end goal of remedying the injured market remains the same. As such, it must be recognised that safeguards are a delicate measure as their drastic effects of "restricting trade" may well apply to fairly traded goods in the market.

THE PROCESS

A safeguard investigation may be initiated either upon the

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SEQUEL

and Nicholas Lai second safeguard investigation

initiative of the Government of Malaysia or a written petition by the domestic industry. In the case of a written petition, the domestic industry must consist of either all the domestic producers of the product in question or domestic producers whose collective output make up a major proportion of Malaysia's total domestic production. Upon receipt of a written petition, MITI must decide whether there is sufficient evidence to initiate an investigation.

On 24 June 2014, Ji Kang Dimensi Sdn Bhd ("Petitioner") submitted a written petition ("Petition") requesting MITI to initiate a safeguard investigation on HRP. According to the Petition, there are two domestic producers of HRP in Malaysia and the Petitioner's output represents 88% of the total domestic production of HRP.

On 18 August 2014, MITI published a gazette notification to initiate a safeguard investigation against HRP imported to Malaysia between 1 January 2011 and 31 December 2013 ("Period of Investigation"). The notice of initiation preliminarily indicated that the import of HRP increased by 13.45% from 2011 to 2012, and by 25.64% from 2012 to 2013. It further claimed that the Petitioner's documents showed that the increased imports of HRP had caused serious injury to the domestic industry in terms of market share and trade performances.

As safeguard measures affect both exporting and importing communities of HRP, it is incumbent that MITI obtain and consider all views before coming to a decision. The relevant notices and documents were sent to all interested parties, which included local importers, foreign exporters, foreign governments and trade associations across the globe. MITI set a 30 day deadline for interested parties to provide their responses and views to the safeguard investigation.

The feedback from Malaysian importers of HRP is worth noting. The common concern raised was the limited grades of HRP which the Petitioner was able to produce. It was argued that the Petitioner could not be materially injured by imports of grades of HRP that were not in competition with the Petitioner's products. As such, a blanket safeguard measure would unduly burden the domestic sectors which require and use stringent grades of HRP, such as the oil and gas, automotive, electrical and electronics, shipbuilding and construction sectors.

On 23 October 2014, MITI conducted a public hearing for the Petitioner and all interested parties to present their arguments before a panel chaired by the Senior Director of Multilateral Trade Policy and Negotiations Division, MITI. A total of 56 parties attended the public hearing. Notable participants were large steel corporations from Japan and Korea, the Malaysian Iron & Steel Industry Federation (MISIF), the Japanese Iron and Steel Federation (JISF), representatives of the governments of Japan, Korea, India, Indonesia, Taipei and Ukraine as well as a number of domestic end users of HRP products.

Having obtained the views and responses of the Petitioner and all interested parties, MITI had to weigh the evidence and make a preliminary determination. While Regulation 9(1) of the Regulations requires MITI to make a preliminary determination within 90 days from the date of initiation of the Petition, MITI exercised its powers under Regulation 9(2) to extend the time period by an additional 30 days.

The Preliminary Determination

On 11 December 2014, MITI gazetted its affirmative preliminary determination, finding, *inter alia*, that the increase of imports during the Period of Investigation had indeed caused serious injury to the domestic industry in terms of the Petitioner's "*decline in market share, decline in domestic sales, low production and capacity utilisation, decline in cash flow, decline in profitability and inventory, and negative return on investment.*" Pursuant to MITI's affirmative finding, a provisional safeguard duty of 23.93% was imposed on HRP imports from 42 countries with immediate effect.

However, MITI took into account the views of exporters and importers alike by exempting certain grades of HRP from the provisional duty (Schedule 1 of Federal Gazette P.U.(B) 543/14). The exemption applied to grades used for the automotive, boiler and pressure vessels, offshore and structural uses and pipelines for the oil and gas sectors.

Pursuant to the affirmative preliminary determination, MITI conducted on-site verification at importers' premises to verify the views and positions set out by the domestic importers. MITI visited a total of 29 domestic importers for this exercise. Interested parties were also free to follow up and meet with MITI to make further representations and comments on the findings of the preliminary determination. Regulation 12 of the Regulations required MITI to make a final determination of the safeguard investigation within 200 days from the preliminary determination.

The Final Determination

On 29 June 2015, MITI gazetted its final determination affirming the findings in its preliminary determination and released a final determination report on 1 July 2015. While the bases for the affirmative determination were maintained, there are material differences that are noteworthy:

(a) First, it found that the increase of imports during the Period of Investigation appeared to be greater than indicated in

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INCENTIVES FOR PRINCIPAL HUBS AND LESS DEVELOPED AREAS

Toh Ying Lynn explains two new investment incentives in Malaysia

On 6 April 2015, Malaysia's Ministry of International Trade and Industry issued detailed guidelines for four new tax incentives ("Guidelines") following the announcement made by the Malaysian Government during the 2015 Budget:

1. Incentive for the Establishment of a Principal Hub;
2. Incentive for Less Developed Areas;
3. Incentive for Industrial Area Management; and
4. Capital Allowance to Increase Automation in Labour Intensive Industries.

This article will discuss the Incentive for the Establishment of a Principal Hub and the Incentive for Less Developed Areas.

INCENTIVE FOR PRINCIPAL HUB

The Guidelines define a "Principal Hub" as a "locally incorporated company that uses Malaysia as a base for conducting its regional and global businesses and operations to manage, control, and support its key functions including management of risks, decision making, strategic business activities, trading, finance, management and human resource."

The introduction of the Principal Hub replaces the existing incentives given to Regional Distribution Centers ("RDC"), International Procurement Centers ("IPC") and Operational Headquarters ("OHQ") as of 1 May 2015. A company which has been granted RDC, IPC or OHQ status is still entitled to enjoy the respective incentives for the full approved period and upon expiration of the said period, the company may apply for the Principal Hub Incentive subject to fulfilling the eligibility criteria.

Incentives

An approved Principal Hub company is eligible for a 3-tiered corporate tax rate as set out in *Table 1* as follows:

3-Tier Incentive	Tier 3		Tier 2		Tier 1	
Years	5	+5	5	+5	5	+5
Tax Rate	10%		5%		0%	

Table 1

To be eligible for the Principal Hub Incentive, an application must be received by the Malaysian Investment Development Authority ("MIDA") from 1 May 2015 to 30 April 2018. Tax incentives are to be approved through the National Committee on Investment ("NCI").

The initial 5-year incentive period may be extended for a further period of five years subject to the fulfilment of the initial criteria and an increase in annual business spending and high value job-creation by 30% and 20% respectively from their initial base commitment.

In addition to the tax incentives, a Principal Hub company is also entitled to the following benefits:

- 100% foreign equity participation;
- Expatriate posts based on the requirements of the applicant company's business plan, subject to current policy on expatriates;
- Higher flexibility for foreign exchange administration;

Strategic Services	Business Services	Shared Services
1. Regional P&L/Business Unit Management 2. Strategic Business Planning and Corporate Development 3. Corporate Finance Advisory Services 4. Brand Management 5. IP Management 6. Senior-level Talent Acquisition and Management	1. Bid and Tender Management 2 Treasury and Fund Management 3. Research, Development & Innovation 4. Project Management 5. Sales and Marketing 6. Business Development 7. Technical Support and Consultancy 8. Information Management and Processing 9. Economic/Investment Research Analysis 10. Strategic Sourcing, Procurement and Distribution 11. Logistic Services	1. Corporate Training and Human Resource Management 2. Finance & Accounting (Transactions, Internal Audit) 3. General Administration 4. IT Services
Note: "P&L Management" focuses on the growth of the company with direct influence on how company resources are allocated, determining the regional or global direction, monitoring budget expenditure and net income, and ensuring every program generates a positive return on investment.		

Table 2

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- A foreign-owned company may acquire fixed assets for the purpose of carrying out the operations of its business plan; and
- Suspension of customs duty for import of raw materials, components, or finished products into free industrial zones, licensed manufacturing warehouses, free commercial zones, and bonded warehouses for production or repackaging, cargo consolidation and integration before distribution to the end customer.

Eligibility Criteria

Amongst the key conditions that have to be fulfilled in order to qualify for the Principal Hub Incentive are the following:

- Incorporation under the Companies Act 1965;
- Paid-up capital of more than RM2.5 million;
- Minimum annual business spending of RM3 million, RM5 million and RM10 million for Tier 3, Tier 2 and Tier 1 respectively;
- Minimum annual sales turnover of RM300 million (applicable only for goods-based companies);
- Serves and controls *"network companies"* outside Malaysia as follows:
  - Tier 3: minimum three countries;
  - Tier 2: minimum four countries;
  - Tier 1: minimum five countries;

  A *"network company"* is a related company or any entity within the Group, including subsidiaries, branches, joint ventures, franchises or any other company related to the applicant's supply chain and business with contractual agreements;
- Carries out at least three qualifying services set out in *Table 2*, including at least one Strategic Service:
  - Tier 3: Strategic Service + two other qualifying services;
  - Tier 2: Regional P&L + two other services;
  - Tier 1: Regional P&L + two other services;
- Employment requirements whereby at least 50% of the high value jobs are to be held by Malaysians by the end of Year 3:
  - Tier 3: 15 high value jobs including 3 key strategic/ management positions;
  - Tier 2: 30 high value jobs including 4 key strategic/ management positions;
  - Tier 1: 50 high value jobs including 5 key strategic/ management position.

  "High value jobs" are jobs that require higher and more diverse set of managerial/technical/professional skills such as management, analytics, communication, problem-solving, and proficiency in information technology. The minimum monthly salary for high value jobs and key strategic/management positions is RM5,000 and RM25,000 respectively;
- Income tax exemption threshold received from services or goods-based company inside and outside Malaysia is based on the ratio of 30:70 (inside:outside);
- Significant use of Malaysia's banking and financial services and other ancillary services and facilities (e.g. trade and logistics services, legal and arbitration services, finance and treasury services); and
- The applicant must have a human resource training and development plan for Malaysians.

