ISSUE 1/2017 • APRIL 2017 KDN No. PP 13699/01/2013 (031337)

LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

The first issue of Legal Insights for 2017 has been pushed back from March to April 2017; the reason being that as we were preparing to hit the presses, the Government tabled two Bills in Parliament to regulate the ride-hailing businesses in Malaysia. As a result, our writers of "*No Such Thing as a Free Ride*" had to scramble to up-date their article.

On the legislative front, the Companies Act 2016 came into operation on 31 January 2017 (except for section 241 and Division 8 of Part III), replacing the Companies Act 1965. Lawyers and the business fraternity, in particular, company secretaries and auditors have to come to grips with new concepts such as no par value shares, solvency statements, written resolution regime for private companies as well as modified requirements in relation to distributions and approval of directors' fees and benefits.

Two cases are worthy of mention. First, the Federal Court held in *Letchumanan Chettiar Alagappan @ L. Allagappan and Anor v Secure Plantation Sdn Bhd* that a complaint of forgery is tantamount to a complaint of fraud. However, the apex court noted that there is no difference in the standard of proof between these concepts in light of its earlier decision in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 where it held that the standard of proof for fraud in civil cases is the balance of probabilities.

Second, a five-member panel of the Federal Court unanimously ruled in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Hulu Langat* that section 40D(3) of the Land Acquisition Act 1960, which gives two assessors the right to decide on compensation, is unconstitutional as it is *ultra vires* Article 121 of the Federal Constitution. According to their Lordships, section 40D(3) usurped the power of the courts by allowing non-qualified persons, i.e. the assessors, to decide on a matter before a court. This decision has been hailed by the legal fraternity as an affirmation of the principle of separation of powers enshrined in our Constitution.

We hope that you will enjoy reading the articles and case commentaries that we have lined-up for you in this issue of our newsletter.

With Best Wishes,

Kok Chee Kheong
Editor-in-Chief

CONTENTS

1 Message from the Editor-in-Chief

2 Announcements

ARTICLES

4 The Seafarers' Bill of Rights

6 The Revival of Ultra Vires?

8 Between a Rock and a Hard Place

10 Bursa Malaysia's Proposed (New) Market

14 There's No Such Thing as a Free Ride

18 An Overview of the Developments in Personal Data Protection

20 Delay and Disruption Protocol (Malaysian Supplement)

CASE COMMENTARIES

2 Trade Wars: A New Hope? – Megasteel Sdn Bhd v Minister of International Trade and Industry & Anor

16 Court Rules in Favour of House – Lim Soo Kok v Resorts World At Sentosa Pte Ltd

©2017 SKRINE. ALL RIGHTS RESERVED. THE CONTENTS OF THIS NEWSLETTER ARE OF A GENERAL NATURE. YOU ARE ADVISED TO SEEK SPECIFIC LEGAL ADVICE ON ANY TRANSACTION OR MATTER THAT MAY BE AFFECTED BY THIS NEWSLETTER. IF YOU REQUIRE FURTHER ANALYSIS OR EXPLANATION OF THE SUBJECT MATTER, PLEASE CONTACT OUR PARTNERS OR THE PERSON WHOM YOU NORMALLY CONSULT. AS THE LEGAL PROFESSION (PUBLICITY) RULES 2001 RESTRICT THE CIRCULATION OF PUBLICATIONS BY ADVOCATES AND SOLICITORS, KINDLY DO NOT CIRCULATE THIS NEWSLETTER TO PARTIES OTHER THAN PERSONS WITHIN YOUR ORGANISATION.

ANNOUNCEMENTS

NEW PARTNERS

The Partners are pleased to announce that Jocelyn Lim Yean Tse, Sim Miow Yean, Janice Tay Hwee Hoon and Kwan Will Sen have been admitted as Partners of the Firm from 1 January 2017.

Jocelyn is a member of our Construction and Engineering Practice Group. Her practice areas include project advisory work and representing clients in contentious disputes. Jocelyn is also an accredited Adjudicator with the Kuala Lumpur Regional Centre for Arbitration.

Miow Yean is a member of our Corporate Division. Her practice areas include real estate, banking, estate planning, private wealth management and probate and administration work.

Janice is a member of our Construction and Engineering Practice Group. Her practice areas include general litigation, arbitration, adjudication and mediation. Janice is currently the Deputy President of the Society of Construction Law (Malaysia).

Will Sen is a member of our Dispute Resolution Division. His portfolio of work includes corporate litigation, arbitration, securities disputes, insolvency, public law and white collar crime.

We extend our heartiest congratulations to Jocelyn, Miow Yean, Janice and Will Sen. We have no doubt that they will continue to make invaluable contributions to the Firm.

ASIAN LEGAL BUSINESS MALAYSIA LAW AWARDS 2017

Our Firm was nominated in 10 categories and received the Law Firm of the Year Award in five categories, namely Litigation, Aviation, Intellectual Property, Real Estate and Energy, Projects and Infrastructure, as well as the Malaysian Law Firm of the Year, at the Asian Legal Business (ALB) Malaysia Law Awards 2017 on 6 April 2017.

CHAMBERS GLOBAL 2017

Skrine maintained its ranking in Band 1 for Corporate/M&A and Band 3 for Banking & Finance of Chambers Global 2017 Rankings for Malaysia. Three of our Partners, To' Puan Janet Looi, Cheng Kee Check and Quay Chew Soon were ranked in Band 2 of leading individuals in Corporate/M&A and our Consultant, Vinayak Pradhan, was ranked in Band 1 for Arbitration (International): Most in Demand Arbitrators. The Firm extends its congratulations to the individuals named.

TRADE WARS :

A commentary on the first judicial review
by Nicholas Lai

A safeguard measure is a form of trade protection. The Ministry of International Trade and Industry ("MITI") undertakes a safeguard investigation under the Safeguards Act 2006 ("Safeguards Act") and Safeguards Regulations 2007 ("Safeguards Regulations") to determine whether a safeguard measure is necessary to protect the domestic industry from suffering injury or threat thereof from a surge of imports.

ATTACK OF THE CLONES?

Megasteel Sdn Bhd ("Megasteel"), the sole Malaysian producer of Hot Rolled Coils steel products ("HRC") at the material time, petitioned to MITI for safeguard measures against HRC imports. On 10 September 2015, MITI initiated an investigation. Notably this was Megasteel's second attempt to seek safeguard protection, having failed in the first ever safeguard investigation in 2011 in respect of the same product.

On 8 January 2016, after investigating the matter and considering the views of the affected parties, the Government of Malaysia, acting through the Minister of International Trade and Industry ("Minister") released its negative preliminary determination ("Decision"). The investigation was terminated. In effect, this meant that the Government declined Megasteel's request for safeguard protection.

However, this time around Megasteel decided to challenge the Minister's Decision in the Malaysian courts, thus making this the first ever judicial review of the Minister's decision in a safeguard investigation.

DECISION OF THE GALACTIC REPUBLIC

The Decision was based on a Non-confidential Preliminary Determination Report dated 8 January 2016 ("Report") issued by MITI as the investigating authority under the Safeguards Act. In the Report, MITI summarised the evidence of Megasteel and 37 respondents or interested parties including foreign governments, foreign and local trade associations, importers and exporters of HRC. In essence, MITI found, *inter alia*, that:

- there was no surge in HRC imports coming into Malaysia warranting a safeguard measure; and
- the domestic HRC industry was not seriously injured as claimed, or where injured, it was not caused by the HRC imports.

It is noteworthy that all interested parties, save one, were opposed to Megasteel's petition and its proposal for safeguard measures.

It is also noteworthy that MITI for the first time relied on data provided by the Royal Malaysian Customs ("RMC") when analysing the import volume. RMC's data allowed MITI to obtain a clearer picture of the relevant import volumes by removing HRC imports that had been given duty exemption status under

NICHOLAS LAI (L)

Nicholas is an Associate in the Dispute Resolution Division of SKRINE. He graduated from the University of Reading in 2011.

MANSHAN SINGH (R)

Manshan is an Associate in the Dispute Resolution Division of SKRINE. He graduated from the University of Leeds with a Bachelor of Laws in 2011 and Master of Laws in 2013.

A NEW HOPE?

of a decision under the Safeguards Act 2006 and Manshan Singh

a national steel policy from its volume analysis. The use of RMC data is a step forward from the 2011 investigation where MITI highlighted the limitations of the consolidated data provided by the Department of Statistics, Malaysia which did not distinguish the different categories of import volume.

Ultimately, MITI was satisfied that even if the investigation were to be continued beyond the preliminary determination, the elements necessary for the imposition of a safeguard measure would not be found. Thus, MITI recommended that the investigation be terminated in accordance with section 20(2)(b) of the Safeguards Act.

THE EMPIRE STRIKES BACK

Dissatisfied with the Decision, Megasteel filed an application in the High Court on 4 April 2016 for leave to initiate a judicial review. The Minister and MITI were named as the respondents in the application which sought, *inter alia*, the following:

- an order to quash the Decision;
- a declaration that the Decision was tainted with irrationality, illegality and procedural impropriety; and
- an order directing the Minister and MITI to re-initiate, continue or complete the investigation and issue a final determination.

In summary, Megasteel contended, *inter alia*, that the Minister and MITI had failed to:

- consider the increase of HRC imports in relative terms (i.e. the increase of HRC imports relative to domestic production) as required by the Safeguards Regulations;
- provide sufficient reasons for excluding the duty-exempt HRC and thus wrongly used the data obtained from RMC in the volume analysis; and/or
- furnish Megasteel with a copy of the data provided by RMC.

Megasteel's application for leave was granted by the High Court on 10 May 2016. The battleground now moved from the halls of MITI to the courts of law for the first time. The rules of the game had changed; every step taken, or omitted, in this 'trade war' carried crucial consequences.

THE REBEL ALLIANCE

Megasteel's judicial review proceedings were of great concern to the many interested parties who had participated in the original safeguard investigation undertaken by MITI. Order 53 rule 4 of the Rules of Court 2012 ("Rules of Court") expressly requires a party who has obtained leave to commence judicial review to file a Notice of Hearing of Application for Judicial Review ("Notice") and to serve a copy of the same and all cause papers on "*all persons directly affected by the application*".

However, in this case, Megasteel did not serve or chose not to serve the Notice, nor the cause papers on any of the 37 interested parties in the original investigation. Out of the 37 interested parties, only nine interested parties (consisting of local and foreign stakeholders) fortuitously came to hear about the judicial review through third-party sources within the industry and successfully applied to intervene in the proceedings ("Interveners"). Hence, the Minister, MITI and the Interveners, in an unusual position, found themselves on the same side and collectively sought to oppose Megasteel's application for judicial review.

THE FORCE AWAKENS

On 6 February 2017, the judicial review was called for hearing before the Court. The Interveners collectively raised a number of objections to Megasteel's judicial review application.

One of the main objections turned on Megasteel's failure to serve the Notice and cause papers in accordance with the Rules of Court. The Interveners argued that the interested parties in the original investigation must be "*persons directly affected by the proceedings*", given that Megasteel had sought for a continuation of the investigation. The Interveners contended that the failure to serve the Notice and cause papers on them had prejudiced their interests.

On the other hand, Megasteel took the position that the term "*interested parties*" defined in the Safeguards Acts cannot be equated to "*persons directly affected by the application*" under the Rules of Court, as to do so would allegedly open the floodgates.

The Interveners also challenged Megasteel's failure to give full and frank disclosure to the Court at the *ex parte* leave stage. It was submitted that the standard of disclosure for judicial review is *uberrimae fidei* (utmost of good faith), being a higher standard than *bona fide* (good faith). The Interveners submitted that Megasteel failed, *inter alia*, to disclose:

- its multiple previous attempts to seek trade protection from MITI by way of safeguards and anti-dumping measures;
- the fact that Megasteel itself was importing HRC in significant volumes during the period of the investigation and thereby contributed to the increase in imports complained of; and
- the views, submissions and evidence provided by the

continued on page 22

THE SEAFARERS' BILL OF RIGHTS

Trishelea Sandosam highlights the key amendments to the Merchant Shipping Ordinance 1952

INTRODUCTION

Tides have changed. In the wave of the 21st century, the global shipping community has increasingly recognised the importance of balancing growth of trade with protection of rights of seafarers. How does Malaysia fare on this front?

