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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

During the past two months, the attention of the Malaysian media and public have been focussed on the upcoming general elections and the report for the redelineation of electoral boundaries. The redelineation was passed by the Dewan Rakyat of the Malaysian Parliament on 28 March 2018 and the Election Commission of Malaysia has fixed 9 May 2018 as the day on which Malaysians will go to the polls.

The aforesaid events eclipsed a significant legal development in Malaysia. On 26 March 2018, the *Malaysian Anti-Corruption Commission (Amendment) Bill 2018* ("Bill") was tabled before the Dewan Rakyat and passed by both Houses of the Malaysian Parliament in early-April 2018. Amongst other amendments, the Bill will introduce corporate liability for corruption in Malaysia.

The proposed amendments will not only make a commercial organisation criminally liable for corruption, but a deeming provision may result in its directors, controllers, partners and management personnel being convicted for the same offence. In light of this significant and welcomed development, we have delayed the publication of this issue of our Newsletter from March to April 2018 to feature an article on the amendments that will be introduced under the Bill.

Another significant legal development in the first quarter of 2018 was the Federal Court's decision in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*. This decision makes it clear that the consent of both parents is required for the conversion of their minor child to Islam, except in a single parent situation. The detailed reasoning of the Federal Court is discussed in this issue of our Newsletter in "*Unilateral Conversion – Back from the Brink*".

We hope that you will enjoy reading the articles and case commentaries contained in this issue of Legal Insights.

With best wishes,

Kok Chee Kheong
Editor-in-Chief

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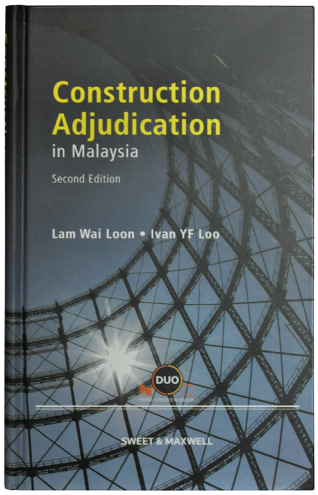
ANNOUNCEMENTS

APPOINTMENT AS JUDICIAL COMMISSIONER

Our Firm congratulates Wong Chee Lin on her appointment as a Judicial Commissioner. Chee Lin retired as a Partner of Skrine to assume her position on the Bench.

PUBLICATION OF BOOKS

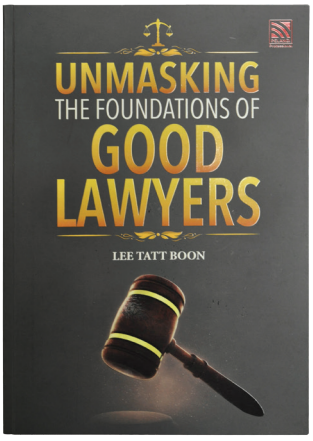
The Construction Industry Payment and Adjudication Act 2012 ("CIPAA") was a game changer for the Malaysian construction industry, introducing a speedy interim mechanism to facilitate payment for construction work.



The first book on CIPAA, "*Construction Adjudication in Malaysia*", co-authored by one of our Partners, Ivan Loo, was published in 2013 before CIPAA came into operation on 15 April 2014.

Since then, statutory adjudication has developed rapidly in Malaysia with a wide body of case law being laid down by the Malaysian Courts. Thus, it was timely that Ivan collaborated to co-author the second edition of "*Construction Adjudication in Malaysia*", which was published on 9 February 2018. The new edition provides an update on the developments that have taken place in this area since the inception of CIPAA.

On 13 March 2018, "*Unmasking the Foundations of Good Lawyers*", written by our Consultant, Lee Tatt Boon, was published.



In this book, Tatt Boon shares his views on the qualities that define a good lawyer. This book will undoubtedly be an invaluable resource for young practitioners as they seek to identify and develop qualities that will help them become good practitioners.

This is the second book authored by Tatt Boon, following on his earlier book, "*Marketing for Young Lawyers*".

We extend our heartiest congratulations to Tatt Boon and Ivan on the publication of their respective books.

CORPORATE LIABILITY

Kwan Will Sen explains a new

It has been at least four years since the idea of introducing corporate liability in Malaysia for bribery and corruption was mooted. This may soon be a reality with the proposed amendments to the Malaysian Anti-Corruption Commission Act 2009 ("Principal Act").

The Malaysian Anti-Corruption Commission (Amendment) Bill 2018 ("Bill") was passed by the Dewan Rakyat and the Dewan Negara on 4 and 5 April 2018 respectively. The Bill will come into operation on a date to be appointed by the Minister after it has received Royal Assent and been gazetted.

The Bill, *inter alia*, introduces a new section 17A ("section 17A") which provides for corporate liability *vis-à-vis* bribery and corruption under the Principal Act. This article explains the salient features of section 17A.

WHAT CONSTITUTES THE OFFENCE?

Section 17A states that a commercial organisation commits an offence if a person associated with the organisation corruptly gives, agrees to give, promises or offers to any person any gratification, whether for the benefit of that person or another person, with intent to obtain or retain business for the commercial organisation, or to obtain or retain an advantage in the conduct of business for the commercial organisation.

> **"a new section 17A … provides for corporate liability vis-à-vis bribery and corruption"**

From the foregoing, it can be seen that an essential element of the offence is that the gratification must be for the benefit of the commercial organisation. Gratification for the benefit of the associated person or other person will not come within the ambit of section 17A.

COMMERCIAL ORGANISATION

A "commercial organisation" refers to any of the following bodies so long as it carries on business, or part of its business, in Malaysia – (a) a company incorporated under the Companies Act 2016; (b) a company wherever incorporated; (c) a partnership under the Partnership Act 1961 or the Limited Liability Partnerships Act 2012; or (d) a partnership wherever formed.

By adopting a purposive interpretation, a company incorporated under the repealed Companies Act 1965 would come within the ambit of item (a) of the preceding paragraph, notwithstanding that the Companies Act 2016 stipulates that a company incorporated under the repealed Act is deemed registered, rather than incorporated, under the latter Act.

Companies incorporated under the Labuan Companies Act

FOR CORRUPTION

development in Malaysian law

KWAN WILL SEN

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1990, and limited partnerships and limited liability partnerships registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010, would come within the ambit of items (b) and (d) respectively above.

PERSON ASSOCIATED

To constitute an offence, the gratification must be carried out by a "*person associated*" with the commercial organisation, namely, a director, partner or an employee of the commercial organisation or a person who performs services for and on behalf of the commercial organisation.

Thus, a commercial organisation will not only be liable for gratification by its director or partner, but also its employee (regardless of his status or functions within the organisation). It could also be liable for gratification by its agents or distributors and possibly, joint-venture partners.

SANCTIONS

A commercial organisation which commits an offence is liable to a fine of not less than 10 times the sum or value of the gratification which is the subject matter of the offence, where the gratification is capable of being valued or is of a pecuniary nature, or RM1.0 million, whichever is the higher, or to a term of imprisonment not exceeding 20 years, or to both.

WHO ELSE IS LIABLE?

When a commercial organisation is convicted of an offence under section 17A, a director, controller, officer, partner or member of the management of the organisation is also **deemed** to have committed the offence ***unless*** he proves that the offence had been committed without his consent or connivance, and that he had exercised due diligence to prevent the commission of the offence, having regard to the nature of his function and to the circumstances.

In *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12, the constitutionality of a similar type of deeming provision in section 122 ("section 122") of the Securities Industry Act 1983 was challenged on grounds that it presumes guilt and abrogates from the prosecution's duty to prove beyond reasonable doubt that an offence had been committed.

The Federal Court upheld the constitutionality of section 122 and ruled that there was no displacement of the burden or standard of proof. According to the Court, it was first necessary for the prosecution to prove beyond reasonable doubt that the offence had been committed by the body corporate before the presumption could be triggered to deem the offence to be committed by the directors and officers of the body corporate.

The Court further explained that the "*unless proviso*" in section 122 (i.e. that the offence had been committed without consent or connivance of the person and that he had exercised due diligence) was a statutory defence that provided the opportunity for the accused to rebut the deeming provision. According to the Court, it is only fair that the absence of consent and connivance should be proved by the accused as these are matters within his knowledge.

It is likely that the deeming provision in section 17A will be interpreted by the courts in the same manner as in *Gan Boon Aun*.

ANTI-CORRUPTION PROCEDURES

A commercial organisation that is charged for an offence under section 17A may successfully defend the charge if it is able to satisfy the court that it has in place adequate procedures to prevent persons associated with the organisation from committing bribery or corruption. The Minister will be issuing guidelines to assist commercial organisations in establishing these procedures.

COMMENTS

Section 17A will no doubt be a game-changer when the Bill becomes law and comes into force.

Directors, controllers, officers, partners and management personnel of commercial organisations will no longer be shielded from bribery and corruption carried out through their organisations. Neither can they turn a blind eye to such practices by their colleagues.

To mitigate the risk of criminal liability to a commercial organisation and its directors, controllers, officers, partners and management, it is imperative for an organisation that carries on business in Malaysia to adopt adequate procedures to prevent persons associated with the organisation from giving gratification for its benefit.

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UNILATERAL CONVERSION IN MALAYSIA – BACK FROM THE BRINK

Trevor Padasian discusses the Federal Court's landmark decision in Indira Gandhi

INTRODUCTION

Monday, 29 January 2018, was a momentous day. On that day, the Federal Court ("FC") set aside the unilateral conversion to Islam of three children in the long-running case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ("*FC Indira Gandhi*"). In doing so, the FC reaffirmed that the jurisdiction of the civil courts was not ousted by Article 121(1A) of the Federal Constitution ("Constitution").

In terms of constitutional law as well as family law, a great deal was at stake. First, was the question of erosion of the judicial power and independence of the civil High Courts; and second, the right of a parent to determine the religion of his or her child or children.

FC Indira Gandhi was just one in a rash of cases involving an inevitable mix of constitutional conundrum and the unilateral conversion to Islam of children by their converting fathers without the consent of their mothers, namely, *Subashini a/p Rajasingam v Saravan a/l Thangathoray* [2007] 2 MLJ 705 (FC), *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah* [2011] 1 CLJ 568 (FC) and *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585 (FC).

> "judicial power … is an essential feature of the basic structure of the Constitution"

EVENTS LEADING UP TO THE DECISION

Indira Gandhi a/p Mutho ("Indira"), the appellant, married Patmanathan a/l Krishnan, the 6th respondent, in 1993. Their marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 ("LRA"). After nearly 16 years of marriage, Patmanathan converted to Islam on 11 March 2009 and changed his name to Muhammad Riduan bin Abdullah ("Riduan"). He left the family home with their youngest child, Prasana Diksa ("Prasana") shortly thereafter. Their two elder children, Tevi Darsiny and Karan Dinish, continued to reside with Indira. Indira discovered sometime in April 2009 that the Pengarah Jabatan Agama Islam Perak had issued three certificates of conversion to Islam of her three children. The Syariah Court had granted custody of the children to Riduan on 3 April 2009.