A Principal Hub company will be given three years from the commencement of the initial 5-year incentive period to comply with the relevant criteria. Failure to do so will result in a clawback of tax benefits obtained.

A Principal Hub company is required to submit a yearly report to MIDA for evaluation of its performance. Non-submission will result in the incentive being withdrawn.

INCENTIVE FOR LESS DEVELOPED AREAS

This incentive was introduced to promote balanced regional growth by channelling more investments to the less developed areas. The expression "*Less Developed Areas*" is not defined and will be considered on a case by case basis in consultation with the relevant authorities.

Incentives

Customized incentives will be given under the Less Developed Areas Incentive based on the merit of each case, subject to the company complying with the conditions and achieving the key performance index for each additional five years.

To be eligible for the Less Developed Areas Incentive, an application must be received by MIDA from 1 January 2015 to 31 December 2020. The NCI will forward its recommendations to the Ministry of Finance for consideration and approval.

The tax incentive will take the form of either:

- Income Tax Exemption of 100% for up to 15 years of assessment (5+5+5) commencing from the first year of assessment in which the company derives statutory income; or
- Income Tax Exemption equivalent to 100% of the qualifying capital expenditure ("Investment Tax Allowance") incurred within a period of 10 years. The Investment Tax Allowance can be offset against 100% of statutory income for each year of assessment and unutilized allowances can be carried forward until fully absorbed.

Additional benefits that may be available under the Less Developed Areas Incentive include:

- Stamp duty exemption on transfer or lease of land or building used for the manufacturing and services activities;

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RE-ENGINEERING THE PROFESSION

Datin Faizah Jamaludin highlights some key amendments to the laws that regulate the engineering profession in Malaysia

On 31 July 2015, the Registration of Engineers (Amendment) Act 2015 came into force, amending the Registration of Engineers Act 1967 ("Act"). On the same day, the Registration of Engineers Regulations 1990 ("Regulations") were amended to supplement the amended Act. These amendments come in the wake of efforts to liberalize one of a myriad of service sectors in Malaysia. To truly appreciate the impact of the amendments to the Act and Regulations, one should first know the motivations behind it.

LAYING THE GROUNDWORK

The Trade, Commerce and Economic Ministers ("Economic Ministers") of the Member States of the Association of Southeast Asian Nations ("ASEAN") signed the ASEAN Framework Agreement ("AFAS") on Services in Bangkok in 1995, in pursuit of the common goal of creating the ASEAN Economic Community ("AEC"). The objectives of AFAS are threefold:

(1) to enhance cooperation in services amongst Member States in order to improve the efficiency and competitiveness, diversify production capacity and supply and distribution of services of their service suppliers within and outside ASEAN;

(2) to eliminate substantially restrictions to trade in services amongst Member States; and

> **"the amended Act adds three categories of engineers … who may be registered"**

(3) to liberalise trade in services by expanding the depth and scope of liberalisation beyond those undertaken by Member States under the General Agreement on Trade in Services (GATS), with the aim to realising a free trade area in services.

In furtherance of these objectives, further meetings were held between the Economic Ministers of ASEAN to monitor the progress of the Member States and continuously discuss strategies and commitments which the Member States would undertake to achieve the AFAS objectives.

One of the more notable meetings was the 37th ASEAN Economic Ministers' Meeting, which was held in Vientiane in 2005, ten years after AFAS was signed. It was at this meeting that the Economic Ministers collectively agreed that the deadline for the liberalisation of all services sectors (including the engineering sector) would be 2015.

We are now approaching the end of 2015, and the foundation laid at the signing of AFAS in 1995 is being built upon in various service sectors in Malaysia.

The amended Act and Regulations represent the beginning of these changes in the engineering services sector in Malaysia. The changes within the Act and the Regulations which are likely to have the most impact on the engineering profession in Malaysia can be divided into three broad categories, as detailed below.

REINVENTING THE ENGINEER

"New" engineers, new responsibilities

While the Act previously recognized and regulated only Professional Engineers, Graduate Engineers and Engineering Consultancy Practices ("ECP"), the amended Act adds three categories of engineers, namely Engineering Technologists, Accredited Checkers and Inspectors of Works, who may be registered with the Board of Engineers Malaysia ("BEM") and whose services are regulated by the Act. Such persons are required to hold a "qualification recognized by BEM", but neither the Act nor the Regulations clarify what these qualifications are.

The amended Act also divides the old "Professional Engineer" class into two categories: a Professional Engineer with Practising Certificate and a Professional Engineer (without a Practising Certificate). A Professional Engineer obtains his Practising Certificate by sitting for the examinations set by BEM. There is, however, a redeeming clause in the new Section 10D(2) which provides that all existing Professional Engineers may apply to become Professional Engineers with Practising Certificate without having to sit for the required examinations.

> **"Arguably, the biggest change … is the removal of the nationality requirement"**

Directly related to the above is the amended Section 8 of the Act which now states that only a Professional Engineer with Practising Certificate or an ECP providing professional engineering services in Malaysia, shall be entitled to submit plans, engineering surveys, drawings, schemes, proposals, reports, designs or studies to any person or authority in Malaysia. Professional Engineers may no longer do so; they may only submit plans or drawings where such plans or drawings are in relation to an equipment, a plant or a specialised product invented or sold by him or his employer.

One immediate effect of this is that Professional Engineers (and engineers who are part of an ECP) must now obtain their Practising Certificates in order to do those things which they would previously simply have been able to do in their capacity as Professional Engineers. For instance, it would seem that in order to submit building plans to local authorities for the purposes of the Street, Drainage and Building Act 1974, one must be a Professional Engineer who has obtained his Practising Certificate from BEM. Similarly, the Certificate of Completion and Compliance required to certify the safety of new buildings may not be issued by an engineer unless he is a Professional Engineer with Practising Certificate.

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The expatriate engineer

Arguably, the biggest change to the registration of engineers is the removal of the nationality requirement to be a Professional Engineer registered with BEM. Under the old Act, only citizens and permanent residents of Malaysia could be registered with BEM as Professional Engineers. The amended Act now allows a person of any nationality to be registered as a Professional Engineer with BEM provided that he meets all the relevant requirements stipulated in the Act and Regulations and has been residing in Malaysia for at least six months prior to his application for registration.

A new kind of ECP

A direct impact of the relaxation of the nationality requirement is that ECPs may now apparently be owned by foreign persons and/or foreign bodies corporate. However, this is not to say that any person may set up and run an ECP. The Act and Regulations provide that:

(1) at least two-thirds of the directors of an ECP must be Professional Engineers with Practising Certificates; and

(2) at least seventy per cent of the share equity of an ECP must be held by Professional Engineers with Practising Certificates; the remaining share equity may be held by any person or body corporate.

> **"(thirty per cent) share equity may be held by any person or body corporate"**

It is not clear as yet whether a body corporate consisting entirely of Professional Engineers with Practising Certificates may count towards the seventy per cent share equity requirement.

The amended Regulations also dictate that an ECP must have a minimum paid-up capital of RM50,000 whilst the amended Act requires the day-to-day affairs of an ECP to be under the control and management of a person who is:

(1) a Professional Engineer with Practising Certificate; and

(2) authorized under a resolution of the board directors to make all final engineering decisions on behalf of the ECP in respect of the requirements under the Act or any other law relating to the supply of professional engineering services by an ECP.

GAME CHANGER?

The liberalization of the engineering services sector is likely to be good for Malaysia's economy in the long term, for two main reasons.

Raising the Game

Firstly, the relaxation of the nationality requirement removes a significant barrier to entry for talented foreign engineers to the Malaysian market for engineering services. This will increase competitiveness within the engineering services sector, while simultaneously exposing local engineers to the capabilities and standards of engineers outside of Malaysia, consequently raising the standards for Malaysian engineers.

Raising the Stakes

Secondly, the fact that foreign persons and foreign bodies corporate may now hold equity in an ECP is likely to encourage foreign investment in the Malaysian engineering scene. We may see state of the art technology being brought to Malaysian shores in future, which local engineers may learn from or capitalize on to speed up innovation in the domestic engineering scene.

CONCLUSION

It may be presumptuous at this early stage to assume that we will observe these benefits immediately, or even in the near future. However, given the nature of the professional engineering services sector, we are likely to see the beneficial effects of the amended Act and Regulations spill over to other economic sectors within the country.

As more and more ASEAN Member States liberalize their engineering services sector, we are more likely to see development and innovation in the engineering sector increase at a rapid rate over the next decade or so. Applied correctly, this opportunity for learning and foreign investment will push us closer towards achieving the AFAS objectives, the ASEAN goal of the AEC, and our own ideal of a truly modernized Malaysia.

The liberalisation of the engineering services sector in other ASEAN Member States will give Malaysian engineers the opportunity to export their services and bring economic benefits to the country through foreign exchange earnings.

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Faizah extends her appreciation to Caroline Leong and Karyn Khor, pupils in Skrine, for their assistance in writing this article.

GETTING AWAY WITH FRAUD: DEFRAUD THE SUBSIDIARY?

Lee Shih and Nathalie Ker discuss the multiple derivative action

Where a wrong has been carried out against a company, the rule in *Foss v Harbottle* provides that the company itself must bring an action and not the shareholder of the company. An aggrieved shareholder may be left powerless in the face of wrongdoing by the majority.

The common law then carved out an exception for a shareholder to bring an action on behalf of the company where the company itself is unable to do so. This is allowed where a wrong is committed against the company and at the same time, the wrongdoers are in control of the company. This is known as a 'fraud on the minority' as the wrongdoers are able to prevent the company from taking action against them. In these circumstances, a derivative action by the shareholder on behalf of the company is allowed.

Certain jurisdictions have also extended the derivative action to allow a shareholder of a parent company to bring an action on behalf of a subsidiary of that parent company. Such an action has been termed as a multiple derivative action.

> **"Certain jurisdictions … allow a shareholder of a parent company to bring an action on behalf of a subsidiary"**

The ability to bring a multiple derivative action is extremely pertinent in today's world, where businesses can be and are often structured into a multi-tiered group of companies and subsidiaries. Shareholders may invest in the investment holding company, with the actual businesses being run and assets held by the first-tier or second-tier subsidiaries further down the corporate structure.

