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TAX LAW

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Budget 2012 Highlights

IN THIS ARTICLE, FOONG PUI CHI HIGHLIGHTS SOME OF THE TAX PROVISIONS IN THE RECENT 2012 BUDGET.

The 2012 Budget which was given the theme "National Transformation Policy: Welfare for the Rakyat, Well-Being of the Nation" was tabled in Parliament by the Prime Minister on 7 October 2011. A significant proposal made in the 2012 Budget is that for the very first time, taxpayers will be given compensation of 2% on the amount of tax refunded late by the Inland Revenue Board ("IRB").

Various tax incentives have also been proposed, amongst others, to attract multinational corporations to establish their respective Treasury Management Centres in Malaysia and to encourage financial organisations to operate in the Kuala Lumpur International Financial District.

Some of the 2012 Budget highlights are discussed below. Unless otherwise stated, the budgetary proposals discussed below when passed by Parliament, shall take effect from Year of Assessment ("YA") 2012.

Direct Taxes

- **2% Compensation for Late Refund of Tax by IRB**
  Presently, taxpayers who are late in paying their taxes are subject to late payment penalties under section 103 of the Income Tax Act 1967 ("ITA"). Commencing from YA 2013, taxpayers will be given compensation of 2% on the amount of tax refunded late by IRB. The compensation of 2% will be paid on a daily basis commencing one day after 90 days from the due date for e-Filing or after 120 days from the due date from manual tax filing.

  However, if the refund ought not to have been made by reason of an incorrect return or incorrect information furnished by the taxpayer, a 10% penalty will be imposed on the amount wrongly refunded.

- **Amendment to section 81 of the ITA: Power to Call for Information**
  With the proposed amendment, the Director General of Inland Revenue ("DGIR") may by notice require any person to provide any information or document, which is under the control or in the possession of that person, within a specified time.

  This amendment will come into operation upon the coming into operation of the Finance (No. 2) Bill 2011.

  Further, a new section 81(2) will be inserted into the ITA pursuant to which the DGIR will be empowered to disregard any information or particulars produced after the expiry of the time specified in the notice issued by the DGIR and following thereon, any information or particulars which have been disregarded under section 81(2) shall not be used to dispute the assessment made, including in any proceedings before the Special Commissioners of Income Tax or Court[1].

- **Duty to Furnish Particulars of Payment made to an Agent etc.**
  With effect from 1 January 2012, every company shall for each YA prepare and

provide to each of its agents, dealers or distributors, who received payment (whether in monetary form or otherwise) arising from sales, transactions or schemes, a prescribed form containing particulars of the said payment(s) made during that YA, name and address of that agent, dealer or distributor and such other particulars as may be required by the DGIR. The prescribed form must be provided to the agent, dealer or distributor on or before 31 March of the following year and the company is required to keep and retain the original copy of the prescribed form in safe custody and make it readily accessible to the DGIR.

- **Advance Payment by Instalments**
  By way of the introduction of a new section 107D into the ITA, the DGIR would be empowered to direct a person to make payment by instalments on account of tax where he has reason to believe that that person fails to furnish a return under the ITA or makes an incorrect return or gives incorrect information in regard to his chargeability to tax. The direction may be issued before the making of an assessment or composite assessment. The person to whom the direction is issued may apply to the DGIR within 30 days after being served with the direction to vary the amount to be paid by instalments and the number of instalments.

  The direction issued shall cease to have effect once an assessment or composite assessment is made and any amount paid pursuant to the direction shall be applied towards payment of tax payable under that assessment[2].

- **Time Bar for Tax Audit**
  Commencing from YA 2013, the time bar for tax audit will be reduced from six years to five years from the date tax assessment is made. This proposal is not applicable for cases of false declaration, wilful late payment and negligence and it will also not alter the requirement to keep records for seven years in accordance with sections 82 and 82A of the ITA.

Tax Incentives and Deductions

- **Treasury Management Centre ("TMC")**
  TMC is a centre which provides financial and fund management services to a group of related companies within or outside the country. In line with the Government's effort to develop Malaysia as a competitive financial centre and to attract multinational corporations to establish their treasury management services in Malaysia, TMCs will enjoy the following incentive package:

(i) 70% tax exemption on statutory income arising from the qualifying services rendered by the TMC to its related companies for a period of five years. The qualifying services to be rendered by a TMC are cash management services, current account management services, financing and debt management services, investment services, financial risk management services and corporate and financial advisory services;

(ii) exemption from withholding tax on interest payments on borrowings by TMC to overseas banks and related companies, provided the funds raised are used for the conduct of qualifying TMC activities;

(iii) full exemption from stamp duty on all loan agreements and service agreements executed by TMC in Malaysia for qualifying TMC activities; and

(iv) expatriates working in TMC will be taxed only on the portion of their chargeable income which is attributable to the number of days they are in Malaysia.