Malaysia has ridden these shifting tides by ratifying the Maritime Labour Convention 2006 ("MLC 2006") on 20 August 2013. Following the ratification of the MLC 2006, the Merchant Shipping Ordinance 1952 ("MSO 1952"), Malaysia's foremost shipping legislation, was amended pursuant to the Merchant Shipping Ordinance (Amendment) Act 2016. The amendments came into operation on 1 March 2017 to anchor the provisions of the MSO 1952 with the requirements imposed by the MLC 2006.

This article will provide a brief overview of the MLC 2006 and set out the key provisions contained in the amendments to the MSO 1952.

WHAT IS THE MLC 2006?

Often hailed as the "bill of rights" for seafarers, the MLC 2006 was developed by the International Labour Organisation to establish minimum working and living standards for seafarers. It came into force on 20 August 2013 and has currently been ratified by 81 countries including leading shipping nations such as the United Kingdom, Singapore, Korea and China, which represent approximately 91% of the world's gross tonnage.

The MLC 2006 consists of Articles and Regulations which outline the core rights, principles and basic obligations of countries ratifying the MLC 2006. There is also the Code which comprises mandatory standard and non-mandatory guidelines providing details for implementation of the MLC 2006.

THE MSO 1952 AMENDMENTS

The main amendments are set out in the new Part III, which completely replaces the former Part III, and offers a more concise read than its predecessor. The provisions of Part III are divided into various sections which include manning and qualification, conditions of service, wages, health, accommodation and provisions, and conduct and discipline.

Who does Part III apply to?

Owners - The definition of owner is wide and includes any person who has interest in the ownership of the ship, a charterer, or a person responsible for the navigation and management of the ship, in circumstances where neither the owner nor the charterer is responsible for the same.

Seafarers – The previous term "seaman" has been dispensed with in favour of the MLC term "seafarer" which now includes a master. Persons such as pilots, repair and maintenance technicians, and military personnel are excluded from the definition of seafarers.

Ships – The bulk of the provisions in Part III apply to Malaysian ships, while a number apply to both Malaysian and foreign ships. The exempted categories of ships include government or state owned ships, fishing vessels, pleasure yachts, Malaysian ships trading or operating exclusively within Malaysian ports, FPSO and FSO vessels.

What are the minimum standards?

- *Manning and qualification*

Safe manning - Before a ship can embark on a voyage or excursion, she must have the sufficient number of ship personnel as prescribed by the safe manning document issued by the Director of Marine (for Malaysian ships) or the flag state (for foreign ships). The penalty for non-compliance is a fine not exceeding RM100,000 and the possibility of detention by the Director of Marine if the ship is in Malaysian waters.

Certification and training – Owners are to provide adequate training to seafarers who must also hold the relevant certificates issued by the Director of Marine or other recognised countries/ training institutions to prove their competency and qualification to serve on a ship.

> **"Malaysia has ridden these shifting tides by ratifying the Maritime Labour Convention 2006"**

Minimum age – Seafarers employed on board a Malaysian ship must now be at least 16 years of age. Limitations are also imposed on the timing and type of work that may be carried out by seafarers below the age of 18 years.

- *Conditions of Service*

Employment contract – Seafarers employed on board a Malaysian ship must have a signed employment contract and have been given an opportunity to examine its terms beforehand. Such contract is deemed to be breached if the owner fails to provide work. This seafarer's employment contract is distinct from the article of agreement ("Article of Agreement") required to be signed between the master of every ship and the seafarer whom the master carries to sea from any port in Malaysia.

Hours of rest – Seafarers on board Malaysian ships are required to be given at least 10 hours of rest in a day, and 72 hours of rest in a week. Special conditions apply to seafarers below the age of 18. In calculating hours of rest, short breaks not exceeding 1 hour or breaks for meals are excluded. Masters or owners who fail to comply face a maximum penalty of RM100,000 on conviction.

Leave – Minimum annual leave of 2.5 calendar days per month of employment must be provided to seafarers employed on

TRISHELEA SANDOSAM

Trishelea is a Senior Associate in the Dispute Resolution Division of SKRINE. Her practice areas include shipping law and employment law.

Malaysian ships. These seafarers are also entitled to shore leave to benefit health and well-being, consistent with the operational requirements of their position. A maximum penalty of RM 50,000 is imposed on owners who do not provide the minimum annual leave to their seafarers.

Termination of contract – A notice period of 14 days, or salary in lieu thereof is required for termination of the employment contract by either party, except in the event of wilful breach of contract or misconduct. In the event of a finding of misconduct after due inquiry, the seafarer may be dismissed without notice or may be subject to a lesser punishment including suspension without wages for not more than two weeks. Notwithstanding these provisions on termination, seafarers employed on board Malaysian ships with employment contracts governed by Malaysian law may be subject to the Industrial Relations Act 1967, in which case any termination of contract by the owner must be with just cause or excuse.

Repatriation – Seafarers on board Malaysian ships are entitled to free repatriation. Owners are prohibited from requiring an advance payment of these potential repatriation costs from the seafarers or recovering the costs of repatriation from wages, except in cases of default by seafarers.

Seaworthiness – There is an implied obligation on the owner in every seafarer employment contract for him or his agent to use reasonable means to make the ship seaworthy at the beginning of the voyage, and keep the ship seaworthy during the entire voyage.

- *Wages and Deductions*

Seafarers on Malaysian ships must be paid wages, including overtime and holiday pay, in accordance with the prescribed timing and method, subject to the deductions permitted by the amendments. The seafarer employment contract is deemed to be broken upon failure by the owner to comply with these obligations. Additionally, the owner of the ship would be liable to a fine between RM50,000 and RM300,000.

- *Social Security, Health, Accommodation and Provisions*

Owners of Malaysian ships must make contributions under the Malaysian Employees Social Security Act 1969 and Employees Provident Fund Act 1991 in respect of Malaysian or Malaysian permanent resident seafarers. Further, owners must also provide medical care, sickness benefit and employment injury benefit to all seafarers, regardless of nationality. Failure to comply carries a fine not exceeding RM200,000 or a maximum term of imprisonment of two years or both.

Owners of Malaysian ships must further ensure that:

a. They are in compliance with the standards for health and medical care and occupational safety;
b. Seafarers working on board their ships are medically fit;
c. They provide and maintain accommodation and recreational facilities for the seafarers; and
d. They provide sufficient drinking water and food of reasonable nutritional value, quality and variety to seafarers serving on board.

- *Documents and Returns*

It is a requirement that Articles of Agreement must be signed before the Port Officer or other officer authorised by the Director of Marine and kept updated and available for inspection when necessary. Penalty for non-compliance is a fine not exceeding RM25,000.

Malaysian and foreign seafarers employed on board Malaysian ships are required to hold a seafarer record book and a valid seafarer identity document. Additionally, foreign seafarers must be registered at a port office. Non-compliance may result in a penalty not exceeding RM5,000 upon conviction.

- *Conduct and Discipline*

The new sections 114 and 115 of the MSO 1952 provide penalties for the following conduct of seafarers, unless the seafarer can avail himself of the defences contained in section 114(2):

a. Conduct endangering ship, structures or persons - applicable to seafarers on board Malaysian ships or on board foreign ships within Malaysian waters; and
b. Disobedience of lawful commands or neglect of duty – applicable to seafarers on Malaysia ships.

- *Maritime Labour Certificate*

Owners of specified categories of ships must hold a valid Maritime Labour Certificate ("Certificate") or Interim Maritime Labour Certificate ("Interim Certificate") (collectively "Certificates") before the ship can commence a voyage. Applications for the Certificate are to be made to the Director of Marine who will issue such Certificate if he is satisfied that (i) the ship has complied with the requirements under Part III; and (ii) the ship has been issued with a Declaration of Maritime Labour Compliance.

The Certificate may be issued for a period not exceeding five years whereas an Interim Certificate may only be issued once for a period not exceeding five months. The Certificates must be displayed in a conspicuous part of the ship, be available for inspection and be produced upon request of interested parties

continued on page 23

THE REVIVAL OF ULTRA VIRES?

Dato' Philip Chan and Lim Jit Qi re-examine the doctrine of ultra vires

THE ULTRA VIRES DOCTRINE

In the context of company law, "*ultra vires*" – "beyond the powers" in Latin – describes a doctrine whereby a company cannot do anything which is beyond the objects clauses contained in its memorandum of association. In the words of Lim Beng Choon J, delivering the judgment of the High Court in *Public Bank Bhd v Metro Construction Sdn Bhd*[1]:

"[A] company's objects as stated in its memorandum cannot be departed from. An attempted departure is as invalid as if the memorandum were a statute of incorporation; it is *ultra vires* the company and cannot be validated by assent of a general meeting of the members or by taking judgment against the company by consent or by estoppel."

The consequence of a transaction being deemed *ultra vires* is severe – the transaction is void regardless of the intention of the parties, therefore the possibility of a revival of the unmitigated doctrine under the Companies Act 2016 ("CA 2016") is of grave concern.

ULTRA VIRES TRANSACTIONS UNDER THE COMPANIES ACT 1965

Under the Companies Act 1965 ("CA 1965"), the *ultra vires* doctrine played a limited role in light of section 20, which provides that no act or purported act of a company and no conveyance or transfer of property to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the conveyance or transfer. By virtue of section 20, an act beyond the objects of the company (which the company has no capacity or power to do) would still be valid, except in the three circumstances set out in section 20(2):

(a) in proceedings against the company by any member of the company or debenture holder or trustee for the debenture holders to restrain the doing of any act or acts or the conveyance or transfer of any property to or by the company;
(b) in any proceedings by the company or by any member of the company against the present or former officers of the company; or
(c) where there is a petition by the Minister to wind up the company.

Section 20(2)(a) reflects the rationale behind the *ultra vires* doctrine, which is to protect shareholders and debenture holders by allowing them to rely on the fact that the company would conduct itself only in accordance with the objects set out in its memorandum of association.[2]

SECTION 35(2)(A) OF THE COMPANIES ACT 2016

Section 20 of CA 1965, which "abolishes the otherwise rigorous effect of the *ultra vires* doctrine",[3] has not been reproduced in CA 2016. The legislators may have thought it unnecessary given that the memorandum and articles of association have been replaced by a "constitution", which is itself optional[4] and which may, but need not necessarily, contain provisions relating to the objects of the company.[5]

Section 21 of CA 2016 provides that a company shall be capable of exercising all the functions of a body corporate and have the **full capacity** to carry on or undertake any business or activity including (a) to sue and be sued; (b) to acquire, own, hold, develop or dispose of any property; and (c) to do any act which it may do or to enter into transactions; and shall have the full rights, powers and privileges for the aforementioned purposes.

However, section 35(2)(a) of CA 2016 provides that if the constitution sets out the objects of a company, "the company shall be restricted from carrying on any business or activity that is not within those objects." Section 35(2)(b) provides that the company shall have "full capacity and power" to achieve such objects, unless the constitution provides otherwise. The implication of sections 21 and 35(2)(a), read together, is that a company **does not** have such "capacity and powers" to undertake matters not within its objects. This is likely to apply to companies incorporated prior to the coming into force of CA 2016, as their existing memoranda of association (if not amended) would contain objects clauses which would become part of their constitution by virtue of section 34(c) of CA 2016, in addition to newly formed companies under CA 2016 which have included objects clauses in their constitutions.