Lord Millet, writing extra-judicially in *Multiple Derivative Actions*, Gore-Browne bulletin July 2010, succinctly describes the consequences if the situation were otherwise:

"The moral for would be fraudsters is simple; choose [a] *company, and be careful to defraud its subsidiary and not the company itself."*

We will discuss the availability of the multiple derivative action in various jurisdictions and the application of these cases in Malaysia.

THE MULTIPLE DERIVATIVE ACTION

The ability to bring a multiple derivative action has not been universally adopted in all jurisdictions but there has been a more positive reception in recent times.

England

In England, prior to the coming into force of the English Companies Act 2006 ("2006 Act"), there were a number of reported cases where the Court permitted the bringing of a multiple derivative action. Examples of these are the cases of *Wallersteiner v Moir (No 2)* [1975] QB 373, *Halle v Trax BW Ltd* [2000] BCC 1020, *Truman Investment Group v Societe General SA* [2003] EWHC 1316 (Ch) and *Airey v Cordell* [2006] EWHC 2728 (Ch). However, in these cases, the right of the aggrieved shareholder to bring such a multiple derivative action was never directly challenged and it was assumed that it was possible.

With the enactment of the 2006 Act, a statutory derivative action was introduced. The provisions provided that a derivative claim "*may only be brought under this Chapter*" or pursuant to an order brought in unfair prejudice proceedings. There was uncertainty whether this provision resulted in the abolition of the common law derivative action, both in its single or multiple derivative form.

The English High Court case of *Universal Project Management Service Ltd v Fort Gilkicker Ltd and others* [2013] Ch 551 ("*Fort Gilkicker*") considered this issue and held that the multiple derivative action continued to survive at common law.

Briefly, the case of *Fort Gilkicker* involved two members holding equal shares in a limited liability partnership ("LLP") which in turn owned all the shares in a company ("Company"). The Company had been incorporated as a special purpose vehicle to carry out a development project. A disagreement arose between the two members of the LLP. The aggrieved member alleged that the other had misappropriated a valuable business opportunity of the Company for his personal benefit and in breach of his fiduciary duty to the Company.

The English High Court acknowledged that the single derivative action at common law had been removed and replaced with the codified statutory derivative action. Recognising that the 2006 Act did not contain provisions allowing for a statutory multiple derivative action, the Court held that the multiple derivative action at common law still survived even after the 2006 Act. The Court could find no persuasive reason why Parliament ought to have intended to have provided no scheme for doing justice where the wrongdoer was a holding company in the wrongdoer's hands.

Therefore, English law continues to recognise the common law right to bring a multiple derivative action.

Hong Kong

In Hong Kong, the landmark case on the multiple derivative action is the Court of Final Appeal case of *Waddington Ltd v Chan Chun Hoo Thomas and others* [2008] HKCU 1381 ("*Waddington*"). Here, the Court considered the slightly more complex situation of a shareholder of a holding company suing on behalf of its sub-subsidiaries.

In *Waddington*, the plaintiff was a minority shareholder in Company A. Company A wholly owned Company B, which in

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turn owned Company C and Company D. The plaintiff alleged that the chairman and executive director of Company A ("first defendant"), who controlled all the companies, had caused the subsidiaries to enter into uncommercial transactions. The plaintiff brought a common law multiple derivative action on behalf of Company C and Company D against the first defendant.

Justice Ribeiro held that section 168B of the Hong Kong Companies Ordinance (Cap 32) at the time did not allow for the multiple derivative action and that such actions continued to be available under the common law. Lord Millet, one of the presiding judges in this appeal, further held that on a question of standing, the court must ask itself whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it. The learned judge held that this is fulfilled in the case of a person wishing to bring a multiple derivative action as any depletion of a subsidiary's assets causes indirect loss to its parent company and its shareholders.

The multiple derivative action was subsequently codified in the new Hong Kong Companies Ordinance (Cap 622) which came into force on 3 March 2014. Section 732(1) of the new Hong Kong Companies Ordinance states:

"*(1) If misconduct is committed against a company, a member of the company or of an associated company of the company may, with the leave of the Court granted under section 733, bring proceedings in respect of the misconduct before the court on behalf of the company.*" (Emphasis ours)

"Associated company" is defined in the new Hong Kong Companies Ordinance as a subsidiary of the body corporate, a holding company of the body corporate or a subsidiary of such a holding company. The Hong Kong Companies Ordinance also expressly preserves the common law right to bring a single or multiple derivative action.

Therefore, Hong Kong law allows for both a statutory and common law multiple derivative action.

The British Virgin Islands

The current position in the British Virgin Islands ("BVI") is that it appears that no multiple derivative action may be brought. BVI law provides for a statutory derivative action and has the restriction that "*a member is not entitled to bring … any proceedings in the name of or on behalf of a company*" except through the statutory provisions.

In the 2013 BVI Court of Appeal case of *Microsoft Corporation v Vadem Ltd* [BVIHCVAP2013/0007] ("*Microsoft Case*"), Microsoft Corporation ("*Microsoft*") was a minority shareholder in the BVI registered respondent company, Vadem BVI. In turn, Vadem BVI owned all the shares in Vadem Inc ("Vadem California"), a California corporation.

One of the crucial issues in the *Microsoft Case* was whether Microsoft could seek leave from the BVI Court to pursue causes of action on behalf of Vadem California. Hence, whether a multiple derivative action would be allowed.

Leave was granted by the learned judge to bring a derivative action on behalf of Vadem BVI but not on behalf of Vadem California. The learned judge stated that Microsoft had no authority to prosecute causes of action on behalf of Vadem California in BVI or anywhere else. On appeal, the BVI Court of Appeal decided that the question as to whether Microsoft could bring an action on behalf of Vadem California was a matter for the *lex fori* (law of the forum, i.e. law of California) to determine. Further, Justice Mario Michel made it very clear that the BVI Courts had no authority to grant leave for Microsoft to bring proceedings in the name of and on behalf of Vadem California as "*BVI law does not permit double derivative proceedings.*"

Therefore, BVI law does not allow for a multiple derivative action to be brought under its statutory provisions. Nonetheless, it remains to be seen whether the BVI Courts in future will adopt the reasoning in *Fort Gilkicker* and *Waddington* in finding that a multiple derivative action continues to exist through the common law route.

CODIFICATION OF THE MULTIPLE DERIVATIVE ACTION

Similar to the present position in Hong Kong, other jurisdictions have provided for a statutory multiple derivative action.

Australia

In Australia, a person may bring proceedings on behalf of a company if he is a member, former member, or person entitled to be registered as a member, of the company "*or of a related body corporate*" (section 236(1)(a) of the Australian Corporations Act 2001 ("2001 Act")). A company is related to another company if the first company is the holding company, a subsidiary, or a subsidiary of the holding company of the first company (section 50 of the 2001 Act). The 2001 Act also states that the right of a person to bring a derivative action at general law (common law) is abolished.

Canada

In Canada, in allowing for a statutory derivative action, there seems to be a wider definition of who a 'complainant' may be. A

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FORBIDDEN FRUIT?

Will Sen discusses a Singapore case on the validity of a litigation funding arrangement by an insolvent company

In *Re Vanguard Energy Pte Ltd* [2015] SGHC 156, the question as to whether the sale of the fruits of litigation by an insolvent company under a litigation funding arrangement was invalid on the grounds that such an arrangement offended the doctrines of maintenance and champerty was answered in the negative by the High Court of Singapore.

"Maintenance" refers to the giving of assistance or encouragement to a party to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. "Champerty" is an "aggravated form" of maintenance in which a person funds or maintains a litigation in return for a share of the proceeds or subject matter of the action – in other words, the maintainer is promised a share of the spoils. Arrangements for the provision of maintenance and champerty are unenforceable on grounds of public policy.

FACTS

Vanguard Energy Pte Ltd ("Company") was placed under compulsory liquidation on 21 November 2014. Three individuals were appointed as liquidators of the Company ("Liquidators").

> **"section 272(2)(c) of the Act permits the sale of a cause of action, as well as the proceeds of such actions"**

Prior to the liquidation order, the Company had filed three actions in the Singapore High Court, seeking, *inter alia*, damages and recovery of monies. The Company had also identified other potential claims.

As the Company had insufficient assets, the Liquidators were unwilling to proceed with the pending actions or potential claims ("Claims") without any indemnity or funding from a third party.

Subsequently, three individuals, namely SK (a creditor, shareholder and former director of the Company), DS (a former director and shareholder of the Company) and JS (a director and shareholder of the Company) (collectively "Funders") agreed to provide the necessary funding for the Claims.

After obtaining approval from the creditors of the Company on 23 January 2015, the Funders and the Liquidators entered into a funding agreement on 13 February 2015 ("Funding Agreement").

The Company then filed an application in the winding-up Court to obtain approval of the terms of the Funding Agreement. As a result of issues that arose in relation to the Funding Agreement during the hearing of the application, the lawyers for the Company proposed that the Funders and the Liquidators execute an Assignment of Proceeds Agreement ("Assignment") in place of the Funding Agreement. The Assignment was the subject matter of the application before the Court.

SALIENT TERMS OF THE ASSIGNMENT

The salient terms of the Assignment were as follows:

(1) The Company would provide upfront funding for 50% of the solicitor-and-client costs and any security for costs to be provided by the Company, subject to a cap of SGD 300,000 ("the Co-Funding"). The Funders would fund the remainder of these costs as well as party-and-party costs and other legal costs;

(2) After all the Claims have been settled, discontinued, or had final judgment entered by the Court, any amounts received by the Company from the Claims ("Recovery") would be paid as follows:

(a) First, to the Company up to the amount of the Co-Funding;

> **"the doctrines of maintenance and champerty had no application to the statutory power of sale under section 272(2)(c)"**

(b) Second, to the Funders up to the amount funded by them; and

(c) Third, any surplus will be paid to the Company.

