Shearn Delamore &co.

Dear valued clients and business partners,

We are pleased to highlight the following legal updates and developments for April 2018.

ARBITRATION & MEDIATION

Court directs suit involving non-parties to arbitration agreement to proceed ahead of arbitration proceedings

The Court of Appeal recently considered the law governing a stay of proceedings in relation to non-parties to an arbitration agreement pending the outcome of arbitration proceedings[1].The court determined that the facts of the case supported the conclusion that the court proceedings involving the non-parties to the arbitration agreement should proceed ahead of the arbitration proceedings between the parties to the arbitration.

Facts

Protasco and PT Asu entered into a sale and purchase agreement ("SPA"), which was governed by an arbitration clause. When PT Asu failed to comply with the terms of the SPA, the SPA was terminated. It was subsequently discovered that Protacso's substantial shareholder, Tey Por Yee, had made the proposal for the transaction to Protasco through his vehicle Global Capital Limited. Unbeknownst to Protasco, Tey and his nominee director in Protasco, Ooi Kock Aun, remained the effective beneficial owners of PT Asu, and the president director of PT Asu had taken instructions from Tey and Ooi in respect of matters pertaining to the SPA. Tey and Ooi also authored and forged the signatures of PT ASU's president director on letters issued in response to Protasco's letters.

Protasco brought an action against PT Asu, Tey and Ooi in the High Court. The causes of action against Tey and Ooi were, amongst others, deceit, fraud and conspiracy to defraud. Protasco's claim against PT Asu was premised on a conspiracy to injure and defraud and breach of contract. PT Asu obtained a stay of the court proceedings between Protasco and itself pursuant to Section 10 of the **Arbitration Act 2005**.

Subsequently, Tey and Ooi filed a stay of the court proceedings in the High Court pending disposal of the arbitration proceedings between Protasco and PT Asu. This was granted in Tey's and Ooi's favour, as the issues between PT Asu, Tey and Ooi were held to be "*connected and intertwined*". Protasco appealed against the stay granted to Tey and Ooi on the basis that they were not parties to the arbitration agreement and a stay of proceedings in relation to non-parties pending the outcome of arbitration proceedings should be granted only in rare and compelling circumstances.

Court of Appeal decision

With respect to Tey and Ooi, the Court of Appeal held that they were not parties to the arbitration agreement. Hence, section 10 of the **Arbitration Act 2005** did not apply to them. As such, the Court of Appeal had the discretion to exercise its inherent power to grant or refuse a stay as sought by Tey and Ooi.

The Court of Appeal considered the various permutations as to what would take place if the arbitration preceded the court proceedings and vice versa. The Court of Appeal had concerns that if the arbitration were to proceed, the arbitrator was likely to make findings of fact against Tey and Ooi (as witnesses) in respect of the allegations of conspiracy to defraud and injure. The Court of Appeal considered the fact that Tey and Ooi would be able to challenge these findings in court, leading to a re-litigation of matters determined by the arbitral tribunal.

If the court proceedings were to be heard and adjudicated on before the arbitration proceedings, it was felt that the High Court trial and findings made against Tey and Ooi would not interfere with nor impinge on the arbitration, as the SPA related solely to Protasco and PT Asu. The Court of Appeal also observed that if the court proceedings were to proceed on appeal, it would be unlikely that an appellate court would lightly reverse findings of fact made by the

trial court; hence, the arbitrator's reliance on findings of fact made by the court would not be subject to doubt.

The Court of Appeal also considered Protasco, which had a legitimate basis to call the conspirators to answer the allegations of conspiracy at the earliest opportunity. Based on this premise, the Court of Appeal reversed the High Court's decision. The proceedings against Tey and Ooi were directed to proceed to trial in the High Court. The arbitration proceedings between Protasco and PT Asu were directed to be held after the disposal of the High Court proceedings.

Comment

The Court of Appeal stressed that each case may differ in terms of the factors to be considered and the weight to be accorded to matters, such as the potential waste of resources, duplicity of evidence and possible conflicting findings in different fora.

This decision takes a different approach to that taken in earlier Court of Appeal decisions, such as **Renault SA v Inokom Corporation Sdn Bhd and Renault SA** [2010] 5 CLJ 32 ("**Renault SA**"). In **Renault SA**, the Court of Appeal decided that the action concerning the non-parties/co-conspirators could be stayed pending the outcome of arbitration.