WHAT THE HIGH COURT DECIDED

On 9 June 2009, Indira applied to the Ipoh High Court ("HC") by way of an application for judicial review for an order of *certiorari* to quash the certificates of conversion on the ground that their issuance by the Registrar of Muallafs was *ultra vires* and illegal. On 25 July 2013, the learned Judicial Commissioner, in addition to finding that the HC had exclusive jurisdiction to hear the judicial review application to the exclusion of the Syariah Court, held that the Registrar of Muallafs had not complied with the requirements of the relevant provisions of the Administration of the Religion of Islam (Perak) 2004 ("Perak Enactment") and quashed the certificates of conversion (see *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552).

In the meantime, Riduan refused to surrender the children to Indira despite the HC having granted Indira full custody of the three children on 11 March 2010. On 30 May 2014, Indira successfully obtained a committal order to commit Riduan to prison until the delivery of Prasana to her. Indira also filed a petition for divorce on grounds of Riduan's conversion to Islam under section 51 of the LRA.

> "Features in the basic structure of the Constitution cannot be abrogated … by way of constitutional amendment"

WHAT THE COURT OF APPEAL DECIDED

However, on appeal by Riduan, the Court of Appeal ("CA") by majority reversed the HC's decision on 30 December 2015 (*Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals* [2016] 4 MLJ 455). The majority held that that the HC had no power to question the decision of the Registrar of Muallafs or to consider the registrar's compliance with the relevant requirements of the Perak Enactment. The fact that a person had been registered in the Registrar of Muallafs as stated in the certificates of conversion was proof that the conversion process had been carried out to the satisfaction of the registrar.

APPEAL TO THE FEDERAL COURT

The FC granted leave to Indira to appeal against the CA's decision on three questions of law. The respondents in the three appeals, which were heard together, were the Director of the Perak Islamic Religious Affairs Department, the Registrar of Muallafs, the Perak Government, the Education Ministry, the Government of Malaysia and Riduan.

The First Leave Question

The first leave question was whether the High Court has exclusive

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and inherent jurisdiction to review the actions of a public authority like the Registrar of Muallafs.

The FC unequivocally answered this question in the affirmative. In summary, under Article 121(1) of the Constitution, judicial power is vested exclusively in the civil High Courts. The jurisdiction and powers of the courts are not confined to federal law. Such judicial power, in particular, the power of judicial review, is an essential feature of the basic structure of the Constitution. Features in the basic structure of the Constitution cannot be abrogated by Parliament by way of constitutional amendment.

Significantly, such judicial power may not be removed from the High Courts and may not be conferred upon bodies other than the High Courts unless such bodies comply with the safeguards provided in Part IX of the Constitution to ensure their independence.

The FC cited a seminal case, *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561, which had last year "*put beyond the shadow of doubt that judicial power vested exclusively in the High Courts by virtue of Article 121(1)*".

On the other hand, the jurisdiction of the Syariah Court to determine a subject matter of a dispute must be expressly conferred by the state legislation. The FC held that there was no doubt that section 50(3) of the Perak Enactment expressly confers jurisdiction on the Syariah Courts. However, section 50(3)(b)(x) which was relied upon did not confer jurisdiction on the Syariah Court to issue a declaration that a person has converted to Islam. Instead, that provision confers jurisdiction on the Syariah Court to issue a declaration that "*a person is no longer Muslim*". The FC pointed out that this provision would be applicable in a case where a person renounces his Islamic faith. The issue to be decided in the instant appeals concerned the validity of the certificates of conversion issued by the Registrar of Muallafs in respect of the children's conversion to Islam. If the FC found that such certificate was invalid, it would only mean that the said person had never at any time been a Muslim. Thus, the question of the person being "*no longer a Muslim*" does not arise.

Limits of Jurisdiction of Syariah Courts

Surveying the jurisprudence of the Constitution, the FC was of the view that the Constitution, being founded on the Westminster model constitution, is premised on certain underlying principles which include the separation of powers, the rule of law and the protection of minorities. Being part of the basic structure of the Constitution, these principles cannot be abrogated or removed. The FC reiterated that the judicial power of the civil courts is inherent in the basic structure of the Constitution. The power conferred on the Syariah Courts pursuant to Article 121(1A) must be interpreted against these foundational principles.

To determine whether Article 121(1A) has the effect of granting jurisdiction to the Syariah Courts in judicial review applications to the exclusion of the civil courts, the FC adopted the two-part test from the Canadian courts (*MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725), namely:

(a) Stage 1: Grant of jurisdiction to inferior court

The principle here is that the jurisdiction of a superior court cannot be vested in a body not constituted in accordance with the provisions that protect the independence of its judges.

Applying this test, the FC held that judicial power cannot be vested in the Syariah Courts which are not "superior courts" within the meaning of Part IX of the Constitution with all its constitutional provisions safeguarding the independence of judges.

(b) Stage 2: Ousting of core jurisdiction of superior court

The principle that underpins this test is that the essential historical functions cannot be removed from the superior courts and granted to other adjudicative bodies if the resulting transfer contravenes the constitution.

Applying this test, the FC held that judicial power is part of the core or inherent jurisdiction of the civil courts being "superior courts" within the meaning of Part IX of the Constitution.

The FC, answering the first leave question in the affirmative, concluded that the power to review the decision of the Registrar of Muallafs, being an executive body, rested solely with the civil courts and not the Syariah Courts.

In answering the first leave question, Zainun Ali FCJ emphasised that that the determination of the present appeals "*did not involve the interpretation of any Islamic personal law and practice, but rather with the more prosaic questions as to the legality and constitutionality of administrative action taken by the Registrar (of Muallafs).*"

The Second Leave Question

The second leave question was whether a child of a marriage registered under the LRA who has not attained the age of 18 years must comply with both sections 96(1) and 106(b) of the Perak Enactment before the Registrar of Muallafs may register the child's conversion to Islam.

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DEVELOPMENTS IN STATUTORY ADJUDICATION IN 2017

Jocelyn Lim examines the significant statutory adjudication cases of 2017

The year 2017 witnessed considerable development in case law on statutory adjudication in Malaysia. This is probably due to the increasing use of this form of dispute resolution mechanism by stakeholders in the construction industry since its inception in 2014. This article examines some of the significant decisions that have been handed down by the Malaysian courts in 2017 and their impact on statutory adjudication under the Construction Industry Payment and Adjudication Act 2012 ("*CIPAA*").

EXPANSION OF ADJUDICATOR'S JURISDICTION

The jurisdiction of an adjudicator which used to be limited to matters set out in the payment claim and payment response has now been significantly expanded by the Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings Berhad* [2017] 8 AMR 167 ("*View Esteem*"). Adjudicators are now not precluded from considering all defences raised by a respondent in an adjudication response even if such defences were not included in the payment response. On the contrary, an adjudicator who fails to consider the defences raised in the adjudication response could have acted in breach of natural justice and his decision may be set aside under *section 15 of CIPAA*. This landmark decision, which now obliges an adjudicator to consider all defences in the adjudication response will have a significant impact on the conduct of statutory adjudication proceedings.

> **"The jurisdiction of an adjudicator … has now been significantly expanded by the Federal Court"**

CONDUCT OF ADJUDICATION PROCEEDINGS

In *Permintex JSK Resources Sdn Bhd v Follitile (M) Sdn Bhd (and Another Originating Summons)* [2018] 1 AMR 693, the respondent applied to set aside the adjudicator's decision on various grounds, one of which was that there had been a breach of natural justice as the adjudicator had failed to invite the parties for a face-to-face preliminary meeting. The High Court in dismissing the respondent's setting aside application, held that *"CIPAA confers broad and vast powers on an adjudicator so that he may proceed with all speed and diligence in arriving at a decision within the tight time frame prescribed"* and that *"it is within the exercise of the broad discretion of the adjudicator to conduct a documents-only adjudication without the need to hear oral evidence."*

Similarly, the wide discretionary power of an adjudicator to order and to limit the filing of written submissions was endorsed in *Tidalmarine Engineering Sdn Bhd v Conlay Construction Sdn Bhd (and Another Originating Summons)* [2017] 8 AMR 75 ("*Tidalmarine*"). As held by the High Court: *"There is thus no basis for arguing that there was a breach of natural justice merely because the adjudicator had not allowed the parties to file their written submissions on the issues raised …"*

It is unquestionable that an adjudicator is the *'master of the proceedings'* and is free to conduct the adjudication proceedings in the manner that he deems fit, so long as he complies with CIPAA, acts impartially and adheres to the rules of natural justice.

STAY OF ADJUDICATION DECISION

The "*exceptional circumstances*" test which in essence refers to the financial status of a party when granting a stay of an adjudication decision under *section 16 of CIPAA* as established in *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* [2015] 11 MLJ 818 has now been expanded in *View Esteem. Section 16* is now given a liberal interpretation, allowing some degree of flexibility to the courts to stay an adjudication decision where there are clear errors, or to meet the justice of the individual case. This appears to be even wider than the *"special circumstances"* test where the paramount consideration is whether in granting a stay of execution, the appeal, if successful, would be rendered nugatory.

Although the test for granting a stay under *section 16 of CIPAA* appears to be wider as the financial status of the other party is not the only factor to be considered, therefore allowing more grounds to justify granting a stay, the Federal Court in *View Esteem* also emphasised that a stay of an adjudication decision ought not to be readily granted and caution must be exercised when doing so. Whether a stay should be granted under *section 16 of CIPAA* is to be determined on a case to case basis and the financial status of the other party is not the only factor to be considered.

EXCLUSION FROM CIPAA

Following the decision in *View Esteem*, a payment dispute that is referred to adjudication would fall within the exclusion under *section 41 of CIPAA* if it is found to be the subject matter of a dispute that had previously been commenced in court or arbitration. In *View Esteem*, there was a court proceeding relating to interim certificates no. 23 to 26R. The respondent initiated an adjudication claim in respect of progress claim no. 28. The Federal Court held that progress claim no. 28 fell within *section 41 of CIPAA* as a progress claim does not stand alone in a separate compartment but is cumulative in nature. Thus, the court found that the subject matter of both the court proceeding and the adjudication proceeding to be the same notwithstanding that the proceedings were based on separate progress claims.

CONDITIONAL PAYMENT CLAUSES

In *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2017] MLJU 1342 *("Jack-In Pile")*, the High Court held that *section 35 of CIPAA* applies retrospectively and any conditional payment provision in a construction contract will be void, irrespective whether the parties had relied on such a provision prior to the coming into force of CIPAA. This appears to be consistent with the earlier decisions of *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd & Another Case* [2016] 5 CLJ 882 ("*Econpile*"), *BM City Realty & Construction Sdn Bhd v Merger Insight (M) Sdn Bhd* [2016] AMEJ 1858 and *Terminal Perintis Sdn Bhd v Tan Ngee*

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Hong Construction Sdn Bhd (and Another Originating Summons) [2017] 7 AMR 887.