Applications received by the Malaysian Investment Development Authority ("MIDA") from 8 October 2011 to 31 December 2016 will be eligible for the above incentive package.

- **Kuala Lumpur International Financial District ("KLIFD")**
  To accelerate the development of KLIFD, the Government has proposed the following incentives:

(i) 100% income tax exemption for a period of 10 years and stamp duty exemption on loan and service agreements for KLIFD Status Companies;

(ii) Industrial Building Allowance and Accelerated Capital Allowance for KLIFC Marquee Status Companies; and

(iii) 70% income tax exemption for a period of five years for property developers in KLIFD.

The effective date for the above incentives has yet to be announced.

- **Industrial Design Services ("IDS")**
  To promote creativity and innovation, the following IDS providers will be granted Pioneer Status with 70% income tax exemption for a period of five years:

(i) new IDS providers who employ at least 50% Malaysian designers; and

(ii) existing IDS providers undertaking expansion and non-IDS providers which would be carrying out industrial design activities:
  (a) upgrading the design facilities by increasing the capital investment of at least 50%; and
  (b) employ an additional 50% qualified Malaysian designers.

This incentive is subject to the following conditions:

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(i) IDS providers and the Malaysian designers must be registered with the Malaysia Design Council;

(ii) IDS providers must be incorporated under the Companies Act 1965 or registered under the Business Registration Act 1956 and shall provide IDS to non-related companies; and

(iii) IDS provided are meant for the purpose of mass production.

Applications received by MIDA from 8 October 2011 to 31 December 2016 will be eligible for the above incentive.

- **Franchise Fee**
  With a view to further develop and promote local product brands both in the domestic and international markets, tax deduction will be given on franchise fees paid for local franchise brands.

- **Private Retirement Scheme ("PRS")**
  Apart from the existing tax relief of up to RM6,000 for EPF contributions and life insurance, in order to promote sufficient savings upon attaining retirement age, a separate tax relief of RM3,000 will be given to resident individuals for contributions made to PRS approved by the Securities Commission and annuity premium.

  Any withdrawals of contributions from PRS by an individual prior to maturity or prior to attaining retirement age will be subject to tax.

  Contributions made by employers to PRS will be deductible up to 19% of the employees' remuneration which includes contributions to EPF and approved scheme under section 150 of the ITA. Tax exemption will also be granted on income received by a PRS fund.

Real Property Gains Tax ("RPGT")

- **RPGT Rates**
  In order to curb property speculation activities, the RPGT rates have been revised such that chargeable assets which are disposed within a period of two years from the date of acquisition will be subject to RPGT at the rate of 10% whilst disposals within two to five years will be subject to RPGT at the rate of 5%. Disposal of assets after five years from the date of acquisition will remain exempt from RPGT. These revised rates will be applicable to disposals of properties commencing from 1 January 2012.

Stamp Duty

- **Loan Agreements for Micro Finance and Professional Services Funds**

  Full stamp duty exemption will be given on loan agreements up to RM50,000 under the Micro Financing Scheme. This exemption is applicable to loan agreements executed between micro enterprises and small and medium and medium enterprises with any banking and financial institutions from 1 January 2012.

  In order to assist professional groups establishing firms in rural areas, full stamp duty exemption will also be given on loan agreements up to RM50,000 undertaken from the Professional Services Fund. This exemption is applicable to loan agreements executed between any professionals with Bank Simpanan Nasional from 1 January 2012.

Other Proposals

Some of the other proposals in the 2012 Budget are as follows:

- investors undertaking new investments in four and five star hotels in Peninsular Malaysia will be given Pioneer Status or Investment Tax Allowance (for applications received by MIDA from 8 October 2011 to 31 December 2013);

- income tax exemption of 70% for a period of five years or Investment Tax Allowance of 100% on qualifying capital expenditure incurred within five years which can be set off against 70% of the statutory income for each YA[3], import duty and sales tax exemption for educational equipment[4] and double deduction for overseas promotional expenses will be given to profit oriented private schools;

- income tax exemption of 70% for a period of five years[5], import duty and sales tax exemption for educational equipment[6] and double deduction for overseas promotional expenses will be given to profit oriented international schools;

- double deduction will be given on expenses incurred in implementing structured internship programmes, participating in overseas career fairs and awarding scholarships to Malaysian students (effective from YA 2012 to YA 2016);

- tax deduction will be given on expenses incurred on issuance of Islamic securities based on the Wakalah principle approved by the Securities Commission or Labuan Financial Services Authority (effective from YA 2012 to YA 2015);

- tax exemption given to shipping companies under section 54A of the ITA will be reduced from 100% to 70% of the statutory income;

- existing tax exemptions for issuance and trading of non-ringgit sukuk originating

from Malaysia will be extended to YA 2014; and

- 100% stamp duty exemption will be given on loan agreements for the purchase of residential properties priced up to RM300,000 under the Skim Perumahan Rakyat 1Malaysia (for sale and purchase agreements executed from 1 January 2012 to 31 December 2016).