The Court of Appeal held that the fact that the non-parties had been named as alleged co-conspirators in the court action did not change the fact that a mechanism for resolving disputes by way of arbitration had been agreed on and should be rightly invoked.

The Court of Appeal held that it would not encourage a "*devious attempt*" to circumvent the arbitration agreement by instituting an action against parties to the arbitration agreement jointly with parties not subject to the arbitration agreement. It remains to be seen which approach will be adopted moving forward.

(1) **Protasco Bhd v Tey Por Yee** [2018] 1 LNS 128

For further information regarding arbitration and mediation matters, please contact our Arbitration and Mediation Practice Group.

COMPETITION LAW AND ANTITRUST

Draft Guidelines published by the Malaysian Competition Commission ("MyCC")

MyCC has recently published draft guidelines on Intellectual Property Rights and Competition Law. The highlights provide for, amongst others, the following:

- exclusive licensing is not likely to infringe the **Competition Act 2010**unless the licence is coupled with anti-competitive conditions such as price fixing and tying;
- in a case of newly developed technology, exclusive dealing arrangements may be found to be beneficial to the consumers in the long run.

Grab's buyout of Uber's Southeast Asian business

The Grab buyout of Uber has attracted the attention of various Competition Commissions. Whilst the Malaysian **Competition Act 2010** does not provide for merger controls, anti-competitive considerations may arise by reason of such a merger. The Malaysia Competition Commission is monitoring the implications of the Grab-Uber merger on the Malaysia market to ensure the Grab-Uber merger is in compliance with the **Competition Act 2010**.

Section 4(1) of the **Competition Act 2010** prohibits horizontal or vertical agreements between enterprises which have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

Section 10(1) of the **Competition Act 2010** prohibits enterprises from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

For further information regarding competition law and antitrust matters, please contact our Competition Law and Antitrust Practice Group.

CORPORATE/M&A

Bursa Malaysia launches BURSASUSTAIN, a one-stop knowledge hub on corporate governance and sustainability

On 24 April 2018, Bursa Malaysia Berhad ("Bursa Malaysia") launched BURSA**SUSTAIN,** a comprehensive online portal designed as a one-stop knowledge and information hub on corporate governance and sustainability. In its press release on the same date, Bursa Malaysia said that the hub aims to provide a platform for users, such as listed issuers, investors and other key stakeholders, to have easy access to the latest information on corporate governance and sustainability.

Designed to be user-friendly, Bursa Malaysia hopes that BURSA**SUSTAIN** will act as a catalyst for listed issuers to adopt and implement quality corporate governance and sustainability practices, as well as improving the quality of disclosures and reporting to be on par with international standards. For investors, BURSA**SUSTAIN** also provides information on responsible investment and Islamic finance.

The three key pillars housed in BURSA**SUSTAIN** are as follows:

1. The **Corporate Governance** pillar provides resources that help listed issuers understand the benefits and value of adopting good corporate governance practices.
2. The **Sustainability** pillar contains tools and resources to inform and inspire listed issuers at different stages of their sustainability journey.
3. The **Responsible Investment** pillar gives investors a better understanding of applying the latest environmental, social and governance information alongside their financial and market

consideration, which will allow them to make better informed investing decisions.

BURSA**SUSTAIN** can be accessed here: https://bursasustain.bursamalaysia.com.

Deadline is looming for foreign insurers to sell down in Malaysia

In recent statements, Bank Negara Malaysia ("BNM") has prompted foreign insurers to comply with their commitment to reduce their shareholding in their local units to 70% before a deadline which is reported to be on 30 June 2018.

To recap, in 2009, Malaysia liberalised foreign ownership rules in the financial sector and foreign equity participation in insurance companies and *takaful* operators was increased to 70%. A higher foreign equity limit beyond 70% for insurance companies will be considered on a case-by-case basis for players who can facilitate consolidation and rationalisation of the insurance industry.

BNM, in its statements published on 8 March 2018 and 26 March 2018, stressed that foreign insurers were given licences to operate in Malaysia on the basis of specific commitments including maintaining a specified level of domestic shareholding within agreed timelines. BNM expects foreign insurers to honour these commitments.