The High Court decision in *Jack-In Pile* has recently been overturned in 2018 by the Court of Appeal which held that a conditional payment clause under a construction contract relied by parties prior to the commencement of CIPAA remains valid and is not affected by *section 35* (*Bauer (Malaysia) Sdn Bhd v Jack-In Pile (M) Sdn Bhd* [Civil Appeal No: B-02(C)(A)-1187-06/2017]). It is believed that an application is being made to the Federal Court for leave to appeal against the Court of Appeal's decision.

COMPETENCY STANDARD AND CRITERIA

In considering whether an adjudicator has met the competency standards and criteria under *Regulation 4 of the Construction Industry Payment and Adjudication Regulations 2014*, the High Court in *Gazzriz Sdn Bhd v Hasrat Gemilang Sdn Bhd* [2017] AMEJ 1630 adopted the approach in *WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd (formerly known as Bluescope Lysaght (Malaysia) Sdn Bhd)(and Another Originating Summons)* [2016] 1 AMR 379 whereby the courts will leave the matter to be determined by the Kuala Lumpur Regional Centre for Arbitration (now renamed the Asian International Arbitration Centre (Malaysia)), which is responsible for setting the standard and criteria under *section 32 of CIPAA*.

APPEAL AGAINST ADJUDICATION DECISION

In *VVO Construction Sdn Bhd v Bina MYK Sdn Bhd (and Another Originating Summons)* [2017] 2 AMR 502, the respondent in addition to its application to set aside the adjudication decision, appealed against the adjudication decision under Order 55A rule 1 of the Rules of Court 2012. The High Court in dismissing the respondent's purported appeal, adopted the decision in *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] 8 CLJ 728 that under CIPAA, there is no provision for appeal and therefore there is no right of appeal against an adjudicator's decision. This is understandably the legal position because if parties are allowed to appeal against an adjudicator's decision, the adjudicator's findings of fact may be disturbed and this contravenes the principle of *rough justice* under CIPAA, the main feature that underpins the statutory adjudication process.

While the legal position is that parties are not allowed to appeal against an adjudicator's decision, there appears to be a growing trend for aggrieved parties who were unsuccessful in an adjudication to resubmit the same unsuccessful claim in a subsequent adjudication before another adjudicator. In other jurisdictions, it is regarded as an abuse of process for a party to engage in 'adjudicator shopping' by resubmitting the same claim repeatedly until it obtains a favourable decision. Presently, there are a few such cases pending in the High Courts on this issue.

INTERIM AND FINAL CLAIMS

The majority in the Court of Appeal case of *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2018] 2 CLJ 163 ("*Martego*") held that CIPAA applies not only to interim claims but also to final account claims. The Court of Appeal took judicial notice that final claim payments had been lodged and adjudicated without any fanfare and the courts and legal practitioners are to be careful in creating an issue when it is settled among the construction industry players that there is in fact no issue as to whether CIPAA applies to final payment claims. The dissenting judge in *Martego* however expressed concern that the inclusion of final payment claims under CIPAA may lead to abuse of process. This is because statutory adjudication does not dispense with the trial process and to enforce a final payment by summary adjudication process will be abhorrent to the notion of justice and fair play.

The High Court in *Tidalmarine* rejected the respondent's contention that CIPAA only applies to a final progress claim (which is issued before defects and rectification works are completed) and not a final account claim (which is issued after defects and rectification works are completed). The Judge held that CIPAA which allows final payment claim would be equally applicable to a claim based on final account as such a claim is still a claim for work done or services rendered under the express terms of a construction contract.

AGGRIEVED PARTY

Section 15 of CIPAA allows an *'aggrieved party'* to apply to the High Court to set aside an adjudication decision. Normally, the *'aggrieved party'* is the respondent who is required to make payment to the claimant. In *Syarikat Bina Darul Aman Berhad & Anor (collectively referred to as BDB-Kery (joint venture)) v Government of Malaysia* [2017] 4 AMR 477 *("SBDAB")*, the claimant whose claim had been dismissed peculiarly filed a setting aside application in the High Court even though it was not required to pay any sum to the respondent. Nonetheless, the claimant was held to be an *'aggrieved party'* within the context of CIPAA as the expression *'aggrieved party'* is given its plain and ordinary meaning, that is to say, a party is aggrieved so long as it has been adversely affected or wrongfully deprived of its right to have its entitlement validly and justly decided pursuant to CIPAA.

In *Wong Huat Construction Co v Ireka Engineering & Construction Sdn Bhd* [2018] 1 CLJ 536 ("*Wong Huat Construction*"), the claimant, who was dissatisfied with the paltry sum of RM29,791.73 that was adjudged in his favour out of the sum of RM231,277.17 claimed, was also held to be an *'aggrieved party'* within CIPAA as the term is given an expansive reading to include a person

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GDPR – ARE YOU READY FOR IT?

Neo Hwee Yong discusses the new data protection law in the European Union

INTRODUCTION

In recent years, the world has seen unprecedented privacy breaches as the global population sees the gradual but unavoidable shift of information into cyberspace. In 2013, it was reported that Yahoo! had suffered a data breach that impacted three billion user accounts.

In 2017, Equifax, a major US credit rating agency, reported that it had suffered a data breach which leaked personal information, such as names, social security numbers, birth dates, addresses and driver's licence numbers, belonging to some 143 million consumers. On 1 March 2018, Equifax announced that further investigations disclosed that the data breach affected a further 2.4 million consumers, bringing the total number affected to almost 145.5 million.

Back home in Malaysia, it has recently been reported that major privacy breaches which may have affected almost the entire population resulted in personal information, such as mobile phone numbers, identification card numbers, home addresses and SIM card data, belonging to some 46.2 million mobile phone users being leaked. The gravity of such breaches cannot be understated, particularly where the information leaked allows criminals to commit identity theft.

> "the GDPR … applies to businesses and companies within and outside the EU which process personal data"

In the most recent controversy, it was reported in March 2018 that personal data belonging to approximately 50 million Facebook users, including likes by the users on the Facebook platform, were accessed and used without consent by Cambridge Analytica, a data analytics firm, for the purpose of building a powerful software programme to predict and influence choices at the ballot box.

In light of major privacy breaches over the years, the European Union ("EU") has adopted the General Data Protection Regulation (Regulation (EU) 2016/679) ("GDPR") as the new EU data protection framework in April 2016. The GDPR is slated to come into force on 25 May 2018 in place of Directive 95/46/EC (General Data Protection Regulation). However, what would this mean for businesses in Malaysia?

WHAT DOES THE GDPR MEAN FOR BUSINESSES IN MALAYSIA?

Trade between Malaysia and EU has grown steadily over the years with reported figures of RM15.46 billion in trade, of which RM8.61 billion comprises exports from Malaysia to the EU. As such, it is imperative for Malaysian businesses, particularly those which trade with parties in the EU, to understand the impact of the implementation of the GDPR due to its wide extra-territorial scope.

The GDPR differs fundamentally from our Personal Data Protection Act 2010 ("PDPA") as it applies to businesses and companies **within and outside the EU** which process personal data of data subjects who are in the EU in the context of offering of goods or services (free or otherwise) to such data subjects or the monitoring of their behaviour as far as their behaviour takes place within the EU (Article 3(2) GDPR). In contrast, the PDPA only applies to personal data in respect of commercial transactions and does not apply to businesses and companies outside of Malaysia unless they use equipment in Malaysia for processing of personal data otherwise than for purposes of transit through Malaysia. This significant and ambitious undertaking by the EU would mean that businesses undertaking any of the activities mentioned in Article 3(2) would be caught by the GDPR, regardless of where they are located in the world, including Malaysia. Indeed, one of the rationales behind the adoption of the GDPR is to ensure that the greater control and protection given to EU citizens over how their personal data is processed will not be defeated simply by transferring the personal data or relocating the business to a place outside of the EU.

> "The GDPR contains a number of requirements which are not found in the PDPA"

In relation to what amounts to offering of goods and services to data subjects in the EU, the GDPR clarifies in its recitals that it must be apparent that the relevant business or company **envisages** offering goods and services to data subjects in the EU. The recitals explain that while it is insufficient to only consider mere accessibility of the business website in the EU or the use of a language generally used in the third country where the business is established, certain factors may make it apparent that the business or company envisages offering goods or services to data subjects in the EU e.g. the use of a **language or a currency** generally used in the EU with the possibility of ordering goods and services in that other language, or mentioning EU customers or users.

On the other hand, monitoring of behaviours involves the tracking of the behaviour of data subjects on the Internet and the subsequent processing of such personal data for other purposes, such as profiling in order to make decisions regarding the data subject or to analyse or predict the data subject's personal preferences, behaviours and attitudes.

WHAT IF I'M ALREADY COMPLIANT WITH THE PDPA?

The GDPR contains a number of requirements which are **not** found in the PDPA, of which some are highlighted below. Therefore,

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where the GDPR applies, businesses and companies in Malaysia must ensure compliance with the same.

Right to erasure

Article 17 of the GDPR provides data subjects in certain circumstances with the right to require data users to erase personal data (right to be forgotten) concerning him or her without undue delay e.g. the personal data is no longer necessary in relation to the purposes for which they were collected or otherwise processed. Where the personal data has been made public by the data user, the GDPR further imposes upon the data user an obligation to take reasonable steps to inform other data users which are processing the personal data of such request for erasure.

Right to data portability

Article 20 of the GDPR grants data subjects in certain circumstances the right to receive from the data user personal data concerning him or her in a structured, commonly used and machine-readable format, and the right to transmit those data to another data user without hindrance. This also includes the right to have the personal data transmitted directly from one data user to another, where it is technically feasible.

Data breach notification

There is currently no data breach notification requirement under the PDPA. The GDPR, however, places an obligation on the data user to notify the supervisory authority (i.e. the independent public authority responsible for monitoring the application of the GDPR within each Member State) and the relevant data subject of the personal data breach.

Under Article 33, data users are required to notify the supervisory authority of any personal data breach (including the nature of the breach and the likely consequences thereof) within 72 hours of becoming aware of it, unless the breach is unlikely to result in a risk to the rights and freedoms of natural persons.

Article 34 requires data users to communicate to the relevant data subject, without undue delay, any personal data breach which is likely to result in a high risk to the rights and freedoms of natural persons, unless the prescribed exemptions apply e.g. it would involve disproportionate effort.

Data protection impact assessment

The GDPR also introduces the requirement to carry out a data protection impact assessment ("DPIA") where processing is likely to result in a high risk to the rights and freedoms of natural persons by virtue of their nature, scope, context and purposes (e.g. processing involving the use of new technologies). The purpose of the assessment is to ascertain the impact of the envisaged processing operations on the protection of personal data. Article 35 emphasises that a DPIA should be required in the following circumstances:

- A systematic and extensive evaluation of the personal aspects relating to natural persons which is based on automated processing that produces legal effects concerning the natural person or similarly affects such person in a significant way;
- Large-scale processing of special categories of personal data, biometric data, or criminal or security records for purposes of making decisions regarding the data subject; or
- A systematic monitoring of publicly assessable area on a large-scale.