How is section 21 to be reconciled with section 35(2)? The only possible interpretation of section 35(2) is that it is a qualification to the unlimited capacity of companies provided for in section 21 – all companies have unlimited capacity, except companies whose objects are set out in their constitution. To interpret section 35(2) as being subject to section 21 would render section 35(2) redundant, and this could not have been Parliament's intention in including section 35(2) as part of CA 2016.[6] Furthermore, the maxim *generalibus specialia derogant* (special provisions override general ones) implies that the more specific section 35(2) overrides the general section 21.[7]

The restriction section 35(2) imposes on the unlimited capacity of section 21 makes it clear that some element of *ultra vires* has been revived under CA 2016 for companies whose objects are set out in their constitution. Without the saving effect of section 20 of CA 1965, the *ultra vires* doctrine will apply in full force on these companies. Although the Corporate Law Reform Committee (CLRC) had recommended that section 20 of CA 1965 be retained for companies which are required to or have decided to specify their objects,[8] the recommendation has been departed from without explanation.

The elimination of section 20 of CA 1965 is also in contrast to the laws governing companies in several other common law jurisdictions which have preserved provisions granting validity to acts done by a company which are contrary to its constitution or beyond its capacity or powers. In the UK, section 39 of the Companies Act 2006 states that the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution.

The Australian Corporations Act 2001 provides in section 125

DATO' PHILIP CHAN (L)

Philip is the Co-Head of the Banking and Property Practice Group of SKRINE. His practice includes corporate and commercial law.

LIM JIT QI (R)

Jit Qi is a Paralegal in SKRINE. She graduated from Kings' College London and is currently pursuing her Certificate in Legal Practice.

that (a) the exercise of a power by a company is not invalid merely because it is contrary to an express restriction or prohibition in the company's constitution; and (b) an act of a company is not invalid merely because it is contrary to or beyond any objects in the company's constitution. The Singapore Companies Act retains section 25 which is nearly identical to section 20 of our CA 1965.

OBJECTS AND POWERS

"A 'power' is a legal ability to do something. An 'object' is the purpose for which a company exists. Put another way, the objects are the ends while the powers are the means towards those ends."[9] For instance, the object of a shipping company would be to carry out the business of shipping goods, and it is equipped with the power to purchase ships to achieve this object. While the above is intuitively appealing, in practice, the objects of a company could simply be set out as the powers which the company is entitled to exercise, and could be multifarious and worded widely. This approach has been criticised but has nevertheless been accepted.[10] The problem which arises here is whether the exercise of an ancillary power (as opposed to a substantive object) set out in the memorandum, for an object which is not in the memorandum, can be regarded as *intra vires*.

This was the issue considered by the English Court of Appeal in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation and others*.[11] The company in question carried on the business of importing and selling steel in the United Kingdom. One of the objects in its memorandum of association reflected this, but it was also stated in two of the objects that the company had the power to give guarantees or become security for such persons, firms or companies as may seem expedient. The company proceeded to give a guarantee for a purpose not directly related to its steel business, and subsequently the receiver appointed for it alleged that the guarantee was void.

Slade LJ, sitting in the Court of Appeal, framed the question as follows: "Is a transaction which falls within *the letter* of the powers conferred on a company incorporated under the Companies Acts but is effected for a purpose not authorised by its memorandum of association properly to be regarded as being beyond the corporate capacity of the company?"[12]

The learned judge found the answer to be in the negative and stated:

"… if a particular act is of a category which, on the true construction of the company's memorandum, is *capable* of being performed as reasonably incidental to the attainment or pursuit of its objects, it will not be rendered *ultra vires* the company merely because in a particular instance its directors, in performing the act in its name, are in truth doing so for purposes other than those set out in its memorandum. Subject to any express restrictions on the relevant power which may be contained in the memorandum, the state of mind or knowledge of the persons managing the company's affairs or of the persons dealing with it is irrelevant in considering questions of corporate capacity."[13]

Therefore, the exercise of ancillary powers disguised as objects in a company's memorandum of association are *intra vires*, even if the purposes for which they are exercised do not align with the substantive objects in the company's memorandum of association. However, it must be added that, as was the case in *Rolled Steel*, a party may still be precluded from enforcing its rights against the company if that party has knowledge that the powers are being exercised in furtherance of improper purposes.

The *Rolled Steel* judgment also draws an important distinction between transactions which are beyond the company's capacity, and transactions which amount to an abuse of corporate powers. While the former is void, the latter can be ratified by all the shareholders and can confer rights on a third party who dealt with the company in good faith and without notice that the transaction was being entered into in furtherance of improper purposes.[14] This principle was cited with approval in *Executive Aids Sdn Bhd v Kuala Lumpur Finance Bhd*.[15]

DOCTRINE OF CONSTRUCTIVE NOTICE

Apart from reintroducing *ultra vires*, CA 2016 also abolishes the doctrine of constructive notice in relation to the constitution of a company or document which has been registered by the Registrar or is available for inspection at the registered office of the company (section 39 of CA 2016). A similar provision is found in section 25A of the Singapore Companies Act.

Although section 39 does take a step towards protecting third parties dealing with companies, it is important to note that whether a party dealing with the company has notice of the company's objects is irrelevant to the validity of the transaction where the transaction is *ultra vires* in the manner mentioned above. In other words, the abolition of the doctrine of constructive notice does not limit the operation of *ultra vires* under CA 2016.

Therefore, the absence of notice would only protect parties in abuse of corporate powers or lack of authority situations. However, it is doubtful that a party dealing with a company can claim an absence of notice in a situation where it has been provided with a copy of the company's constitution.

CONCLUSION

The coming into force of CA 2016 brings with it a revival of the *ultra vires* doctrine without the saving effect of section 20 of CA 1965. While companies may derive some comfort from the wide language of the objects in their memoranda of association and

continued on page 23

BETWEEN A ROCK AND A HARD PLACE

Kelly Chung discusses the duties of a nominee director under the Companies Act 2016

The term "nominee director" is not defined in the Malaysian Companies Act 2016 ("CA 2016"). The Corporate Law Reform Committee ("CLRC") which was established in 2003 pursuant to the Companies Commission of Malaysia Act 2001 to undertake a comprehensive review of the corporate law in Malaysia between 2003 to 2007, accepted the definition by the Australian Companies and Securities Law Review Committee, which states that the term "nominee directors" refers to *"persons who, independent of the method of their appointment, but in the performance of their office, act in accordance with some understanding, arrangement or status which gives rise to an obligation … to the appointor."*

The status of nominee directorship may pose difficulties to a nominee director as he may be required to balance the interests of, on the one hand, the company on which he sits on the board, and on the other, of the person who nominated him to the board. This may put a nominee director in a position of potential conflict in dealings between the company and his appointor or other persons or entities in which his appointor has an interest.

DEVELOPMENT OF THE LAW IN MALAYSIA

Statutory regulation of the duty of a nominee director was introduced in Malaysia when the Companies (Amendment) Act 2007 came into force on 15 August 2007. A new section 132(1E) ("S.132(1E)") was inserted into the Companies Act 1965 ("CA 1965") which reads as follows –

"A director, who was appointed by virtue of his position as an employee of a company, or who was appointed by or as a representative of a shareholder, employer or debenture holder, shall act in the best interest of the company and in the event of any conflict between his duty to act in the best interest of the company and his duty to his nominator, he shall not subordinate his duty to act in the best interest of the company to his duty to his nominator."

S.132(1E) of the CA 1965 did not break new ground as it merely codified the duty imposed on nominee directors under the common law, which had hitherto been applied by the Malaysian court in *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332.

In this case, an individual, Choo ("Choo"), was appointed as a director of Concrete Engineering Products Bhd ("CEPCO") by certain individuals whom Choo claimed had acquired controlling interest in CEPCO. Subsequent to his appointment, Choo attempted to dispose of CEPCO's core business to its main competitor without the consent of CEPCO's board. According to Choo, this scheme fitted into his appointors' corporate plan which was to replace CEPCO's core business with another business.

The trial judge, James Foong, J, referring to the Singapore case of *Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors* [1994] SLR 282, declared that "*the primary duty of a director is his allegiance to the company, except, if he, as a nominated director and where there is no conflict of interest, then he may take into account the interest of his principal.*"

After considering the facts in detail, the Judge opined that Choo had not acted *bona fide* in the interest of CEPCO nor promoted or advanced CEPCO's interests. His Lordship concluded that Choo's actions as a director throughout this period were solely for the benefit and interest of the group that nominated him to the board of CEPCO. According to the Court, such interest not only conflicted with those of CEPCO but had disastrous consequences on CEPCO as its assets were nearly stripped and its core business was on the verge of being annexed by its main competitor. In light of the foregoing, the learned Judge concluded that Choo had been in breach of his fiduciary duty to CEPCO.

Subsequent to the *Industrial Concrete Case*, two cases came up for consideration by the Malaysian Courts after the enactment of S.132(1E) of the CA 1965.

The first was *Sundai (M) Sdn Bhd v Masato Saito & Ors* [2013] 9 MLJ 729. The first defendant, Saito ("Saito") was a director and principal of the plaintiff which carried on business of an education centre for a Japanese education programme in Malaysia. Saito was also the nominee of Sundai Japan, the shareholder of the plaintiff.

Saito conspired with various individuals in a scheme to set up a rival school and carried out various actions, such as using the plaintiff's confidential information to cause damage to the plaintiff and to further the objectives of the rival school.

The Court held that Saito was bound by S.132(1E) of the CA 1965 and had a duty to act in the best interest of the plaintiff. The Court observed that when there is a conflict between his duty to the plaintiff and his duty to his nominator, Saito should not subordinate his duty to act in the best interest of the plaintiff to his duty to his nominator. Although the Court held that Saito had breached his duty to the plaintiff, this was more a case of breach of a director's general duty to act in the best interest of the company under section 132(1) of the CA 1965 rather that a case of a conflict between the duty of a director to act in the interest of the company and his duty to his nominator as Sundai Japan was not involved in the establishment of the rival school and was as much a victim of Saito's actions as the plaintiff.

In *Abdul Rahim bin Suleiman & Anor v Faridah bt Md Lazim & Ors* [2016] MLJU 598, the first respondent was a shareholder of a company and also the administrator for an estate of which she and her siblings were beneficiaries ("Estate"). The Court of Appeal proceeded on the basis that the first respondent was appointed as a nominee director of the company by the Estate.

The company had intended to bring a claim of approximately RM1.4 million against the Estate. However, a settlement agreement was entered into for approximately one-half of the amount claimed, which the first respondent had voted in favour of. It was found that the settlement was clearly intended to benefit the beneficiaries of the Estate and was not in the best interest of the company. The Court decided that the first respondent could not, on the one hand as the administrator of the Estate, make a proposal for the benefit of the Estate and on the other hand, as

KELLY CHUNG KEE LEE

Kelly is an Associate in the Corporate Division of SKRINE. She graduated from the University of Bristol in 2012.

a director of the company, accept her own proposal. As such, it was held that the first respondent had acted in contravention of S.132(1E) as she had subordinated her duty to the company to her duty to her nominator.

Subsequent to these cases, the CA 2016 came into operation on 31 January 2017. As section 217(1) of the CA 2016 is identical in terms with the now repealed S.132(1E) of the CA 1965, except for the use of the word "member" in place of "shareholder", the principles laid down by the Malaysian Courts in *Sundai (M) Sdn Bhd* and *Abdul Rahim bin Suleiman* remain applicable.

DEVELOPMENTS IN OTHER JURISDICTIONS

In these days when it is not unusual for a company to have shareholders which are companies or to be formed as a joint-venture between other companies, the strict approach of requiring a nominee director to act in the best interest of the company in the event of a conflict between his duty as a director and his duty to his nominator has been diluted in certain jurisdictions through the introduction of the adjusted fiduciary duty which in certain instances, allows a nominee director to act in the best interests of his nominator.

New Zealand

The adjusted fiduciary duty has been adopted in the New Zealand Companies Act 1993 ("NZCA"). Section 131 of the NZCA provides that a director of a company that is a wholly-owned subsidiary, may if expressly permitted by the constitution of the company, act in a manner which is in the best interests of the holding company even though it is not in the best interest of the subsidiary. Similarly, a director of a joint venture company, may if expressly permitted by the constitution of the company, act in a manner which is in the best interests of a shareholder or the shareholders even though it is not in the best interest of the subsidiary.

