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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

The fourth quarter of 2015 witnessed several significant legal developments.

On the legislative front, the long-awaited Companies Bill 2015 was tabled before the Dewan Rakyat in mid-October 2015 but the second and third readings have been adjourned to the next session of the Malaysian Parliament. The controversial National Security Council Bill 2015 was tabled before the Dewan Rakyat just two days before the House adjourned. This Bill was eventually passed by both Houses of Parliament and will become law upon receipt of Royal Assent.

The draft Trans-Pacific Partnership Agreement was unveiled to the Malaysian public by the Minister of International Trade and Industry on 5 November 2015. The draft will be tabled for debate in a special session of Parliament to be convened in January 2016.

The Paris Agreement which involves 198 countries was signed on 12 December 2015. However, this agreement will only come into effect if it is ratified by 55 countries representing 55% of global emissions of greenhouse gases.

The question as to whether the Malaysian Government will sign the Trans-Pacific Partnership Agreement is likely to be answered in the near future. The fate of the Paris Agreement will only be known sometime later. Let us hope that the Paris Agreement will become binding, and more importantly, achieve its noble objective of mitigating the effects of global warming.

We wish our readers a Blessed Christmas and a Happy New Year.

With Best Wishes,

Kok Chee Kheong
Editor-in-Chief

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LANDMARK CASE SERIES

SKRINE DINNER & DANCE 2015

The Skrine Dinner and Dance 2015 was held at Bayview Beach Resort, Penang on 24 and 25 October 2015 with the theme "*Around The World*".

About 350 staff and their family members converged on Penang for a weekend of fun, away from the hustle and bustle of Kuala Lumpur. The attendees enjoyed a 3-hour stopover at Georgetown to savour the renown culinary delights of Penang before heading to the hotel.

The Grand Ballroom of the hotel was creatively decorated with landmark items from the different continents of the world. In line with the theme, many attendees came dressed in traditional outfits from various countries, such as Japan, Egypt and Spain.

The evening's proceedings included an inter-floor competition; with each floor having to put up a performance, conduct a lip sync battle (in the style of Jimmy Fallon) and participate in a national costume designing face-off. The staff presented four entertaining performances which featured breath-taking dance moves, melodious voices, catwalk *a la* "Victoria Secret Angels" and a Chinese "bhangra-busting" dancer.

Overall, the event was a success due to the encouraging turnout by the staff and the excellent efforts of the Organising Committee.

NOT FOR

Yap Yeong Hui explains decision on

In *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212, the apex court of Malaysia was called upon to consider the enforceability of a contract to use influence in procuring a government contract.

BRIEF FACTS

The Respondent entered into a letter of undertaking with the Appellants whereby the Respondent agreed to provide services to procure a project to replace the Johor-Singapore Causeway ("Project") for a company ("Consortium") in which the second Appellant was a shareholder. The Respondent was to be paid a sum of RM20 million for his services.

The Project was initially awarded to the Consortium but was subsequently cancelled. The Respondent commenced proceedings against the Appellants for payment of the sum of RM20 million under the letter of undertaking.

The Appellants pleaded two main defences, namely that (i) the procurement of the Project on account of the Respondent's close relationship with the Malaysian Government was against public policy and that the letter of undertaking was illegal and void pursuant to section 24(e) of the Contracts Act 1950 ("Act"); and (ii) the letter of undertaking could not be put into effect as the Project did not materialise.

> **" whether a contract is contrary to public policy is a question of law "**

DECISIONS OF THE HIGH COURT AND THE COURT OF APPEAL

With regard to the first defence, the High Court held that the Appellants had failed to produce any evidence to support their assertion that the nature of the services rendered by the Respondent had a tendency to be injurious to the public interest. The High Court further found that the letter of undertaking was not tainted with illegality as the Project, if it had proceeded, would have been beneficial to the public.

Notwithstanding that, the High Court accepted the Appellants' second defence that as the Project had been terminated, the Respondent was not entitled to payment under the letter of undertaking. The Court rejected the Respondent's argument that he was still entitled to be paid under the letter of undertaking because it was the 'Project' and not the 'award' that had been withdrawn.

On appeal, the Respondent's argument that there was a difference between 'award' and 'Project' was accepted by the Court of Appeal. In reaching its decision, the Court of Appeal

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SALE!

the Federal Court's landmark influence peddling

looked at the wording of the letter of undertaking and concluded that the parties did not intend to make reference to the Project. Accordingly, as there was an award in favour of the Consortium, the Court ordered the Appellants to pay the Respondent the said RM20 million. The Appellants appealed to the Federal Court.

DECISION OF THE FEDERAL COURT

The Appellants were granted leave to appeal the following question to the Federal Court:

"Whether an agreement to provide services to influence the decision of a public decision maker to award a contract is a contract opposed to public policy as defined under section 24(e) of the Contracts Act 1950 and [is] therefore void?"

The Federal Court answered the leave question in the affirmative and allowed the Appellants' appeal. The Federal Court was of the view that there were two components to the leave question, namely, (a) the scope of the term "*public policy*" under section 24 of the Act, and (b) the legal position of the provision of the service of influencing the decision of a public decision maker in awarding a contract for consideration.

> **" the sale of influence engenders corruption and undermines public confidence in the Government "**

Public Policy as a Ground to Invalidate a Contract

In relation to the first component, the five member Federal Court was of the view that invalidating a contract on the ground of public policy is separate from the invalidation of a contract that is forbidden by any law or which if permitted would defeat any law. The Court cited paragraph 430 of Halsbury's Laws of England, 5th Edition, Volume 22 and held that whether a contract is contrary to public policy is a question of law. The Court further observed that public policy is not static and may vary from time to time and that the courts would be guided by public opinion in deciding what constitutes public policy.

Influence Peddling is Contrary to Public Policy

As for the second component, the Federal Court first referred to various English authorities, including *Montefiore v Menday Motor Components Company Ltd* [1918] 2 KB 241, *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 488 and *Omega Group Holdings Ltd and others v Kozeny and others* [2006] EWHC 872 (Comm) which held that influence peddling is contrary to public policy in England.

The Court then said that section 24 of the Act is a codification of the common law and it is therefore contrary to Malaysian public policy that a person be hired for money or valuable consideration to use his position and interest to procure a benefit from the Government. This is because the sale of influence engenders corruption and undermines public confidence in the Government, which is inimical to public interest.

The Court also referred to Mulla Indian Contract and Specific Relief Acts, 13th Edition, Volume 1 at 702-703 which categorically states that "*An agreement, the object of which is to use influence with Ministers of government to obtain a favourable decision, is destructive of sound and good administration. It showed a tendency to corrupt or influence public servants to give favourable decisions other than on their own merits. Such an agreement is contrary to public policy. It is immaterial, if the persons intended to be influenced are not amenable to such recommendations.*"

> **" it is … contrary to Malaysian public policy that a person be hired for … valuable consideration to use his position … to procure a benefit from the Government "**

In this case, the RM20 million claimed by the Respondent was intended as payment for services rendered by the Respondent to secure the Project. The Respondent himself pleaded the service rendered by him, which was that he had "used his influence and good relationship with the Government of Malaysia" to procure the Project for the Consortium. The Respondent also particularised his close relationship with specific Federal Ministers and his dealings with Federal Ministers with respect to the Project. Further, the Respondent provided details of his influence and the manner in which he exerted his influence and convinced those Federal Ministers. The Court concluded on these facts and on the face of it, that it was plain and obvious that the consideration was unlawful, and that the letter of undertaking was void.

The Court rejected, as preposterous, the Respondent's submission that an agreement to use a person's contacts with certain government officials in order to procure contracts could not be against public policy in Malaysia in view of the widespread

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A NEW PRESCRIPTION FOR THE AILING ENVIRONMENT?

Sheba Gumis and Yee Xin Qian examine the recent changes to environmental law requirements in Malaysia

In recent years, Malaysia has seen an increase in environmental awareness, particularly after witnessing the devastating results of uncontrolled development in the country, such as the widespread flooding in the East Coast of West Malaysia and the landslides in Cameron Highlands in 2014.

The Government, acknowledging the need to update existing environmental laws, gazetted the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015 ("2015 Order"). This was part of the Government's preventive strategy in ensuring that all development projects would take into account environmental factors at all stages of planning, construction and operations.

The 2015 Order supersedes the previous Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 ("1987 Order") by making changes to the prescribed activities requiring Environmental Impact Assessments ("EIA").

> **"One of the more notable changes... is the introduction of a two-tier approach to EIAs"**

However, it should be noted that the 1987 Order continues to apply to any environmental impact assessment report ("EIA Report") approved or received by the Director General of Environmental Quality ("DG") for any prescribed activity under the 1987 Order before the 2015 Order came into operation on 29 August 2015.

THE REQUIREMENT FOR EIA

The requirement for an EIA is set out in Section 34A of the Environmental Quality Act 1974. A person who intends to carry out a prescribed activity is required to appoint a qualified person to conduct an EIA and to submit an EIA Report to the DG.

The EIA Report must be prepared in accordance with the guidelines prescribed by the Department of Environment ("DOE") and contain an assessment of the impact that such activity will have, or is likely to have, on the environment. Proposed measures to prevent, reduce or control the adverse impact on the environment are also required to be detailed in the EIA Report.

THE 1987 ORDER

Only activities prescribed by the DG are required to have EIAs conducted on them. Prior to the coming into operation of the 2015 Order, prescribed activities requiring EIAs were set out in the 1987 Order.

The 1987 Order contained one schedule prescribing nineteen categories of activities and included those relating to agriculture, airport, drainage and irrigation, and other activities. Most of the activities prescribed in the 1987 Order were defined in terms of project size (area) and capacity (quantum) while others were not defined by any unit of measure.

While the 1987 Order covered a wide range of prescribed activities, there has since been a need to update the prescribed activities to regulate activities that were not envisaged when the 1987 Order was gazetted nearly 30 years ago.