Data Protection Officer

Article 37 of the GDPR requires data users and data processors to designate a Data Protection Officer ("DPO") in certain circumstances, e.g. where the processing is carried out by a public authority or body (except for courts acting in their judicial capacity) or the core activities involve processing on a large-scale of special categories of data and personal data relating to criminal convictions and offences.

Designation of representative in the EU

Article 27 requires data users and data processors who are not established in the EU but are caught under Article 3(2) of the GDPR to designate in writing a representative in the EU, unless (i) the processing is occasional and does not include processing on a large-scale of special categories of data or personal data relating to criminal convictions and offences and is unlikely to result in a risk to the rights and freedoms of natural persons; or (ii) the data user or data processor is a public authority or body. One of the main purposes of such a representative is to act on behalf of the data user or data processor as a point of contact with any supervisory authority on any matter relating to the GDPR.

Data Processors

Under the PDPA, direct obligations are only placed on data users and not data processors, although in certain circumstances the former is required to contractually bind the latter to ensure compliance with the PDPA.

Unlike the PDPA, the GDPR imposes direct obligations on data processors. These obligations include the obligation to: (i) obtain specific or general written authorisation of the data

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DIVISION OF POWERS BETWEEN SHAREHOLDERS AND DIRECTORS

Lee Shih and Joyce Lim discuss the effect of the Federal Court's decision in the Petra Perdana case

On 14 December 2017, the Federal Court delivered its grounds of judgment in the case of *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd* [2018] 2 MLJ 177 ("*Petra Perdana*"). This case relates to two appeals which emanated from a High Court action relating to questions in company law on governance and management of a company as between its directors and shareholders in general meetings. In particular, it gives guidance on the division of powers between the shareholders and directors on managing the affairs of a company and sets out the test to be adopted in determining whether a director has acted in the best interest of the company.

BRIEF FACTS

The plaintiff, Petra Perdana Berhad ("PPB"), owned 126 million ordinary shares in Petra Energy Berhad ("PEB"), amounting to approximately 64.62% of the issued and paid up capital of PEB. At all material times, the three defendants were directors of PPB.

In April 2007, an ordinary resolution was passed and a general mandate was given to PPB to, among others, divest up to 19.5 million of its shares in PEB ("Shareholders' Divestment Mandate"). On or about 10 December 2007, PPB divested 9 million of its PEB shares (which represented approximately 4.62% equity stake in PEB), thereby reducing PPB's holding in PEB from 64.62% to 60%. The Shareholders' Divestment Mandate was renewed on an annual basis.

Subsequently, pursuant to payment demands by a ship builder in respect of the balance purchase price of a vessel, PPB's board of directors resolved in August 2009 to sell 10.5 million PEB shares (5.38% equity stake in PEB) ("August Board Mandate"). Pursuant to the August Board Mandate, PPB divested 10.5 million PEB shares on 10 September 2009, reducing its stake in PEB from 60% to 54.62% ("Second Divestment").

By November 2009, PPB was facing serious financial difficulties and cash flow problems. After considering various fundraising options, PPB's board of directors resolved to divest PPB's remaining 54.62% shareholding in PEB ("November Board Mandate"). Pursuant to the November Board Mandate, PPB sold 48.8 million PEB shares (25.03% equity stake in PEB) to Shorefield Resources Sdn Bhd ("Shorefield"), resulting in Shorefield becoming the controlling shareholder of PEB ("Third Divestment"). The proceeds of the disposal obtained from the Third Divestment were utilised to pare down bank borrowings and the gearing ratio of PPB's group of companies. The Third Divestment also resulted in a gain of approximately RM13.7 million for PPB's group of companies.

During the board of directors' meeting on 22 December 2009, the PPB board deliberated on the divestment of the remaining 29.59% shareholding in PEB pursuant to the November Board Mandate ("Intended Fourth Divestment"). The Intended Fourth Divestment did not take place as an injunction was obtained in the High Court by one of PPB's directors to restrain the sale of the shares.

This led to a corporate power struggle dispute within PPB and resulted in the defendants being removed as directors of PPB at an Extraordinary General Meeting on 4 February 2010.

DECISION OF THE HIGH COURT

With a new management in place, PPB commenced an action in the High Court against the defendants on the basis, among others, that, in causing PPB to undertake the Second Divestment and Third Divestment:

(i) the defendants had acted in breach of their statutory duties under Section 132(1) of the Companies Act 1965 ("CA 1965");
(ii) the second and third defendants dishonestly assisted the first defendant in the various breaches of duty and were accessories thereto;
(iii) the defendants and the fourth defendant (who was at the material time an executive director of PEB) conspired, whether by lawful or unlawful means, to injure PPB vide the Second Divestment and Third Divestment; and
(iv) the defendants in breach of their fiduciary, statutory or common law duties, failed to act in the best interest of PPB.

The defendants argued that the Second Divestment and Third Divestment were undertaken due to urgent cash flow problems caused by a downturn in PPB's business. On the other hand, it was PPB's contention that the cash flow problems were not genuine and that the defendants' ulterior motive was to dispose of PEB to Shorefield under a conspiracy contrived by the defendants to enable Shorefield to become the controlling shareholder of PEB.

The High Court found in favour of the defendants, holding that, at all times, the decisions by the defendants to undertake the Second Divestment and Third Divestment were business judgments made in good faith after exercising due care and diligence. Further, the High Court found that the defendants did not breach their fiduciary duties to PPB.

DECISION OF THE COURT OF APPEAL

PPB's appeal to the Court of Appeal was allowed. The Court of Appeal focused on determining whether the defendants had acted in the best interest of PPB and found that the proposition "*best interest of the company*" was for the majority to decide. In particular, it found that the Shareholders' Divestment Mandate provided a barometer as to what the shareholders gauged as being the best interest of PPB. In this regard, it was held that in failing to comply with the restrictions of the Shareholders' Divestment Mandate, the defendants had failed to act in the best interest of PPB. Secondly, the Court of Appeal held that a shareholders' resolution carried at a general meeting of company amounted to "*regulations*" pursuant to the articles of association of a company by which the defendants were obligated to comply with. Further, it was held that shareholders by a majority could decide what was in the best interest of a company.

DECISION OF THE FEDERAL COURT

Eighteen questions of law were posed to the Federal Court, seven of which the apex court found unnecessary to answer. This article will focus on the main issues discussed in *Petra Perdana*.


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Division of powers

One of the main issues here was the division of powers between the shareholders in a general meeting and the board of directors. The question posed to the Federal Court was whether the powers of management conferred on directors by CA 1965 and the articles of association could be overridden by an ordinary resolution passed by a simple majority of shareholders at a general meeting. In other words, whether the Shareholders' Divestment Mandate could override the powers of the directors to divest the PEB shares held by PPB.

The Federal Court answered the question in the negative, holding that shareholders may *only* override the powers of the directors by altering the articles to take away the powers of the directors, or, by refusing to re-elect the directors of whose actions they disapprove.

Statutory force to this legal position can be found in Section 131B of CA 1965 which provides that "*the business and affairs of a company must be managed by, or under the direction of, the board of directors*", subject to "*any modification, exception or limitation contained in the Act or in the memorandum or articles of association of the company.*"

Furthermore, the articles of association of PPB had set out that the business affairs of PPB shall be managed by the directors with the exception, *inter alia*, that the directors' exercise of powers were subject to "*these regulations*" and CA 1965. The Federal Court (in upholding the High Court's decision) held that the reference to "*regulations*" means regulations as envisaged under CA 1965, i.e. the articles of association, and not resolutions passed at a general meeting such as the Shareholders' Divestment Mandate, and as such, the directors were not bound to comply with the Shareholders' Divestment Mandate to divest only up to 19.5 million shares in PEB. In other words, the Divestment Mandate did not deprive the defendants of their power to deal with the PEB shares in accordance with CA 1965 and the articles of association.

On this point, while this case was decided in the context of CA 1965, it is interesting to note that the new Section 195 of the Companies Act 2016 ("CA 2016") provides that shareholders are entitled to pass a resolution in a general meeting to make non-binding recommendations to the directors on management matters, or, pass a special resolution to make a binding recommendation on the directors if the recommendation is in the best interest of the company.

Test for breach of duty to act in the best interest

Another main issue here was the test to be applied in determining whether a director had acted in the "*best interest of the company*". The Federal Court held that the test to be applied is a combination of both a subjective element and an objective element.

Subjective element

The breach of a director's duty is determined based on an assessment of the state of mind of the director, i.e. whether the director (and not the court) considers that the exercise of discretion is in the best interest of the company. The director is under a duty to act in what he believes to be the best interest of the company.

Objective test

However, the director's assessment of the company's best interest is subject also to an objective review or examination by the courts. The Federal Court adopted the test laid down by the Court of Appeal in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor* [2012] 3 MLJ 616 which is whether "*an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company.*"

On the facts, the Federal Court decided that the Second Divestment was carried out in view of the urgency of the cash flow problems faced by PPB and as such, it was justifiable to sell the shares at a depressed price. In respect of the Third Divestment, similarly, the Federal Court found that the defendants had carried out the same as they were advised that the cash flow problem faced by PBB for the following 12 months would deteriorate and PPB would face serious liquidity problems.

Applying the tests above, the Federal Court concluded that an honest and intelligent man in the position of the defendants would reasonably have concluded that the Second Divestment and the Third Divestment were necessary in the best interest of PPB. As such, the defendants had acted in good faith and in the best interest of PPB.

Business judgment rule

Briefly, the business judgment rule anticipates that in the absence of fraud, breach of fiduciary duty and conspiracy, a court should not undertake the exercise of assessing the merits of a commercial or business judgment made by the directors of a company, especially with the benefit of hindsight. This is necessary to preserve the directors' discretion and to protect them from the court's interference.

This rule was encapsulated in Section 132(1B) of CA 1965 (now Section 214 of CA 2016), which states that a director who makes a business judgment is deemed to meet the requirements of his statutory duty to exercise reasonable care, skill and diligence and the equivalent duties under the common law and in equity if he (i) makes the business judgment in good faith and for a

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A RIGHT TO INSPECT AND A RIGHT TO SUSPEND?

Sheba Gumis and Choy Yuin Yi discuss two cases concerning directors' rights and duties

It is trite law that the accounting and related records of a company are open to inspection by directors (Section 167(3) of the Companies Act 1965 ("CA1965") and section 245(4) of the Companies Act 2016 ("CA2016")). However, the extent and limit of this right is not expressly set out in the aforementioned Acts.

Further, as both CA1965 and CA2016 are silent on the right of a company to suspend a director, a question also arises whether a company is entitled to take such action against its directors.

In this article, we examine the recent cases of *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2018] 2 CLJ 103 and *Kwan Teck Hian v Insulflex Corporation Sdn Bhd* [2018] 2 CLJ 335 where these issues were considered by the High Court.

Both cases were heard by Mohd Nazlan J, who delivered his judgment in *Dato' Seri Timor Shah Rafiq* on 15 March 2017, and in *Kwan Teck Hian*, three months later on 15 June 2017.