The NZCA also permits a director of a company that is a subsidiary (but not a wholly-owned subsidiary) to act in the best interests of the holding company even though it is not in the best interest of the subsidiary, provided that it is expressly permitted to do so by the constitution of the company and the prior agreement of the shareholders (other than its holding company) is obtained.

Australia

The adjusted fiduciary duty has been adopted in Australia only in respect of a company that is a wholly-owned subsidiary of another. Section 187 of the Australian Corporations Act 2001 ("ACA") provides that a director of a wholly-owned subsidiary will be taken to have acted in the best interest of the subsidiary if the following conditions are satisfied: (i) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company; (ii) the director acts in good faith in the best interest of the holding company; and (iii) the subsidiary is solvent at the time when the director acts and does not become insolvent because of the director's act.

Notwithstanding the limited recognition of the special position of nominee directors by statute, the Australian courts have long accepted that it is unrealistic and in some cases, impossible, to expect nominee directors to approach every company problem with a "completely open mind". The case of *Re Broadcasting Station 2GB Ltd* [1964-65] NSWR 1648 sets out the general principle that a nominee director is entitled to take into account the interests of his appointing shareholder as long as the director honestly believes those interests are consistent with the interests of the company as a whole and such belief is not unreasonable.

In *Re Broadcasting Station*, Jacobs J rejected the idea that nominee directors could not take into account the interests of their appointors. Instead, he took the view that there would only be a violation of the directors' duties if the directors had knowingly sacrificed the interests of the company while acting in accordance with the wishes of their appointor. According to Jacobs J, to require a higher standard of nominee loyalty would be to "*ignore the realities of company organisation* [*and*] *... make the position of a nominee or representative director an impossibility.*"

The United Kingdom

The position in the UK appears to place greater emphasis on a company's wider interests rather than focus solely on the interests of the shareholders. Section 172(1) of the UK Companies Act 2006 ("UKCA") allows a director of a company to act in the way he considers, in good faith, to be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so, may have regard to various factors, such as (i) the likely consequences of any decision in the long term; (ii) the interests of the company's employees; (iii) the desirability to maintain a reputation for high standards of business conduct; and (iv) the need to act fairly as between members of the company.

Indeed, in *Re Neath Rugby Limited* [2009] EWCA Civ 291, the UK Court of Appeal held that a nominee director could take the interests of his nominator into account without being in breach of his duties to the company, provided that his decisions as a director were taken in what he genuinely considered to be the best interests of the company.

Further, section 175(4)(b) of the UKCA allows a director to act in circumstances where there would otherwise be a conflict of interest if the other directors have authorised such action. In addition, section 180(4)(b) of the UKCA allows the company's articles of association to authorise certain conflicts of interest whereby any acts or omissions carried out in accordance with

continued on page 13

BURSA MALAYSIA'S PROPOSED (NEW) MARKET

Chee Kheong and Hui Jin highlight some salient features of Malaysia's proposed new share market

On 2 September 2016, Bursa Malaysia ("Exchange") issued Consultation Paper No. 1/2016 to seek public feedback on a proposed concept for a new securities market, tentatively called the "(New) Market" ("New Market").

This was followed by the issuance of Consultation Paper 3/2016 on 8 November 2016 to seek further feedback on the proposed regulatory framework for the New Market, including the proposed listing requirements ("NMLR") and the proposed amendments to the Rules of Bursa Malaysia Securities Berhad ("BMS Rules") and the Rules of Bursa Malaysia Depository Sdn Bhd to accommodate the New Market.

The consultation period for Consultation Papers No. 1/2016 and 3/2016 closed on 2 October 2016 and 30 November 2016 respectively.

This article discusses the salient features of the New Market as set out in the proposed NMLR and the proposed amendments to the BMS Rules. Some of these features could be modified after the Exchange considers the feedback received on the consultation papers.

> **"The New Market seeks to provide a platform for Malaysian Small and Medium Enterprises ("SMEs") to raise capital"**

MAIN FEATURES

The New Market seeks to provide a platform for Malaysian Small and Medium Enterprises ("SMEs") to raise capital. It will operate under an adviser-driven framework and is unique in that it will be a qualified market where only sophisticated investors will be allowed to trade.

A "sophisticated investor" is an investor who falls within the categories set out in Parts I of Schedules 6 and 7 of the Capital Markets and Services Act 2007 ("CMSA"). These include a high-net worth entity whose total net assets exceed RM10 million and a high-net worth individual whose total net personal assets or net joint assets with his spouse exceed RM3 million or whose gross income, or joint gross income with his spouse, in the preceding 12 months exceed RM300,000 and RM400,000 respectively.

As the New Market will be an "alternative market", an applicant who seeks a listing on the New Market does not require the prior approval of the Securities Commission Malaysia ("SC"). Instead, the applicant will deposit an information memorandum with the SC and concurrently submit its listing application to the Exchange. The discretion as to whether to approve or reject the application rests solely with the Exchange.

In considering an application, the Exchange will focus on areas of corporate governance, conflicts of interest and public interest but will not assess the suitability of an applicant for listing on the New Market.

ADMISSION REQUIREMENTS

General

To be eligible for admission to the New Market, an applicant must be a public company incorporated in Malaysia. No minimum quantitative requirements in relation to profit or operating history are necessary.

Suitability for Listing

The applicant must be considered suitable for listing in the assessment of its Approved Adviser.

> **"it will be a qualified market where only sophisticated investors will be allowed to trade"**

Identifiable Core Business

The applicant must have a clearly identifiable core business, that is a business which provides the principal source of operating revenue or after-tax profit and which comprises the principal activities of the applicant and its subsidiaries. Among others, an applicant which is an investment holding corporation with no immediate or prospective business operations within its group and an incubator are not considered as suitable for listing.

Shareholding spread

At least 10% of the total number of shares for which listing is sought must be held by public shareholders at the time of admission.

Types of securities

Only ordinary shares may be listed on the New Market. A listed corporation is not prohibited from issuing preference shares, convertible securities, debt securities or other securities but these may not be listed. Nevertheless, any ordinary shares which are to be issued upon conversion of convertible securities must be listed. The application for listing and quotation of the shares which are to be issued upon conversion must be submitted to the Exchange before the convertible securities are issued.

MORATORIUM

The promoters are not permitted to dispose of any of their

KOK CHEE KHEONG (L)

Chee Kheong is a Partner in the Corporate Division of SKRINE.

TIONG HUI JIN (R)

Hui Jin is an Associate in the Corporate Division of SKRINE. She graduated from the University of Reading in 2012.

shares for 12 months after the date of admission. Thereafter, the promoters must hold, in aggregate, at least 45% of the share capital held by them as at the date of admission. The NMLR does not specify an expiry date for the latter moratorium or any minimum percentage of shares which must be held by the promoters on the date of admission.

METHODS OF OFFERING

An applicant may issue new shares by way of an excluded issue, that is, an issue to accredited or high-net worth investors listed in Schedule 7 of the CMSA or an issue which is prescribed to be an excluded issue by the Minister of Finance under section 230(1)(b) of the CMSA. This may be effected through a public offer, placement or book building or a combination of these methods.

If an applicant has already fulfilled the shareholding spread requirement before submitting an application for admission, it may seek listing by way of introduction.

> “No minimum quantitative requirements in relation to profit or operating history are necessary”

An offer for sale of existing shares by promoters is not allowed unless (i) the applicant has generated one full financial year of operating profit based on its latest audited financial statements; or (ii) the promoters are corporations undertaking venture capital or private equity activities and are registered with the SC. Furthermore, in either event, the listed corporation must be able to comply with the moratorium requirements discussed above.

To protect investors, all subscription moneys received under a primary offering must be placed in a trust account which is to be opened with a licensed financial institution and jointly operated by the applicant and a custodian who may be the Approved Adviser, a placement agent or an issuing house appointed by the applicant. The subscription moneys will be released to the applicant only upon the listing of its shares on the New Market.

ADVISER-DRIVEN FRAMEWORK

The New Market will operate under an adviser-driven framework. Two categories of advisers will be introduced – an Approved Adviser and a Continuing Adviser. Both categories of advisers must be a corporate finance adviser which is licensed by the SC.

An applicant must retain the services of a Continuing Adviser for at least three full financial years after its admission to the New Market or at least one full financial year after it has generated operating revenue, whichever is the later. The Approved Adviser who submitted the application for admission of the applicant to the New Market must act as its Continuing Adviser for at least one full financial year following the applicant's admission. Non-compliance with the above requirements may result in the suspension of trading and the delisting of the listed corporation.

An Approved Adviser is authorised to undertake initial listing activities and post-listing activities whereas a Continuing Adviser may only undertake post-listing activities.

Initial listing activities include (i) assessing the suitability of an applicant for admission to the New Market; (ii) participating actively in the preparation of the admission document; and (iii) ensuring that the due diligence process for the admission document complies with the relevant guidelines issued by the SC.

Post-listing activities include (i) maintaining regular contact with the listed corporation; (ii) advising and providing guidance to the listed corporation and its directors as to their obligations under the NMLR and ensuring their compliance with all relevant laws and guidelines; (iii) reviewing any document to be released by the listed corporation to the public as well as any circulars to be issued to its shareholders prior to their release; and (iv) assisting a listed corporation in any post-listing corporate proposals for which an adviser is required under the NMLR, including reviewing the adequacy of the disclosure document, ensuring that the execution of the proposal complies with the NMLR and all relevant laws and guidelines and that any difference in effect of the proposal on minority shareholders (as compared to other shareholders) is clearly disclosed.

CONTINUING REQUIREMENTS

A listed corporation will be subject to various continuing obligations after it has been listed. Some of these requirements are discussed below.

Corporate Disclosure Policy

The listed corporation must ensure timely, complete and accurate disclosure of material information to investors in order to maintain a fair and orderly market for its shares. The dissemination of material information must be thorough and non-selective.

Immediate Announcements

The NMLR requires a listed corporation to make an immediate announcement in respect of prescribed matters, including (i)

continued on page 12

BURSA MALAYSIA'S PROPOSED (NEW) MARKET

continued from page 11

any change in its chief executive or composition of the board of directors or auditors; (ii) any proposed material diversification in its operations; (iii) any change in control of the listed corporation; (iv) any deviation of 25% or more between its announced unaudited financial results and the audited financial results; (v) commencement of winding-up proceedings; and (vi) any modified opinion or material uncertainty relating to going concern in its auditors' report.

TRANSACTIONS

Non-related Party Transaction

For non-related party transactions ("Non-RPT"), an immediate announcement must be made if the percentage ratio is 10% or more. Shareholders' approval is required for a Non-RPT where the percentage ratio is 25% or more.

Related Party Transaction

A listed corporation must make an immediate announcement of a related party transaction ("RPT") if the percentage ratio is 5% or more and obtain its shareholders' approval if the percentage ratio is 10% or more.

The directors of the listed corporation, excluding interested directors, are required to ensure that a RPT is in the best interests of the listed corporation, fair, reasonable, on normal commercial terms and not detrimental to the interest of the minority shareholders.

Interested parties are not permitted to vote on the resolution in respect of an RPT.

General Exceptions

Transactions which involve a value of RM250,000 or less are exempted from the requirement to make an announcement in relation to an RPT or Non-RPT.

Further, the NMLR also lists four categories of transactions which are not normally regarded as RPTs. This list is significantly shorter than the corresponding lists in the Main Market Listing Requirements ("MMLR") and the ACE Market Listing Requirements ("ALR").

Interestingly, there are no provisions in the NMLR that deal with recurrent RPTs, i.e. recurrent transactions of a revenue or trading nature which are necessary for the day-to-day operations of a listed corporation or its subsidiaries.

Significant Change in Business Direction or Policy

A transaction that will result in a significant change in the business direction or policy of a listed corporation may only be carried out with the approval of its shareholders. The listed corporation must, prior to the terms of the transaction being agreed upon, appoint an Approved Adviser for the purposes set out in item (iv) of the post-listing activities described above.