CHANGES AND UPDATES UNDER THE 2015 ORDER

Public Displays

One of the more notable changes under the 2015 Order is the introduction of a two-tier approach to EIAs.

> **"The 2015 Order attempts to plug loopholes of and fine tune the 1987 Order"**

The 2015 Order contains two schedules, namely the First Schedule and the Second Schedule. The prescribed activities specified in the First Schedule do not require EIAs to be made available for public display and comment unless otherwise instructed by the DG, whereas the EIAs of prescribed activities specified in the Second Schedule must be put up for public display and public comment.

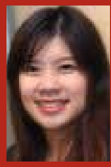
As a general rule, the previous position under the 1987 Order required all EIAs to be made available for public display and comment, although subsequent DOE guidelines only required detailed EIAs (as compared to preliminary EIAs) to be displayed to the public for comment.

Fine tuning the 2015 Order

The 2015 Order attempts to plug the loopholes of and fine tune the 1987 Order by reducing thresholds for certain activities, having more comprehensive provisions, and redrafting certain provisions for greater clarity.

We see certain prescribed activities in the 2015 Order having had their thresholds lowered to increase DOE's oversight over the same. For example, industrial estate development covering areas of 20 hectares or more is now a prescribed activity. Previously, only industrial estate development for medium and heavy industries exceeding 50 hectares was considered to be a prescribed activity.

The construction of off-shore and on-shore pipelines exceeding of 30 kilometres in length is now a prescribed activity as compared to the previous 50 kilometre threshold.



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Land development schemes covering an area of 20 hectares or more but less than 500 hectares now require an EIA Report (without public display and comment), whereas such schemes of 500 hectares or more require an EIA Report (with public display and comment). Previously, only agricultural land development schemes of 500 hectares or more came within the ambit of the 1987 Order.

Item 3(4) of the 2015 Order plugs loopholes in the 1987 Order by deeming certain activities as prescribed activities. These include any prescribed activity which has been divided into a size or quantum smaller than the size or quantum specified in the First Schedule and the Second Schedule or any increase in size or quantum of an activity which results in such activity falling within the specified parameters for prescribed activities under the 2015 Order. There is no corresponding provision in the 1987 Order.

> **“ The 2015 Order introduces the concept of an “environmentally sensitive area” ”**

We also see more precise drafting in the 2015 Order, as certain descriptions of prescribed activities are redrafted for greater clarity. Examples include the prescribed activity of “oil and gas fields development” in the 1987 Order which is now divided in the 2015 Order into oil field development, gas field development and oil and gas field development, to capture all three activities.

Another example is the forestry category of prescribed activities, where the expression of “hill forest land” in the 1987 Order is replaced by “forest at 300 metres or more above mean sea level” in the 2015 Order.

Environmentally Sensitive Area

The 2015 Order introduces the concept of an “environmentally sensitive area” and extends the requirement for an EIA to certain activities (such as coastal or land reclamation along river banks, and mining of minerals) adjacent to or near an environmentally sensitive area. This concept was not in the 1987 Order but was discussed in the five-year National Physical Plans published in 2000 and 2005.

An “environmentally sensitive area” refers to any area specified as such in the development plan or national physical plan under the Town and Country Planning Act 1976 or any area specified as an environmental protection area or an environmental conservation area under relevant legislation in Sabah and Sarawak.

New Prescribed Activities

Taking into account developments in today’s modern world, the 2015 Order introduces a number of new prescribed activities to extend the DOE’s oversight to these activities.

Interestingly, development or land clearing in slope areas in certain circumstances, reclamation of land for man-made islands, capital dredging and disposal of waste dredged materials and activities using and generating radioactive materials are all now captured as prescribed activities under the 2015 Order. These activities, which were subject to bad press and garnered public awareness in recent years, now require EIAs under the 2015 Order. There is also a requirement for the EIA Reports relating to some of the aforementioned activities to be displayed for public comment, depending on the manner and circumstances in which the activities are to be carried out.

CONCLUSION

The 2015 Order updates Malaysia’s environmental laws to provide for more comprehensive coverage and greater clarity with respect to activities that require an EIA. The 2015 Order was presumably drafted to address environmental issues of high concern in recent years due to major development projects carried out around the country involving land reclamation, drainage and irrigation, radioactive materials and radioactive wastes, amongst others.

It is hoped that the 2015 Order will assist the DOE in ensuring that future development projects are carried out in an environmentally sustainable and acceptable manner without causing any serious or irreversible damage to our already fragile environment.

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FRAUDSTERS BEWARE

Nimalan Devaraja reviews the landmark case on the standard of proof in civil fraud claims

In *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 7 CLJ 584, the Malaysian Federal Court took a bold step to restate the law on an issue of significant importance to the legal community, that is, the standard of proof to be applied to prove fraud in a civil claim.

THE ISSUE

Only one leave question was posed to the Federal Court in this appeal, namely:

"Whether the Federal Court should rely on the ratio set in Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45 in determining the burden of proof in civil fraud."

From the onset, the Federal Court clarified that the issue for determination relates to the "*standard of proof*", i.e. the degree of persuasion, and not "*burden of proof*", i.e. the responsibility of proving, required in civil claims where fraud is alleged.

While the facts that brought this important question to the forefront of legal development in the year 2015 is admittedly important to the parties involved, the facts had no real bearing on the answer to the leave question and thus will not be dealt with in this article.

LAYING DOWN THEIR MARKERS

Both parties were in agreement that the present standard of proof for fraud in civil claims, i.e. that of beyond reasonable doubt, was not in tandem with the standard applied in other common law jurisdictions.

While both parties felt that the correct standard of proof should be on the balance of probabilities, the Respondent sought to refine the standard by adding a further requirement that where the allegation of fraud is serious, as for instance criminal in nature, a higher quality of evidence should be required while maintaining the standard of proof to be on the balance of probabilities.

THE THREE HEADS OF ARGUMENT

In considering the leave question, the Federal Court noted that there is no specific provision in any legislation in Malaysia that stipulates the relevant standard of proof required in both criminal and civil proceedings. Therefore, the standard of proof is a common law principle.

Based on the reported judgments by the Malaysian Courts, it was apparent that the Malaysian Courts had applied three different principles in addressing the standard of proof to be applied in civil claims where fraud is alleged.

(1) Beyond Reasonable Doubt

The first principle, and the prevailing principle, prior to *this appeal*, is premised on the standard of beyond reasonable doubt, as has been applied in criminal cases. This principle has its roots in the Privy Council case of *Saminathan v Pappa* [1981] 1 MLJ 121 which adopted the principle enunciated in the Privy Council case of *Narayanan Chettyer v Official Assignee of the High Court, Rangoon* (28) AIR 1941 where Lord Atkin held that *"Fraud of this nature, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt."*

Subsequent to *Saminathan*, the Malaysian Courts have applied the "beyond reasonable doubt" standard to civil claims founded on fraud in most decisions (*e.g. Chu Choon Moi v Ngan Siew Tin* [1986] 1 MLJ 34 and *Datuk Jaginder Singh v Tara Rajaratnam* [1986] 1 MLJ 105).

(2) High Degree of Probability

Prior to *Saminathan*, the Malaysian Courts had applied a different standard of proof in civil claims when fraud was alleged, that is one of *"a very high degree"* of the balance of probability. In the Federal Court case of *Lau Kee Ko & Anor v Paw Ngi Siu* [1974] 1 MLJ 21, Raja Azlan Shah J (as he then was) stated that *"It is a wholesome rule of our law that where a plaintiff alleges fraud, he must do more than establish the allegation on the basis of probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation."*

Even after *Saminathan*, this principle still gained traction where the Federal Court in *Lee You Sin v Chong Ngo Khoon* [1982] 2 MLJ 15 qualified the balance of probabilities standard by requiring a higher degree of probability where the allegation of fraud was more serious. *Lee You Sin* was in line with the Singapore case of *Eastern Enterprises v Ong Choo Kim* [1969] 1 MLJ 236, where it was held that the more serious the allegation of fraud such that it was tilting towards criminal liability, the higher degree of probability is required before it can be said that the standard of proof on the balance of probabilities has been satisfied.

(3) The Middle Ground

A third principle was put forward by the Federal Court in *Ang Hiok Seng v Yim Yut Kiu* [1997] 2 MLJ 45 in what seems to be a well-meaning but impractical attempt at finding a middle ground. Mohd Azmi FCJ explained this principle in the following terms:

"… where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities … But where the allegation of fraud … is entirely founded on a civil fraud – and not based on a criminal conduct or offence – the civil burden is applicable."

In other words, the standard of proof to be applied is dependent on the nature of the fraud alleged.

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The Court in *Ang Hiok Sing* went further to declare that *Lau Kee Ko* should no longer be considered good law insofar as it rejected the criminal burden in all cases of fraud.

To add to the confusion, the Federal Court in *Yong Tim v Hoo Kok Cheong* [2005] 3 CLJ 229 reversed the trend and re-adopted the first principle, namely the "beyond reasonable doubt" standard in cases of civil fraud.

With the lower courts being bound by the principle of *stare decisis*, the principle set forth in *Yong Tim* prevailed until *Sinnaiyah* came before the Federal Court.

THE COMMONWEALTH POSITION

With both parties to the appeal urging the Federal Court to resolve the confusing state of the law on the issue and to adopt a position which is in tandem with the generally accepted standard in other common law jurisdictions, the Federal Court undertook a detailed analysis on the standard of proof applied in civil fraud cases in several Commonwealth countries.