(3) The Funders agreed to indemnify the Company against any shortfall between the Recovery and the amount of Co-Funding as well as for any damages, compensation, costs, security, interest or disbursements which the Company agrees, or is ordered, to pay in relation to the Claims (apart from the Co-Funding);

(4) The Funders would provide a banker's guarantee for SGD 1 million and would top up the amount of the guarantee by an additional SGD 300,000 for each action commenced in respect of a potential Claim;

(5) The Liquidators would have full control of legal proceedings, except that the Funders' agreement would be required on the choice of solicitors and on any settlement or discontinuance of any Claim; and

(6) All rights, title and interests of the Company and the Liquidators

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(present and future) over part of the Recovery equal to the funds provided by the Funders ("Assigned Property") would be sold to the Funders by way of assignment.

The terms of the Funding Agreement were similar to the Assignment, save that the Assigned Property, i.e. a part of the proceeds that are expected to be recovered in the Claims, is to be sold to the Funders under the Assignment; whereas under the Funding Agreement, the Company merely promised to use part of the proceeds of the Recovery to repay the Funders the amount funded by them.

ISSUES BEFORE THE COURT

Whilst the Assignment was in the best interest of the Company's creditors (as it allowed the Company to pursue the Claims with minimal risk and potentially benefitting from any Recovery), the Assignment raised various legal issues, of which three are discussed below.

Whether the Assignment is permitted under section 272(2)(c)

Section 272(2)(c) of the Singapore Companies Act ("Act") reads as follows:

"*The liquidator may … sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels …*"

Although the expression "property" is not defined in the Act, the Court held that it is to be used in the same sense as in the Singapore Bankruptcy Act wherein section 2(1) defines "property" to include "*things in action … and every description of property … and description of interest … arising out of or incidental to, property*".

The Court held that section 272(2)(c) of the Act permits the sale of a cause of action, as well as the proceeds of such actions. The Assigned Property represents part of the fruits of the Claims which are the property of the Company. The assignment of the Assigned Property under the Assignment therefore falls within the scope of the power of sale in section 272(2)(c). The Court relied on the English cases of *Grovewood Holdings Plc v James Capel & Co Ltd* [1995] 1 Ch 80 and *Ruttle Plant Limited v Secretary of State for Environment Food and Rural Affairs No 2* [2008] EWHC 238 (TCC) and the Australian case of *Re Movitor Pty Ltd (In Liquidation)* (1996) 64 FCR 380 to support its conclusion.

The Learned Judicial Commissioner commented that, in contrast, section 272(2)(c) of the Act could not apply to the Funding Agreement as that agreement did not purport to sell either the Claims or the proceeds of the Claims, and was just a promise by the Company to use part of the proceeds of the Claims to repay the Funders the amount funded by them.

Whether the doctrines of maintenance and champerty apply

The Judicial Commissioner agreed with the observations in the English Court of Appeal case of *In Re Oasis Merchandising Services Ltd* [1997] 2 WLR 764 and the Australian case of *Movitor,* and held that the doctrines of maintenance and champerty had no application to the statutory power of sale under section 272(2)(c) of the Act. In light of its earlier conclusion that the assignment under the Assignment fell within section 272(2)(c), it followed that the Assignment was immune from the doctrines of maintenance and champerty.

His Lordship further observed that it did not matter whether the Funders make a profit or are merely recovering the amount funded by them.

Does the Assignment offend the doctrines of maintenance and champerty

Notwithstanding its findings that the doctrines of maintenance and champerty do not apply to the power of sale under section 272(2)(c) of the Act, the Court went on to state that in any event, the Assignment did not offend the doctrines of maintenance and champerty.

After reviewing authorities from Singapore, United Kingdom, Hong Kong and Australia, the Court concluded that these cases support the proposition that an assignment of a bare cause of action (or the fruits of such actions) will not be struck down if:

(1) it is incidental to a transfer of property; or

(2) the assignee has a legitimate interest in the outcome of litigation; or

(3) there is no realistic possibility that the administration of justice may suffer as a result of the assignment. In this regard, the following should be considered:

   (a) whether the assignment conflicts with existing public policy that is directed at protecting the purity of justice or the due administration of justice, and the interests of vulnerable litigants; and

   (b) the policy in favour of ensuring access to justice.

Applying the above considerations to the facts, the Court

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OBERGEFELL : JUDICIAL ACTIVISM OR JUDICIAL PUTSCH ?

A commentary on the U.S. Supreme Court's decision on same-sex marriages
by Janice Tay and Kok Chee Kheong

On 26 June 2015, the US Supreme Court by a 5:4 majority ruled in *Obergefell et. al. v Hodges et. al.* 576 U.S. ___ (2015)* that same-sex marriage is a right conferred under the United States Constitution.

In this article, we will examine the reasons for the majority opinion as well as those given by the dissenting justices in this landmark decision.

BACKGROUND

This decision arose from the disposal of 16 consolidated petitions, 14 of which were brought by same-sex couples and the remaining two by two men whose respective same-sex partners had passed away.

The petitioners claimed that government officials in Michigan, Kentucky, Ohio and Tennessee who denied same-sex couples the right to marry or refused to recognise same-sex marriages lawfully performed in another State had violated the Fourteenth Amendment of the Constitution.

> **"the Fourteenth Amendment required a State to license a marriage between two people of the same sex"**

THE MAJORITY OPINION

The Supreme Court ruled that the Fourteenth Amendment required a State to license a marriage between two people of the same sex and to recognise a marriage by two persons of the same sex when their marriage is lawfully licensed and performed out-of-State.

The provisions of the Fourteenth Amendment relied upon in the majority opinion are the "Due Process Clause" which provides that no State shall "*deprive any person of life, liberty, or property, without due process of law*" and the "Equal Protection Clause" which provides that no State shall "*deny any person within its jurisdiction the equal protection of the laws*".

Kennedy J delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor and Kagan, JJ joined.

According to Kennedy J, the right to marry is protected by the Constitution. *Loving v Virginia* 388 U.S.1 (which invalidated bans on interracial marriages) and *Turner v Safley* 482 U.S. 78 (which held that prisoners could not be denied the right to marry) were cited in support of this proposition. According to the judge, the force and rationale of these cases apply to same-sex couples and lead to the conclusion that same-sex couples may exercise the right to marry.

He then laid down four principles and traditions to demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples:

1. The right to personal choice regarding marriage is inherent in the concept of individual autonomy; decisions about marriage are among the most intimate that individuals can make, whatever their sexual orientation;

2. The right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. Same-sex couples have the same right to enjoy intimate association - a right which extends beyond freedom from laws that criminalise same-sex intimacy;

3. The right to marry safeguards children and families and draws meaning from related rights of childrearing, procreation and education. Laws that prohibit same-sex marriage or refuse recognition of such marriage harm and humiliate the children of same-sex couples;

> **"the majority justices have usurped the power of the legislature to determine what constitutes marriage"**

4. Marriage is a keystone to the nation's social order. There should not be any difference between same and opposite sex couples with respect to this principle, but same-sex couples are denied the benefits (such as rules of intestate succession, hospital access, workers' compensation benefits, health insurance and child custody and support rules) that are accorded to opposite-sex couples by the State.

In the opinion of Kennedy J, the fundamental liberties which are protected by the Due Process Clause of the Fourteenth Amendment "*extend to certain personal choices central to individual dignity and autonomy, including choices that define personal identity and beliefs.*" The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.

"*When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim of liberty must be addressed*" said the Chief Justice. As same-sex couples seek in marriage the same legal treatment as opposite-sex couples, the judge concluded that it would disparage their choices and diminish their personhood to deny them this right.

According to the majority, the right of same-sex couples to marry is also derived from the Equal Protection Clause of the Fourteenth

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Amendment. While the Due Process Clause and the Equal Protection Clause set forth independent principles, the majority justices were of the view that the two Clauses are connected in a "profound" way and in certain instances, may be instructive as to the meaning and reach of each other. The justices acknowledged that in some instances, one Clause may capture the essence of the right in a more accurate and comprehensive way, and in other instances, the two Clauses may converge in identifying and defining the right.

The majority justices were of the view that the laws under challenge burden the liberty of same-sex couples and curtail precepts of equality. These laws are in essence unequal: same-sex couples are denied all benefits accorded to opposite-sex couples and are barred from exercising a fundamental right. The Court concluded that the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

The Court then declared invalid the relevant State laws to the extent that they exclude same-sex couples from marriage on the same terms as opposite-sex couples. The Court also held that there is no legal basis for a State to refuse to recognise a lawful same-sex marriage performed in another State on the ground of its same-sex character.

THE DISSENTING OPINIONS

The dissenting justices, Roberts CJ and Scalia, Thomas and Alito JJ each filed a dissenting opinion.

The common ground in the dissenting opinions is that the majority justices have usurped the power of the legislature to determine what constitutes marriage. Some of the views articulated by the dissenting justices are highlighted below.

Chief Justice Roberts

The real question in the appeals, according to Roberts CJ, is what constitutes "marriage" or, more precisely, who decides what constitutes marriage. In his opinion, this is a matter to be decided by the people acting through their elected representatives, and not by five lawyers who happen to hold commissions authorising them to resolve disputes according to law.

Whilst acknowledging that the policy arguments put forward by the petitioners for extending marriage to same-sex couples is compelling, the Chief Justice cautioned that the Court is not a legislature and should not have the right to make a State change its definition of marriage.

According to the Chief Justice, "*Under the Constitution, judges have power to say what the law is, not what it should be ... Accordingly, courts are not concerned with the wisdom or policy of legislation.*" He added that as a result of the neglect by the majority of this restrained conception of the judicial role:

"*Today, however, the Court has taken the extraordinary step of ordering every State to license and recognise same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening … Five lawyers have closed the debate (on what constitutes marriage) and enacted their own vision of marriage as a matter of constitutional law.*"

Roberts CJ also forewarned that "*It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage.*"

Justice Scalia

Scalia J agreed wholly with the opinion of Roberts CJ but was less restrained in his criticism of the majority opinion.