Major Disposal

The NMLR also requires a listed corporation to obtain the approval of its shareholders before undertaking a "major disposal", that is, a disposal of all or substantially all of the corporation's assets which may result in the listed corporation being no longer suitable for continued listing on the New Market. The threshold for approving a major disposal is 75% of the total number of issued shares held by the shareholders present and voting on the resolution.

Independent Adviser

Unlike the MMLR and the ALR, there is no requirement under the NMLR for a listed corporation to appoint an independent adviser to, *inter alia*, opine on the fairness and reasonableness and whether to vote in favour of a proposed RPT that requires shareholders' approval or of a "major disposal". Further, the Continuing Adviser will not be required under Rule 4.13 of the NMLR to provide specified advice in respect of these transactions as the obligation under that rule only arises where the NMLR expressly requires an Adviser for a transaction. While this may be viewed as a shortcoming in the interest of investor protection, especially in relation to RPTs, the Exchange may have felt that such protection is not critical, given that the investors on the New Market are primarily sophisticated investors.

TRADING AND RELATED MATTERS

Method of trading and settlement

The shares of a listed corporation will be "prescribed securities" under the Securities Industry (Central Depositories) Act 1991. Accordingly, all listed shares of the listed corporation will be deposited with Bursa Malaysia Depository Sdn Bhd and be transferred by way of crediting and debiting the securities accounts of the buyer and seller of the shares.

Clearing and settlement of the trade will be carried out in accordance with the BMS Rules and the Rules of Bursa Malaysia Securities Clearing Sdn Bhd on a T+3 basis.

Restriction on trading

Subject to the exception mentioned below, only sophisticated investors will be allowed to trade on the New Market. A duty is imposed on Participating Organisations to ensure that their clients who wish to trade on the New Market satisfy the foregoing requirement.

An existing member of a listed corporation will be permitted to sell his shares on the New Market but will not be allowed

to purchase more shares on the New Market if he is not a sophisticated investor.

Margin Financing and Day Trading

Participating Organisations are not allowed to provide margin financing for shares listed on the New Market. However, discretionary financing under Rule 7.31 and other forms of financing (not being similar to margin financing or discretionary financing) under Rule 7.32 of the BMS Rules are permitted.

Day trading of shares listed on the New Market is not permitted.

Direct Business Transactions

Direct Business Transactions (DBT) may be carried out in respect of shares listed on the New Market without approval of the Exchange.

> **"Participating Organisations are not allowed to provide margin financing for shares listed on the New Market"**

Securities Borrowing and Lending and Short-Selling

Securities Borrowing and Lending, Permitted Short-Selling and Regulated Short-Selling are not permitted for shares listed on the New Market.

Graduation

A company listed on the New Market may seek a transfer to the ACE Market if it satisfies all the requirements for admission to the ACE Market.

CLOSING REMARKS

The New Market is expected to be launched in the second quarter of 2017. It will provide another avenue for fundraising by SMEs, in addition to the P2P Financing and Equity Crowd Funding platforms operated by recognised market operators registered under section 34 of the CMSA. Interesting times lie ahead for SMEs who seek alternative means of financing their business.

Writers' email: **kck@skrine.com & tiong.hui.jin@skrine.com**

BETWEEN A ROCK AND A HARD PLACE

continued from page 9

those articles would not be a breach of a director's general duties.

THE CLRC'S VIEWS

Having considered the provisions in the NZCA and ACA, the CLRC, in Consultative Document No. 5 (Clarifying and Reformulating the Directors' Role and Duties) issued in August 2006, nevertheless took the view that nominee directors must be held to a strict fiduciary duty to act in the best interest of the company. The CLRC acknowledged that this position is "*not in line with commercial reality and may not be facilitative to the business needs of companies*", but took the stance that the facilitation of business should not be at the expense of good corporate governance.

The CLRC set out two grounds for adopting the strict approach. First, it would assist nominee directors to understand the nature and extent of their duty. Second, the CLRC was concerned that the adjusted fiduciary duty may not be effectively enforced due to the difficulty in determining or defining with certainty the identity of nominee directors.

Although the CLRC accepted that the strict fiduciary duty may be adjusted in the case of a wholly-owned subsidiary by reason that there "*would be no minority shareholders' interests which needs protection*", this exception was not incorporated into S.132(1E) of the CA 1965 nor section 217(1) of the CA 2016.

CONCLUSION

The strict fiduciary duty approach has attracted some criticism – some have argued that it infringes market freedom by denying the shareholders the discretion to vary the application of the rule. Proponents of this school of thought contend that shareholders should be permitted to make their own arrangements in relation to their corporate structure so long as the interests of minority shareholders are protected. For example, Mohammad Rizal Salim and Teh Tai Yong in "*Market Freedom or Shareholders' Protection? A Comparative Analysis of the Duties of Nominee Directors*", International Journal of Law and Management, Vol. 50 No. 4, 2008, pp. 168-188, took the view that "*where the shareholders have agreed in a shareholders or joint venture agreement to adjust the fiduciary duties of directors so that the directors may act in the best interests of the nominator, there is no reason why this should not be allowed.*"

Notwithstanding the arguments by the proponents of the adjusted fiduciary duty, it is clear that unless and until section 217(1) of the CA 2016 is amended, the CA 2016 imposes a strict fiduciary duty on a nominee director to not subordinate his duty to act in the best interest of the company to his duty to his nominator when a conflict arises between these interests.

Writer's e-mail: **kelly.chung@skrine.com**

THERE'S NO SUCH THING AS A FREE RIDE

Richard Khoo and Rachel Chiah discuss the legal issues arising from ride-hailing services

Need a ride? Take an Uber!

Ride-hailing services such as Uber and Grab began as a novel and attractive alternative, but are a norm today. Although lauded as a solution to public transport woes, do they also present a new problem?

WHAT ARE RIDE-HAILING SERVICES?

Ride-hailing services are online platforms through which a registered user can check the availability of cars and the estimated fare of a ride before requesting for the transportation service ("Services"). This request would then be accepted by a registered driver ("Drivers"). The platform allows both parties to monitor the progress of the vehicle. Payment, either by way of cash or credit card, is made upon completion of the ride.

The Services are appealing for being quick, reasonably priced and accessible. All one needs is the respective ride-hailing service application on his smartphone and access to the Internet.

UNCHARTED TERRITORY

The Services differ structurally and operationally from traditional forms of public transportation services. Nonetheless, the Services are similar in that they provide transportation services to members of the public. As such, many have argued that they should be regulated.

Lawmakers and policy-makers did not, and could not have, envisaged a concept like the Services when making and passing the current applicable laws. The authorities are thus presented with a conundrum: how do you regulate something when you do not have anything to regulate it with?

This article examines several key issues arising from the lack of regulation of the Services in Malaysia and the measures proposed by the Malaysian Government to deal with them.

Licence to operate

The Malaysian Land Public Transport Commission ("SPAD") has stated that although the Services are legal businesses, the manner in which they operate is not.

Pursuant to section 16 of the Malaysian Land Public Transport Act 2010 ("LPTA"), operators or providers of public service vehicle services are required to hold an operator's licence. It is important to note that operators or providers include a person who (i) uses or drives a public service vehicle himself; or (ii) employs one or more persons to use or drive a public service vehicle.

"Public service vehicle services" refers to the carriage of passengers by means of public service vehicles, whether for hire, reward, or any other valuable consideration. Read in conjunction with the First Schedule of the LPTA (which specifies the types of public service vehicles), this requirement would apply to operators or providers of taxi, bus and car-hire services.

Transport under the Services is typically in the form of private cars, which are not a type of public service vehicle. Accordingly, operators or providers of the Services are not required to have an operator's licence.

Many, in particular taxi drivers, have argued that the Services should not be allowed to bypass licence requirements imposed on other forms of public transport. That, of course, would be unfair to the latter. However, as the Services are not subject to any conditions of a licence, the greater concern is that the monitoring and supervision of the authorities is far less effective, if not absent altogether. Operators and providers of the Services seemingly need not comply with the requirements applicable to regulated public transportation services.

Licence to drive

Another point to consider would be the Drivers' licence for driving. Drivers, who use their personal vehicles, would presumably hold a driving licence for the use of motor vehicles as required under section 26 of the Malaysian Road Transport Act 1987 ("RTA").

For driving or conducting a public service vehicle, a vocational licence is required under Section 56 of the RTA. The Drivers' use of their vehicles for providing transportation services to members of the public suggests that it may be necessary for them to obtain a vocational licence. It is pertinent to note that the Malaysian Ministry of Transport has voiced its intention to require the Drivers to obtain vocational licences.

As stated earlier, public service vehicles do not include private vehicles. Hence, Section 56 of the RTA, as presently worded, does not apply to the Drivers who use their own vehicles for providing public transportation services. The question as to whether it should be applicable is a difficult one to answer. It is clear that the intention behind having different types of licences is due to the different uses of vehicles. Personal use is a separate matter from providing public transport. Drivers, therefore, should be licensed appropriately.

On the other hand, would requiring a vocational license be a redundant exercise? This appears to be the stance taken by the Drivers, who are of the view that their licence for the use of their motor vehicles is sufficient.

Inspection of vehicle

The Motor Vehicles (Periodic Inspection, Equipment and Inspection Standard) Rules 1995 require public service vehicles to be inspected periodically at PUSPAKOM inspection centres. Save for newly manufactured public service vehicles which are to be inspected annually, inspections are to be carried out once in every six months. If a vehicle fails to meet the stipulated inspection standards, it must undergo a re-inspection.

It is obvious why public service vehicles are subject to periodic inspections. Safety is naturally a priority when it comes to vehicles used for public transport. This is due to the frequency in which such vehicles are used as well as the number of passengers

RICHARD KHOO BOO HIN (L)

Richard is a Partner in the Construction and Engineering Practice Group of SKRINE. His main practice area is advising on and drafting of construction and engineering contracts.

RACHEL CHIAH (R)

Rachel is an Associate in the Construction and Engineering Practice Group of SKRINE. She graduated from the University of Nottingham in 2013.

being carried. As the risk of accidents or collisions would be correspondingly higher, steps must be taken to minimise the risk of injury to innocent passengers who have no control over the condition of the vehicles.

By definition, vehicles used by Drivers are not public service vehicles. Fundamentally, it is irrefutable that they are or should be deemed as such. Thus, for the purpose of ensuring the safety of passengers, it would be prudent to require Drivers to have their vehicles inspected regularly.

Insurance for passengers

A worry that has cropped up amongst consumers of the Services is the insurance coverage for the vehicles being used. This is because the insurance taken up by Drivers for their vehicles would be for private vehicles rather than commercial vehicles. Coverage of third party liability would thus be less extensive if not lacking altogether. There is therefore the possibility that passengers may not be insured against personal injuries sustained in the course of using the Services.

This boils down once more to the Drivers using their vehicles not only for personal use, but also for providing the Services. Consumers of public transportation services should be adequately protected from the possible risks arising from the use of such Services.

The Deputy Minister of Transport has stated that the Government of Malaysia intends to make it compulsory for Drivers to purchase commercial vehicle insurance. Additionally, operators of the Services seem well aware of the need to assuage consumers' fears. For instance, Grab recently announced that it had purchased extensive personal accident insurance coverage for both its Drivers and the passengers.

Compliance costs

The additional requirements imposed on operators of public service vehicle services have led to an outcry by the operators of these services that the operators of the Services and the Drivers have an unfair advantage as they are not subjected to the cost of complying with the legal requirements imposed on operators of public service vehicle services.

PULLING THE BRAKES

As a matter of public policy, regulation is essential for both the economy and society. The Services, which presently sit outside the scope of applicable laws, cannot be an exception to the rule. It is to be noted that in August 2016, SPAD announced that the Cabinet had approved its proposed Taxi Industry Transformation Programme. One of the proposed reforms in the Taxi Industry Transformation Programme is the regulation of the Services by way of amending the LPTA.

On 4 April 2017, the Commercial Vehicles Licensing Board Act (Amendment) Bill 2017 and the Land Public Transport (Amendment) Bill 2017 (collectively, the "Bills") were presented to the House of Representatives of the Malaysian Parliament for the first reading.* The significant amendments set out in the Bills are considered below.