Amongst some of the insurance companies which are reported to be wholly-foreign owned are Great Eastern Life, Prudential Assurance and AIA.

With the deadline looming, it will be interesting to see how the affected foreign insurers comply with the foreign equity limit in the next two months.

BNM's statements can be found here:

- http://www.bnm.gov.my/index.php?ch=en_press&pg=en_press&ac=4639
- http://www.bnm.gov.my/index.php?ch=en_announcement&pg=en_announcement&ac=622&lang=en

For further information regarding corporate law/M&A matters, please contact our Corporate/M&A Practice Group.

INTELLECTUAL PROPERTY

Schwan-Stabilo Marketing Sdn Bhd & Anor v S &Y Stationery & Ors [2018] MLJU 319

Schwan-Stabilo Schwanhaeusser Gmbh & Co. Kg ("Schwan-Stabilo"), the second plaintiff, is the registered proprietor of the Stabilo trade marks and is involved in the manufacturing and selling of stationery products bearing the marks whilst the first plaintiff, Schwan-Stabilo Marketing Sdn Bhd ("Schwan-Stabilo Marketing"), is a subsidiary company of Schwan-Stabilo. Schwan-Stabilo Marketing distributes and sells Schwan-Stabilo's goods in Malaysia.

The first defendant ("S & Y Stationery"), on the other hand, is in the wholesale and retail business of stationery products and had previously purchased Schwan-Stabilo's goods from Schwan-Stabilo Marketing for re-sale to retailers and the public.

S & Y Stationery owed a sum of money to Schwan-Stabilo Marketing and could not repay the outstanding sum. As a result, S & Y Stationery returned a quantity of Schwan-Stabilo's goods to Schwan-Stabilo Marketing. Schwan-Stabilo Marketing subsequently discovered that a part of the returned goods were counterfeit.

The High Court found in favour of Schwan-Stabilo Marketing and Schwan-Stabilo ("Plaintiffs") and had ordered, among others, an assessment of compensatory damages to be paid by S & Y Stationery, Chong Moy Chai @ Chong Fooi Lin and Tang Kok Seng ("Defendants") to the Plaintiffs for:

1. trade mark infringement;
2. tort of passing off; and
3. tort of unlawful interference with trade.

Pursuant to the High Court's decision, the learned Deputy Registrar of the High Court had conducted an assessment of compensatory damages.

This case is an appeal by the Defendants against an assessment of compensatory damages where the Plaintiffs has attempted to profit unjustly by claiming an exorbitant amount as compensatory damages. The High Court considered, amongst others, the following questions:

1. Whether the Court can rely on adverse inference to justify the amount of damages claimed by the Plaintiffs;
2. Whether Loss Profits Basis or Royalty Basis should be applied in this case;
3. Whether the Court should award three different types of compensatory damages for three causes of action.

Whether the Court can rely on adverse inference to justify the amount of damages claimed

The High Court held that, even where an adverse inference is drawn against a defendant in the assessment proceedings, the plaintiff still has the evidential burden to prove compensatory damages. Accordingly, in the event where the plaintiff has failed to prove loss or damage, he is only entitled to nominal damages.

Nonetheless, the Court may rely on adverse inference against the defendant where:

1. the relevant evidence has been adduced in assessment proceedings by the plaintiff; and
2. there are two or more inferences which may be drawn based on such evidence.

The Court may then rely on adverse inference against the defendant to justify drawing a particular inference regarding the evidence which has been suppressed by the defendant. It would appear from this that adverse inference drawn from suppressing evidence will affect the amount of damages that can be claimed by the plaintiff.

Whether Loss Profits Basis or Royalty Basis should be applied in this case

The High Court held that the Loss Profits Basis rather than the Royalty Basis is to be applied in this case. The Court had considered, amongst others, the following:

1. Schwan-Stabilo did not provide any evidence that it has issued any licence in Malaysia for the use of the Stabilo marks. Further, Schwan-Stabilo Marketing is a subsidiary of Schwan-Stabilo and is not its licencee;
2. The English Court of Appeal had questioned the application of the Royalty Basis in trade mark infringement and passing off cases where the mark in question was not available for hire;
3. There was no evidence of the "*going rate*" of Schwan-Stabilo's purported licence (a requirement under case law to apply the Royalty Basis);
4. Although the sale of counterfeit goods by S & Y Marketing did infringe the Stabilo trade marks under section 38(1)(a) of the **Trade Marks Act 1976**("TMA"), it did not wholly deprive Schwan-Stabilo of its exclusive right to use the Stabilo trade marks under section 35(1) of the TMA.