The learned judge described the majority opinion as one which makes the majority of the nine lawyers on the Supreme Court the ruler of the 320 million US citizens and robs them of the most important liberty – the freedom to govern themselves.

The judge was astounded by the hubris reflected in the majority opinion, which he criticised as "judicial Putsch". The majority "*have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since.*"

He also lambasted the opinion as pretentious and its content egotistic and often profoundly incoherent.

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INCORPORATION BY WAY OF REFERENCE

Peh Fern and Wen Shan explain a significant decision on section 9(5) of the Arbitration Act

It is not an uncommon practice for parties to incorporate the provisions of one contract ("original contract") into another contract ("second contract") by referring generally to the provisions of the original contract in the second contract. One of the common phrases being e.g. terms and conditions: "*as per original policy*" or "*as attached*".

This broad brushstroke of language was the point of contention in *Best Re (L) Limited v ACE Jerneh Insurance Berhad* [2015] MLJU 0256 wherein the Court of Appeal was asked to determine whether a mere general reference to the original contract constituted effective incorporation of an arbitration clause into a reinsurance contract. Interestingly, the Malaysian case law had no precedent to the concept of a 'reference for incorporation' in relation to such contracts.

BACKGROUND FACTS

The insurance policy ("Original Policy") between Sony, the insured, and ACE Jerneh ("Insurer") contained an arbitration clause (Clause 13). The Insurer and Best Re ("Reinsurer") entered into three Reinsurance Contracts ("Reinsurance Contracts"). It was an undisputed fact that the Reinsurance Contracts contain neither an express arbitration clause nor an express reference to Clause 13 in the Original Policy. The Reinsurance Contracts only included a clause which read *"as per Standard Extended Warranty Insurance Policy issued by [Insurer] as attached."*

A dispute arose between the Insurer and the Reinsurer resulting in the Insurer initiating a suit against the Reinsurer in the Sessions Court. The Reinsurer applied for and was granted a stay of proceedings by the Sessions Court pending reference of the dispute to arbitration.

The Insurer appealed against the decision of the Sessions Court to the High Court where the Insurer successfully argued that the arbitration clause in the Original Policy was not incorporated into the Reinsurance Contracts. In support of this submission, the Insurer cited a series of English cases on bills of lading and reinsurance which held that an arbitration clause could not be incorporated by a mere general reference, but that a specific reference to the arbitration clause was required.

The Reinsurer, dissatisfied with the High Court's decision, appealed to the Court of Appeal.

ISSUES CONSIDERED BY THE COURT OF APPEAL

The Court of Appeal was asked to decide on a single issue: whether Malaysian law requires a specific reference to incorporate an arbitration clause or whether a mere general reference would suffice.

On 29 June 2015, the Court of Appeal decided that a mere general reference sufficed as Section 9(5) of the Malaysian Arbitration Act 2005 ("Arbitration Act") made no requirement for a specific reference for the incorporation of an arbitration clause. In its reasoning, three points were considered:

(1) The Approaches

Within reinsurance law, arbitration clauses have been considered as a special species with special requirements for incorporation by reference. In the English case of the *Federal Bulker* [1981] 1 Lloyd's Rep 103, Bingham LJ said that, *"generally speaking, the English law of contract has taken a benevolent view of the use of general words to incorporate by reference standard terms to be found elsewhere. But in the present field a different, and stricter, rule has developed, especially where the incorporation of arbitration clauses is concerned."*

This benevolent view, referred to herein as the 'General Approach', is the frequently used general reference to incorporate the original contract into the second contract, e.g. the phrase of "*terms and conditions are as attached*" being a familiar phrase.

For over a century, the English reinsurance and shipping markets have operated in their own spheres with their own set of rules and regulations. The English Courts have accommodated their practices and have developed a unique albeit stricter approach towards incorporation of an arbitration clause by reference. Beginning with *T W Thomas & Co, Limited v Portsea Steamship Company, Limited* [1912] AC 1 and followed by a series of cases through the last century, the English Courts have consistently held that an arbitration clause cannot be incorporated by a mere general reference. In *Cigna Life Insurance Co of Europe SA-NV v Intercaser SA de Seguros y Reaseguros* [2001] Lloyd's Rep IR 821, the High Court held that, "*the legal justification for this conclusion comes from the special position which these clauses have in English law. An agreement to arbitrate disputes is regarded as personal to the parties to the agreement and collateral to the main obligations.*"

This stricter approach, referred to herein as the 'Strict English Approach', requires a specific reference to be made for effective incorporation of an arbitration clause from the original contract into the second contract, e.g. "*the terms and conditions are per the original contract, including the arbitration clause*". It was this approach that the High Court adopted in this instance.

(2) The Framework of the Arbitration Act

Section 9(5) of the Arbitration Act provides that an arbitration clause is incorporated when "*the reference is such as to make that clause part of the agreement.*" Section 9(5) corresponds to Article 7(2) of the UNCITRAL Model Law.

The Court of Appeal recognised that the Arbitration Act is based upon and reflective of the UNCITRAL Model Law which provides a standard model to assist nations in modernising and reforming the features of their national arbitration law.


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Several jurisdictions, including Hong Kong and Singapore, have adopted the Model Law, thus the contents of their respective legislation are similarly drafted to our Arbitration Act. In contrast, the English Arbitration Act 1996 is non-Model Law compliant albeit bearing substantial similarities to the Model Law. As such, the Court of Appeal found it helpful to consider how other common law jurisdictions which are Model Law compliant have approached the interpretation of Article 7(2).

The Hong Kong High Court in *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328 construed Article 7(2) of the Model Law as incompatible with the Strict English Approach. This decision was affirmed in *Gay Construction Pty Ltd & Anor v Caledonian Techmore (Building) Ltd (Hanison Construction Co Ltd, Third Party)* [1994] 2 HKC 562.

The Singapore Court of Appeal in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Anor* [2014] 1 SLR 130 adopted the reasoning in the Hong Kong cases, holding that "*the strict rule has been overextended impermissibly from its original application in the context of bill of lading and charter parties*".

(3) The Malaysian Position

The Court of Appeal recognised that the interpretation of Section 9(5) of the Arbitration Act had hitherto been unsettled. The Court of Appeal in *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 7 CLJ 785, a case concerning a construction contract, adopted the General Approach whereas the High Court in *Sigur Ros Sdn Bhd v Malayan Banking Bhd & Anor* [2013] 8 CLJ 86, a case involving a bank guarantee, followed the Strict English Approach. Notably, however, in *Albilt* there was no reference to the Model Law, whilst in *Sigur Ros* there was no reference to *Albilt*, which could have set the precedent for it.

THE COURT OF APPEAL'S DECISION

In coming to its decision, the Court of Appeal appreciated that the enforceability of an arbitration clause was to be read in light of the statutory provision and the purpose for it. Their Lordships recognised the trend of encouraging arbitration along with its secondary duty to enable business efficacy in the commercial world. With these factors in mind, the Court concluded that the word "*reference*" in Section 9(5) of the Arbitration Act did not require a specific reference to the arbitration clause; that it was drafted and designed to accept general references. Consequently, their Lordships unanimously decided that the general reference used in the Reinsurance Contracts had incorporated the entire Original Policy, including the arbitration clause.

COMMENTARY

Broadly, there is no right or wrong as the two approaches to incorporation by reference are both applicable and workable in the real world. The General Approach is near universal but the Strict English Approach has time and again been considered and justified for matters relating to bills of lading and reinsurance.

Historically, the Strict English Approach was developed foremost for bills of lading and charter parties; and was subsequently extended to reinsurance. A unique feature of bills of lading is that the new party to the second contract is not actually furnished with the original contract. Hence, whilst a bill of lading may state that the terms are as per the original contract, the new party may not have actual knowledge of the contents and logically should not have agreed to terms unknown to it. This unique feature is notably absent in reinsurance contracts.

The Strict English Approach has its merits but *T W Thomas* was decided long before the Model Law was introduced to aid international commercial relations by providing a uniform framework for national legislation to adopt. The Model Law does not proscribe a state from adopting the Strict English Approach but was deliberately drafted to accept the wider interpretation of the General Approach. Regardless, it is the General Approach which has found favour, being adopted by a number of other jurisdictions, including Bermuda, Canada, Switzerland, France, Hong Kong, Singapore and the United States.

For the most part, this decision will not affect the vast majority of existing contracts or cause a stir amongst commercial entities that prefer arbitration. Entities should nonetheless be aware that by importing all the terms from the original contract, they may also be agreeing to arbitrate a dispute. Thus a party who does not wish to arbitrate a dispute will have to expressly exclude the application of the arbitration clause where a general reference to incorporate is used.

All things being considered, this decision is welcomed for two reasons. First, it makes it clear that the Malaysian Courts will adopt the General Approach in interpreting Section 9(5) of the Arbitration Act. Second, it determines that the Strict English Approach in relation to the adoption of an arbitration clause in a reinsurance contract under English law will not apply to a reinsurance contract in Malaysia. As the matter began at the Sessions Court, the Court of Appeal's decision is final and any change must come from a separate case to be decided by the Federal Court.

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IS LEAVE REQUIRED TO COMMENCE BANKRUPTY PROCEEDINGS ON A JUDGMENT THAT IS MORE THAN SIX YEARS OLD?

A commentary on Dr Shamsul Ban Abdul Kadir v RHB Bank Berhad by David Tan

The Federal Court in its recent decision of *Dr Shamsul Bahar Bin Abdul Kadir v RHB Bank Berhad* [2015] 4 CLJ 561 held that a judgment creditor ("JC") who commences bankruptcy proceedings against a judgment debtor ("JD") in respect of a debt under a judgment where six years or more have lapsed since the date of the judgment must obtain prior leave of the court pursuant to Order 46 Rule 2 of the Rules of the High Court 1980 (now Rules of Court 2012).