(1) A definition "e-hailing vehicle" is introduced and refers to "*a motor vehicle … used for the carriage of persons on any journey in consideration of a single or separate fares … facilitated through an electronic mobile application …*" The Drivers' vehicles would fall within such a definition.

(2) In connection therewith, e-hailing vehicles will be classified as public service vehicles. The Drivers' vehicles would therefore be subject to the standards and requirements imposed on public service vehicles. This would require the Drivers to submit their vehicles for periodic inspections and take appropriate insurance cover for their passengers.

(3) An operator or provider of an "intermediation business" will be required to obtain a licence for such business. "Intermediation business" is defined as "*the business of facilitating arrangements, bookings or transactions for the provision of land public transport services … for any valuable consideration …*" The introduction of this amendment will result in operators and providers of the Services having to obtain, and be subject to the conditions of, a licence. In the event the operators or providers fail to comply with this licence requirement, they will be liable to a fine or imprisonment or both.

The amendments set out in the Bills are clearly aimed at regulating the Services and as a consequence thereof, levelling the playing field between operators of public service vehicles and the operators and providers of the Services. At the time of writing however, the Bills have yet to be presented for their second reading. As the Bills are tabled by the Government, it is likely to be a matter of time before the proposed amendments become law.

CONCLUSION

In Singapore, regulation of the Services has already been introduced by way of amendments to the Singapore Road Traffic Act. The Singapore Transport Minister has stated that while the regulations are intended to protect consumers' interests and safety, they also allow for the growth of the point-to-point transport industry. Evidently, a balance has to be struck so that the introduction of regulation does not hamper socio-economic development.

continued on page 23

COURT RULES IN FAVOUR OF HOUSE

Syafinaz explains a case on the registration of a foreign judgment for gambling debts

BACKGROUND FACTS

On 26 March 2014, Resorts World At Sentosa Pte Ltd ("RWS") filed a writ of summons and statement of claim against Lim Soo Kok ("Lim") in the Singapore High Court. After the cause papers had been served by substituted service on Lim and the time prescribed for entering an appearance had lapsed, RWS obtained a judgment in default against Lim on 8 December 2014 ("Singapore Judgment").

The Singapore Judgment was registered by an order of the High Court of Malaya ("Order for Registration") on 12 February 2015 under section 4 of the Reciprocal Enforcement of Judgments Act 1958 ("REJA"). The Order for Registration required Lim to pay the sum of RM1,530,212.48 (equivalent to S$572,363.00) with interest and costs to RWS.

The Order for Registration together with the Notice of Registration were personally served on Lim on 6 May 2015.

> **" a distinction must be drawn between suing on a gaming debt and the registration and enforcement of a valid foreign judgment "**

APPLICATION TO SET ASIDE THE ORDER

Lim filed an application to set aside the Order for Registration on the ground that the enforcement of the Singapore Judgment is contrary to public policy in Malaysia under section 5(1)(a)(v) of REJA as the Singapore Judgment is based on a gambling debt incurred in RWS's casino in Singapore ("Setting Aside Application").

On the other hand, RWS contended that the registration of a foreign judgment obtained in relation to a lawful gaming transaction in Singapore is not contrary to public policy under section 5(1)(a)(v) of REJA. RWS also contended that the legal position differed from one where a civil suit is filed in Malaysia to enforce a gaming debt.

The High Court agreed with RWS that a distinction must be drawn between suing on a gaming debt and the registration and enforcement of a valid foreign judgment under REJA. The Judge referred to the case of *Jupiters Ltd (Trading as Conrad International Treasury Casino) v Gan Kok Beng & Anor* [2008] 7 CLJ 715 where Vincent Ng, J held as follows:

"… the applicant had merely applied to register a judgment legally obtained in England pursuant to the Reciprocal Enforcement of Judgments Act 1958, but had not sought to enforce a cause of action founded on a gaming or wagering contract – in which case the Lex Fori of the country where the cause of action is sought to be litigated would have to prevail. Surely, it would be entirely consistent with our public policy for our courts to accord due recognition to any reciprocal agreements between our country and another … In Ritz Hotel Casino, the defendants ought to be precluded from going behind the English judgment by submitting on our public policy. Ritz Hotel Casino and Aspinall Curzon ought to be distinguished from this case as those two cases only concern the registration of foreign judgments that has not only been provided for but sanctioned by statute, which enjoins our courts to allow registration if the papers are in order."

The learned judge noted that decision of the High Court in *The Ritz Hotel Casino Ltd & Anor v Datu Seri Osu Hj Sukam* [2005] 3 CLJ 390 to set aside the registration of a foreign judgment for a gambling debt on ground that the registration contradicted Malaysia's public policy had been overturned by the Court of Appeal.

> **" RWS is availing itself to the right of reciprocity of registering a valid and lawful judgment of a foreign court "**

The High Court then dismissed Lim's Setting Aside Application on, *inter alia*, the following grounds:

(1) RWS was availing itself of the right of reciprocity of registering a valid and lawful judgment of a foreign court as expressly provided under REJA;

(2) RWS was not filing a civil suit to enforce the gaming debt; and

(3) When a gaming transaction is lawful in the foreign country from which the judgment originates, the registration and enforcement of the foreign judgment is not against public policy in Malaysia.

Dissatisfied with the decision of the High Court, Lim appealed to the Court of Appeal.

THE COURT OF APPEAL'S DECISION

On 19 January 2017, the Court of Appeal unanimously dismissed Lim's Appeal. The Court of Appeal held that there was no appealable error and agreed with the finding of the High Court that the registration and enforcement of the Singapore Judgment was not against public policy in Malaysia.

COMMENTARY

The High Court in this case was correct in drawing a distinction

SYAFINAZ VANI

Syafinaz is a Senior Associate in the Dispute Resolution Division of SKRINE. She holds a Bachelor of Laws degree from the University of London and a Master of Laws degree from University College London.

between a case where a party commences legal proceedings in Malaysia based on a cause of action that is founded on a gaming debt, as in *Jupiters*, and one that involves the registration and enforcement of a foreign judgment obtained with respect to a gaming debt under REJA, as in *The Aspinall Curzon Ltd v Khoo Teng Hock* [1991] 2 MLJ 484.

Jupiters Ltd

In *Jupiters Ltd*, the plaintiff commenced legal proceedings in Malaysia on six dishonoured cheques issued by the defendant to the plaintiff to settle debts incurred while gambling at a licensed casino operated by the plaintiff in Australia.

As the cause of action arising from the dishonouring of the six cheques was being litigated in Malaysia, the *lex fori*, i.e. the law of the country in which the action is brought, would be Malaysian law.

> **“ the registration and enforcement of the Singapore Judgment is not against the public policy of Malaysia ”**

The court noted that section 26 of the Civil Law Act 1956 and section 31 of the Contracts Act 1950 stipulate, *inter alia*, that gaming or wagering agreements are null and void. As the cheques were issued to settle gambling losses owing to the plaintiff, the court held that they were given for no consideration by virtue of those statutory provisions.

Accordingly, the High Court ruled that the plaintiff's claim against the defendant could not be sustained.

Aspinall Curzon

The defendant in this case appealed against the decision by a senior assistant registrar to register a judgment obtained by the plaintiff in England against him. The defendant said that the money which he owed the plaintiff was in respect of cheques that he had issued for moneys which he had lost while gambling at the plaintiff's casino.

The defendant contended that the cheques were given for an illegal consideration and the contract was therefore void under section 24 of the Contracts Act 1950. The defendant also argued that the judgment should not be enforced as it was against public policy of Malaysia and cited section 31 of the Contracts Act, section 26 of the Civil Law Act and section 5(1)(a)(v) of REJA in support of this contention.

The plaintiff disputed the defendant's contention. According to the plaintiff, the defendant had issued the cheques to obtain cash and gaming chips so that he could gamble at the plaintiff's casino. The plaintiff submitted that even if the judgment was for a gambling debt, the gambling took place in the United Kingdom in a casino licensed under the UK Gambling Act 1968.

The Judge said that the cheques had been issued in exchange for cash and gaming chips for the purposes of gaming at a licensed gaming casino. Therefore, it was not for an unlawful purpose under the laws of England and the enforcement of the UK judgment could not be considered as being contrary to public policy in Malaysia. The defendant's appeal was dismissed.

THE LAST ROLL OF THE DICE?

Although Lim has failed on two occasions to set aside the registration of the Singapore Judgment, the matter has not ended. Lim has sought leave to appeal to the Federal Court on the question, *"Whether on a true construction of Section 5(1)(a)(v) of the Reciprocal Enforcement of Judgment Act 1958, the enforcement of a foreign judgment based on a gambling debt is contrary to public policy of Malaysia."*

Lim's application for leave is set to be heard in May 2017. If leave is granted, Lim may yet have one last roll of the dice in this game of high stakes.

Writer's email: **syafinaz.vani@skrine.com**

Note: The decision of the High Court is reported as Resorts World At Sentosa Pte Ltd v Lim Soo Kok [2017] 1 CLJ 363. The Court of Appeal decision is unreported.

AN OVERVIEW OF THE DEVELOPMENTS IN PERSONAL DATA PROTECTION

Jillian Chia traces the developments in data protection laws in Malaysia since 2013

It has been just over three years since the Personal Data Protection Act 2010 ("PDPA") came into operation on 15 November 2013.

The PDPA is Malaysia's first data protection legislation of general application. It applies to "data users", that is, any person who collects, uses, discloses or processes personally identifiable data in a commercial transaction. The PDPA is administered by the Department of Personal Data Protection ("PDP Department") under the purview of the Ministry of Communications and Multimedia.

CHRONOLOGY OF DEVELOPMENTS

2014

Along with the implementation of the PDPA, various subsidiary legislation and instruments were issued, such as the Personal Data Protection Regulations 2013 which provided guidance on the consent, security, data retention and data integrity requirements.

"The focus … during the first year … was on registration of data users and awareness"

The Personal Data Protection (Class of Data Users) Order 2013 and the Personal Data Protection (Registration of Data Users) Regulations 2013 set forth the requirements and procedures for registration of specified categories of data users. Classes of data users who had to be registered included those falling within the following sectors: Communications, Banking and Financial Institutions, Insurance, Healthcare, Tourism and Hospitalities, Transportation, Education, Direct Selling, Services (namely organisations which provide legal, audit, accountancy, engineering, architectural or private employment agency services or carry on retail or wholesale dealings), Real Estate and Utilities.

The PDP Department also issued several proposal papers in 2014 to seek feedback from relevant stakeholders on issues such as management of employee personal data, consent requirements, direct marketing and management of data collected from close circuit television (CCTV). The proposal papers did not however mature into official guidelines, but nevertheless serve as an indicator of the PDP Department's stance on these issues.

In October 2014, the Personal Data Protection Commissioner ("Commissioner") Abu Hassan bin Ismail was succeeded by Mazmalek bin Mohamad.

The focus of the PDP Department during the first year of implementation was on registration of data users and awareness.

2015

The PDP Department's focus for 2015 was on compliance and appraisal. Data users who were required to be registered but had not yet done so were given the opportunity to register without imposition of penalties. The online registration portal was also launched on the PDP Department's website (http://www.pdp.gov.my) in 2015. Manual applications were phased out and registrations are now accepted only if they are submitted through the online registration portal.

A public consultation paper was released on the proposed Personal Data Protection Standards which set out detailed measures to be taken by data users in respect of security, retention and integrity of data.

The Data User Forums were formed for specific industries, in particular, for the Communications, Banking and Finance, Insurance, Hospitality, Transport, Direct Sales, Professional Services and Utilities sectors. Each Data User Forum was directed by the Commissioner to develop its own codes of practice for adherence by data users in the respective sectors.