England

The English position on this question of law was settled once and for all in the House of Lords case of *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35 where Lord Hoffmann held that *"I think that the time has come to say once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."*

Lord Hoffmann was forcefully supported by Baroness Hale of Richmond who emphatically stated that "*Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.*"

The English Supreme Court reiterated the above position *In re S-B Children* [2009] UKSC 17 where it affirmed that "*there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.*" The Supreme Court also rejected the nostrum, *"the more serious the allegation the more cogent the evidence needed to prove it."* This rejection goes to show that even for hybrid cases, i.e. civil cases which contain material allegations of criminal conduct, the same civil standard of proof - that is one of balance of probabilities - applies.

Canada

The Canadian Courts have taken the same position as the English Courts. In *F.H. v McDougall* [2008] SCC 53 the Canadian Supreme Court held that *"in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."*

In wholeheartedly rejecting the suggestion that there should be different levels of scrutiny of evidence depending on the seriousness of the allegation, Rothstein J observed:

"To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge."

Australia

The approach of the Australian Courts is neatly summarised in the High Court case of *Rejfek & Anor v McElroy & Anor* [1965] 39 ALJR 177 where it was held that:

"But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge."

An observation which is of particular interest in the Malaysian context is that *Rejfek* followed an earlier decision of *Helton v Allen* [1940] 63 CLR 691 where the Australian High Court had dismissed the pronouncements of Lord Atkin in *Narayanan* as mere *dicta*.

Singapore

The Courts in Singapore have applied the balance of probabilities principle as the standard of proof for fraud in civil claims. While the notion of a third standard of proof where fraud is the subject of civil claim has been rejected, the courts there nevertheless added a caution that *"the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may*

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BOUQUETS AND BRICKBATS

Amy Hiew provides the highlights of the 2015 International Arbitration Survey

International arbitration is considered as one of the leading methods for resolving cross-border disputes. As part of a major empirical investigation into the trends in international arbitration, the School of International Arbitration at Queen Mary University of London (under the sponsorship of White & Case LLP) conducted the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration ("2015 Survey"), which focused on the improvements and innovations in the international arbitral process.

The objective of the 2015 Survey was to collate the views of a comprehensive range of stakeholders on the improvements and innovations, both past and potential, in international arbitration. With 763 questionnaire responses and 105 personal interviews, the 2015 Survey was reported to have one of the largest pools of respondents to date.

Some of the key findings of the 2015 Survey were:

- An overwhelming majority of the respondents chose international arbitration as their preferred dispute resolution mechanism.
- The five most preferred and widely-used seats are London, Paris, Hong Kong, Singapore and Geneva.
- The four most preferred arbitral institutions are the ICC, LCIA, HKIAC and SICC, with the most improved institution being the HKIAC.
- The procedural innovation perceived as most effective at controlling time and cost in international arbitration is a requirement for tribunals to commit to a schedule for deliberation and delivery of final awards.
- Respondents generally have a positive perception of guidelines and soft law instruments in international arbitration.
- A clear majority of respondents felt that tribunal secretaries and third party funding are areas which require regulation.

VIEWS ON INTERNATIONAL ARBITRATION

In line with the growing popularity of international arbitration, an overwhelming majority of the respondents (90%) chose international arbitration as their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other alternative dispute resolution methods (34%). This result may be explained by reference to the specific characteristics of international arbitration that respondents find most valuable. Unsurprisingly, "*enforceability of awards*" (65%) is regarded as the most valuable characteristic of arbitration, followed closely by "*avoiding specific legal systems/national courts*" (64%). The other commonly known attributes, such as "*finality*" and "*neutrality*", were chosen less often.

On the other hand, the often cited advantage of arbitration, "*costs*" was by far the worst characteristic (68%). This was followed by "*lack of effective sanctions during the arbitral process*" (46%), "*lack of insight into arbitrator's efficiency*" (39%) and "*lack of speed*" (36%).

It appears that the common denominator of these worst characteristics is that they relate to the internal working of the arbitral system which is within the control of its stakeholders. It was perceived that the lack of effective sanctions during the arbitral process did not incentivise efficiency by counsel, whilst the desire to appoint productive arbitrators was hindered by lack of insight into arbitrators' efficiency. In turn, these factors resulted in increased cost. Despite the flaws in international arbitration, the respondents felt that the benefits of international arbitration outweighed its flaws.

Interestingly, it was reported that the one issue that was repeatedly raised when asked what improvement could be made to international arbitration was the phenomenon dubbed "*due process paranoia*". "*Due process paranoia*" describes a reluctance by a tribunal to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully. It was perceived that the tribunal's decision in allowing repeated extension of deadlines, admitting fresh evidence late in the process, or condoning other disruptive behaviour by counsel may be attributed to the tribunal's fear that the award would otherwise be vulnerable to challenge. It is therefore not surprising that many of the respondents expressed the view that problems such as the lack of speed and increased cost are partly rooted in this due process paranoia.

> **" the respondents felt that the benefits of international arbitration outweighed its flaws "**

PREFERRED AND IMPROVED SEATS

Whilst the traditional arbitration hubs of London (45%) and Paris (37%) are still the most widely used and preferred seats, the greatest momentum was shown by Hong Kong (22%) and Singapore (19%), which were the third and fourth most popular seats respectively.

The "*reputation and recognition of the seat*" (65%) was the main reason for selecting these seats, followed by "*law governing the substance of the dispute*" (42%). The 2015 Survey also disclosed that the four most important factors (in descending order of importance) for the choice of seats are "*neutrality and impartiality of the local legal system*", "*national arbitration law*", "*track record for enforcing agreements to arbitrate and arbitral awards*" and "*availability of quality arbitrators who are familiar with the seat*".

The respondents felt that Singapore (24%) and Hong Kong (22%) were the seats that have improved the most over the past five years. Better hearing facilities, availability of quality arbitrators who are familiar with the seat, better local arbitral institutions and improvements to the national arbitration law were the most often cited reasons why the respondents thought their selected seat

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had improved the most.

The International Chamber of Commerce ("ICC") (68%) again topped the chart as the preferred arbitral institution. It is reported that the internationalism of the ICC and its high-quality services helped the ICC maintain its dominant position.

The main areas of discontent among users were the lack of insight provided into institutions' efficiency and arbitrator performance, and the lack of transparency in institutional decision-making in relation to the appointment of, and challenges to, arbitrators. It was suggested that more information about the average length of time of institutions' cases would enable users to make more informed choices on arbitral institutions. Many respondents also suggested that institutions should publish the time arbitrators took from their appointment to the rendering of the award in previous cases at that institution.

REDUCING TIME AND COST

The respondents considered that cost and lack of speed were among the worst characteristics of international arbitration. The proposed procedural innovation to control time and cost that received the most positive response was the "*requirement that tribunals commit to and notify parties of a schedule for deliberations and delivery of final award*". Sanctions for dilatory conduct by parties or their counsel also featured among the more popular innovations to reduce time and cost.

> **“ the lack of speed and increased cost are partly rooted in (the) due process paranoia ”**

Further, 92% of respondents wanted simplified procedures to be included in institutional rules for smaller claims. At least 94% of respondents felt that simplified procedures should not apply to disputes exceeding US$1 million. However, as only 11% of respondents indicated that the majority of their disputes were valued under USD$1 million, it is debatable whether there is indeed a need for simplified procedures.

The 2015 Survey reported that emergency arbitrators, as a method to control time and cost, received lukewarm responses, with scores of 35% "*not effective*", 30% "*neutral*", and 36% "*effective*". One of the findings relating to emergency arbitrators which merit attention is that only 29% of respondents would prefer to seek urgent relief from an emergency arbitrator, while 46% would opt for relevant domestic courts. Users' reluctance to seek reliefs from emergency arbitrators could be influenced by the enforceability of the emergency arbitrators' decisions as 78% of respondents wanted decisions by emergency arbitrators to be enforceable in the same way as arbitral awards.

In response to the question as to what could arbitration counsel do better to reduce time and cost, the four main options chosen by the respondents were as follows: "*seek to work with opposing counsel to narrow issues*" (66%); "*seek to work with opposing counsel to limit document production*" (62%); "*encourage settlement, including the use of mediation during an arbitration*" (60%); and "*not overlawyering*" (57%). Only 51% of the respondents favoured running an arbitration concurrently with a separate mediation while 78% of the respondents preferred to stay an arbitration pending mediation.

SOFT LAWS AND GUIDELINES

Generally, respondents had a positive perception of guidelines and soft law instruments in international arbitration. On the question as to whether international arbitration is being '*overregulated*', a clear majority (70%) said that international arbitration currently enjoys an adequate amount of regulation, thus indicating a preference for status quo.

The IBA Rules on Taking of Evidence in International Arbitration and the IBA Guidelines on Conflict of Interest were the most widely known and the most frequently used soft law instruments. These two instruments were also considered to be the most effective.

ROLE AND REGULATION OF SPECIFIC ACTORS

Arbitrator

A small majority (55%) felt that the conduct of arbitrators should be regulated more. Among the options proposed in the survey to regulate arbitrators' conduct were instruments issued by arbitral institutions, a code of conduct by a professional institution or body for arbitrators (such as the Chartered Institute of Arbitrators) and databases that provide the parties with information about the arbitrator's performance in past cases. However, each of the aforesaid options received about 20% favourable response.

Party Representative

Only 46% of respondents felt that the conduct of party representatives should be regulated more, although interestingly, 68% of the in-house counsel group favour greater regulation. It was reported that interviewees opined that the best way to regulate party representatives was not through more regulation, but through effective use of the sanctions that are currently available.

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THE GOOSE MAY BE COOKED

Nathalie Ker explains the Yung Kee Restaurant saga

In Hong Kong, the name "Yung Kee Restaurant" is synonymous with good roast goose dishes. From its humble beginnings as a modest food stall in Kwong Yuen West Street to a bustling restaurant in the Yung Kee Building on Wellington Street, Yung Kee Restaurant has been tantalising both local and international taste buds for more than half a century.