At first blush, the Federal Court's decision in *Shamsul Bahar* seems a peculiar decision since a fairly recent Federal Court decision of *Ambank (M) Bhd v Tan Tem Son* [2013] 3 MLJ 179 had held that a bankruptcy proceeding is not a writ of execution within the meaning of Order 46 Rule 2. This article will examine the reasoning of the Federal Court in *Shamsul Bahar*.

BRIEF FACTS

A consent judgment dated 10 October 2000 was entered into between the JD and the JC whereby the JD was ordered to pay RM554,000.00 to the JC by way of a first instalment of RM54,000.00 on or before 15 November 2000 followed by monthly instalments of RM20,000.00 each from 15 November 2000 until full settlement.

> "Lim Ah Hee was not an authority for the proposition that leave is not required"

The JD failed to settle the judgment sum. Consequently, the JC issued a bankruptcy notice for the sum of RM350,000.00 against the JD on 3 January 2011 and served the same on the JD on the following day. The JD applied to set aside the bankruptcy notice on the ground that the bankruptcy notice was invalid as it was issued without the leave of court pursuant to Order 46 Rule 2 which, *inter alia*, requires a JC to obtain leave of court in order to enforce a judgment where six years or more have lapsed since the date of the judgment.

DECISION OF THE HIGH COURT

In September 2011, the Senior Assistant Registrar dismissed the JD's application to set aside the bankruptcy notice. The JD appealed to the judge in chambers. On 9 November 2011, the learned High Court Judge dismissed the JD's appeal, holding that he was bound by the Federal Court decision of *Perwira Affin Bank v Lim Ah Hee* [2004] 3 MLJ 253 which held that a bankruptcy proceeding is a continuation of a judgment and that no leave is required to issue the bankruptcy notice after six years.

DECISION OF THE COURT OF APPEAL

The JD's appeal was dismissed by the Court of Appeal which affirmed the decision of the High Court. The Court of Appeal held that the words "writ of execution" in Order 46 Rule 2, as interpreted by the Federal Court in *Lim Ah Hee*, did not include a bankruptcy proceeding.

DECISION OF THE FEDERAL COURT

The JD obtained leave to appeal to the Federal Court on two questions of law - the first being whether it is a mandatory requirement under Section 3(1)(i) of the Bankruptcy Act 1967 ("BA 1967") for a JC to obtain leave pursuant to Order 46 Rule 2 in order to commence bankruptcy proceedings on a judgment debt where six years or more have lapsed since the date of the judgment.

The Federal Court answered the above question in the affirmative and set aside the bankruptcy notice issued against the JD. Their Lordships opined that it was not necessary to answer the second leave question.

According to their Lordships, the appeal turned on the interpretation of Section 3(1)(i) of the BA 1967, in particular, the words "*execution thereon having not been stayed*".

> "Tan Tem Son had clearly departed from history and case law"

Section 3(1)(i) of the BA 1967 reads:

(1) A debtor commits an Act of bankruptcy in each of the following cases:

(i) If a creditor has obtained a ***final judgment or final order against him for any amount and execution thereon not having been stayed*** *has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice ... ;"* (emphasis added)

The Federal Court traced the origins of the BA 1967 and found that Section 3(1)(i) of the BA 1967 is almost an exact duplicate of Section 4(1)(g) of the English Bankruptcy Act 1883 and Section 1(1)(g) of the English Bankruptcy Act 1914.

After examining the decisions of the English Courts in *Re ex parte Woodall* (1884) 13 QBD 479, *Re ex parte Ide* (1886) 17 QBD 755 and *Re Connan, ex parte Hyde* [1888] 20 QBD 690, the Federal Court concluded that:

"[25] The ratio that determined the outcome in those three

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English cases was not that bankruptcy was a form of execution and therefore had to comply with the Rule of Court relating to execution. Rather, ***the ratio was that the creditor must be in a position,*** *when he issued the bankruptcy notice,* ***to levy immediate execution*** *upon the judgment,* ***should he choose to levy execution.*** *"* [emphasis added]

Their Lordships then observed that the Malaysian Courts in *Re SMRM Sithamparam Chettiar; ex parte Sundra Singh* [1935] 1 MLJ 38, *Low Mun v Chung Khiaw Bank Ltd* [1987] 2 CLJ 400, *Wee Chow Yong, Ex P; Public Finance Bhd* [1990] 1 CLJ 176 and *Re Ahmad Lazim & Anor, Ex P Bank Kerjasama Rakyat (M) Bhd* [1999] 2 CLJ 101 had accepted the ratio of the decisions in *Woodall* and *Ide* and this represented the state of the law prior to *Lim Ah Hee* and *Tan Tem Son.*

Distinguishing Lim Ah Hee

The Federal Court distinguished *Lim Ah Hee* on the ground that *Lim Ah Hee* had nothing to do with the meaning of the words "*execution thereon not having been stayed*" in Section 3(1)(i) of the BA 1967. Rather, the issue in *Lim Ah Hee* was whether the second limb of Section 6(3) of the Limitation Act (which, *inter alia*, prohibits the recovery of interest in respect of a judgment debt after six years from the date on which the interest became due) applied to a bankruptcy proceeding. It was in the context of Section 6(3) of the Limitation Act that the Court decided in *Lim Ah Hee* that a bankruptcy proceeding is not a writ of execution.

Consequently, the Federal Court concluded that *Lim Ah Hee* was not an authority for the proposition that leave is not required to issue a bankruptcy notice where six years or more have lapsed from the date of the judgment or on the interpretation of the words "*execution thereon not having been stayed*" in Section 3(1)(i) of the BA 1967.

Departure from Tan Tem Son

The Federal Court then referred to *Tan Tem Son* where it had disapproved *Woodall* and *Ide* on the basis that the Section 4(1)(g) of the English Bankruptcy Act 1883 did not contain the proviso found in Section 3(1)(i) of the BA 1967.

The Federal Court in *Shamsul Bahar* disagreed with the reasoning in *Tan Tem Son* and stated:

"[52] We do not dispute that when Woodall and Ide were decided, s. 4(1)(g) of the Bankruptcy Act of 1883 did not contain the proviso similar to the proviso to s. 3(1)(i) of the BA 1967. But we fail to appreciate how the absence of that proviso to s. 4(1)(g) of the Bankruptcy Act of 1883 could militate against the reasoning in Woodall and in Ide ...

[53] It is however pertinent that ***apart from the proviso****, s. 3(1)(i) of the BA 1967 is in pari materia with s. 4(1)(g) of the English Bankruptcy Act of 1883 and with s. 1(1)(g) of the English Bankruptcy Act of 1914, and as such, due regard should be given to the enunciation by English courts on the meaning and application of the English provisions ... A bankruptcy proceeding is not execution. But* ***the right of the creditor to issue bankruptcy notice is pegged to the right of the creditor to proceed to execution. A creditor is not entitled to issue bankruptcy notice if he is not in a position to issue execution on his judgment at the time when he issues the bankruptcy notice****".*

The Court concluded that *Tan Tem Son* had clearly departed from history and case law. Accordingly, their Lordships felt compelled to bring the law back to where it was before *Tan Tem Son*, that is, to be in line with the law in other jurisdictions that had provisions equipollent to Section 3(1)(i) of the BA 1967.

ANALYSIS

A careful examination of the ratio in *Shamsul Bahar* reveals that the Federal Court did not in fact extend the definition of a writ of execution to include bankruptcy proceedings under Order 46 Rule 2.

The effect of *Shamsul Bahar* is that a JC who wishes to commence a bankruptcy proceeding based upon a judgment where six years or more have lapsed since the date of the judgment will need to obtain leave of Court to execute upon the judgment as a precondition to issuing a bankruptcy notice against the JD. The requirement in Order 46 Rule 2 is therefore applicable to bankruptcy proceedings, albeit in a roundabout manner, without straining or extending the definition of a writ of execution as per Order 46 Rule 2.

CONCLUSION

In view of the decision of the Federal Court in *Shamsul Bahar*, it would be prudent for a JC to commence bankruptcy proceedings within six years from the date of judgment to avoid the risk of leave to execute on the judgment being refused by the courts and also to avoid unnecessary legal costs.

The decision in *Shamsul Bahar* raises the possibility that a JD who was made bankrupt pursuant to a bankruptcy proceeding commenced six years or more after the date of judgment in reliance on *Lim Ah Hee* or *Tan Tem Son* may seek to rescind and annul the bankruptcy orders issued against him by reason of the JC's omission to obtain prior leave of court under Order 46 rule 2.

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CAN UNCONSCIONABILITY BE EXCLUDED AS A GROUND TO RESTRAIN A CALL ON A PERFORMANCE BOND?

Shannon Rajan provides the latest developments on restraining a call on a performance bond.

INTRODUCTION

The appeals to the Court of Appeal of Singapore in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another* [2015] SGCA 15 arose out of the main contractor's application to restrain a call on an on-demand performance bond by a developer on the ground that the call was being made unconscionably. However, the contract between the parties contained a clause stipulating *inter alia* that the main contractor was not (except in the case of fraud) entitled to restrain a call on the performance bond on any ground, including the ground of unconscionablility ("the Clause"). The central question was whether the Clause was invalid and unenforceable because it was contrary to public policy as an ouster of the court's jurisdiction.

The presiding judge, Edmund Leow JC, held that the Clause was unenforceable for three reasons. First, the Clause was an attempt to oust the court's jurisdiction. In his view, it was a severe incursion into the court's freedom to grant injunctive relief on the ground of unconscionability. Second, the power to grant injunctions emanated from the court's equitable jurisdiction, which could not be circumscribed by contract. Third, the unconscionability exception was based on policy considerations, which could not be brushed aside by agreement. The acceptance by the Singaporean courts of the unconscionability exception was a *"considered and deliberate"* balance struck between party autonomy and regulating dishonest and unconscionable behavior.

The Judge held however that the high threshold necessary to invoke a restraint on the ground of unconscionability was not satisfied on the facts. He therefore dismissed the main contractor's application to restrain the developer's call. Both parties appealed against the Judge's decision. The main contractor appealed against the Judge's finding that the developer did not make the call unconscionably whilst the developer cross-appealed against the Judge's holding that the Clause was unenforceable.