> **"The right … can only be forfeited if it is used for an ulterior purpose or to cause injury to the company"**

DATO' SERI TIMOR SHAH RAFIQ

Background facts

The plaintiff was a non-executive director of the defendant and a nominee director for the defendant's minority shareholder, Nautical Supreme Sdn Bhd ("NSSB"). The majority shareholder, Azimuth Marine Sdn Bhd ("AMSB"), controlled the defendant's board by having the right to appoint a greater number of nominee directors than NSSB.

To investigate what appeared to be serious accounting irregularities, the plaintiff requested a copy of the defendant's accounting records. The request was denied by the defendant's board, although the plaintiff was allowed to inspect the documents at the defendant's office. The board also voted against the plaintiff's request for the accounting records to be inspected by his auditor of choice.

The defendant raised various counter allegations, the main one being that the inspection request was for the ulterior purpose of pressuring the defendant and AMSB to continue making payments to NSSB, which had stopped after a dispute between the two shareholders.

The plaintiff then applied to Court seeking orders that he be allowed to inspect and make copies of the defendant's financial records and for the appointment of an auditor to assist him for that purpose.

Right of inspection

The Court, relying on *Paul Nicholson v Faber Medi-Serve Sdn Bhd & Ors* [2002] 1 MLJ 355, *Dato' Tan Kim Hor & Ors v Tan Chong Consolidated Sdn Bhd* [2009] 2 MLJ 527 (CA) and *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 3 SLR 65 (Singapore CA), held that directors have an unrestricted and direct access to a company's accounting records and that such right is mandatory in order to enable a director to discharge his responsibilities fairly and equitably for the benefit of the company and its shareholders.

The Court observed that *Wuu Khek Chiang George* also held that a director is *prima facie* entitled to inspection and is not required to demonstrate any particular ground or "*need to know*" basis.

Forfeiting the right of inspection

Mohd Nazlan J, also held that a director's inspection right can only be forfeited where it is exercised not to advance the interest of the company but for ulterior purposes to injure the company (*Edman v Ross, Molomby, Deluge Holdings Pty Ltd & Anor v Bowlay & Ors* [1991] 9 ACLC 1486) or for an improper purpose (*Oxford Legal Group Ltd v Sibbasbridge Services Plc* and Another [2008] EWCA 387).

Drawing on the principles laid down in *Tan Kim Hor*, the Judge added that the Courts do not have any residual discretion to refuse inspection and that it is for the company resisting the exercise of this right to show clear proof that the director is using the right for some ulterior or improper purpose or to injure the company.

Right to copies of documents

The Court referred to sections 131B and 132 of CA1965 (substantially in *pari materia* with sections 211 and 213 respectively of CA2016) and stated that the law vests the duty of management of a company in its directors, which must be discharged with reasonable care and diligence in the best interest of the company. Given these positive duties and the potential liabilities, the law accords directors a virtually absolute and unqualified right to inspect the books of a company which they are responsible for. The jurisprudential basis for the directors' inspection right applies equally to the right to make copies of the documents so inspected, the latter being a subset of the former.

Inspection by director's agent

The Court held that a director's right to appoint an auditor to assist him in the exercise of his inspection rights is clearly envisaged in section 167(6) of CA1965. This provision, which is in *pari materia* with section 245(8) of CA2016, allows the court to order that the accounting and other records of a company be open for inspection by an approved company auditor acting on behalf of a director, subject to a written undertaking given to court that the information acquired by the auditor during the inspection should not be disclosed except to that director.


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Whether ulterior motive proved

With regard to the defendant's main contention that the plaintiff's request for inspection was made for the ulterior purpose of pressuring the defendant and AMSB to continue making payments to NSSB, the learned Judge said that he did not find evidence of any pressure being brought to bear by NSSB or the plaintiff on the defendant. In any event, the Court added that any dispute as to the payments allegedly due from AMSB to NSSB were of no relevance to the defendant as they were issues between the defendant's shareholders.

According to the Court, of greater relevance was the fact that the payments were due to NSSB and not the plaintiff, who was not even a shareholder of NSSB. Thus, any suggestion that the request for inspection was for the personal benefit of the plaintiff was misconceived. The Judge further said that the defendant failed to demonstrate any manner in which the purported payment dispute, which did not concern the plaintiff in his capacity as a director of the defendant, amounted to an ulterior or improper purpose unrelated to the discharge of the plaintiff's duty as a director of the defendant.

The Court also rejected the other arguments raised by the defendant in opposing the plaintiff's request on grounds that these arguments lacked substance and were an attack on the plaintiff's application rather than evidence of improper or ulterior motives.

The Judge added that it is not for the plaintiff, as a director, to justify why he needs to examine the records. He reiterated that based on *Dato' Tan Kim Hor*, it is for the defendant to show clear proof and to satisfy the court that the grant of the right of inspection would be for a purpose detrimental to the interest of the company. In the absence of such proof, a director's right of inspection is unbridled and almost absolute. As the defendant had failed to show such proof, the Court ordered that the plaintiff be allowed to inspect and make copies of the defendant's financial records and to appoint an auditor to assist him in the inspection.

KWAN TECK HIAN

Background facts

The plaintiff was a director of the defendant company, together with two other directors ("Other Directors").

Without consulting the plaintiff, the Other Directors established an executive committee and determined that certain business transactions for the defendant could only be carried out with the authorisation of the executive committee. The plaintiff was then denied access to the defendant's accounting and financial records.

At the defendant's annual general meeting, the plaintiff objected to a proposal by one of the Other Directors to utilise a RM8.5 million loan facility obtained from Public Bank Berhad. The plaintiff then unilaterally issued a letter to five banks, requesting them to freeze the defendant's monies held with those banks ("the Impugned Acts").

The defendant then served on the plaintiff a show cause letter demanding an explanation for the Impugned Acts. A notice of a board meeting of the defendant to be held on 8 December 2016 was also served on the plaintiff.

The plaintiff requested the defendant to make available a copy of the updated management accounts at the board meeting and to allow an independent auditor to inspect certain accounting records of the defendant. The defendant reserved its right pending legal advice and proceeded to hold a domestic inquiry against the plaintiff who chose not to attend.

At the board meeting of 8 December 2016, the plaintiff produced a statement explaining the Impugned Acts. The defendant's board accepted the disciplinary panel's finding of gross misconduct against the plaintiff and resolved to terminate the plaintiff's employment and to suspend his directorship.

The plaintiff commenced proceedings ("Originating Summons") to enforce his inspection right as a director of the defendant. The defendant responded by applying to strike out the Originating Summons.

Principal assertions of the defendant

The defendant's key contentions concerned the Impugned Acts. According to the defendant, these acts were committed by the plaintiff out of a selfish or personal interest and were not in the best interest of the defendant. It contended that the Impugned Acts were in breach of fiduciary duty on the part of the plaintiff and if the plaintiff had been successful, those acts would have had catastrophic effect on the defendant in that it would have been unable to receive monies through the bank accounts and its operations would likely have ceased, and employees, suppliers and third parties would not be paid.

The defendant also noted that the plaintiff intended to dispose of his shares in three companies to one Pecol Industries Sdn Bhd ("Pecol") and had copied his letters to the banks to the Pecol. The disclosure of the defendant's sensitive information to Pecol, a third party, constituted another breach of fiduciary duty by the plaintiff.

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COURT OF APPEAL UPHOLDS PRE-CIPAA "PAY WHEN PAID" CLAUSE

Shannon Rajan highlights the recent Court of Appeal's decision on "pay when paid clauses"

SHANNON RAJAN

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INTRODUCTION

In the recent case of *Bauer (Malaysia) Sdn Bhd v Jack-In Pile (M) Sdn Bhd* (unreported), the Court of Appeal considered whether a *"pay when paid"* clause in a construction contract is void under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA").

Unless otherwise stated, all references to sections in this article are to sections in CIPAA.

BRIEF BACKGROUND FACTS

There were two appeals before the Court of Appeal where the High Court judge dismissed the Appellant's application to set aside an adjudication decision and allowed the enforcement of the aforesaid adjudication decision by the Respondent. The said decision (reported in [2017] MLJU 1342) was premised on a finding that a *"pay when paid"* clause in a construction contract was void pursuant to section 35, which prohibits any conditional payment clauses in a construction contract.

> **"access to justice is a substantive right and … CIPAA is a legislation relating to substantive rights"**

Clause 11.1 of the construction contract, which according to the High Court judgment was dated 16 March 2011 (i.e. prior to the coming into force of CIPAA on 15 April 2014) provides as follows:

"11.0 Progress Payment

11.1 ***All payment shall be made within 7 days from the date the Specialist Contractor received their related progress payment and subjected to 5% retention.*** *The Sub-Contractor shall submit his claims with measurement records of work done including demarcated sketches and/or delivery orders (where applicable), duly endorsed by the Specialist/Main Contractor's and Consultants authorised site staff. The cut-off date for the progress claim shall be on 20th day of each calendar month."* (Emphasis added)

The main issue before the adjudicator was whether section 35 applied to construction contracts which existed prior to the coming into force of CIPAA. It was not disputed that prior to the adjudication, the parties had followed the mode of payment under clause 11 of the construction contract. Notwithstanding this, the adjudicator found that section 35 applied and consequently, ignored clause 11 and relied on the default provision entitling to progress payments under CIPAA to award a sum of RM 906,034.00 to the Respondent.

The High Court judge relied on *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor* [2015] 5 CLJ 527, which held, amongst others, that CIPAA applies to all construction contracts regardless of when those contracts were made and accordingly, affirmed the adjudicator's decision.

THE COURT OF APPEAL'S DECISION

Regarding the applicability of section 35, the Court of Appeal found that there is no express provision under CIPAA excluding or including construction contracts made prior to the commencement of CIPAA. Hence, the Court of Appeal had to determine Parliament's intention through established principles of interpreting statutes. In this regard, the Court found that the applicable principle of law was that if the legislation does not take away any substantive rights of a citizen, then that legislation would be *"procedural"* in nature and can be interpreted as retrospective legislation unless there are clear words to the contrary.

> **"section 35 takes away the parties' right to have their payment regime regulated by a "pay when paid" mode"**

In determining whether CIPAA gave rise to *"substantive rights"*, the Court of Appeal observed that prior to CIPAA, the claimants in the construction industry could only resort to either the courts or arbitration to settle their disputes. However, with CIPAA, the claimants now have an additional avenue to make a claim for their contractual fees. As such, the Court of Appeal was of the view that access to justice is a substantive right and accordingly, found that CIPAA is a legislation relating to substantive rights. It further found that although there is a procedural regime under CIPAA dictating how claims are to be processed before the adjudicator, that regime was merely a by-product or the consequence of the substantive right created by CIPAA.

The Court of Appeal also viewed section 35 as a substantive right of an individual *vis-à-vis* the right to freedom of contract where the parties are entitled to regulate their business affairs subject

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PROMOTIONS

The Partners are pleased to announce that Sheba Gumis, Foo Siew Li, Tan Shi Wen, Lee Ai Hsian, Loshini Ramarmuty, Natalie Lim and Khong Siong Sie have been admitted as Partners of the Firm from 1 January 2018.