However, the recent judgement of the Hong Kong Court of Final Appeal in *Kam Leung Sui Kwan v Kam Kwan Lai & Ors* FACV 4/2015 ("Yung Kee Case") may signal the end of the era of the '*Flying Roast Goose*'. On 11 November 2015, the Court of Final Appeal ordered that the family business be wound up, unless the parties agree to a buyout of the petitioner's shares within 28 days.

BACKGROUND FACTS

This long-running legal saga stems from the all too familiar story of a large family business empire crippled by disputes among the shareholders after the death of the founder. Some years before his death, Kam Shui Fai, the founder of the Yung Kee group of companies ("Founder") took steps to create a corporate structure which would place the family's shareholdings outside Hong Kong. This was done for estate planning purposes.

> **"(the) presence (of shareholders) in the jurisdiction is highly relevant and will usually be the most important single factor"**

Thus, a company, Long Yau Limited ("Long Yau"), was incorporated in 1990 in the British Virgin Islands ("BVI"). The majority shareholdings in each operating company were transferred to Long Yau and Long Yau was in turn a wholly-owned subsidiary of Yung Kee Holdings Limited ("Company"), the ultimate holding company of the family business and which had also been incorporated in the BVI.

After the Founder's death, the relationship between the Founder's two sons, Kam Kwan Sing and Kam Kwan Lai, soured. The older brother, Kwan Sing, brought an action against his brother Kwan Lai and the Company, alleging that the affairs of the Company were being carried out in a manner unfairly prejudicial to him and sought an order to force Kwan Lai to buy out his shareholding, or alternatively that the Company be wound up on the just and equitable ground under section 327(3)(c) of the Hong Kong Companies Ordinance (which has been maintained as section 327(3)(c) of the new Cap 32, now renamed the Companies (Winding Up and Miscellaneous Provisions) Ordinance).

THE DECISION OF THE COURTS BELOW

The Court of First Instance and the Court of Appeal held that the Court had no jurisdiction to order the winding up of the Company. Both courts held that the connection between the Company incorporated in the BVI and Hong Kong was not sufficiently strong to justify the exercise of the jurisdiction of the Hong Kong courts to wind up a foreign company.

Both courts also held that a more stringent connection was required in the case of a shareholders' petition as compared to a creditors' petition. In particular, the Court of Appeal noted that exercising its jurisdiction to wind up a foreign company was an "exorbitant" discretion, more so in a shareholders' petition than in a creditors' petition. The Court of Appeal was not swayed by the fact that the businesses of all the subsidiaries indirectly held by the Company were all based and run in Hong Kong.

> **"it does not follow that … a sufficient connection … cannot be established through its shareholders or subsidiaries"**

THE DECISION OF THE COURT OF FINAL APPEAL

The Court of Final Appeal disagreed with the analyses of the courts below and held that there was indeed a sufficiently close connection between the Company and Hong Kong. The Court first went back to the 'core principles' enunciated in the case of *Re Beauty China Holdings Ltd* [2009] 6 HKC 351, which are as follows:

(1) There had to be a sufficient connection with Hong Kong, but this did not necessarily have to consist of the presence of assets within the jurisdiction;

(2) There must be a reasonable possibility that the winding up order would benefit those applying for it; and

(3) The court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

The Court then stated that the starting point was that the country of incorporation is normally the most appropriate jurisdiction in which to seek a winding up order.

Shareholders' Petition vs Creditors' Petition

In relation to the difference between a creditors' petition and a shareholders' petition, the Court made the point that creditors seek a winding up order against a debtor in order to obtain payment in or towards satisfaction of their debts. Thus, the presence in Hong Kong of significant assets which may be made available to the liquidator for distribution among the creditors would usually suffice.

However, the case of a shareholders' petition is different. Whilst a creditors' petition is between the petitioner and the company,

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a shareholders' petition is between the petitioner and the other shareholders; thus the presence of the other shareholders within the jurisdiction is an "*extremely weighty factor*" in establishing the sufficiency of the connection between the company and Hong Kong. Further, a shareholder's purpose in seeking a winding up order is also different, in that a shareholder seeks to realise his investment in the company as opposed to the payment of a debt.

The Court of Final Appeal disagreed with the Court of Appeal that it was only in exceptional cases that a court should be willing to exercise its statutory jurisdiction to wind up a foreign company on the just and equitable ground. The question is the same whatever the ground: whether there is a sufficient connection between the company and the jurisdiction in which the petitioner seeks to have it wound up. In the case of a shareholders' petition founded on the just and equitable ground, the question is "*whether, having regard to all the circumstances, including the fact that the company is incorporated in another jurisdiction, it is just and equitable that the company should be wound up in Hong Kong.*" In light of the nature of the dispute and the fact that it was a dispute between the shareholders, "*their presence in the jurisdiction is highly relevant and will usually be the most important single factor.*"

Sufficiency of Connection

The Court then went on to set out the nine factors relied upon by Kwan Sing which established the relevant connection between the Company and Hong Kong:

(1) The Company itself was merely a holding company of a group of directly and indirectly held subsidiary companies and carried on no business of any kind whether in the BVI or Hong Kong;

(2) All the underlying assets of the Company, i.e. the assets of its wholly owned subsidiary Long Yau, were situated in Hong Kong;

(3) The business of the group was wholly carried on by the Company's indirectly held subsidiaries, i.e. subsidiaries of Long Yau, all of which were incorporated in Hong Kong and carried on business exclusively in Hong Kong;

(4) The whole of the Company's income was derived from businesses carried on in Hong Kong;

(5) All the Company's shareholders and directors were and had always been resident in Hong Kong and none of them had ever set foot in the BVI where the Company was incorporated;

(6) All the directors of its directly and indirectly held subsidiaries were and had always been resident in Hong Kong and none of them had ever set foot in the BVI;

(7) All board meetings of the Company and its subsidiaries were held in Hong Kong and all administrative matters relating to the Company were discussed and decided in Hong Kong;

(8) Crucially the dispute was a family dispute between parties all of whom were and had always been resident in Hong Kong and the events giving rise to it and the conduct of which complaint was made all took place in Hong Kong; and

(9) The only connection which the Company had with the BVI was that both it and its wholly owned direct subsidiary Long Yau were incorporated there. The fact that the Company's only asset, being its shareholding in Long Yau, was located in the BVI was merely a consequence of this.

The Court of First Instance and the Court of Appeal had earlier held that there could not be a sufficient connection to enable the Court to exercise its jurisdiction because the only asset of the Company was its shares in Long Yau which was located in the BVI. Both lower courts had accepted the argument that the underlying businesses and assets of the group, which were in Hong Kong, belonged to Long Yau's subsidiaries and not to Long Yau, while the shares in the Hong Kong subsidiaries belonged to Long Yau and not to the Company.

The Court of Final Appeal rejected the above reasoning and emphasised that although a company and its shareholders are separate and distinct legal entities, "*it does not follow that there is no connection between them or that a sufficient connection of a company with a particular jurisdiction to justify the court winding it up there cannot be established through its shareholders or subsidiaries.*"

It was also held that the nature of the connection would vary from case to case, and there was no "*doctrinal reason*" to exclude a connection through a wholly owned subsidiary. In doing so, the Court referred to its earlier decision of *Waddington Ltd v Chan Chun Hoo* [2008] 11 HKCFAR 370, where the shareholder of a holding company was allowed to bring an action on behalf of its sub-subsidiaries against the director of the holding company, as any depletion of a subsidiary's assets causes indirect loss to its parent company and its shareholders.

Findings of the Court

Having decided that there was a sufficient connection for the Court to exercise its jurisdiction to wind up the Company, the Court of Final Appeal reviewed and accepted the trial judge's findings that:

(1) Each brother had a legitimate expectation that he could fully participate, and be properly consulted, in the running of the

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PUTTING VALUE TO INTELLECTUAL PROPERTY

Lee Quin examines the landscape of intellectual property valuation in Malaysia

At the turn of the century, major companies began to change the way they viewed assets. Preceding the dotcom era in the late 1990s, a company's assets largely comprised of tangible property such as land, buildings, machinery and raw materials. Although such assets are still a factor, the most valuable assets today are often intangible: intellectual property ("IP").

In the last decade or so there has been a significant increase in the number of companies which have become market leaders through the effective creation, extraction and leveraging of their IP through efficient IP management. Nevertheless, small and medium enterprises, or SMEs, which are the building blocks of many developed economies, have been slow to realise the potential of IP management in increasing their competitiveness due to a lack of understanding of the role of a strong IP portfolio in their business operations.

Traditionally, corporations would use their tangible assets as collateral to obtain financing from financial institutions. Currently, there are over 1,000 SMEs in Malaysia with MSC Malaysia status that own Intellectual Property Rights ("IPRs") in the form of patents, trademarks, copyrights, industrial designs and geographical indications. As with any other savvy business, these SMEs would ideally want to capitalise on their IPRs.

> **"IP valuation is a process of determining the monetary value of a particular IP"**

However, in the absence of an officially recognised IP valuation framework to rely upon, financial institutions are reluctant to accept IP assets as collateral for loans. To satisfy the needs of the SMEs and the requirements of the financial sector, the Prime Minister Datuk Seri Najib Tun Razak had suggested at the 22nd MSC Malaysia Implementation Council Meeting (ICM) in October 2010 that an IP valuation model be established.

As a result, the Multimedia Development Corporation (MDeC) and the Intellectual Property Corporation of Malaysia ("MyIPO") jointly formulated an IP valuation model and the same was introduced to the market in November 2013 to pave the way for IPRs to be valued, recognised and accepted as collateral by financial institutions. This IP valuation model is to serve as a guide for financial institutions as well as stakeholders in conducting IP valuation, in addition to being used as a basis for third parties to undertake the valuation process.

WHAT IS IP VALUATION?