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[2] The proposed new section 81(2) has subsequently been dropped from the Finance (No.2) Bill 2011 in the course of its passage through the Parliament.
[3] for applications received by MIDA from 8 October 2011 to 31 December 2015
[4] for applications received by MIDA from 8 October 2011
[5] for applications received by MIDA from 8 October 2011 to 31 December 2015
[6] for applications received by MIDA from 8 October 2011

CORPORATE LAW

The Recent Development of Legal Framework for the Renewable Energy Industry in Malaysia

IN THIS ARTICLE, CHLOE SUNG DISCUSSES THE GOVERNMENT'S PLANS, INCENTIVES AND THE LEGAL FRAMEWORK SURROUNDING THE DEVELOPMENT OF THE RENEWABLE ENERGY SECTOR IN MALAYSIA.

Introduction

The importance of sustainable development[1] within the energy sector in Malaysia was first recognised in the Eighth Malaysia Plan (2001-2005). Under the Eighth Malaysia Plan, the role of renewable energy[2] was strengthened as the fifth fuel in order to supplement the energy supply from conventional energy sources. As seen in the Ninth Malaysia Plan (2006-2010), the Government's efforts to promote utilisation of renewable resources were intensified by the launching of the Small Renewable Energy Power Programme[3] and the Malaysia Building Integrated Photovoltaic Technology Application Project[4]. Following the Tenth Malaysia Plan (2011-2015), several new initiatives anchored upon the National Renewable Energy Policy and Action Plan ("National Renewable Energy Plan")[5] to achieve a renewable energy target of 985 megawatts by 2015 and which was aimed to contribute 5.5% to Malaysia's total electricity generation mix[6]. Amongst the measures taken are:

(1) introduction of a Feed-in Tariff of 1% that will be incorporated into the electricity tariffs payable by consumers to support the development of renewable energy ("FiT"); and

(2) establishment of Renewable Energy Fund ("Fund") from the FiT to be administered by the Sustainable Energy Development Authority ("SEDA"), a special agency under the Ministry of Energy, Green Technology and Water, for the purposes of supporting the development of renewable energy sector.

Under the National Renewable Energy Plan, the following five strategies have been identified to achieve the objectives:

(i) introduce an appropriate regulatory framework;
(ii) provide a conducive environment for renewable energy businesses;
(iii) intensify human capital development;
(iv) enhance renewable energy research and development; and
(v) design and implement a renewable energy advocacy programme, namely, to increase the awareness of all stakeholders of the benefits and advantages of utilising renewable energy and participation in renewable energy businesses.

Renewable Energy Act 2011 ("Act")

By a Federal Government Gazette published on 29 November 2011 ("Gazette"), the Ministry of Energy, Green Technology and Water has appointed 1 December 2011 as the date of coming into force of the Act, with the exception of sections 17 and 18.

The Act seeks to establish a legal framework to catalyse the generation of energy produced from renewable resources[7] ("Renewable Energy") such as biogas, biomass, small hydropower and solar photovoltaic technology by, amongst others, establishing and implementing a special tariff system.

Feed-in tariff ("FiT")

The Act introduces the FiT as a cost pass-through mechanism for the generation of Renewable Energy by approved energy producers[8] that supply not more than 30 megawatts of Renewable Energy to an electricity grid as determined by power utility companies. By virtue of section 12 of the Act, a mandatory obligation is imposed on the power utility companies to purchase the Renewable Energy generated by approved energy producers pursuant to renewable energy power purchase agreements to be entered into between the power utility companies and the approved energy producers ("REPPA"). The REPPA shall be for a specific period to be determined based on the types of renewable resources and technologies from which the Renewable Energy is generated ("RE technologies"). As provided in the fourth column of the Schedule to the Act, the term of REPPA for biogas and biomass technologies shall be 16 years whereas for small hydropower and solar photovoltaic technologies, the term shall be 21 years ("Effective Period"). It is noted from the Schedule to the Renewable Energy (Renewable Energy Power Purchase Agreement) Rules 2011 ("REPPA Rules") that there are nine types of REPPA to be entered into between the parties having regard to the types of renewable resources and installed capacities. The substance of each type of REPPA shall contain certain provisions as set out in Rule 5(2) of the REPPA Rules and shall be in such form as prescribed by SEDA.