Sheba is a member of our Corporate Division. Her portfolio includes mergers and acquisitions, joint ventures, and education, mining and natural resources and investment laws.

Siew Li is a member of our Dispute Resolution Division. Her main practice areas include employment and industrial relations, immigration and shipping and maritime law.

Shi Wen is a member of our Corporate Division. Her main practice areas include competition law, oil and gas, healthcare and ship financing.

Ai Hsian is a member of our Corporate Division. Her portfolio includes banking and finance, electronic payment systems, mergers and acquisitions and joint ventures.

Loshini is a member of our Construction and Engineering Practice Group. Her main practice areas include arbitration and statutory adjudication.

Natalie is a member of our Intellectual Property Division. Her practice includes drafting and advising on technology, media and telecommunications, e-commerce and data protection matters.

Siong Sie is a member of our Tax Practice Group. His portfolio includes tax litigation and advisory matters. Siong Sie is a Fellow of the Association of Chartered Certified Accountants.

We are also pleased to announce that Ashish Matthews, Anita Natalia and Nathalie Ker have been promoted to Senior Associates.

Ashish is a member of our Construction and Engineering Practice Group. His practice involves drafting and advising on infrastructure, construction and engineering contracts.

Anita is a member of our Dispute Resolution Division. Her portfolio includes corporate and commercial litigation, construction claims, corporate insolvency and alternative dispute resolution.

Nathalie is a member of our Dispute Resolution Division. Her main practice areas include corporate and commercial litigation, corporate insolvency and alternative dispute resolution.

We extend our heartiest congratulations to Sheba, Siew Li, Shi Wen, Ai Hsian, Loshini, Natalie, Siong Sie, Ashish, Anita and Nathalie.

INFRINGING WEBSITE LIST: TURNING OFF THE TAPS

Alyshea Low explains the use of infringing website lists to enhance the protection of intellectual property rights

INTRODUCTION

In the late 1990s, government authorities in countries such as China and Hong Kong actively took steps to crack down on the production and distribution of pirated optical media products. These products included films, music, videos, and various entertainment, educational, and business software and literary material.

Organized criminal enterprises found Malaysia to be an attractive alternative for their production and distribution bases, as it did not have effective legislation or regulations to combat piracy then.

THE OPTICAL DISCS ACT 2000

On 15 September 2000, the much-anticipated Optical Discs Act 2000 ("Act") came into effect. It contained provisions to deal with the licensing and regulatory framework to control the manufacture of optical discs in Malaysia.

The Act, together with the Optical Discs Regulations 2012, proscribed piracy and fraudulent activities and strengthened the protection of intellectual property rights in Malaysia. The Act was an important legislative tool to combat the increasing manufacture and distribution of bootleg products.

Under the Act, manufacturers are required to obtain a license and licensees must mark each optical disc with their assigned manufacturer's code for ease of identification. The Act defines "optical discs" to mean compact discs (CD), digital versatile discs (DVD), laser discs (LD), mini discs (MD), and any other medium or device on which data may be stored in digital form and read using laser, and includes any such medium or device manufactured for any purpose, whether or not any data readable using a laser or other means has been stored on it.

OTHER RELEVANT LEGISLATION

Other than the Act, penalties are stipulated under other relevant legislation such as the Trade Descriptions Act 2011 and the Copyright Act 1987. Section 41 of the Copyright Act 1987 prescribes a list of offences and a range of penalties. Depending on the severity of the piracy, penalties range from a fine of not less than RM2,000 and not more than RM250,000 for each infringing copy, or imprisonment for a term not exceeding five years or both, and for every subsequent offence, a fine of not less than RM4,000 and not more than RM500,000 or imprisonment for a term not exceeding 10 years or both.

The Trade Descriptions (Optical Disc Label) Order 2010 was introduced as part of the Government's initiative to eradicate copyright piracy. Under the aforesaid Order, any person found guilty of an offence, is liable to a fine not exceeding RM100,000 or imprisonment for a term not exceeding three years or both, and for a second or subsequent offence, to a fine not exceeding RM200,000 or imprisonment for a term not exceeding six years or both. A body corporate, if convicted, would be liable to a fine of not exceeding RM250,000 for the first offence and not exceeding RM500,000 for the second and subsequent offences.

CHANGING TIMES

Pirated optical discs, although less pervasive than in the past, still remain available. However, as the age of the Internet has taken globalisation to a new level, piracy in Malaysia is no longer limited to media in a physical form.

With the boom of the dotcom era, piracy has diversified into online piracy through illegal copying and dissemination of copyrighted works such as audios, videos, books, and software over digital platforms. Although there is access to content from legitimate digital platforms such as Netflix and Spotify, a large number of pirate websites remain present on the World Wide Web. While consumers obtain 'free' content from pirate websites, the owners of these websites benefit by earning revenue from advertising.

In late 2017, Malaysia became the third country, after Vietnam and Hong Kong, in the Asia Pacific region to launch the Infringing Website List ("IWL") initiative. The initiative was launched by stakeholders in the creative and advertising communities, e.g. Media Prima Bhd, Astro, Communications and Multimedia Content Forum of Malaysia, Motion Picture Association, Centre for Content Promotion and Media Specialists Association, in their effort to combat digital piracy. The IWL identifies websites that have been illegally providing copyrighted content, and the list of these websites is shared with advertisers, agencies, and other intermediaries to stop the placement of advertisements on these illegal websites.

OPERATION CREATIVE AND THE UK IWL

The IWL initiative takes its lead from the UK's Operation Creative, an initiative led by the City of London Police's Police Intellectual Property Crime Unit ("PIPCU") in 2014. Operation Creative was designed to disrupt and prevent websites from providing unauthorised access to copyrighted content, in partnership with the creative and advertising industries.

Based on the City of London Police's website (www.cityoflondon.police.uk), as part of Operation Creative, rights holders in the creative industries identify and report copyright infringing websites to PIPCU, providing a detailed package of evidence indicating how the site is involved in copyright infringement. Officers from PIPCU then evaluate the evidence and verify whether the websites are infringing copyright.

If the website is found to be providing infringing content, the site owner will be contacted by PIPCU officers and offered an opportunity to engage with the police. This provides the site owner with a favourable option to correct their behaviour and to operate legitimately.

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However, if the owner of the website fails to comply or otherwise cooperate, then a variety of other tactical options are available. These include contacting the domain registrar to seek suspension of the site, advert replacement, and disruption of advertising revenue through listing on an infringing website list.

The UK Infringing Website List is an online portal containing an up-to-date list of copyright infringing sites, identified by the creative industries and verified by PIPCU. This list is not publicly available. It is only available to the partners of Operation Creative and those involved in the sale and trading of digital advertising.

Operation Creative now lists over 2,000 pirate websites and involves over 130 advertising associations and companies. Recent reports have shown a 73% decrease in mainstream advertisements appearing on pirate websites, and the initiative appears to be a successful ground-breaking method to combat digital piracy.

CONCLUSION

As there has been rapid evolution in the development of technology, particularly in the last decade, combating piracy is now more complex than ever. Digital piracy is a relatively new crime and Malaysia continues to face challenges in ensuring the effective protection of copyright.

With the age of the internet providing borderless access to limitless information, the introduction and implementation of the IWL in Malaysia is a clear sign that stakeholders in the local creative and advertising industries have taken heed of the successfully implemented Operation Creative and the UK Infringing Website List and have taken significant steps to improve protection and enforcement of intellectual property rights in Malaysia. By cutting off advertising revenue flowing to these websites, the IWL is a promising tool in combating a new era of piracy.

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SKRINE ANNUAL BOWLING CHAMPIONSHIP

Skrine's 12th Annual Bowling Championship was held on 20 April 2018 at U-Bowl, One Utama, Petaling Jaya.

After an intensely fought battle, the Blues (with 1979 pins) emerged as Champions for the 2nd consecutive year. The Incredibles (with 1946 pins) were the 1st runners-up and the Top Guns (with 1808 pins), the 2nd runners-up.

Kamal Shah Bin Umar from the Incredibles won the Best Male Bowler and the Best Female Bowler was awarded to Pon Komalam S.Punnusamy from the Top Guns.

Congratulations to all the winners of the 2018 Skrine Bowling Championship and many thanks to the participants and the many supporters for making this event an enjoyable one. It certainly was a fun-filled night and undoubtedly the teams are all geared up for the 2019 championship!

UNILATERAL CONVERSION IN MALAYSIA – BACK FROM THE BRINK

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Section 96(1) of the Perak Enactment provides that in order for a conversion of a person to Islam to be valid, the person converting must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith. In addition, at the time of uttering the two clauses, the person must be aware of the meaning of the clauses and must utter them based on the person's own free will. Section 106(b) of the same enactment provides that a person below the age of 18 may convert if he is of sound mind and his parent or guardian consents in writing to his conversion.

The FC answered the second leave question in the affirmative and held that the requirements in sections 96 and 106 are mandatory and must be complied with. It found that the children of Indira and Riduan did not utter the two clauses of the Affirmation of Faith and were not present before the Registrar of Muallafs before the certificates of conversion were issued. As the mandatory statutory requirements were not fulfilled, the Registrar of Muallafs had no jurisdiction to issue the certificates of conversion. The lack of jurisdiction by the Registrar of Muallafs therefore rendered the certificates issued a nullity.

The FC then considered whether section 101(2) of the Perak Enactment, which provides that a certificate of conversion to Islam shall be conclusive proof of the facts stated in the certificate of conversion, had the effect of excluding the HC's power to review the issuance of those certificates. This argument was rejected by the FC. First, the FC held that the court's supervisory jurisdiction to determine the legality of an administrative action (i.e. the issue of the certificates of conversion) by the Registrar of Muallaf could not be excluded even by an express ouster clause (*Anisminic Ltd v The Foreign Compensation Commission and Another* [1969] 2 AC 147 (HL)).

Further, and in any event, the FC opined that the language of section 101(2) did not purport to oust judicial review. The provision merely states that the certificate of conversion is conclusive proof of the facts stated therein, that is, that the person named in the certificate has been converted to the religion of Islam, and his name has been entered in the Registrar of Muallafs. In the present appeals, the fact of the conversion or the registration of Indira's children was not challenged – what was challenged was the legality of the conversion and registration.

The Third Leave Question

The third leave question considered whether the mother and father (if both are surviving) of a child of a civil marriage must consent before a certificate of conversion to Islam could be issued in respect of the child.

According to the FC, this issue involves the interpretation of the expression "parent" in Article 12(4) of the Constitution. The FC cited Articles 12(3) and 12(4) of the Constitution which provide:

"*(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.*

(4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his ***parent*** *or guardian.*" (*Emphasis added*)

The FC also considered the national language (Bahasa Malaysia) translation of Article 12(4) was differently worded thus:

"*(4) Bagi maksud Fasal (3) agama seseorang yang di bawah umur lapan belas tahun hendaklah ditetapkan oleh ibu* ***atau*** *bapanya atau penjaganya.*" (*Emphasis added*)

In view of the inconsistency between the Bahasa Malaysia and English versions of Article 12(4), it was contended that the Bahasa Malaysia version prevailed over the English version pursuant to Article 160B of the Constitution which provides, *inter alia*, that the Yang di-Pertuan Agong may prescribe a translated text in Bahasa Malaysia to be the authoritative version. However, the FC agreed with the HC that since the requisite prescription of the national language version by the Yang di-Pertuan Agong under Article 160B had not been effected, the authoritative version is the English version.