IP valuation is a process of determining the monetary value of a particular IP, whether in the form of a trademark, patent, copyrighted work, or otherwise. IP valuation is relevant for a myriad of reasons, e.g. for purposes of mergers and acquisitions, joint ventures, IP portfolio rationalisation and assessments, tax planning, the monetisation of IP including licensing and franchising, sale and purchase of business or IP asset, technology transfer, collateral in financing or IP-backed securitisation, litigation or in the case of a liquidation.

The main purpose of having an IP valuation exercise is to determine how much an IP or a combination of IPs is worth. This estimated value will then form the basis for accepting the IP asset as collateral for a financing facility provided by a financial institution or for other transactions or purposes, such as a sale of the IPRs or the assets or shares of the owner of the IP.

HOW IS VALUATION PERFORMED?

Valuation of an IP right is not a straightforward task as it is not a matter of putting a fixed number on it. For a variety of reasons, IPRs fluctuate in value. For example, a patent may begin its life as a unique solution to a problem, but with time, newer and better solutions may be found which may reduce its worth. Alternatively, successful marketing of the product can result in the patent becoming more valuable. A trademark generally gains value with the passing of time, as more goodwill becomes attached to it.

There are a number of methods used to value IPRs. Identifying and selecting the most appropriate approach to IP valuation would depend on a number of factors, including the context and purposes of transactions, the timing, and the perspective of the valuation (be it from the perspective of a seller, buyer or financier).

However, each method has its limitations and no method is appropriate in every case. Generally, these methods are divided into two categories: the quantitative and qualitative valuation.

While the quantitative approach relies on numerical and measurable data to calculate the economic value of the intellectual property, the qualitative approach focuses on the analysis of the characteristics (such as the legal strength of the patent) and the uses of the IP.

SELECTING THE RIGHT METHOD

The three commonly used IP valuation methodologies are: the cost approach, the market approach, and the income approach.

Cost Approach

By adopting this approach, value is determined by calculating the cost of developing a similar or exact IP asset. Its advantage is that it is a useful indicator when an income stream does not exist or when there are no economic benefits. However, this approach does not incorporate expected economic benefits or income generating potential.

Market Approach

With the market approach, value is determined by comparing the IP asset with the actual price paid for a similar IP asset under comparable circumstances. This approach is simple and accurate

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if comparable data is available, as it is useful as a cross-check. Its drawback, however, is that it does not consider the uniqueness of the IP, the fact that there are limited formal markets, and that there may be a lack of comparable data.

Income Approach

The main concept of this approach is to determine value based on economic income that the IP asset is expected to generate, adjusted to its present day value. This is a useful method when IP assets generate stable or predictable cash flows. However, it may be subject to many assumptions and distant cash flows and discount rates have to be estimated.

THE MALAYSIAN IP VALUATION MODEL

The Malaysian IP Valuation Model ("IPVM") is said to be consistent with the recommendations of internationally accepted standards, including the International Financial Reporting Standards (IFRS), International Valuation Standards (IVS) and International Organisation for Standardisation (ISO). Additionally, the IPVM generally follows a relatively cautious approach to provide a conservative view of IP value, which is better aligned with the needs of the financial sector.

> **" The generally accepted method … that has been selected for the IPVM is the income method "**

The generally accepted method and the one that has been selected for the IPVM is the income method, or specifically, the valuation on a relief-from-royalty ("RFR") basis. The mechanics of the RFR approach operates by calculating how much an IP owner is relieved from paying royalties by virtue of owning its IP, assuming a traditional licence agreement is in place. Future IP earnings (sales x royalty rate) are discounted to reflect the time value and risk attached to those future cash flows and tax is deducted. However, as the RFR approach utilises discounted cash flow methodology, it requires an understanding of the future cash projections, comparative applicable royalty rates, hurdle rates (that are normally expressed via rates calculated from the weighted average cost of capital), terminal growth values and the prevailing taxation rate.

As a result, MyIPO has acknowledged that by nature, the RFR approach is conservative (although it provides a reasonable view on IP value), as the royalty rate on which it is based does not necessarily incorporate full value transfer to the licensor. It can be shown that as a result of the negotiation process, in reality the licensee regularly retains a percentage of the economic benefit resulting from use of the asset.

It is also noteworthy that the IPVM comes with a proposed, standardised reporting format that outlines not only the valuation approach and method but also detailed descriptions of the business, in order to provide a complete picture of the valuation undertaken.

IP VALUATION TRAINING

To ensure that IPR owners get fair value for their IP assets, the government has allocated a budget of RM19 million for IP valuation training programmes to local intellectual property valuers. Towards this end, MyIPO successfully conducted Malaysia's first ever IP Valuation Training Programme in May 2013, in collaboration with IP valuation experts from Switzerland's University of Bern's World Trade Institute.

In line with this, MyIPO in cooperation with the Ministry of Finance and the Ministry of Domestic Trade, Cooperatives and Consumerism has also been hosting the biennial Global IP Valuation Conference in Kuala Lumpur. The purpose of the global event is to bring together key industry players, influencers, stakeholders and policymakers to share their best practices and experience in creating and extracting value from IP assets, as well as to discuss the growing interest in transforming IP assets into an alternative form of collateral.

CONCLUSION

MyIPO has indicated that the key for acceptance of IP as collateral boils down to its acceptance by financial institutions. It has suggested that it is useful to have in place an established and agreed IPVM in order to achieve this. It must be noted that the agreed approaches or techniques of valuation will depend on the financier's assessment criteria. When both the assessment criteria and approaches are reviewed hand-in-hand, more credible IP valuations can be obtained. The success of the Malaysian IPVM will require a shift in the mindset and outlook as well as the support and commitment from the financial sector and the IP community.

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ARE SPARE PARTS PROTECTED AS REGISTERED DESIGNS?

Hemalatha Ramulu discusses the impact of a significant recent Malaysian case

In *Veresdale Ltd v Doerwyn Ltd* [2015] 7 MLJ 836, the High Court was required to consider whether certain motor spare parts qualified for protection as an "*industrial design*" under the Industrial Designs Act 1996 ("IDA").

The plaintiff in this action had collaborated with the defendant to develop a new automobile and its various components and parts. The plaintiff successfully obtained registration for the "hood for an automobile" under Malaysian Design Certificate No. MY12-01583-0101 ("1583 design"), the "front bumper for an automobile" under Malaysian Design Certificate No. MY12-01584-0101 ("1584 design"), the "rear bumper for an automobile" under Malaysian Design Certificate No. MY12-01585-0101 ("1585 design") and the "grill for an automobile" under Malaysian Design Certificate No. MY12-01586-0101 ("1586 design") from the Malaysian Intellectual Property Office.

During the course of the collaboration, certain disputes arose and the parties sought from the Court a declaration as to whether the 1583, 1584, 1585 and 1586 designs should be excluded from registration, given the exclusionary portion of the definition of an "industrial design" under Section 3(1)(b)(ii) of the IDA.

> **"The House (approved) the distinction … between … items … sold simply as spare parts and items … where customers might buy fancy designs for their own sake"**

The parties argued that although the IDA provided protection for features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, being features which in the finished article appeal to and are judged by the eye, this did not include, *inter alia,* features of shape or configuration of an article which are dependent upon the appearance of another article of which the article is intended by the author of the design to form an integral part. On this basis and relying on the decision of the Registered Designs Appeal Tribunal in *Ford Motor Company Limited and another, re* [1993] RPC 399 Ch. D, the parties sought for declaratory reliefs that the 1583, 1584, 1585 and 1586 designs be expunged from protection as it was not disputed that the features of shape and configuration of these designs were very much dependent on the overall appearance of the automobile for which they were designed for.

THE "MUST MATCH" OR SPARE PART EXCEPTION

The definition of an industrial design under the IDA is in *pari materia* with the definition of a design under the then provisions of the United Kingdom Registered Designs Act 1949 ("UKRDA") which was amended by the Copyright Designs and Patents Act 1988 ("CDPA").

It is interesting to note that the 1988 amendments to the UKRDA *viz* Section 1(1)(b)(ii) came to exclude from protection *features of shape or configuration of an article which are dependent upon the appearance of another article of which the article is intended by the author of the design to form an integral part* or otherwise colloquially referred to as the "must match" provision following the landmark decision in *British Leyland Motor Corp Ltd & Anor v Armstrong Patents Co Ltd & Anor* [1986] RPC 279. The decision in *British Leyland Motor* is important for the landscape of the law and in dealing with, *inter alia*, the intellectual property protection of articles that are sold as spare parts.

Briefly, in *British Leyland Motor*, the House of Lords was required to consider whether copyright protection ought to be appropriately afforded to the plaintiff for technical drawings for an exhaust pipe that were in effect articles likely to be repaired by owners and therefore purchasable as spare parts. The defendants in that case were suppliers of spare parts; particularly, spares for the exhaust pipe of the Leyland Marina manufactured by the plaintiff.

The House of Lords recognised that the then existing law in the United Kingdom had created an anomaly by wrongly extending copyright protection to industrial drawings of purely functional objects when they were neither registrable as a design for lacking eye appeal nor as a patent since they embody no new invention. This had resulted in the author acquiring an enduring monopoly for his lifetime plus seventy (70) years when that could not have been the intention of Parliament to do so.

Notwithstanding the above anomaly, the House of Lords, fuelled by policy reasons against denying car owners the right to repair, held that manufacturers of automobiles could not derogate from the grant of sale of the automobile to the owner the right to repair freely and that that right would be useless if suppliers of spare parts were not entitled to anticipate the need for repair. On that basis it was held that notwithstanding the copyright existing in the technical drawings of the exhaust pipes, the plaintiffs could not derogate from the grant of the sale of the Leyland Marina the right to the owner to freely repair it.

Subsequent to the aforesaid decision, there was a radical overhaul to the law in the United Kingdom which culminated in the CDPA, an unregistered design right system and appropriate defences in the copyright legislation as well as the inclusion of the aforesaid exclusionary spare part or "must match" provision in the UKRDA.