By virtue of section 16(1) of the Act and Rule 20 of the Renewable Energy (Feed-in Approval and Feed-in Tariff Rate) Rules 2011, an approved energy producer shall, during the Effective Period, be paid the FiT by the power utility company with whom the approved energy producer has entered into the REPPA. The FiT rate varies for different types of renewable resources and installed capacities, which are set out in row (a) of the third column of the Schedule to the Act. In addition to the basic FiT rates, approved energy producers will be eligible to receive a bonus FiT rate upon satisfaction of certain criteria specified in row (b) of the third column of the Schedule to the Act.

Section 17 of the Act provides that the FiT rates for Renewable Energy installations decline progressively each year at the % specified in the fifth column of the Schedule to the Act save for the FiT rates for small hydropower installations ("Degression Rate"). The Degression Rate is subject to review and adjustment by SEDA under section 18 of the Act. The basis of the Degression Rate is that the cost of the RE technologies is expected to decrease as the RE technologies mature. Notwithstanding that, sections 17 and 18 of the Act will only come into operation on 31 December 2012 pursuant to the Gazette. Until then, the FiT rate for the respective Renewable Energy installations remains unchanged.

The extended period of time under the REPPA and the Degression Rate allow investments by approved energy producers to be recouped over the long-term and hence making renewable energy projects a viable and sound long-term investment for companies and individuals.

Section 21 of the Act further provides that upon the FiT rate applicable to a particular Renewable Energy installation becoming equal to or lower than the average cost of generating and supplying energy from non-renewable resources ("Displaced Cost"), the approved energy producer will be paid by the power utility company a tariff that is based on the prevailing Displaced Cost for the remaining term of the REPPA.

As noted earlier, the FiT system will be administered by SEDA, a statutory body which was recently established under the Sustainable Energy Development Authority Act 2011 which came into force on 1 September 2011.

For the purpose of helping the public to understand the FiT mechanism better, the Ministry of Energy, Green Technology and Water has issued a Handbook on the Malaysian Feed-in Tariff for the Promotion of Renewable Energy in March 2011 ("Handbook"). As explained in the Handbook, the FiT and the Fund are structured to be a polluter's pay concept namely that, the end consumers that consume more electricity pay more to the Fund to cover their carbon footprints, while those who consume less electricity are exempted from contributing to the Fund.

Fund

The Fund will be established by virtue of section 23 of the Act and shall be administered by the SEDA. The FiT to be paid by power utility companies to approved energy producers will be financed by the Fund when the power utility companies recover the difference between the FiT paid and the prevailing Displaced Cost from the Fund. In turn, the Fund is derived from, amongst others, 1% of the tariffs levied and collected by the power utility company in relation to its service of supplying electricity to end consumers. This has the effect of passing the cost of FiT to end consumers. In this regard, paragraph 3(1)(a) of the Renewable Energy (Allocation From Electricity Tariffs) Order 2011 provides that consumers in Peninsular Malaysia who consume more than 300 kilowatt hours per month will have to start paying an additional 1% of their monthly utility bill from December 2011.

Government's incentives

In addition to implementation of the National Renewable Energy Plan, the Government offers attractive incentives to encourage the generation of Renewable Energy to ensure sustained national economic development for the future. Based on the information set out in the official site of the Malaysian Industrial Development Authority, the incentives that are available for generation of Renewable Energy include (i) pioneer status; (ii) investment tax allowance;

and (iii) exemption from payment of import duty and/or sales tax on machinery, equipment, materials, spare parts and consumables[9].

The generation of Renewable Energy is a promoted activity under the Promotion of Investments Act 1986. Companies that are undertaking generation of Renewable Energy by using biomass, small hydropower (not exceeding 10 megawatts) and solar power technologies are eligible for the following incentives:

(a) pioneer status with income tax exemption of 100% of statutory income for 10 years. Accumulated losses and unabsorbed capital allowances incurred during the pioneer period can be carried forward and deducted from the post pioneer income of the company; or

(b) investment tax allowance of 100% on the qualifying capital expenditure incurred within a period of five years can be offset against 100% of the statutory income for each year of assessment. Any unutilized allowances can be carried forward to subsequent years until fully utilised.

Companies that are undertaking generation of Renewable Energy can also apply for import duty and sales tax exemption on imported machinery, equipment, materials, spare parts and consumables used directly in the generation process and that are not produced locally. For locally purchased machinery, equipment, materials, spare parts and consumables, full exemption is given on sales tax.

Conclusion

The implementation of the Government's plans and incentives together with the initiation of the Act are necessary to encourage sustainable development of the energy sector in Malaysia. Whilst the production of energy from renewable resources is not expected to sufficiently meet the national energy demand at present, this is a good start for Malaysia in playing its part in reducing global warming emissions.