Whether the Court should award three different types of compensatory damages for three causes of action

The Court held that the number of causes of action does not determine the nature and quantum of relief to be granted.

Conclusion

The Court was unable to compute compensatory damages by applying the Loss Profits Basis as Schwan-Stabilo did not adduce the relevant evidence and is now barred from adducing any fresh evidence for the appeal. Therefore, the Plaintiffs had failed to discharge its evidential burden to prove its loss of business profits. Accordingly, the Appeal was allowed.

For further information regarding intellectual property law matters, please contact our Intellectual Property Practice Group.

TAX AND REVENUE

Legal Professional Privilege and the powers of the Director General of Inland Revenue ("DGIR")

The Malaysian Bar had challenged the Defendant's ("DGIR") power to undertake tax audits on the clients' accounts of law firms on the basis that it contravened legal professional privilege.

The key prayers sought were as follows:

"*1. a Declaration that Section 142(5) of the Income Tax Act 1967 ('ITA') does not entitle nor empower the DGIR to disregard the privilege under Malaysian law that protects all communications, books, objects, articles, materials, documents, things, matters or information passing between an Advocate and Solicitor and his/her client or advice given by an Advocate and Solicitor to his/her client, whether contained in any book, statement, account or other record of any description whatsoever (hereinafter collectively referred to as 'Client Communications'), and which privilege is referred to variously under Malaysian law as 'legal professional privilege', 'solicitor-client privilege' or 'legal privilege' (hereinafter referred to as 'Privilege') by requesting or demanding access to, or disclosure of, such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client;*

2. a Declaration that Part V of the ITA generally, and Section 80 of the ITA in particular, do not entitle nor empower the DGIR to disregard the Privilege that protects all Client Communications by requesting or demanding access to, or disclosure of, any such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client;

3. a Declaration that Privilege under Malaysian law generally, and as referred to in Sections 126, 127, 128 and 129 of the Evidence Act 1950 in particular, require an Advocate and Solicitor to reject any request or demand of the DGIR for access to, or disclosure of, any Client Communications, unless Privilege is waived by the client."

In a decision delivered by the High Court on 2 April 2018, Yang Arif Datuk Wira Kamaludin bin Md Said allowed the application of the Malaysian Bar with costs.

In summary, the learned Judge held that:

i. Privilege is absolute unless it is waived by the privilege holder or falls within the proviso to section 126 of the **Evidence Act 1950** ("EA") and it therefore affords protection to clients and not to lawyers;
ii. it is not open for the DGIR to have any access to the clients' account with a view to checking whether the law firms have understated their income without having any reasonable suspicion of any misconduct or criminal conduct on the part of the law firms;
iii. the DGIR cannot be allowed to use the ITA as an instrument of fraud purportedly to fish for information on the clients of the law firms;
iv. the non-obstante nature of section 142(5)(b) of the ITA ought to be read in accordance with the actual words of Parliament;
v. section 142(5)(b) of the ITA, at most, only has the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by "*practitioners*" such as tax accountants and tax agents with a view to taxing their clients and it does not extend to "*advocates and solicitors*";
vi. in section 142(5)(b) of the ITA, Parliament had clearly used different words as it recognised that "*practitioner*" and "*advocate and solicitor*" are different persons;
vii. section 142(5)(b) of the ITA does not oust the common law on Privilege; and
viii. based on the clear and express language in section 126 of the EA, it cannot be disputed that section 126 of the EA is the specific provision which governs matters pertaining to Privilege. The DGIR has misunderstood and misapplied the Latin maxim *Generalia Specialibus Non Derogant*.

This is a landmark case on legal professional privilege in Malaysia. At this juncture, it is not known what the DGIR's next steps will be in this matter.

A full article on this case will be published in the June issue of our newsletter.

Goods and Services Tax ("GST")

The revised version of the **Industry Guide on Insurance and Takaful** (revised as at 26 March 2018) has been published on the Royal Malaysian Customs Department's GST website.

For further information regarding tax and revenue matters, please contact our Tax and Revenue Practice Group.

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