FORD MOTOR CO LTD'S DESIGN APPLICATIONS [1995] RPC 167

Subsequent to the 1988 reforms, Ford Motor Co Ltd and Iveco Fiat SpA filed a series of applications for various car parts including wing mirrors, seats, steering wheels, main body panels, doors, bonnet lids, boot lids and windscreens which were all rejected by the Designs Registry on the basis that those designs fell within the "must match" exception.

On appeal to the Registered Designs Appeal Tribunal ("RDAT"),

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the Registrar asserted for the first time that the designs of various car parts for which registration was sought were not registrable as they failed to satisfy the definition of an 'article'. The RDAT made a distinction between wing mirrors, seats and steering wheels on the one hand as being registrable and main body panels, doors, bonnet lids, boot lids and windscreens on the other as falling foul of the definition of an 'article'. The RDAT found that parts such as main body panels, doors, bonnet lids, boot lids and windscreens were not 'articles' because, apart from forming part of a complete vehicle, they had no reality as articles of commerce.

The RDAT made a distinction between the two categories of articles also on the basis that with regard to the former, such parts should be distinguished from parts which, while *in situ* are contributing features to the appearance of the vehicle, are subsidiary to its essential shape. Therefore, parts such as wing mirrors, wheels, seats and steering wheels were found to contemplate substitutions where possible while leaving the general shape and appearance of the overall vehicle unchanged. The RDAT found therefore that, assuming that the latter category of parts were articles, they then consisted only of features which fell within the "must match" exclusion.

> **" the policy against ... design protection of spare parts ... applies here in Malaysia "**

According to the reasoning of the RDAT, these parts form part of and contribute to the overall shape and appearance of the vehicle and therefore are excluded from design protection. Ford Motors sought judicial review but the Divisional Court of the Queen's Bench Division largely upheld the RDAT's decision. Ford Motors appealed to the House of Lords.

The House was called upon to answer amongst others (i) whether objects which are spare parts for other objects are "articles" within the meaning of the UKRDA; and (ii) what was the true construction of section 1(1)(b)(ii)?

THE DEFINITION OF AN ARTICLE

In considering the first question, the House of Lords was required to look at the definition of an "article" under the UKRDA which defined an article as "*any article of manufacture including any part of an article if that part is made and sold separately*". In this regard, the House of Lords cited with approval the interpretation given to the definition of an "article" in *Sifam Electrical Instruments Co Ltd v Sangamo Weston Ltd* [1973] RPC 899. In this case the words "*any article of manufacture including any part of an article if that part is made and sold separately*" were interpreted to refer to an article that is intended by the proprietor of the design to be put on the market and sold separately. It was held that the phrase "*if that part is made and sold separately*" must be intended to mean that both the manufacture and sale of the part in question must be operations which are distinct from the manufacture and sale of the *whole article* of which the part forms a component.

Applying the above, the House of Lords held that in order to satisfy the requirement of an "article", it is not sufficient that the part concerned is made and sold simply as a spare part for the greater article; it must in addition "*have an independent life as an article of commerce and not be merely an adjunct of some larger article of which it forms part.*"

The House then went on to approve the distinction drawn by the lower courts between the category of items which would be sold simply as spare parts and items such as wing mirrors, seats and steering wheels where customers might buy fancy designs for their own sake and not merely as replacement spares. Insofar as the latter category was concerned, the House referred these as "proprietary" articles susceptible of being made and sold separately and therefore, not precluded from being registered. On that basis the House rejected the applications to register designs in respect of components for cars such as main body panels, doors, bonnet lids, boot lids and windscreens and allowed items such as wing mirrors, seats and steering wheels.

The House thereafter declined to consider the construction to be given to the "must match" exception because of their conclusion that the parts sought to be registered were not in any event articles "*made and sold separately*". As regards the approach taken by the RDAT and the Courts below (where the latter had found that in any event components for cars such as main body panels, doors, bonnet lids, boot lids and windscreens fell afoul of the "must match" exception since there was no design freedom for the suppliers of this category of parts having regard to the need to conform with the overall design of the car as a whole), the House commented that *ex hypothesi* the design for a component part of a vehicle is constrained in some degree by the appearance of the vehicle for which it was designed, and there would not be many cases where the said component would be adaptable enough to be accommodated within another vehicle if it were to be an independent article of commerce.

Their Lordships found the second question of no utility and no answer was provided in respect of the construction to be given to the "must match" exclusion.

THE DEFINITION OF AN ARTICLE UNDER THE IDA

The definition of an article under the IDA is largely borrowed from the definition of an article under the UKRDA after

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DOMESTIC VIOLENCE – YOU WILL PAY DEAR-LY

Trevor Padasian and Susanah Ng examine a ground-breaking case on domestic violence

INTRODUCTION

From a national survey conducted between 1990 and 1992 by Women's Aid Organisation (WAO), a Malaysian non-profit organisation for women survivors of domestic violence and their children, it was estimated that in 1989 an astonishing 1.8 million women or 36% of women over the age of 15 were beaten by their husbands or boyfriends; yet, only 909 women actually reported violence to the police (http://www.wao.org.my/Domestic+Violence_37_5_1.htm).

These alarming statistics may have contributed to the enactment of the Malaysian Domestic Violence Act 1994 ("DVA") which seeks to "*provide for legal protection in situation of domestic violence and matters incidental thereto*". Malaysia has also become a signatory or is committed to achieving the goals of the Convention on the Elimination of All Forms of Discrimination Against Women, the Beijing Declaration 1995 and Platform for Action, and Millennium Development Goals (Goal 3), all of which seek to protect women against discrimination and all kinds of violence in everyday life.

Since the coming into force of the DVA nearly 20 years ago on 1 June 1996, there has not been a single case reported where a court has awarded damages, whether in the form of monetary compensation or otherwise, to the victims of domestic violence, that is ... until 28 August 2015.

On that date, in an unprecedented decision, the Family Court in *Chin Yoke Yin v Tan Theam Huat* [2015] 11 MLJ 577 awarded compensation for personal injuries suffered as a result of domestic violence pursuant to section 10 of the DVA.

BRIEF FACTS

The Petitioner Wife and Respondent Husband were married for about 25 years before the Petitioner Wife filed for a divorce in Court under the Law Reform (Marriage and Divorce) Act 1976 ("LRMDA").

The Petitioner Wife's main ground for divorce was that the marriage had irretrievably broken down in that the Respondent Husband had behaved in such a way that she could not reasonably be expected to live with him. The Petitioner Wife gave evidence that she was a victim of domestic violence many times during the marriage.

The Respondent Husband agreed for the marriage to be dissolved and the Court was left to determine three issues, namely:

(1) Whether the Court had jurisdiction to hear the case with regard to domestic violence and thus determine the Petitioner Wife's claim for damages as compensation for domestic violence suffered;

(2) Maintenance of the Petitioner Wife and daughter; and

(3) Division of matrimonial assets.

DECISION OF THE FAMILY COURT

Madam Justice Noraini binti Abdul Rahman ("the Judge") who presided over this matter held that:

(1) The Court has jurisdiction to hear and determine the Petitioner Wife's claim for compensation for damages for domestic violence as the DVA was specifically cited in the intitulement (or heading) of the Petitioner Wife's Divorce Petition. As this was a matrimonial matter, it fell within the civil jurisdiction of the High Court. The Judge awarded RM4,000 as compensation to the Petitioner Wife;

(2) The Petitioner Wife be paid RM4,000 per month and the daughter, RM1,500 per month, by way of maintenance; and

(3) The matrimonial assets be divided equally between the Petitioner Wife and Respondent Husband.

This commentary will discuss the aspects of Her Ladyship's judgment that relate to the issue of domestic violence.

> **"This decision ... is the first time ... that a victim of domestic violence has been awarded monetary compensation"**

ANALYSIS

Jurisdiction to award compensation for domestic violence

The Judge's basis for jurisdiction to hear and award compensation in this case is correct. Section 2 of the DVA defines "Court" to mean *"in respect of civil proceedings for compensation under section 10, the court competent to hear such claims in tort"*. The Family Court which is a branch of the High Court is competent to hear such claims in tort and is thus competent to hear the Petitioner Wife's claim for compensation under the DVA.

Where a victim of domestic violence suffers personal injuries or damage to property or financial loss as a result of the domestic violence, section 10(1) of the DVA empowers the court to "*award such compensation in respect of the injury or damage or loss as it deems just and reasonable*".

Definition of "domestic violence"

Section 2 of the DVA defines "*domestic violence*" as being "*the* ***commission of one or more of the following acts***:

(a) *wilfully or knowingly placing, or attempting to place, the victim in fear of physical injury;*


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(b) *causing physical injury to the victim by such act which is known or ought to have been known would result in physical injury;*

(c) *compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain;*

(d) *confining or detaining the victim against the victim's will;*

(e) *causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim;*

(f) *causing psychological abuse which includes emotional injury to the victim;*

(g) *causing the victim to suffer delusions by using any intoxicating substance or any other substance without the victim's consent or if the consent is given, the consent was unlawfully obtained;* ***or***

(h) *in the case where the victim is a child, causing the victim to suffer delusions by using any intoxicating substance or any other substance,*

by a person, whether by himself or through a third party, against-

(i) *his or her spouse;*

(ii) *his or her former spouse;*

(iii) *a child;*

(iv) *an incapacitated adult; or*

(v) *any other member of the family …"* (*Emphasis added*)

In order to constitute "domestic violence", an act must fall within one of the acts listed in paragraphs (a) to (h) of the foregoing definition.

In addition, a person would be considered a victim of an act of domestic violence only if he or she is one of the persons listed in paragraphs (i) to (v) of the definition. Given that the definition is gender-neutral, a victim could either be the wife or husband. Interestingly, a boyfriend or girlfriend who is not an incapacitated adult would not fall within the categories of persons who are protected under the DVA.