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[1] The term was first used in the 'Report of the World Commission on Environment and Development: Our Common Future' released by the United Nations World Commission on Environment and Development in 1987, to mean "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." (http://www.un-documents.net/ocf-02.htm#I).

[2] As the International Energy Agency explains: Renewable energy is derived from natural processes that are replenished constantly. In its various forms, it derives directly from the sun, or from heat generated deep within the earth. Included in the definition is electricity and heat generated from solar, wind, ocean, hydropower, biomass, geothermal resources, and biofuels and hydrogen derived from renewable resources. (http://www.therenewablecorp.com/resources/white_papers/13.renew_main2003.pdf, page 9)

[3] The programme was initiated by the then Ministry of Energy, Communications and Multimedia (now known as Ministry of Energy, Green Technology and Water), with the aim of promoting a wider use of the renewable resources available in Malaysia, particularly its utilisation in power generation. In view that the Renewable Energy Act 2011 as the regulatory framework for FiT mechanism and the Sustainable Energy Development Authority Act 2011 have been passed in the Parliament in April 2011 respectively, this programme has been suspended with immediate effect.

[4] A project jointly funded by the Government and the Global Environment Facility with the principal objective of reducing the long-term cost of building integrated photovoltaic ("BIPV") technology within the Malaysian market, which will subsequently lead to sustainable and widespread BIPV technology applications that will avoid greenhouse gases emission from the country's electricity sector. The project was closed on 31 May 2011.

[5] The National Renewable Energy Policy and Action Plan can be downloaded from SEDA portal.

[6] http://www.epu.gov.my/html/themes/epu/html/RMKE10/img/pdf/en/chapt6.pdf, page 302.

[7] namely, a particular resource or technology that satisfies the criteria set out in the second column of the Schedule to the Renewable Energy (Criteria For Renewable Resources) Regulations 2011.

[8] Section 4 of the Act provides that a person shall be eligible to apply for an approval allowing the person to participate in the FiT system if the person proposes to generate Renewable Energy from a renewable energy installation having an installed capacity of not more than 30 megawatts ("Eligible Producer"). Rule 3 of the Renewable Energy (Feed-in Approval and Feed-in Tariff Rate) Rules 2011 further sets out other eligibility criteria to apply for the feed-in approval. After considering the application for approval by the Eligible Producer, the SEDA may approve or refuse such application under Section 7(1) of the Act subject to certain conditions to be imposed on the Eligible Producer.

[9] http://www.mida.gov.my/env3/index.php?page=incentives-for-environmental-management.

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EMPLOYMENT LAW

Does the Employment (Amendment) Act 2011 undermine the Employer-Employee relationship and erode workers' rights?

IN THIS ARTICLE, REENA ENBASEGARAM ANALYSES THE CONTENTIOUS AMENDMENTS MADE TO THE EMPLOYMENT ACT 1955.

The Employment Act 1955 ("EA"), which applies to Peninsular Malaysia and Labuan, is recognized by most human resources practitioner and lawyers as one of the primary legislations in the country that regulate the terms and conditions of employment for employees.

On 6 October 2011, the Parliament passed the Employment (Amendment) Act 2011 ("Amendments"), which would introduce approximately 33 amendments to the EA. The Amendments, however, have yet to be enforced. One of the controversial amendments is the introduction of a new section on Contractor for Labour.

Under the Amendments, a Contractor of Labour is defined as:-

"a person who contracts with a principal, contractor or sub-contractor to supply the labour required for the execution of the whole or any part of any work which a contractor or sub-contractor has contracted to carry out for a principal or contractor, as the case may be".

The Amendments also introduces a new section **33A** which reads as follows:-

"33A. (1) A contractor for labour who intends to supply or undertakes to supply any employee shall register with the Director General in the prescribed form within fourteen days before supplying the employee.

(2) If a contractor for labour referred to in subsection (1) supplies any employee, it shall keep or maintain one or more registers containing information regarding each employee supplied by him and shall make such registers available for inspection.

(3) A contractor for labour who –

(a) supplies his employee without registering with the Director General as required under subsection (1); or

(b) fails to keep or maintain any register, or make available any register for inspection as required under subsection (2),

commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit".

In essence, the Amendments introduce a compulsory system of registration of contractors for labour in the country[1]. Hence, any contractor that supplies labour for an industry or establishment would now have to register with the Labour Department before it can undertake the business of supplying labour. In addition, the Amendments require a contractor for labours to maintain a register of its employees which are supplied to third party entities.

The Malaysian Trade Union Congress ("MTUC") has taken the position that the Amendments contradict the International Labour Organisation ("ILO") Declaration on Fundamental Principles and Rights at Work which was ratified by Malaysia in 1998[2].