The FC then referred to the Eleventh Schedule to the Constitution (read together with Article 160(1)) which provides that, in interpreting the Constitution, "*words in the singular include the plural, and words in the plural include the singular*". The FC explained that the reason "parent" is used in Article 12(4) is to provide for a situation where the child has only one parent, i.e. a single parent situation. Where both parents exist, the Eleventh Schedule is to be relied on, that is the plural form of the word, i.e. "**parents**" is to be used and accordingly, the decision on the religion of a child is to be decided by both parents.

Finally, the FC upheld the equality of parental rights in respect of an infant (which is defined to include any child who has not attained the age of majority) as embodied in *inter alia* sections 5 and 11 of the Guardianship of Infants Act 1961 ("GIA") which provides that "*a mother shall have the same rights and authority as the law allows to a father*" in relation to the custody or upbringing of an infant and that the court "*shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be*". The FC held that the GIA would still apply to the children of Indira and Riduan notwithstanding the latter's conversion to Islam as conversion does not absolve a person of antecedent obligations.

Both parents' consent was therefore necessary before the certificates of conversion to Islam could be issued and the FC answered the third leave question in the affirmative.

In light of its answers to the leave questions, the FC allowed Indira's appeal. At the same time, the FC also ordered the

majority decision of the CA to be set aside and affirmed the decision and orders of the HC.

Prospective effect

In a rare development in Malaysian jurisprudence, the FC applied the doctrine of prospective ruling and ruled that its decision in *FC Indira Gandhi* is to have prospective effect. This means that the decision will not affect decisions made by the courts prior to the date of the FC's judgment, i.e. 29 January 2018.

COMMENTS

The *FC Indira Gandhi* decision has been rightly commended for its sound judgment and cogent analysis of the complex constitutional and family law issues of the case. The decision has brought some judicial certainty to this hitherto troubled area of jurisprudence. The FC's interpretation of Articles 121(1) and 121(1A) of the Constitution clearly demonstrates the jurisdictional limits of the Syariah Courts and the supremacy of the civil High Courts. Its interpretation of Article 12(4) of the Constitution and sections 5 and 11 of the GIA removes any doubt that the consent of both parents is required before a certificate of conversion can be issued, except in a single-parent situation.

However, as an apex court, a future panel of the FC has the power to, and may depart from, the reasoning and judgment of *FC Indira Gandhi*. It is therefore imperative that Parliament reintroduce Clause 7 which had at the last moment been withdrawn from the Law Reform (Marriage and Divorce)(Amendment) Bill 2016 that was passed to amend the LRA in August 2017. Clause 7, which sought to introduce a new section 88A into the LRA, had provided:

"*Where a party to a marriage has converted to Islam, the religion of any child of the marriage shall remain as the religion of the parties to the marriage prior to the conversion, except where both parties to the marriage agree to a conversion of the child to Islam, subject always to the wishes of the child where he or she has attained the age of eighteen years.*"

Arising from *FC Indira Gandhi*, it has been reported that the Government may consider reintroducing Clause 7 (Star Online, 30 January 2018). It remains to be seen whether the Government has the political will to make this a reality.

GDPR – ARE YOU READY FOR IT?

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user prior to engaging another processor; (ii) process personal data only on instructions from the data user; (iii) designate, in certain circumstances, a representative established in the EU (if the data processor is not established in the EU); (iv) designate a DPO in certain circumstances; and (v) inform the data user of any personal data breach without undue delay after becoming aware of the same.

WHAT HAPPENS IF I DON'T COMPLY?

The GDPR prescribes the imposition of hefty fines for non-compliance based on the provisions in question. Article 83 permits the relevant supervisory authority to impose a fine of up to EUR10 million or up to 2% of the total worldwide annual turnover of the preceding financial year in the case of an undertaking, whichever is higher, for breach of certain provisions such as the requirement to carry out a DPIA.

A fine of up to EUR20 million or up to 4% of the total worldwide annual turnover of the preceding financial year in the case of an undertaking, whichever is higher, may be imposed for breach of certain provisions such as the basic principles for processing, including conditions for consent.

HOW LONG DO I HAVE TO COMPLY?

The 2-year grace period following the adoption of the GDPR will expire on **25 May 2018**. Businesses and companies must ensure compliance with the GDPR by that date.

CONCLUSION

The PDPA has only been in force for less than five years and many businesses and companies in Malaysia are still struggling to ensure compliance with the same.

The implementation of the GDPR means that businesses and companies in Malaysia that are required to comply with the GDPR would have to conduct internal assessments in order to ensure compliance with the GDPR by 25 May 2018 or risk the imposition of fines and penalties. However, the extent of enforcement which the supervisory authorities are willing to take against data users and data processors established outside of the EU under this new data protection framework remains to be seen.

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DEVELOPMENTS IN STATUTORY ADJUDICATION IN 2017

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who has received an adjudication decision in his favour but is aggrieved as he should have received more.

CONSTRUCTION WORK

In 2016, it was established by the High Court in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & Another Case* [2017] 1 CLJ 101 that consultancy agreements fell within the ambit of CIPAA. This year, in *MIR Valve Sdn Bhd v TH Heavy Engineering Berhad & Other Cases* [2017] 8 CLJ 208, the High Court had to decide an interesting point as to whether works done on a ship to convert it into a Floating Production Storage and Offloading ("*FPSO*") vessel constitutes construction work within the meaning of a '*construction contract*' under CIPAA. MIR Valve Sdn Bhd was appointed by TH Heavy Engineering Sdn Bhd to supply valves to be installed onto the FPSO vessel for the production and processing of gas condensate and crude oil. In determining the aforementioned point, the learned judge considered the functional purpose of the vessel. Notwithstanding that the vessel could still move around, it was no longer a ship in the sense of transporting people or goods from one place to another as the predominant purpose of the vessel was now to serve the gas, oil and petrochemical industry. On this basis, the judge concluded that the vessel which is being converted for the oil and gas industry, falls neatly within the definition of '*construction work*' which includes any *'gas, oil and petrochemical work'*.

It is interesting to note that the learned High Court Judge observed *per obiter* that a '*ship building*' contract is excluded from CIPAA as it does not come within the ambit of structures (which are mainly buildings constructed above or below ground level) or infrastructure (such as roads, harbour works, railways, cableways, canals or aerodromes). The same sentiment was expressed in *YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd (and 3 Other Originating Summons)* [2017] 5 AMR 76 ("*YTK Engineering*") whereby the High Court observed, *per obiter*, that a shipping contract or a mining contract does not fall within the meaning of *"construction work"* under *section 4* and hence is not a *"construction contract"* under *sections 2 and 4 of CIPAA*.

OBJECTION TO ADJUDICATOR'S APPOINTMENT

In *Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd and another case* [2017] MLJU 146, the High Court held that a party who participated fully in an adjudication proceeding without raising any objection as to the validity of the adjudicator's appointment during the proceeding was estopped from raising the objection subsequently in its setting aside application. It is to be noted that an objection to the validity of an adjudicator's appointment is to be distinguished from an objection to an adjudicator's jurisdiction, the latter of which can be raised at any point of time and at any stage of the proceeding.

EXTENSION OF TIME FOR PAYMENT RESPONSE

The issue as to whether there was a breach of natural justice when an adjudicator refused to allow the respondent's application for extension of time to submit a payment response was considered in *Binastra Ablebuild Sdn Bhd v JPS Holdings Sdn Bhd & Another Case* [2018] 2 CLJ 223 ("*Binastra*"). The High Court found that it is not a breach of natural justice merely because an adjudicator refused to allow the respondent's application for extension of time. All natural justice requires is that an adjudicator hears both sides and comes to a determination on the issue.

It is interesting to note that in considering the issue, the learned judge commented in passing that it is doubtful whether an adjudicator has the power to extend the time for service of a payment response as such response is a matter to be complied with and served before his appointment as adjudicator. While it is arguable that an adjudicator has the power under *section 25(p) of CIPAA* to *"extend any time limit imposed on the parties under this Act as reasonably required"*, the issue may not be of significant importance in light of *View Esteem* which now requires an adjudicator to consider all defences raised in an adjudication response notwithstanding the absence of a payment response.

EFFECT OF SETTING ASIDE

In *Wong Huat Construction,* it was held that the setting aside of an adjudication decision will restore all parties to their original positions as though the adjudication did not take place. Thus, a party is not barred from subsequently initiating a fresh adjudication proceeding, arbitration or litigation in respect of the claim.

Notwithstanding the findings in *Wong Huat Construction*, the Court may exercise its inherent jurisdiction and decide on the claim itself. In *Bina Puri Construction Sdn Bhd v Syarikat Kapasi Sdn Bhd* [2017] 5 AMR 750, the High Court in exercising its inherent jurisdiction to ensure convenience and fairness in legal proceedings, allowed the applicant's claim in whole and ordered the respondent to pay the applicant the amount claimed in its adjudication proceedings.

LOSS AND EXPENSE CLAIMS

In *SBDAB,* the High Court Judge held that an adjudicator who had erroneously decided that he had no jurisdiction to decide on loss and expense claims was in breach of natural justice. His Lordship found that such claims came within the ambit of CIPAA as they were due to the delay in completion of works and therefore payable as part of the amount claimable for the additional costs incurred for work done under the relevant contract. However, the Court recognised that not all loss and expense claims are within the purview of CIPAA as there may be instances where a claim for special damages arises out of a breach by the employer. It appears that whether a loss and expense claim falls within the ambit of CIPAA depends on whether the claim is one which inevitably arises from the carrying out of the work and whether the construction contract provides for the party to be paid the amount claimed in consideration for its performance of construction work.

DIVISION OF POWERS BETWEEN SHAREHOLDERS AND DIRECTORS

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It is interesting to note that a claim for bonus payment has been expressed in *YTK Engineering* to be within the purview of CIPAA. A bonus payment differs entirely from profit or loss sharing. The former is an incentive payment paid to a contractor who manages to save cost for the employer or complete the project earlier. The contractor will still be paid the agreed consideration for work done or services rendered except that he would be paid additionally an incentive or bonus payment for his exemplary work in completing the project earlier or in saving costs. It is a further sum that is agreed to be paid to the contractor based on his performance and that will be certified by the certifying officer and added to the contract sum as a bonus or incentive payment. Such a claim would be upheld under CIPAA.

TERMINATED CONTRACT

Binastra once again confirmed the High Court's decision of *Econpile* where it was decided that an adjudicator has jurisdiction to decide the dispute even though the construction contract has been terminated.