Relevant factors

The Court may take into account the factors set out in section 10(2) of the DVA when it hears a claim for compensation. These factors include the pain and suffering of the victim, the nature and extent of physical injury or psychological abuse and emotional injury suffered, the cost of medical treatment, loss of earnings, the value of the property destroyed or damaged, and necessary and reasonable expenses incurred if the victim is compelled to be separated from the perpetrator due to the domestic violence.

Medical evidence of injuries

The Petitioner Wife had adduced evidence of her injuries by tendering a medical report and calling two doctors to testify that she had sought treatment at a hospital for assault by the Respondent Husband. According to her, she had discovered him *in flagrante delicto* with another woman in his work place which was a hotel. It was then that he had pushed the Petitioner Wife in three different places, grabbed her upper limb and pushed her backwards. Her medical report noted that she suffered from soft tissue injury, comprising abrasion wounds at her right and left elbows and tenderness at her left thigh region.

The Judge accepted the evidence and awarded damages to the Petitioner Wife. Although not expressly stated, it was implicit in the judgment that the Judge made a finding of fact that the Respondent Husband had caused physical injury to the Petitioner Wife "*by such act which is known or ought to have been known would result in physical injury*" within the meaning of the definition of "domestic violence".

In awarding the Petitioner Wife a sum of RM4,000 as damages, the Judge agreed with the counsel for the Petitioner Wife that the quantum of compensation could be based on accident cases as "*looking at it objectively there were injuries, and it doesn't matter how it was caused either by motor vehicle accident or domestic violence*". The Judge however limited her award for compensation to those injuries that were substantiated by the medical check-up and report.

Significance of the case

This decision is remarkable in that it is the first time in nearly 20 years since the coming into force of the DVA that a victim of domestic violence has been awarded monetary compensation for personal injuries. It also appears that there had been no reported cases of applications being made under section 10 of the DVA for an award for damages until now.

Previous claims for damages for injury inflicted upon a petitioner (typically the wife) by the spouse had failed, given that they were made under the LRMDA (for instance, *Sathia Vadivaloo v Magendran Vellasamy* [2013] 1 LNS 429 and *Lim Siaw Ying v*

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MIND YOUR WORDS

Natalie Ooi re-visits the landmark case of Hedley Byrne & Co Ltd v Heller & Partners Ltd

In 1932, the House of Lords had in *Donoghue v Stevenson* [1932] AC 562 established the law of negligence as a distinct tort by holding a person liable for acts or omissions which could reasonably be foreseen to cause harm or loss to another person.

The years that followed witnessed many developments and refinements in the law of negligence but conventional thought was that liability under this new branch of law did not extend to statements made negligently or to cases where the aggrieved party suffered only economic or financial loss.

Almost two decades later, the Court of Appeal, by a 2:1 decision in *Candler v Crane, Christmas & Co* [1951] 2 KB 164, declined to extend the principles laid down in *Donoghue v Stevenson* by confining the imposition of liability for economic loss to cases where a contractual or fiduciary relationship exists between the parties.

Some 13 years later, the House of Lords was presented with the opportunity to reconsider the decision in *Candler v Crane, Christmas & Co* in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("Hedley Byrne").

THE FACTS

The appellants, Hedley Byrne & Co Ltd, were an advertising agency. As the appellants had concerns on the financial position of their customer, Easipower Ltd ("Easipower"), the appellants requested their bankers to obtain a banker's report on Easipower on two occasions. The appellants' bankers communicated with the respondents, Heller and Partners, a firm of merchant bankers with whom Easipower maintained a bank account.

On 18 August 1958, in response to an enquiry by the appellants' bankers as to whether Easipower would be good for an advertising contract worth £8,000 to £9,000, the respondents opined orally that they believed Easipower to be "*respectably constituted*" and "*considered good for its normal business engagements*". The contents of the oral reference were relayed by the appellants' bankers to the appellants in a letter. It was common ground that the respondents had given the oral reference gratuitously and without responsibility on their part.

On the second occasion, the respondents were requested by the appellants' bankers to confirm Easipower's creditworthiness for an advertising contract worth £100,000. The respondents advised in writing on 11 November 1958 that Easipower was a "*respectably constituted company, considered good for its ordinary business engagements*". The respondents qualified its advice as "*confidential*" and "*for your private use and without responsibility on the part of the bank or its officials*". The respondents' response was sent to the appellants by its bankers.

Relying on the statements made by the respondents, the appellants extended credit to Easipower and suffered financial losses of about £17,000 when Easipower went into liquidation. The appellants commenced legal proceedings against the respondents to recover the losses on grounds that their advice was given fradulently or negligently and in breach of the respondents' duty to exercise due care in giving the advice. The allegation of fraud was subsequently abandoned and the trial proceeded on the basis of negligent misstatement.

THE HIGH COURT AND THE COURT OF APPEAL

The trial judge, McNair J, found that the respondents were negligent. However, based on authorities binding upon him, the learned Judge absolved the respondents from liability due to the absence of a contractual or fiduciary relationship between the parties.

The Court of Appeal upheld McNair J's decision on the same ground and added that apart from authorities binding on the court, it would not be reasonable to impose on a banker answering such queries a duty to do more than act honestly.

THE DECISION OF THE HOUSE OF LORDS

Lord Reid stated in his judgment that in general, an innocent but negligent misrepresentation does not give rise to a cause of action. There must be something more than a mere misstatement. According to Lord Reid a *"special relationship"* must exist between the parties so as to give rise to a duty of care on the part of the party who is giving the information or advice.

This *"special relationship"* can arise when it is established that a party was relying on the other party to exercise reasonable care in giving the information or advice and the other party knew, or ought to have known, that the first-mentioned party was relying on his information or advice.

Lord Reid said that three options are available to a reasonable man who knows that his skill and judgement were being relied upon:

(1) He could keep silent or decline to give any information or advice;

(2) He could give an answer with a clear qualification that it is being made without responsibility; or

(3) He could answer without any such qualification.

In the first two scenarios, the person would not be liable for any loss suffered by the other person. However, if a person took the third course of action, he must, according to Lord Reid, *"be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the enquirer which requires him to exercise such care as the circumstances require"*.

In the opinion of Lord Pearce, the question as to whether a *"special relationship"* arises depends on the circumstances of the transaction. His Lordship added that, *"if, for instance, they*

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disclosed a casual social approach to the inquiry, no such special relationship or duty of care would be assumed. To import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer."

Lord Morris expounded that *"it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful enquiry a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."*

According to Lord Devlin, *"… the categories of special relationships, which may give rise to a duty to take care in word as well as deed, are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which … are equivalent to contract that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract …"*

The learned Judge continued:

"Payment for information or advice is very good evidence that it is being relied on and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good."

Notwithstanding that all five Law Lords were of the view that a person could be liable for a negligent misstatement if a *special relationship* exists between the parties, their Lordships unanimously agreed to dismiss the appellants' claim on the ground that the respondents had clearly stated that they assumed no responsibility for their statements and thus did not assume any duty of care to the appellants.

THE LEGAL POSITION IN MALAYSIA

The principle laid down in *Hedley Byrne* has been applied in Malaysia (e.g. *Malaysian International Merchant Bankers Berhad v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia* [2001] 1 MLJ 375 (CA)).

Over the years, the Malaysian Courts have recognised that a special relationship exists in certain circumstances which gives rise to a duty of care. Amongst these are the relationship between a merchant bank and its client (*Malaysian International Merchant Bankers Berhad v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia*); a stockbroker and its client (*Ho Kam Seong v Arab Malaysian Securities Sdn Bhd* [2000] 4 AMR 3947); a solicitor and his client (*Dato' Seri Au Ba Chi v Malaysian United Finance Bhd & Anor* [1989] 3 MLJ 434); and a financial adviser/consultant and its client (*Bank Utama Bhd v Insan Budi Sdn Bhd* [2009] 1 MLJ 148 and *Dato' Zamzuri bin Ghaffar v BIMB Trust Ltd & Ors* [2011] 8 MLJ 185).

CONCLUSION

The pronouncements by the House of Lords in *Hedley Byrne* dispelled the three-decade old notion that the principles laid down in *Donoghue v Stevenson* do not apply to negligent misstatements (except where a contractual or fiduciary duty exists) or to financial or economic losses.

Arising from *Hedley Byrne*, it is clear that a party may succeed in a claim against another party for negligent misstatements if the claimant is able to establish that:

(1) A *"special relationship"* exists between the parties so as to give rise to a duty of care on the part of the other party to exercise reasonable care in giving the information or advice;

(2) The other party must have acted negligently in giving the information or advice; and

(3) The claimant has suffered loss or damage, which could be financial or economic in nature, in reliance on the information or advice given by the other party.

In his dissenting judgment in *Candler v Crane, Christmas & Co* (@ p. 178), Denning LJ observed that in each of the great cases of *Ashby v White* 92 ER 126, *Pasley v Freeman* 100 ER 450 and *Donoghue v Stevenson*, the judges were divided in opinion - on the one side were *"the timorous souls who were fearful of allowing a new cause of action"* and on the other were *"the bold spirits who were ready to allow it if justice so required."* It may be apt to say that the five Law Lords in *Hedley Byrne* were indeed *"the bold spirits"* who did not hesitate to extend the boundaries of the law of negligence.

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NOT FOR SALE!

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practice where government officials had no qualms of awarding contracts or projects to their cronies.

The Federal Court also took the opportunity to overrule two earlier cases of *Wong Hon Leong David v Noorazman bin Adnan* [1995] 4 CLJ 155 and *Ahmad Zaini Japar v TL Offshore Sdn Bhd* [2002] 5 CLJ 201. These two cases involved plaintiffs who were suing for their fees for securing contracts in favour of the defendants allegedly by using their influences. The Federal Court in *Merong Mahawangsa* was of the view that once the illegality of a contract is raised or becomes apparent, the court is duty bound to consider the allegation by reference to section 24 of the Act and pertinent case law, which the courts in the two earlier cases had failed to do.