THE ARGUMENTS ON APPEAL

The developer put forward four arguments to support its position that the Clause was enforceable, namely that (i) clauses which restricted or excluded equitable remedies have been held to be enforceable even if they were to be construed strictly; (ii) the Clause was not an ouster clause as it merely restricted the grounds on which relief may be sought from the court rather than remove access to the court completely; (iii) the Clause should be upheld in order to give effect to party autonomy; and (iv) the Clause did not fall into any of the established categories of public policy that rendered it invalid.

The main contractor's position was that the Clause was unenforceable because it was an ouster of the court's jurisdiction as it fettered the court's power rather than the parties' rights, and Singapore law had *"developed a public policy"* of protecting contractors from oppressive calls on performance bonds.

COURT OF APPEAL'S DECISION

In dealing with the question of whether the parties can agree to exclude the unconscionability exception as a ground for restraining a call on a performance bond, the Court of Appeal stated that whilst freedom of contract is the norm, the courts are, on occasions, prepared to override the parties' contractual rights if to do so would give effect to the greater public good. However, given the inherently nebulous nature of public policy, such occasions will be the (rare) exception. One category of contracts which has been held to be contrary to public policy concerns contracts that oust the court's jurisdiction as *"[t]he right of access to the courts has always been jealously guarded by the common law, and the general principle remains that contracts which seek to oust the jurisdiction of the courts are invalid."* [1]

> **"The Court of Appeal … held that the Clause is not one which sought to oust its jurisdiction"**

On the other hand, the Court observed that limitations placed on the rights and remedies available to the parties have not been treated as an ouster of the court's jurisdiction, and cited the example of parties being at liberty to limit or even exclude altogether an innocent party's right to damages in the event of a breach of contract by the other party. These are known as limitation or exclusion clauses and they seek to restrict or exclude a *common law* remedy. The Court opined that such clauses have never been treated as being void and unenforceable as there is no denial of access to the court by virtue of them.

The Court further observed that although the Clause does not attempt to restrict or limit an innocent party's right to *damages at common law*, it does, nevertheless, attempt to restrict or limit a contracting party's right to an *injunction in equity*. Specifically, the Clause sought to restrict the right of the obligor under the performance bond to apply for an injunction to restrain the beneficiary from calling on that bond except in a situation of fraud. This is in effect the restriction of an *equitable* remedy. Although such a clause may be potentially subject to the court's scrutiny pursuant to common law principles (for example, the clause was not incorporated into the contract) or the provisions of the Unfair Contract Terms Act 1994 ("UCTA") (for example, the clause is unenforceable because of unreasonableness),

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the Court concluded that both these situations appear to be inapplicable in the present case.

The Court also turned its attention to the Malaysian Federal Court case of *AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd* [2] ("AV Asia"), which was relied upon by the High Court Judge and the main contractor to support the position that the clause was void and unenforceable. In *AV Asia*, the parties entered into a mutual non-disclosure agreement ("MNDA"), which prohibited the respondent from disclosing confidential information that it obtained from the appellant.

Clause 15 of MNDA provided that if there was disclosure or unauthorised use of confidential information, damages would *"not be sufficient"* to compensate for the breach and that *"injunctive relief would be appropriate to prevent any actual or threatened use of disclosure"* of the confidential information. The appellant relied on the alleged breaches of the MNDA and sought an interlocutory injunction. The appellant argued that the Court was obliged to give effect to Clause 15 and should therefore grant the injunction. The Federal Court rejected the appellant's argument and stated that Clause 15 did not fetter the Court's discretion.

The Court of Appeal held that there were material distinctions between *AV Asia* and the case before it. First, *AV Asia* was focused on the weight to be given to such clauses in the exercise of the court's discretion when deciding whether or not to grant an injunction, and not the contractual validity or enforceability of those terms. Second and more importantly, the parties cannot by agreement force the court to grant an injunction where one would not ordinarily have been issued. The court cannot be obliged to exercise its discretion in a way that is contrary to the principles it would ordinarily apply to the grant of injunctive relief. However, this does not, in the opinion of the Court, preclude the parties from agreeing to limit their right to seek certain remedies or reliefs from the court, which is the effect of the Clause. Lastly, the Court observed that *AV Asia* did not expressly refer to the category of public policy relating to the contracts that oust the court's jurisdiction.

The Court of Appeal therefore held that the Clause is not one which sought to oust its jurisdiction or severely curtail its equitable jurisdiction to grant injunctions. The Court observed that its jurisdiction to hear the matter was not impacted by the Clause, although the remedy it could grant has been sought to be limited or even excluded. This was something that the parties voluntarily agreed to and could in any event be (in appropriate circumstances) overseen by the court pursuant to, for example, the relevant provision of UCTA.

The Court acknowledged that the development of the doctrine of unconscionability in the context of (abusive) calls on performance bonds centered on policy considerations. It was motivated by the recognition that a performance bond could be used as an *"oppressive instrument"*,[3] which may cause *"undue hardship"* or *"unwarranted economic harm to the obligor"*.[4] The Court however clarified that the conception of policy that formed the basis for the unconscionability doctrine is *quite different from* the concept of public policy, which underpins that category of contracts which are void and unenforceable as being contrary to public policy as such contracts seek to oust the court's jurisdiction.

For the reasons stated above, the apex court of Singapore held that the Clause was enforceable. Accordingly, it allowed the developer's appeal and dismissed the main contractor's cross-appeal.

CONCLUSION

The Court's decision gave primacy to the parties' freedom to contract where a party may contractually limit the grounds under which the other party may apply for an injunction to restrain the call on its performance bond to the case of fraud only. The rationale was an *"intensely practical"* one in that the developer could have called for a cash deposit instead of a performance bond under the terms of the contract and there was thus *"no pressing reason in either principle or policy"* why the Clause was contrary to public policy.

It remains to be seen whether the Malaysian courts will go so far as to uphold a clause in a contract that excludes unconscionability as a ground to restrain a call on a performance bond. The position may be buttressed if the contract in question entitles the developer to a cash deposit and a performance bond as an alternative security to the cash deposit. Such a clause may, arguably, be valid and enforceable in Malaysia.

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Endnotes:

1 R A Buckley, "Illegality and Public Policy" (Sweet & Maxwell, 3rd Ed.,2013).

2 [2014] 3 MLJ 61.

3 See GHL Pte. Ltd. v Unitrack Building Construction Pte Ltd and another [1993] 3 SLR (R) 44.

4 See JBE Properties Pte. Ltd. v Gammon Pte. Ltd [2011] 2 SLR 47.

OBERGEFELL : JUDICIAL ACTIVISM OR JUDICIAL PUTSCH ?

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Justice Thomas

Thomas J expressed, albeit briefly, concern that the majority had apparently disregarded the political process as a protection for liberty.

The main thrust of the judge's dissenting opinion was the erroneous application of the "Due Process Clause" by the majority. According to Thomas J, it is necessary for a party to identify a deprivation of life, liberty, or property in order to invoke protection under the Due Process Clause.

The expression "liberty" refers to the right to freedom of "locomotion" (movement) and from the restraint thereof except by due course of law. Based on this understanding of "liberty", Thomas J was of the view that the petitioners were not in any way deprived of this right.

The judge argued that even if "liberty" encompasses something more than freedom from physical restraint, it would not extend to the types of right claimed by the majority, i.e. a right to a particular governmental entitlement. Receiving of governmental recognition and benefits has nothing to do with any understanding of "liberty" that would have been contemplated by the draftsmen of the Constitution. According to him, *"As a philosophical matter, liberty is only freedom from government action, not an entitlement to government benefits. And as a constitutional matter, it is likely even narrower that that, encompassing only freedom from physical restraint and imprisonment"*.

The cases cited by Kennedy J, namely *Loving* and *Turner*, were distinguished as precedents that involved absolute prohibitions on private actions associated with marriage, and not with the denial of governmental recognition and benefits associated with marriage.

Thomas J postulated that the majority's assertion that the decision will advance the "dignity" of same-sex couples may be a tacit recognition by those justices that the cases did not involve liberty, as traditionally understood. According to the judge, the flaw in this assertion is that the Constitution contains no "dignity" Clause and even if it did, the government would be incapable of bestowing dignity.

Justice Alito

Alito J said that the Supreme Court had held in *Washington v Glucksberg*, 521 U.S. 701 that "liberty" under the Due Process Clause should be understood to protect only those rights that are deeply rooted in the history and tradition of the United States. The rationale, according to the judge, was to prevent five unelected justices from imposing their personal vision of liberty upon the American people.

In the opinion of the judge, it is beyond dispute that the right to same-sex marriage is not among those rights. The majority justices had, in Alito J's opinion, disregarded the fact that this right lacks deep roots or even that it is contrary to long established tradition, and claimed the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

Further, the majority had attempted to circumvent the problem presented by the newness of the right by claiming that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority had argued that a State has no valid reason to deny that right to same-sex couples.

The judge reiterated the views in his dissenting opinion in *United States v Windsor* 570 U.S. ___ (2013)* that any change on a question that is so fundamental should be made by the people through their elected officials. Instead, the majority had usurped the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.

Alito J echoed the sentiments expressed by Roberts CJ and Scalia J, that:

"*Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority can invent a new right and impose that on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriages should worry about the scope of the power that today's majority claims.*"

THE LEGAL EFFECT OF THE DECISION

Prior to the Supreme Court's decision in *Obergefell*, 36 States and the District of Columbia had already recognised same-sex marriages. As a result of this decision, the remaining 14 States will no longer be able enforce their State laws that prohibit same-sex marriages. These States will also have to recognise same-sex marriages solemnised in States that permit such marriages.

THE FALLOUT

Barely three months after the Supreme Court's decision, the *New York Times* reported that Kim Davis, a county clerk in Rowan County, Kentucky, was jailed for contempt of court for defying a court order to issue marriage licences to same-sex couples. Davis asserted that her religious beliefs precluded her from recognising same-sex marriages.