MTUC's President was quoted as saying that, "Companies need not accrue money for retirement benefit or for retrenchment when they outsource workers from suppliers. It is also a direct assault on the basic foundation of labour rights and the enslavement of the dignity of labour, perpetuating the establishment and operation of dehumanising labour. … How can the minister push for amendments based only on the NUPW (National Union of Plantation Workers) recommendations? The NUPW is not attached with MTUC that represents hundreds of unions," *he said, and explained that there was a difference in the plantation and manufacturing industries*[3].

The questions remains whether the objections to the Amendments are warranted.

Firstly, it is pertinent to note the Amendments do not significantly change the current situation as there already exist companies which are in the business of the supplying of labour. In fact, it is arguable that the foregoing amendments do accord some level of regulation on contractors for labour in light of the requirement to resgister with the Director General and to maintain a register.

Secondly, the Minister of Human Resources has some powers under the EA to control or regulate on the usage of workers supplied by contractors for labour. Section 2A(1) of the EA, for example, empowers the Minister of Human Resources to issue an order to prohibit the employment, engagement or contracting of any person or class of persons to carry out work in any occupation in any agricultural or industrial undertaking, constructional work, statutory body, local government authority, trade, business or place of work other then under a contract of service entered into with-

(a) the principal or owner of that agricultural or industrial undertaking, constructional work, trade, business or place of work; or
(b) that statutory body or that authority.

Thirdly, the use of contract works supplied by contractors for labour in favour of in house

employees is also controlled by unfair dismissal protection laws in Malaysia. Industrial jurisprudence as it stands, allows an employer to retrench its employees in the event the employer wishes to outsource that particular function which the said employees are performing should that course of action promote economic viability. In such a situation, the work continues to exist but will now be performed by the employees of the outsource company. However, the companies concerned would need to justify the undertaking of such an outsourcing or retrenchment exercise in terms of costs-savings and work efficiency.

Although there is a difference between engaging workers from an outsourcing company and from a labour supplying company, the end result would be the same, the work would be performed by the employees of a third party.

Whilst there are authorties which deem that the company in question was entitled to outsource and the consequential retrenchment exercise was bona fide, there are just as many cases which hold otherwise. What is clear is that the company cannot act with impunity when it comes to its employees.

A clear cut example is the case of **Ipoh City & Country Club Berhad v Mohd Khurshaid Ramjan Din**[4] wherein the Industrial Court ruled that the retrenchment of in-house employees on the basis of contracting out of the work, was unfair. The court held:-

"By substituting the existing security department of which the claimant was a part with seven contract security guards under the misguided excuse of retrenchment is, to my mind, not sustainable. Companies must be careful where to draw the line when embarking on reorganisation of their businesses so as not to circumvent the just interests of their employees".

Hence, a company which wishes to replace its employees with contract workers, would still need to justify the same in the event the dismissed employees challenge the termination of their services at the Industrial Court. The amendments to the Employment Act 1955 do not change this position.

MTUC's objections is also premised on the notion that the contract workers supplied by contractors for labour will not have their rights protected nor will they have security of tenure unlike the direct employees of the company. Part of the reason is the presumption that such workers cannot be unionised.

It was reported that, *"A just employment relationship dictates that all workers should be employees of the owner-operator employer not some other third party labour supplier, whether they be known as 'contractor for labour', outsourcing agent or by any other name….. If the amendments proposed become law, then many workers at the factory would effectively lose their rights to be able to form or be members of the trade union at the workplace, or the right to directly and effectively negotiate with the principal who effectively controls the work place, working conditions and benefits. If the proposed amendment becomes law, effectively it will also weaken existing workers and unions, by reducing their negotiating power for now when a strike or a protest in called, there will be other workers of other third party employers who will continue to work normally thus making worker struggle for better rights almost impossible. This proposed amendment is a 'union busting' exercises and allows employers to utilise 'divide and rule' tactics to counter legitimate demands of their workers and avoid employer obligations and responsibilities"*[5].

Section 2 of the Trade Unions Act 1959 defines a "trade union" or "union" as any association or combination of workmen or employers, being workmen whose place of work is in West Malaysia, Sabah or Sarawak, as the case may be, or employers employing workmen in West Malaysia, Sabah or Sarawak, as the case may be:

(a) within any particular establishment trade, occupation or industry or within any similar trades, occupations or industries; and
(b) whether temporary or permanent.

MTUC's objections presuppose that employees of contractors for labour would not be able to join either the national union or in-house union in a particular industry even though the work they actually perform would be for a company in the same industry.