Finally, the Federal Court commented, albeit *obiter*, that as the award and the Project were intrinsically linked, the award was automatically retracted when the Project was withdrawn. As such, the RM20 million was not payable when the Project was withdrawn.

“ once the illegality of a contract is raised … the court is duty bound to consider the allegation by reference to section 24 of the Act ”

CONCLUSION

This decision of the Federal Court brings Malaysia in line with the position of many other countries. Contracts should be granted on the merits and not based on extraneous reasons such as the influence exercised over the party granting the contract.

In light of this decision, those who offer services of procuring contracts through the exercise of influence are forewarned that the courts will not assist them in recovering payment of their fees.

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FRAUDSTERS BEWARE

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have to do if he hopes to establish his case” (see the Singapore Court of Appeal case of *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263).

It would appear from *Tang Yoke Kheng* that the standard of proof for fraud in civil claims falls within the head of principle put forth in *Lee You Sin* and is not consistent with the current position in England, Australia and Canada.

THE DECISION

Having considered the legal position in the various common law jurisdictions, the Federal Court agreed with both parties in *Sinnaiyah* that the standard of proof for fraud in civil claims in Malaysia should be reviewed.

In making a bold decision to decisively realign the position of law in the country and departing from all three previous principles applied by the apex court before them, the Federal Court in *Sinnaiyah* adopted the principle applied by the House of Lords in *In re B (Children)* and rejected the Respondent’s argument to adopt the principle in *Lee You Sin*.

The Federal Court then answered the leave question in the negative and held that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases and the balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim, the standard of proof is on the balance of probabilities.

However, while the Federal Court agreed that neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied, it is still something to be taken into account, where relevant, in deciding where the truth lies.

The Federal Court did however issue a caveat that the principle laid down in *Sinnaiyah* was to apply only to that case and to future cases and should not be utilised to set aside or review past decisions that involve fraud in civil claims.

With this decision, *Yong Tim, Ang Hiok Seng, Low Kee Ko, Lee You Sin* and *Saminathan* have ceased to be good law and Malaysia has now brought itself in line with the legal position in England, Australia and Canada in relation to the standard of proof to be applied to prove fraud in a civil claim.

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BOUQUETS AND BRICKBATS

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Tribunal Secretaries

In general, the respondents had a positive view of the role of tribunal secretaries, with only 9% feeling that they were not useful.

The majority of respondents identified three particular tasks as appropriate for tribunal secretaries to undertake: organisation tasks (93%); communications with the parties (82%); and preparing drafts of procedural orders and non-substantive parts of awards (75%). Whilst the roles of tribunal secretaries are recognised, a vast majority did not consider it appropriate for tribunal secretaries to conduct substantive or merits-related tasks.

Third Party Funding

In recent times, third party funding has attracted a great deal of attention across the arbitration community. In fact, 39% of respondents had encountered third party funding in practice; 12% having used it and 27% have seen it used.

On the issue of regulation, 58% of respondents opined that the best way to regulate this area was through guidelines such as the IBA Guidelines. Generally, respondents felt that it should be mandatory for claimants to disclose any use of third party funding (76%) and the identity of the funders (63%), but not the full terms of any funding agreement.

CONCLUSION

The 2015 Survey confirms the popularity of international arbitration as a mechanism for dispute resolution. Overall, the respondents appear to be satisfied with the existing framework of the leading arbitral institutions. The control of time and cost appears to be the main concern of the respondents. Greater transparency in third party funding is also called for. The 2015 Survey also provides helpful insights on areas where arbitral institutions could improve upon in order to meet the requirements of the international arbitration community.

The full report can be viewed at: http://www.arbitration.qmul.ac.uk/docs/164761.pdf

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THE GOOSE MAY BE COOKED

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business of the Company and its subsidiaries and could not be excluded from that; and

(2) Kwan Lai had acted in a manner that was prejudicial to Kwan Sing's interests by appointing his son as a director of various companies to secure majority control of the boards of those companies, awarding higher salaries to his children as compared to Kwan Sing's children and allowing his children to use the premises of one of the companies on a rent-free basis.

On the basis of these findings, the Court concluded that it was just and equitable to wind up the Company.

COMMENTS

The judgement of the Court of Final Appeal in the *Yung Kee Case* is a landmark decision in favour of shareholders' rights for redress. The decision may spur more actions in Hong Kong by shareholders who desire to wind up offshore companies which have no business activity of their own in Hong Kong but indirectly hold assets in that jurisdiction through subsidiary companies. This would relieve shareholders of the burden of having to seek redress in the foreign country of incorporation.

In the Malaysian context, the Companies Act 1965 ("CA") has similar provisions to the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance. Sections 314 and 315 of the CA provide for the winding up of unregistered companies which include foreign companies. The judgement in the *Yung Kee Case* will be a persuasive authority should such an action be brought before the Malaysian courts.

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EDITOR'S NOTE

Subsequent to the completion of this commentary, it was reported in Channel NewsAsia on 16 December 2015 that the Hong Kong Court of Final Appeal confirmed the winding up of the Company as the shareholders could not settle the dispute within the time prescribed by the Court.

ARE SPARE PARTS PROTECTED?

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amendments were made to the former through the Layout-Designs of Integrated Circuits Act 2000. The IDA now defines an article as "any article of manufacture or handicraft, and *includes any part of such article* or handicraft if that part is made and sold separately but does not include an integrated circuit or part of an integrated circuit within the meaning of the Layout-Designs of Integrated Circuits Act 2000, or a mask used to make such an integrated circuit."

The requirement that component parts should satisfy the requirement that they be manufactured and sold separately is very much entrenched and therefore it must only be concluded that when considering the registrability of features of shape and appearance of spare parts, it would be critical for car manufacturers to consider whether or not the article or parts of the article to which the design was applied satisfies the definition of an article to begin with.

CONCLUSION

In *Veresdale,* the parties had conceded that the designs for which the 1583, 1584, 1585 and 1586 certificates were granted were in fact dependent upon the appearance of the automobile for which they were designed and sought that they be expunged under Section 3(1)(b)(ii) of the IDA. Given these constraints, the Court had rightly granted the relief sought. It is submitted however that in view of the decisions in *Sifam Electrical Instruments* and *Ford Motor Co Ltd's Design Applications*, it would appear that a higher threshold is required to be satisfied which is to first consider, whether the articles to which the 1583, 1584, 1585 and 1586 designs were applied fell within the definition of an "article" under the IDA.

In conclusion it may be surmised further that given that the IDA was enacted well after the 1988 reforms were brought about in the United Kingdom, and the definition of an article as well as the "must match" exclusion in the IDA was borrowed almost word for word from the UKRDA, the policy against which the design protection of spare parts operates in the United Kingdom applies here in Malaysia as well.

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DOMESTIC VIOLENCE

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Wong Seng & Anor [2009] 4 MLJ 409). The courts in those cases opined that there was no provision in the LRMDA granting them the power to award damages for such injuries.

Quantum of damages – a comparison

Similar to the DVA, the United Kingdom's Protection from Harassment Act 1997 ("PHA") also covers domestic abuse. In *Singh v Bhakar* [2007] 1 FLR 880, a wife sued her mother-in-law for harassment under the PHA, claiming that she had endured four months of near imprisonment and bullying by her mother-in-law which resulted in her suffering depression for many months. She was awarded damages of £35,000 (approximately RM225,000 based on the exchange rate in mid-December 2015).

It is notable that the judge in *Singh v Bhakar* felt that there were important differences between a domestic abuse case and an ordinary personal injury case. In accident claims, the compensation is almost entirely for the consequences of the accident rather than the trauma of the accident itself which usually lasts a very short time whilst in a domestic abuse case, compensation is for the abusive acts which could continue for a long period of time. In addition, the judge was of the view that it must be much worse to know that one is the target of deliberate and malevolent behaviour than to be injured as a result of carelessness. These factors are highly relevant and should be taken into account when a Malaysian court awards damages for domestic violence under section 10 of the DVA.

CONCLUSION

This unprecedented decision may encourage long-suffering spouses who have been victims of domestic violence by their respective spouses to seek compensation in Court. The outcome of such claims would of course depend on whether the victims are able to substantiate their claims by providing evidence, such as medical reports and police reports, of the injuries inflicted upon them.

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EDITOR'S NOTE

We understand that the Respondent Husband has filed an appeal against the Judge's decision. It will be interesting to see whether the Court of Appeal will uphold the Judge's decision, especially with regard to the award of damages for domestic violence.












SKRINE REGATTA 2015

Our bi-annual Skrine Regatta was held at the Putrajaya Water Sports Complex on 14 November 2015. The charity of choice this time was Teach for Malaysia, a non-governmental organisation which aims to end education inequity in the country.

There were 6 preliminary heats followed by the Grand Finals. In the first heat, PwC Dragons edged the Skrine Dragons by just 0.02 seconds. This proved to be the fastest timing of the day. The final heat witnessed a face-off between accounting firm rivals, KPMG Vikings and PwC Dragons. The Vikings earned bragging rights in a close race.

Teach for Malaysia sportingly sent a team, the TFM Pandas, to participate in the event. Although the Pandas had fewer training sessions than the others, they did not just make up the numbers but put up a valiant effort in each race.

The boats were buffeted by strong cross-winds in the Grand Finals. The Skrine Dragons crossed the finishing line first, followed closely by the KPMG Vikings, PwC Dragons and TFM Pandas.

Although Skrine Dragons regained the cup from the KPMG Vikings, everyone left as winners, having raised RM15,000.00 for Teach for Malaysia who also received teaching aids and stationery from the Red Box Project in Skrine.

Paddles up!




LEGAL INSIGHTS

A SKRINE NEWSLETTER

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

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