As with *Obergefell*, this decision drew much controversy. Texas Senator Ted Cruz, in condemning the incarceration of Davis, said, "*Today, judicial lawlessness crossed into judicial tyranny.*"

The decision by Judge Bunning to imprison Davis went beyond the punishment sought by the same-sex couples, who had only requested that she be fined.

The judge defended his decision, stating that imposing a fine "*would not bring about the desired result of compliance.*" According to CNN.com, Judge Bunning said that he too was religious, but when he took his oath to become a judge, that oath trumped his personal beliefs.

The judge released Davis after five nights of imprisonment and directed the deputy clerks in Rowan County to issue marriage licences to all legally eligible couples. He also ordered Davis not to interfere in any way with the issue of marriage licences by her deputy clerks.

This controversy is by no means resolved as Davis maintains that marriage certificates issued without her consent as county clerk are not valid. It is unclear whether there are any merits in her contention.

COMMENTARY

It is evident from the opinions rendered that the case has created a schism amongst the justices of the Supreme Court. On the one hand, the majority may be commended for adopting an innovative approach which ensures that the Constitution is a living instrument that can be adapted to accommodate the evolving values and outlook of society.

On the other hand, the dissenting judges have expressed in no uncertain terms, their concern that the majority had stepped beyond the traditional role of the Court and had waded into the realm of the legislature by creating a fundamental right which had hitherto been non-existent under the Constitution. In the words of Scalia J, "*This is a naked judicial claim to legislative – indeed, super-legislative – power.*"

Regardless of the jurisprudence involved, the Supreme Court's decision in *Obergefell* has been welcomed by many as a step which alleviates the plight of same-sex couples and their children. For the detractors of same-sex marriage in the affected States, the institution of marriage will never be the same again.

The question as to whether the majority decision represents the zenith of judicial activism or blatant and outright judicial Putsch may rage on for years to come.

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* The full citation for *Obergefell* and *Windsor* were unavailable from the US Supreme Court's website at the time of publication of this article.

SKRINE LAWYERS' TEAM BUILDING

This year, we headed down to the beautiful seaside town of Port Dickson for the Skrine lawyers' team building weekend on 22–23 August 2015.

Activities for this year's team building included a series of outdoor tele-match games where the lawyers actively participated in games such as guiding our blindfolded teammates in searching for colour-specific balls, displacing ping pong balls in aluminium cans using a plastic spade and water, and filling plastic bottles with water using a punctured bottle. Despite the scorching heat of the afternoon sun, the camaraderie and team spirit amongst newly acquainted colleagues and familiar friends was high as we worked together to complete the tasks.

The team-building exercises were followed by a poolside BBQ dinner where we were divided into groups of 12 people to participate in team quizzes. This was followed by some games, prize-giving, dancing and karaoke. Some lawyers decided to put on their most colourful Hawaiian shirts and dresses to vie for the best Hawaiian-dressed title.

With the great turnout and energy from the participants, the weekend team building event was a fun, positive and memorable retreat.

THE SAFEGUARD SEQUEL

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the Petition (for the 2011-2012 period, the initial reported increase of 13.45% became 42.17% in the final determination report; while the 2012-2013 period also saw an increase from the initially reported 25.64% to 28.65%). While MITI did not explain how the higher percentages were arrived at, one possible explanation could lie in the removal of exempted grades of HRP from the initial import volume analysis.

(b) Secondly, the provisional safeguard duty of 23.93% was replaced with lower final duties. Safeguard duties were to be imposed over three years with progressive reductions: 17.40% for 2015/6; 13.90% for 2016/7; 10.40% for 2017/8.

(c) Thirdly, MITI took a positive list approach in the final determination as opposed to the negative list approach in the preliminary determination. This means that instead of applying a blanket final safeguard duty on all imported HRP and providing a list of exempted HRP grades, MITI specified the range of HRP products on which final safeguard duties were imposed. By doing so, importers of grades of HRP that fall outside the specified range of HRP products would not be subject to the final safeguard duties.

(d) Lastly, *de minimis* imports were also exempted from the final safeguard duties. Imports from developing countries that did not make up at least 3% individually or 9% collectively of Malaysia's total HRP imports were exempt from the final safeguard duties pursuant to section 33(1) of the Act.

CONCLUSION

While Malaysia is still taking baby steps into the safeguard scene, other Asian and ASEAN countries have long used this trade measure to remedy sudden and unforeseen influx of goods. India is considered the world's most proactive jurisdiction in trade protectionism, having initiated 24 safeguard investigations since 2007 and a total of 39 investigations since its first in 1997. Indonesia is not far behind, having initiated no less than 23 safeguard investigations since 2007, and a total of 26 investigations since its first in 2004.

Malaysia's first two safeguard investigations clearly demonstrate the willingness of MITI to fairly listen to and weigh the arguments presented by all parties concerned. As local industries become more aware of the potential that safeguard measures can offer, we may well see an increase in the number of safeguard investigations being initiated in the years to come. It is incumbent that MITI continues to carry out its duty in balancing the interests of all stakeholders in the domestic market and not unnecessarily impede natural market forces of free and fair trade.

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INCENTIVES FOR PRINCIPAL HUBS

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- Withholding tax exemption on fees for technical advice, assistance or services or royalty in relation to manufacturing and services activities up to 31 December 2020;
- Import duty exemption on raw materials and components that are not produced locally and are used directly in the manufacture of finished products subject to the prevailing policy, guidelines and procedures; and
- Import duty exemption on machinery and equipment that are not produced locally and are used directly in the activity for selected services sectors, subject to the prevailing policy, guidelines and procedures.

> **"Customized incentives will be given under the Less Developed Areas Incentive based on the merit of each case"**

Eligibility Criteria

To qualify for Less Developed Areas Incentive:

- The applicant must be a company incorporated under the Companies Act 1965 and may be an existing company which is expanding its operations into a Less Developed Area, or a newly established company;
- The manufacturing or services activities undertaken by the company in a Less Developed Area will lead to substantial creation of employment and rural development; and
- The company must comply with other conditions specified by the Ministry of Finance including value added, local employment and Managerial, Technical and Supervisory staff index (MTS Index) requirements.

CONCLUSION

Time will tell whether the benefits under the Principal Hub Incentive and Less Developed Areas Incentive will attract more foreign direct investments into Malaysia.

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GETTING AWAY WITH FRAUD

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complainant bringing a derivative action may be a shareholder of the corporation "*or any of its affiliates*" and may sue on behalf of the corporation or any of its subsidiaries (sections 238 and 239(1) of the Canadian Business Corporations Act 1985 ("1985 Act")).

A company is affiliated with another if one of the companies is a subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person. Further, if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other (section 2(2) of the 1985 Act). A complainant also includes any other person who, in the discretion of the Court, is a proper person to make an application (section 238(d) of the 1985 Act).

IS THERE ROOM FOR THE MULTIPLE DERIVATIVE ACTION IN MALAYSIA?

The Malaysian position is that a derivative action can be brought either under the statutory derivative action provisions of sections 181A-181E of the Companies Act 1965 or through the common law derivative action route.

However, Malaysia's statutory derivative action does not contain wording to suggest that a multiple derivative action route is possible. The authorities of *Fort Gilkicker* and *Waddington* would be persuasive here in Malaysia and it is likely that a multiple derivative action would be possible under the common law.

CONCLUSION

It is therefore hoped that the Malaysian Courts will endorse the availability of the multiple derivative action should it be an issue before the Courts.

It is also hoped that there will be an eventual amendment to our statutory derivative action provisions to expressly allow for a multiple derivative action. The common law route would still be filled with its complexities and uncertainties. Recognising this, the statutory derivative action was introduced in Malaysia in order to make it easier for an aggrieved shareholder to seek redress on behalf of the company. It would therefore be beneficial to widen the statutory route to allow a multiple derivative action.

In conclusion, the very same reasons which justify the derivative action would also justify the multiple derivative action. Therefore if wrongdoers must not be allowed to defraud a parent company with impunity, they must also not be allowed to defraud its subsidiary with impunity.

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FORBIDDEN FRUIT?

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opined that both the Funding Agreement (superseded by the Assignment) and the Assignment would not run afoul of the doctrines of maintenance and champerty for the following reasons:

(1) there is nothing in the Assignment that is contrary to public policy which, in this case, is to protect the purity of justice and the interest of vulnerable litigants. In this regard:

   (a) the purity of justice is protected in that the Liquidators have full control of the legal proceedings and the Funders' agreement is required only on the choice of solicitors and on any settlement or discontinuance of any Claim;

   (b) the Company's and its creditors' interests are not prejudiced as the Company would not be able to pursue the Claims without the funding; and

   (c) there is nothing that could be said to amount to wanton intermeddling or to involve trafficking in litigation;

(2) the Funders have a legitimate interest in the litigation of the Claims as they are shareholders of the Company and are either current or former directors of the Company, and one of them is also a creditor of the Company. As shareholders, they would benefit from the spoils of successful litigation and thus have financial interests in the litigation.

LOCAL APPLICATION

To date, there are no reported decisions in Malaysia on the issue as to whether the assignment of the fruits of litigation (recovered from litigation funded by the assignees) is to be considered as a sale of 'property' and therefore permitted under section 236(2)(c) of the Malaysian Companies Act 1965.

As section 236(2)(c) of the Malaysian Companies Act 1965 is identical to section 272(2)(c) of the Act, the Singapore High Court's decision in *Re: Vanguard Energy* would, at the very least, be of persuasive authority, before the Malaysian Courts in the interpretation of section 236(2)(c).

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LEGAL INSIGHTS

A SKRINE NEWSLETTER

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

THE FIRM HAS DEVELOPED OVERSEAS TIES THROUGH ITS MEMBERSHIP OF INTERNATIONAL ORGANISATIONS SUCH AS LEX MUNDI, PACIFIC RIM ADVISORY COUNCIL, THE INTER-PACIFIC BAR ASSOCIATION, THE ASEAN LAW ASSOCIATION, THE INTERNATIONAL TRADEMARKS ASSOCIATION AND THE INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

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