"the Personal Data Protection Standards … are prescribed as "a minimum requirement""

On 23 December 2015, the Personal Data Protection Standards ("Standards") were issued by the PDP Department by publication on its website and came into force with immediate effect. The Standards were based largely on the consultation paper issued earlier in the year and spell out three main standards namely: Security Standards, Retention Standards and Data Integrity Standards which apply to personal data which are processed electronically and non-electronically. The Standards are prescribed as "a minimum requirement" which applies to all data users. Failure to comply with the Standards constitutes a breach of the PDPA and is subject to penalties.

The Standards introduced detailed measures to be undertaken by data users. These measures include the prohibition of transfer of personal data using removable media devices and cloud computing services save where there is written approval of an authorised officer from the upper management of the data user's organisation, the requirement to enter into contracts with data processors (i.e. persons who process personal data on behalf of a data user) in respect of any data processing, the preparation and maintenance of records of disposal of personal data in a state which is ready for submission when directed by the Commissioner.

The PDP Department's newsletter reported that 107 compliance

JILLIAN CHIA

Jillian is a Partner in the Intellectual Property Division of SKRINE. Her practice areas include advising on data protection, information technology and telecommunication laws.

audits had been carried out by the PDP Department in 2015.

2016

Investigation and enforcement was the theme of the PDP Department in 2016. The Personal Data Protection (Compounding of Offences) Regulations 2016 came into force on 15 March 2016. These regulations outline the offences that may be compounded with the written consent of the Public Prosecutor and stipulate the manner in which the offer, acceptance and payment of compounds may be made.

On 16 December 2016, the Personal Data Protection (Class of Data Users) (Amendment) Order 2016 came into force, specifying additional classes of data users who are required to be registered with the PDP Department. Notably, licensees under the Pawnbrokers Act 1972 and the Moneylenders Act 1951 are now required to be registered with the PDP Department. Failure to do so will amount to a breach of the PDPA and attracts penalties.

> **“Investigation and enforcement was the theme of the PDP Department in 2016”**

WHAT TO EXPECT IN 2017

In early 2017, Mazmalek bin Mohamad completed his tenure as Commissioner and was succeeded by Khalidah binti Mohd Darus. The policies and outlook of the PDP Department under the new Commissioner have yet to be discerned but it is anticipated that the codes of practice for each industry will be finalised this year.

It is also anticipated that enforcement of the PDPA would become a priority given that the PDPA is now in its third year of implementation.

COMPLIANCE REDUX?

In view of the developments in data protection laws that have taken place in Malaysia over the last three years, it may be appropriate for a data user to review the adequacy of the measures that it had previously taken to comply with the PDPA.

The checklist below may be adopted as a guide, but the data user should nevertheless seek advice from its legal counsel:

- ☐ Register as a data user if you fall within any class of data user which is required to be registered
- ☐ Prepare a Data Protection Notice/Privacy Policy and notify all relevant data subjects
- ☐ If the Data Protection Notice/Privacy Policy has been issued over 12 months ago, to update such Notice/Policy (if required) and reissue the same to the data subjects
- ☐ Ensure that consents obtained from data subjects are in a form which can be recorded and maintained
- ☐ Prepare a third party disclosure list in a format which can be readily presented to the Commissioner upon request
- ☐ Establish a security policy which complies with the Security Standards, and can be readily presented to the Commissioner upon request
- ☐ Review contracts with data processors to ensure that they contain data protection clauses which comply with the PDPA
- ☐ Establish a data retention policy and personal data disposal schedule which complies with the Retention Standards
- ☐ Prepare and maintain records of disposal of personal data in a format which can be readily presented to the Commissioner upon request
- ☐ Prepare a form for updating of personal data and make the same available online or in physical copy
- ☐ Establish standard operating procedures (SOPs) to deal with access and correction requests and with inquiries or complaints pertaining to processing of personal data

Writer’s e-mail: **jc@skrine.com**

DELAY AND DISRUPTION PROTOCOL (MALAYSIAN SUPPLEMENT)

Janice and Chih-wen provide an overview of the Delay and Disruption Protocol (Malaysian Supplement)

INTRODUCTION

On 20 January 2017, the Society of Construction Law (Malaysia) ("SCL (Malaysia)") launched a Malaysian supplement ("First Malaysian Supplement") of the Second Consultative Draft Delay and Disruption Protocol in the United Kingdom ("Second Consultative Draft Protocol"). Given that both documents are to be read together, the background and journey of the Delay and Disruption Protocol ("Protocol") have to be appreciated.

This article will provide an overview of the Protocol, its reception by the courts and revisions made to the Protocol since it was first published before dwelling on the First Malaysian Supplement.

WHERE IT ALL BEGAN

The Society of Construction Law ("SCL") was founded in the United Kingdom ("SCL (UK)") in 1983 to promote for the public benefit, education, study and research in the field of construction law and related subjects, both in the United Kingdom and overseas. SCL (UK) has international links with similar SCLs in Europe (consisting of 21 national SCLs), the Caribbean, the Gulf States, Australia, Hong Kong, New Zealand, Singapore and Malaysia. SCL (Malaysia) was formed in 2003 to cater for members in Kuala Lumpur and Selangor and expanded to become a national society, admitting members from all states of Malaysia in 2009. SCL (Malaysia) has since become part of SCL-International, the world-wide federation or alliance of national or regional SCL organisations.

> **"The purpose of the Protocol is to provide a means by which the parties can ... avoid unnecessary disputes"**

The First Edition of the Protocol was published by SCL (UK) in 2002. The object of the Protocol then (and now) is to provide useful guidance on some of the common delay and disruption issues that arise in construction projects. For example, where one party wishes to obtain from the other an extension of time or recover loss and expense incurred for the additional time spent to complete the project. The purpose of the Protocol is to provide a means by which the parties can resolve such matters and avoid unnecessary disputes. The focus of the Protocol is therefore to provide practical and principled guidance on proportionate measures for dealing with delay and disruption issues that can be applied to all projects.

With the passage of time, the developments in law, practices and technology, increased scale of larger projects and feedback from international use (which was not initially anticipated) necessitated the Protocol to be relooked and reviewed.

In July 2015, the review committee of the Protocol published 'Rider 1' which reviewed the Protocol against a backdrop of developments in law and technology.

In 2016, the review committee appointed by the Council of SCL (UK) produced the Second Consultative Draft Protocol for public consultation. The Second Edition of the Protocol was recently published in February 2017 and supersedes the First Edition and Rider 1.

JUDICIAL RECOGNITION

Since the publication of the Protocol, judicial recognition to it has been diverse.

England

In England, the courts have taken judicial notice of the existence of the Protocol. This can be seen from *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 where Hamblen, J observed that:

"... the SCL Protocol is not in general use in contracts in the construction industry and nor has it been approved in any reported case. There was no evidence that the parties were aware of it or that they contracted with it in mind. Further, the SCL Protocol itself says that "it is not intended to be a contractual document. Nor does it purport to take precedence over the express terms of a contract or be a statement of law" ... In such circumstances the SCL Protocol can be of little assistance in relation to the legal causation issues which arise in this case."

Examples of other cases in England citing the Protocol include *Mirant Asia-Pacific Construction (Hong Kong) Limited v Ove Arup* [2007] EWHC 918 and *Great Eastern Hotel Company Ltd v John Laing Construction Ltd* [2005] EWHC 181.

Hong Kong

Likewise, in Hong Kong, judicial notice was given to a method of delay analysis recommended by the Protocol in *Leighton Contractors (Asia) Limited Stelux Holdings Ltd* [2004] HKCFI 804. However, the Court ultimately held that the arbitrator's rejection of this method did not amount to a misconduct.

Australia

In contrast, the approach in Australia towards the Protocol has been markedly different, with greater recognition being accorded to the Protocol. In *Alstom Ltd v Yokogawa Australia Pty Ltd & Anor (No 7)* [2012] SASC 49, the Supreme Court of South Australia rejected an expert's method of delay analysis on the basis that it was not a method featured in the Protocol nor

JANICE TAY (L)

Janice is a Partner in the Construction and Engineering Practice Group of SKRINE. Her main practice areas include arbitration and adjudication.

OOI CHIH-WEN (R)

Chih-wen is an Associate in the Construction and Engineering Practice Group of SKRINE. He graduated from the University of Cardiff in 2013.

was it in any text on construction law. The Supreme Court held as follows:

"These methods were also recognised as such in the Society of Construction Law Delay and Disruption Protocol ("the Protocol") … The first problem with this method is that it is not an accepted method of delay analysis for construction programming practitioners. Mr King had never encountered this particular method before. It is not mentioned in the Protocol as a recognised method of delay analysis."

Examples of other cases in Australia citing the Protocol include *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd (No 3)* [2012] VSC 557 and *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd* [2006] VSC 490.

Malaysia

At present, there are no Malaysian cases citing the use and effect of the Protocol.

THE MALAYSIAN CHAPTER

It has long been pondered whether a Delay and Disruption Protocol should be formulated based specifically on the needs of the Malaysian construction industry.

In 2016, SCL (Malaysia) formed a legal and technical committee to propose a Delay and Disruption Protocol in Malaysia. The committee eventually decided to draft a Malaysian Supplement to the Protocol with the intention of making the Supplement a "living document", that is, a document with improvements being continuously made to its contents based on regular feedback from industry players. The committee envisaged that SCL (Malaysia) would eventually publish a Delay and Disruption Protocol in Malaysia.

A draft of the First Malaysian Supplement was then circulated to individuals and eminent organisations such as the Construction Industry Development Board, Master Builders Association Malaysia, Chartered Institute of Building, Institute of Engineers Malaysia, Pertubuhan Akitek Malaysia, Royal Institute of Chartered Surveyors, Royal Institute of Surveyors Malaysia and Wanita Industri Binaan Malaysia for review and comments.

On 20 January 2017, SCL (Malaysia) launched the First Malaysian Supplement to the Second Consultative Draft Protocol. As the Second Consultative Draft Protocol has been superseded by the Second Edition of the Protocol recently, SCL (Malaysia) will be making eventual changes to the First Malaysian Supplement.

Contents of the First Malaysian Supplement

Read together with the Second Consultative Draft Protocol, the First Malaysian Supplement consists of 21 core principles and seven guidance sections relating to areas such as delay damages, extension of time claims, delay analysis, acceleration of work, global claims, disruption claims and valuation of variation claims.

There are three main differences between the First Malaysian Supplement and the Second Consultative Draft Protocol in relation to the areas of liquidated ascertained damages ("LAD"), claims for extension of time ("EOT") and the Malaysian statutory adjudication regime under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA").

LAD

LAD are pre-estimated damages for delay in a construction project due to delay by a contractor. In Malaysia, such damages are governed by Section 75 of the Contracts Act 1950 which governs penalty clauses in contracts. Based on the Federal Court's decisions in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445, actual loss claimed in respect of LAD must usually be proven.

The First Malaysian Supplement suggests that unless new developments in the law occurs, any party claiming LAD should include evidence of actual losses it had suffered which are not too remote.

EOT

Construction contracts generally provide for delay or disruption events and allocate risks accordingly by EOT clauses.

The benefit to the contractor of an EOT clause is to relieve the contractor from liability for LAD for any period prior to the extended contract completion date. The benefit of such a clause for the employer is that it establishes a new contract completion date, and prevents time for completion of the works becoming "at large".

A key emphasis in any construction project is record keeping, especially when a contractor seeks an EOT. The contractor would be required to make the application as comprehensive as possible and to include details such as the causes of delay, effect of the delay on the work programme, estimated length of delay, steps taken to minimise or mitigate delay and the required EOT.

The First Malaysian Supplement sets out the general requirements in dealing with EOT claims. Such considerations include the

continued on page 22

DELAY AND DISRUPTION PROTOCOL

continued from page 21

following:

(1) What would be considered as comprising adequate particulars or necessary submissions to be included in an EOT application;
(2) How a contract administrator should deal with EOT and delay/disruption issues; and
(3) How to deal with "condition precedent" situations.

The First Malaysian Supplement emphasises that the relevant information would be easily obtainable and readily available if the project records are kept in proper order. Principal sources of such information include official works records, progress reports, site diaries, letters, instructions, emails, drawings, photographs and other records.