However, it has not actually been tested in the courts as to whether an individual working in a particular industry would be allowed to join the relevant union although he is an employee of a labour supplier. Even if the foregoing is feasible, the next issue would be whether the union in question would be willing to represent such an individual and negotiate on his behalf, and also the response of his employer.

It is arguable that there is nothing in the law preventing employees of labour suppliers, that is the contractor for labour, from setting up their own (national) union as it may not be practical for each company to set up individual in-house unions as the workforce in each would presumably not be substantial. For example, there exists a Union of Employees in Trade Unions.

More importantly, the termination of the services of such workers would still need to be with just cause or excuse. Hence, it cannot be said that these contract workers are not protected.

The following case, dating back to the mid-80s, illustrates this point.

The case of **Milford Haven Automation (Malaysia) Sdn. Bhd. and Anthony Ernest De Silva**[6] revolved around a company which supplied additional manpower, both skilled and unskilled, under a contract for services to Esso Production Malaysia Inc. ("EPMI") as and when they were required. EPMI which operat-

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ed 17 offshore platforms would call for workers as and when they wanted them and released them when there was no work for them. The company had no control as to which employee would be released and when he would be released. Such workers would work on the EPMI's platforms entirely on the supervision of EPMI's supervisors. As a result of the reduction in the activity of EPMI's East Field Operation, EPMI had informed the company that it no longer required the services of a number of the company's personnel. When the company could not find alternative employment for these personnel, they retrenched them.

The Industrial Court had taken the view that the company could not question EPMI's right of control to release a workman as otherwise it would jeopardise the company's contract with EPMI and upheld the retrenchment exercise. However, the High Court quashed the foregoing decision and held that the retrenchment exercise was without just cause.

Based on the foregoing, it would appear that contract workers, the recent amendments to the Employment Act notwithstanding, need not be unduly concerned as their rights as an employee remain intact. The amendments do not diminish the obligations of the contractor for labour in its capacity as employer. SD

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[1] The Employment Act 1955 does not apply to Sabah and Sarawak wherein both states have its own respective Labour ordinances which are identical to the Employment Act. To date, however, no corresponding amendments have been introduced into the ordinances of the 2 states.
[2] The Star Online, 20 October 2011
[3] The Star Online dated 20.10.2011
[4] [2006] 3 ILR 1756
[5] Malaysiakini dated 31.10.2011
[6] [1985] 1 ILR 376

FINANCIAL SERVICES

Revisions to the Securities Commission's Private Debt Securities Guidelines, *Sukuk Guidelines* and Trust Deed Guidelines and Amendments to the Securities Commission Act 1993 and the Capital Markets and Services Act 2007

IN THIS ARTICLE, JOCELYNN LIU PROVIDES AN OVERVIEW OF THE RECENT REVISIONS AND AMENDMENTS MADE TO THE PRIVATE DEBT SECURITIES GUIDELINES, SUKUK GUIDELINES, TRUST DEED GUIDELINES, SECURITIES COMMISSION ACT 1993 AND THE CAPITAL MARKETS AND SERVICES ACT 2007.

Introduction

On 12 April 2011, the Securities Commission Malaysia (the "SC") launched the Capital Market Masterplan 2 (the "CMP2"). The CMP2 outlines the SC's long-term strategy for the development of the capital market in Malaysia.

In line with the broad objective of the CMP2 to achieve higher levels of operational efficiency, enhanced standards for fair and ethical business practices and to strengthen internal controls for business conduct and risk management, the SC revised the Private Debt Securities Guidelines (the "PDS Guidelines"), Islamic Securities Guidelines (Sukuk Guidelines)(the "*Sukuk Guidelines*") and the Trust Deed Guidelines to enhance the regulatory framework for fundraising and product regulation in the bond and *sukuk* markets.[1]

Major amendments were also made to the Securities Commission Act 1993 (the "SCA") and the Capital Markets and Services Act 2007 (the "CMSA") to promote the development of the capital market in line with global standards pursuant to the strategies outlined in the CMP2.[2]

Overview of the revised PDS Guidelines, Sukuk Guidelines and Trust Deed Guidelines

The revised PDS and *Sukuk Guidelines* streamline the approval process and time-to-market for the issuance of corporate bonds and *sukuk*. Revisions include a new "deemed approval" process[3] for bonds and *sukuk* which fulfill certain conditions, whereby a proposed issue of bonds or *sukuk* is considered deemed approved on the date of receipt by the SC of all the information and documents and upon fulfillment of all the conditions set out in the respective guide-

lines. For issuers who are not able to, or do not wish to use the "deemed approval" route, the SC will grant its approval for bonds and *sukuk* within a period of 14 working days from the date of submission.[4] The revisions made in the PDS and *Sukuk Guidelines* also facilitate a more informed investment decision-making process with additional provisions[5] to ensure greater disclosure of relevant information to investors.