REGISTRATION OF DECISION IN PART

In *Harmony Teamwork Construction Sdn Bhd v Vital Talent Sdn Bhd* [2017] 10 MLJ 726, the defendant contended that the order for enforcement ought not be the same terms as the adjudication decision but for a reduced amount as the defendant had made part payment. It was held that whilst *section 28(2) of CIPAA* allows the High Court to make an order for enforcement of an adjudication decision '*either wholly or partly*', an order for enforcement in part is only applicable where part of an adjudication decision has been set aside pursuant to *section 15 of CIPAA*. Thus, an order for enforcement will be registered in the terms of the adjudication decision unless a part of such decision has been set aside.

PRE-AWARD INTEREST

Unlike the *Arbitration Act 2005* which precludes an arbitrator from awarding pre-award interest unless provided in an arbitration agreement (see *Far East Holdings Bhd v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1, the decision in *Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd and another case* [2017] 8 MLJ 708 appears to confirm that an adjudicator has the power to grant pre-award interest pursuant to *section 25(o) of CIPAA*.

CONCLUSION

As it can be seen from the above review, the law on statutory adjudication in Malaysia is developing rapidly. This stream of cases on statutory adjudication will undoubtedly assist in the interpretation of the provisions of CIPAA and in filling the gaps in the statute.

proper purpose; (ii) has no material personal interest in the subject matter of the business judgment; (iii) is informed about the subject matter of the business judgment to the extent that he reasonably believes to be appropriate in the circumstances; and (iv) reasonably believes that the business judgment is in the best interest of the company.

This rule has been applied by the courts consistently (see: *Howard Smith v Ampol Petroleum Ltd* [1974] AC 821 (PC); *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] 4 SLR (R) 162 (HC); *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313 (CA)).

The Federal Court held that the decisions to undertake the Second Divestment and the Third Divestment were business judgments made for a legitimate purpose by the defendants who had acted in good faith and in the best interest of PPB. As such, there was no basis for the court to substitute its own decision with that of the defendants. Having made the above findings, the Federal Court set aside the orders of the Court of Appeal and reinstated the orders of the High Court.

Distinction in duties owed by Non-Executive Directors and Executive Directors

One of the questions posed to the Federal Court was "*whether a distinction should be drawn between executive directors and non-executive directors in circumstance where non-executive directors have limited management functions and played a limited role in executing the impugned decisions made collectively by the board of directors*".

This question followed the High Court's decision that the two non-executive directors were entitled to rely on the operational forecasts, financial data and information provided to them by PPB's management as they had less direct knowledge of the day to day operations and finances of PPB than that of the executive director. The Federal Court declined to answer this question given that its answers to the other questions posed were sufficient to dispose of the matter. We will have to wait for another case on this.

CONCLUSION

The Federal Courts decision in *Petra Perdana* has provided much clarity to the law in respect of the governance and management of a company. In particular, it has affirmed the clear division between the powers of the directors and shareholders in managing the affairs of a company. The case further establishes the appropriate test to be applied in determining whether a director had acted in the best interest of the company, and the application of the business judgment rule in decisions made by directors.

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A RIGHT TO INSPECT AND A RIGHT TO SUSPEND?

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Accordingly, the defendant contended that it had rightfully suspended the plaintiff to contain the damage that the latter could potentially inflict on the defendant.

Arising from the suspension of the plaintiff as a director, the defendant submitted that plaintiff did not have the *locus standi* to initiate the Originating Summons. The defendant further maintained that in view of his suspension as a director, the plaintiff could not enforce his right of inspection.

Can a director be suspended?

Firstly, the Judge noted that a copy of the minutes of the board meeting stated that the plaintiff's directorship had been suspended. On the other hand, the draft minutes of the same meeting disclosed that the secretary had advised that the defendant's board had no power to suspend the defendant and the chairman was to seek legal advice on the matter. In light of the conflicting evidence, Nazlan, J said that it was not clear whether a valid resolution had in fact been passed by the defendant's board to authorise the suspension of the plaintiff.

The Court stated that even if a valid resolution had been passed to suspend the plaintiff, its true legal basis could still be challenged. As there were no provisions in either the articles of association of the defendant or in the CA1965 (or for that matter, CA2016) which authorised the board to suspend a director, the issue is whether the law permits the suspension of a director.

The Court considered two conflicting decisions on the suspension of directors, namely *Fong Poh Yoke & Ors v The Central Construction Company (Malaysia) Sdn Bhd* (1998) 4 CLJ 112 which held that the board of directors has authority to suspend a director and *Jerry Ngiam Swee Beng v Abdul Rahman bin Mohd Rashid & Anor* (2003) 6 MLJ 448 which held that the Court does not have the power, nor does the CA1965 have provisions, to suspend directors.

The High Court stated that where a director fails in the proper exercise of his powers as a director, when the powers are exercised for ulterior or improper purposes, or when the acts injure the interest of the company, the board has the right to seek for his removal or for action (including injunctive relief) to be taken for such transgressions. In the absence of any legal basis for the suspension in the articles of association, the rights, duties and powers of a director cannot be affected or whittled down, even less so suspended by a mere decision of the board.

The Court also noted that a suspension of directorship would bring into play a host of uncertainties which are inimical to the proper and efficient management by the board of directors. It would, said the Judge, make little sense for a director to be denied the exercise of his rights and powers without also excusing him from performing his duties as a director which brings with it the potential liabilities for the breach of such duties. The Judge concluded that any action to restrict the powers of a director must be based on clear and specific legal provisions. Resorting to suspension of directorship is woefully inadequate and ought to be avoided.

His Lordship clarified that his ruling only applies to the suspension of the rights and duties vested in the office of a director. If a director is also an executive, e.g. a managing director, suspension of the executive function is not objectionable.

In view of his conclusion that the plaintiff could not be legally and validly suspended of his powers and responsibilities as a director of the defendant, the Judge held that defendant's objection on the absence of locus by reason of the plaintiff's suspension was devoid of substance and untenable.

Extent of a director's right of inspection

In considering the extent of a director's right of inspection, including the right to obtain copies of documents and for the inspection to be conducted by an independent auditor appointed by the director, the learned Judge in essence reiterated the legal position enumerated in his judgment in *Dato' Seri Timor Shah Rafiq*.

Similarly, His Lordship applied the reasoning in *Dato' Seri Timor Shah Rafiq* to determine the basis on which a director's right of inspection may be overridden.

According to the Court, the concerns expressed by the plaintiff as to the defendant's financial position and on certain items disclosed in the defendant's financial statements, were certainly matters for a director to be aware of and accountable to. Denial of access would render the director being unable to perform his statutory and fiduciary duty.

Although the Judge acknowledged that the Impugned Acts were committed by the plaintiff without proper authority and should not be condoned, he was of the view that the acts had not caused damage to the defendant's operations. Most crucially, the Court said that the defendant had failed to show any real connection between the Impugned Acts and the refusal to accede to the plaintiff's request for access to the defendant's financial records. Merely asserting a past wrong by a director without identifying the improper motive or establishing the link between the allegedly improper motive to the application for access is patently and grossly inadequate.

The Judge also rejected the defendant's assertion that the plaintiff's intention to sell his shares in certain companies to Pecol amounted to an improper exercise of his fiduciary and statutory duty as a director. Nazlan, J said that the plaintiff's intention to sell his shares was a separate and independent matter and was wholly inconsequential to the denial of the plaintiff's inspection right. The Court said that there was no suggestion or evidence that the information sought by the plaintiff would have a bearing on the shares allegedly intended to be sold by him.

COURT OF APPEAL UPHOLDS "PAY WHEN PAID" CLAUSE

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The Judge acknowledged that it is not easy for a company to demonstrate clear proof that the inspection right would be used by a director for a purpose detrimental to the company. His Lordship cited *Mageswary Kanniah v Vithyulingan Miniandy & Anor* [2009] 9 CLJ 40 and added, *per obiter*, that even the fact that a director had set up a competing company does not *ipso facto* indicate that the director concerned would be using the company's records for the ulterior motive of benefitting the other company.

The Judge concluded that the defendant's arguments to resist the plaintiff's application lacked substance and did not provide clear proof of any ulterior motive or purposes unrelated to the exercise of director's duties that could justify the striking out of the Originating Summons or the denial of the plaintiff's inspection rights. Accordingly the orders sought by the plaintiff in the Originating Summons were allowed.

COMMENTS

Kwan Teck Hian does not break new legal ground on the right of a company to suspend a director. By holding that a company cannot suspend a director, the Court followed one of two conflicting High Court decisions, namely *Jerry Ngiam Swee Beng* instead of *Fong Poh Yoke*.

Similarly, both cases discussed in this article do not create new law in relation to a director's right to inspect a company's documents and were determined by applying the relevant statutory provisions and the principles laid down in existing case law. Nevertheless, both are interesting and well-reasoned. In essence, the principles discussed in these cases on a director's right of inspection can be summarised as follows –

(1) A director's right to inspect a company's accounting and related records is almost absolute - he is not required to justify the need to examine such records;

(2) The right of inspection can only be forfeited if it is used for an ulterior purpose or to cause injury to the company;

(3) The onus lies on the company to provide clear evidence that the right is being used by the director for an ulterior purpose or to cause injury to the company; and

(4) The right of inspection includes the right to make copies of the documents and to have the inspection carried out by a qualified auditor on behalf of the director.

to any prohibitions recognised by law. According to the Court, section 35 takes away the parties' right to have their payment regime regulated by a *"pay when paid"* mode. The Court of Appeal was also guided by the presumption when interpreting statutes that Parliament will not take away the entrenched right of an individual retrospectively unless there are clear words to such effect within the statute. As there were no such clear words in CIPAA, the Court of Appeal concluded that CIPAA, including section 35, is prospective in nature and clause 11 of the construction contract remained valid.

The Court of Appeal took a different view from *UDA Holdings Bhd* and found support in *International Contractual and Statutory Adjudication* where the learned author, Andrew Burr, expressed the view that CIPAA was not a *"procedural legislation"*. The author premised his reasoning on section 36(1) which allows parties to contract out of the *"progress payment"* regime and such a right is not consistent with the spirit and intention of CIPAA. He opined that the phrase "*unless otherwise agreed by parties*" in section 36 ought to be deleted.

The Court of Appeal therefore concluded that the adjudicator had exceeded his jurisdiction in holding that clause 11 was void and allowed the two appeals and set aside the orders of the High Court and those of the adjudicator.

CONCLUSION

With the Court of Appeal's decision, the statutory adjudication practice in Malaysia which has been governed by the decision of *UDA Holdings Bhd,* has changed. A *"pay when paid"* clause under a construction contract existing prior to the commencement of CIPAA remains valid and enforceable and will not be affected by the introduction of section 35.

However, it is unclear whether the Court of Appeal's finding that *"CIPAA 2012 is prospective in nature"* is intended to apply to the whole of CIPAA or only to construction contracts entered between parties after the commencement of CIPAA. This case is presently pending an application for leave to appeal to the Federal Court.

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LEGAL INSIGHTS

A SKRINE NEWSLETTER

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

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