CIPAA

With the advent of CIPAA in the Malaysian construction industry on 15 April 2014, recognition must be given to the provisions of CIPAA which affect the timing of a project. For example, a contractor who is successful in an adjudication under CIPAA and has not been paid the adjudicated sum after delivery of the adjudication decision may suspend performance or reduce the rate of progress of performance by giving 14-days' written notice to other party in accordance with Section 29 of CIPAA.

The First Malaysian Supplement highlights the effect of CIPAA on delay and disruption in greater detail.

LOOKING AHEAD

Akin to the Protocol, it is not intended that the First Malaysian Supplement be a contract document nor does it purport to take precedence over the express terms of a contract or be a statement of the law. It represents a scheme to deal with delay and disruption issues, whilst recognising that some issues may not have absolute answers.

The launch of the First Malaysian Supplement was well-received by all attending parties. Nonetheless, the reaction of the construction industry to the First Malaysian Supplement remains to be seen, both locally and internationally.

Writers' email: **janicetay@skrine.com & ooi.chih-wen@skrine.com**

Janice and Chih-wen are among the co-authors of the First Malaysian Supplement. Janice is the Deputy President of SCL (Malaysia) and Chih-wen is a Committee Member of SCL (Malaysia).

TRADE WARS : A NEW HOPE?

continued from page 3

interested parties in the original safeguards investigation were not included in the *ex parte* application.

The Court having heard the submissions of the Interveners and the response by Megasteel, dismissed Megasteel's application. According to the Court:

- there was non-compliance with Order 53 rule 4 of the Rules of Court as Megasteel did not serve the Notice and the cause papers on all parties directly affected by its application; and

- there was no full and frank disclosure on Megasteel's part; amongst other things, Megasteel's omission to disclose that it was a significant importer of HRC constituted a material non-disclosure.

A NEW HOPE?

It has been reported that Megasteel has closed its steel mill in Banting in August 2016 (staronline-100916). The judicial review was positioned to provide Megasteel a glimmer of hope, a fighting chance to obtain trade protection from MITI and perhaps resume production at its mill. Unfortunately for Megasteel, this hope was quashed as a result of the Interveners' preliminary objections being upheld by the Court.

WILL THE DEATH STAR BE RESURRECTED?

This decision is noteworthy for two reasons. First, it is the first time that the decision in a safeguard investigation has been challenged in Malaysia by way of a judicial review.

Secondly, the decision is instructive in relation to applications for judicial review of a decision under the Safeguards Act as it highlights the importance of serving the relevant cause papers on the parties who participated in the original safeguards investigation and the need for full and frank disclosure on the part of an applicant in such proceedings.

As Megasteel did not file an appeal against the High Court's decision, matters in this case have come to a close. Just as Star Wars aficionados may wonder whether they will witness another resurrection of the Death Star in future episodes of this series, stakeholders in the Malaysian steel industry may well be wondering whether Megasteel will open another battlefront in this long-running trade war.

Writers' e-mail: **nicholas.lai@skrine.com & manshan.singh@skrine.com**

Note: The case which is the subject matter of the above commentary is *Megasteel Sdn Bhd v Minister of International Trade and Industry and the Ministry of International Trade and Industry* (Application for Judicial Review No. WA-25-68-04/2016)

THE SEAFARERS' BILL OF RIGHTS

continued from page 5

such as the Director of Marine, the seafarer or his representatives.

In the event of any breach of the provisions of Part III or the conditions of the Certificates, the Director of Marine may suspend the Certificates and direct the owner to take steps to remedy the breach. Failure to remedy the breach may result in a revocation of the Certificates, after which the Owner must surrender the Certificates within 14 days of revocation or risk a fine not exceeding RM25,000 on conviction.

- *Private Employment Agencies*

Private employment agencies carrying on the business of supplying seafarers to work on any ship must hold a valid licence issued by the Director of Marine, failing which they will be liable to a fine not exceeding RM200,000 on conviction.

- *Treatment of Stowaways*

The International Convention for the Safety of Life at Sea ("SOLAS 1974") is the leading international shipping convention pertaining to safety of life at sea. The new section 127 of the MSO 1952 introduces mandatory procedures in line with SOLAS 1974 for the owner and master of a ship to comply with when dealing with stowaways, which include taking appropriate measures to ensure the security, general health, welfare and safety of the stowaway until disembarkation.

COMMENTS

While some of the standards under the MLC 2006 were already part of Malaysian law, the recent amendments to the MSO 1952 signal Malaysia's continued commitment to increase harmonisation of her shipping laws with that of the global shipping community. This augurs well for Malaysia in her quest to become a leading maritime nation. What is imperative now is for the Malaysian authorities to ensure proper enforcement of these standards, to avoid making "*a scarecrow of the law*".

Owners, masters and seafarers should apprise themselves of the various obligations imposed by the amendments and take the appropriate measures to avoid contravention of the MSO 1952.

Life may have just got harder for the likes of Captain Jack Sparrow.

Writer's e-mail: **trishelea.sandosam@skrine.com**

FREE RIDE

continued from page 15

If the Bills are passed and the proposed regulation of the Services is implemented in Malaysia, what will the effect of such regulation be? Will it bring this product of "disruptive technology" to a juddering halt or will the exponential growth of the Services continue unabated? Only time will tell.

Writers' e-mail: **richard.khoo@skrine.com & rachel.chiah@skrine.com**

NOTE

* It is to be noted that the Commercial Vehicles Licensing Board Act 1987 applies only to Sabah, Sarawak and the Federal Territory of Labuan whereas the Land Public Transport Act 2010 applies only to Peninsular Malaysia.

ULTRA VIRES

continued from page 7

the narrow interpretation of the doctrine in *Rolled Steel*, parties dealing with a company which has included objects clauses in its constitution are reminded to carefully scrutinise those clauses to ensure that the transactions they enter into are not later discovered to be void for being *ultra vires*.

Writers' email: **pc@skrine.com & lim.jit.qi@skrine.com**

ENDNOTES:

[1] [1991] 3 MLJ 56.
[2] See *Ashbury Railway Carriage & Iron Co Ltd v Riche* (1875) LR 7 HL 653, 678 per Lord Chelmsford; 684 per Lord Hatherley.
[3] (n 1) 63.
[4] Companies Act 2016, s 31. Companies limited by guarantee must have a constitution: s 38(1).
[5] Companies Act 2016, s 35(1). The constitution of a company limited by guarantee must state the objects of the company: s 38(3)(b).
[6] Section 14 of the Interpretation Acts 1948 and 1967 provides that each section of an Act shall have effect as a substantive enactment.
[7] Francis Bennion, *Statutory Interpretation* (Butterworths 1997, 3rd edn), 903.
[8] Corporate Law Reform Committee, 'Review of the Companies Act 1965 – Final Report', 67-68.
[9] Walter Woon, *Company Law* (2nd edn, Pearson Professional 1997), 102.
[10] *Cotman v Brougham* [1918] AC 514; (n 1) 60.
[11] [1986] Ch 246.
[12] ibid 287.
[13] ibid 295.
[4] ibid 297. Although note section 39 of the Companies Act 2016 on the non-application of the doctrine of constructive notice.
[15] [1992] 1 MLJ 89, 97. See also *Public Bank Bhd v Metro Construction Sdn Bhd* [1991] 3 MLJ 56 and *Bumiputra Merchant Bankers Bhd v Supreme-QBE Insurance Bhd* [1990] 2 MLJ 247.

LEGAL INSIGHTS

A SKRINE NEWSLETTER

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

EDITORIAL COMMITTEE

Editor-In-Chief
Kok Chee Kheong

Editor
Kalaiselvi Balakrishnan

Sub-Editors
Claudia Cheah Pek Yee
Ebbie Amana Wong
Julia Chow Mei Kuin
Selvamalar Alagaratnam
Shannon Rajan
Sheba Gumis
Teh Hong Koon
Teoh Wei Shan
Trevor Jason Padasian
Vijay Raj s/o Balasupramaniam

Photography
Nicholas Lai

Skrine Publications Sdn Bhd
Unit No. 50-8-1, 8th Floor,
Wisma UOA Damansara,
50, Jalan Dungun,
Damansara Heights,
50490 Kuala Lumpur,
Malaysia.
Tel: 603-2081 3999
Fax: 603-2094 3211

Printed By
Nets Printwork Sdn Bhd
58 Jalan PBS 14/4,
Taman Perindustrian,
Bukit Serdang,
43300 Seri Kembangan,
Selangor Darul Ehsan.
Tel: 603-8945 2208
Fax: 603-8941 7262

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

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

CONTACT PERSONS FOR SKRINE'S MAIN PRACTICE AREAS:

Acquisitions, Mergers & Takeovers
Cheng Kee Check (ckc@skrine.com)
Quay Chew Soon (qcs@skrine.com)

Arbitration
Ivan Loo (il@skrine.com)

Aviation
Mubashir bin Mansor (mbm@skrine.com)

Banking
Theresa Chong (tc@skrine.com)
Vinayaga Raj Rajaratnam (vrr@skrine.com)
Claudia Cheah (cpy@skrine.com)

Bankruptcy / Insolvency
Wong Chee Lin (wcl@skrine.com)
Lim Chee Wee (lcw@skrine.com)

Capital Markets
Phua Pao Yii (ppy@skrine.com)
Fariz Abdul Aziz (fariz.aziz@skrine.com)

Competition Law
To' Puan Janet Looi (llh@skrine.com)

Compliance
Selvamalar Alagaratnam (sa@skrine.com)

Construction & Engineering
Ashok Kumar Ranai (amr@skrine.com)

Corporate Advisory
Quay Chew Soon (qcs@skrine.com)

Corporate & Commercial Disputes
Wong Chee Lin (wcl@skrine.com)
Lim Chee Wee (lcw@skrine.com)

Corporate Restructuring / Debt Restructuring
To' Puan Janet Looi (llh@skrine.com)
Wong Chee Lin (wcl@skrine.com)

Customs & Excise
Preetha Pillai (psp@skrine.com)

Data Protection
Jillian Chia (jc@skrine.com)

Defamation
Mubashir bin Mansor (mbm@skrine.com)
Leong Wai Hong (lwh@skrine.com)

Employment & Industrial Relations
Siva Kumar Kanagasabai (skk@skrine.com)
Selvamalar Alagaratnam (sa@skrine.com)

Environment
To' Puan Janet Looi (llh@skrine.com)

Foreign Investments
To' Puan Janet Looi (llh@skrine.com)

Franchising & Licensing
Leela Baskaran (bl@skrine.com)

Information Technology / Telecommunications
Charmayne Ong Poh Yin (co@skrine.com)

Insurance & Reinsurance
Quay Chew Soon (qcs@skrine.com)
Loo Peh Fern (lpf@skrine.com)

Intellectual Property
Khoo Guan Huat (kgh@skrine.com)
Charmayne Ong Poh Yin (co@skrine.com)

International Arbitration
Lim Chee Wee (lcw@skrine.com)

Islamic Finance
Oommen Koshy (koshy@skrine.com)

Joint Ventures
To' Puan Janet Looi (llh@skrine.com)
Phua Pao Yii (ppy@skrine.com)

Land Acquisition
Leong Wai Hong (lwh@skrine.com)

Oil & Gas, Energy & Utilities
Fariz Abdul Aziz (fariz.aziz@skrine.com)

Private Equity & Venture Capital
Phua Pao Yii (ppy@skrine.com)

Privatisation
To' Puan Janet Looi (llh@skrine.com)

Project Financing
Theresa Chong (tc@skrine.com)

Real Estate
Dato' Philip Chan (pc@skrine.com)

Securities & Shares
Preetha Pillai (psp@skrine.com)

Shipping & Ship Finance
Siva Kumar Kanagasabai (skk@skrine.com)
Dato' Philip Chan (pc@skrine.com)

Tax
Preetha Pillai (psp@skrine.com)

Trade Remedies
Lim Koon Huan (lkh@skrine.com)

Trusts / Wills / Probate / Charities
Theresa Chong (tc@skrine.com)
Leong Wai Hong (lwh@skrine.com)