In addition, the revised *Sukuk Guidelines* provide greater clarity on the application of Shariah rulings and principles endorsed by the SC's Shariah Advisory Council in relation to *sukuk* transactions[6] while the Trust Deed Guidelines improves disclosure standards and protection for corporate bond and *sukuk* holders.

The revised PDS Guidelines, *Sukuk Guidelines* and Trust Deed Guidelines came into effect on 12 August 2011 and superseded the Guidelines on the Offering of Private Debt Securities, Guidelines on the Offering of Islamic Securities, Guidelines on the Minimum Contents Requirements for Trust Deeds and all the related Practice Notes respectively. The revised Private Debt Securities Guidelines, *Sukuk Guidelines* and Trust Deed Guidelines can be found on the SC's website at www.sc.com.my

Overview of the amendments to the SCA and the CMSA

Amendments were made to the SCA and the CMSA through the Securities Commission (Amendment) Act 2011 and the Capital Markets and Services (Amendment) Act 2011 respectively, both of which came into force on 3 October 2011. Amendments to the SCA and the CMSA include the following:

1. **Legal framework for the private retirement scheme industry**

   In line with efforts to enhance the adequacy of savings for retirement needs, the amendments provide for a dedicated regulatory framework for private retirement schemes ("PRS").[7] The PRS framework will provide the public with options to make additional voluntary long-term contributions to supplement their retirement savings within a well-structured and regulated environment.

   Under the PRS framework, providers of funds may, subject to the SC's approval, offer a range of funds from which individuals can choose to invest in, based on their financial needs, goals and risk appetites.

2. **More efficient licensing framework**

   The requirement for the annual renewal of CMSA licences has been removed.[8] However the appointment of chief executive officers for licensed intermediaries will now require the SC's prior approval.[9] Supervision efforts will be enhanced and annual reporting of information by licensed companies and their representatives will be introduced which, amongst others, will form the basis for continued assessment on their fit and properness.

3. **Regulation of OTC derivatives**

   To promote transparency in the over-the-counter ("OTC") derivatives market, the amendments introduce a framework for the reporting of OTC derivative contracts to a trade repository which will be established and operationalised within the next two years.[10]

4. **Oversight of foreign auditors**

   To enhance the oversight of foreign auditors, the amendments introduce a framework to enable the Audit Oversight Board to grant recognition to foreign auditors who audit the financial statements of a public interest entity.[11]

5. **Managing systemic risk**

   - Amendments to the CMSA empower the SC to obtain information and issue directions to market intermediaries to take appropriate measures to monitor, mitigate or manage systemic risk. The amendments also empower the SC to share information and cooperate with other supervisory authorities both domestic and foreign, who manage systemic risk in the capital market.[12]

Conclusion

The revised PDS Guidelines, *Sukuk Guidelines* and Trust Deed Guidelines and the amendments to the CMSA and SCA as outlined above is a welcome move, and is a step towards promoting a more efficient regulatory framework for capital markets.

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[1] SC Press Release *"SC revises Guidelines for Corporate Bonds and Sukuk"* dated 12 July 2011
[2] SC Press Release *"Significant Amendment to Securities Laws to Strengthen Capital Market"* dated 5 October 2011

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[3] The SC had introduced the "deemed approval" process in its Exposure Drafts of the PDS and Sukuk Guidelines before the new PDS and Sukuk Guidelines came into effect.
[4] Please see Section 5 of the PDS and Sukuk Guidelines for more information on the approval process for bonds and sukuk.
[5] In particular, please see Section 8 of the PDS Guidelines and Section 11of the Sukuk Guidelines, respectively.
[6] Please see Sections 8 and 9 of the Sukuk Guidelines for details of the Shariah rulings and principles in relation to Sukuk transactions.
[7] Part IIIA of the CMSA
[8] Section 60 of the CMSA as amended by Section 7 Capital Markets and Services (Amendment) Act 2011, and Section 64 of the CSMA as amended by Section 11 of the Capital Markets and Services (Amendment) Act 2011.
[9] Section 75(2) of the CMSA
[10] Subdivision 4 of Division 3 of Part III of the CMSA
[11] Section 31O of the SCA
[12] Part IXA of the CMSA

DISPUTE RESOLUTION

Is the "but for" test relevant today?

IN THIS ARTICLE, NAVINDERAN SUBRAMANIAM EXAMINES THE RECENT FEDERAL COURT'S DECISION IN **WU SIEW YING V GUNUNG TUNGGAL QUARRY & CONSTRUCTION SDN BHD & ANOR**[1] IN RELATION TO THE CORRECT TEST TO BE APPLIED TO ESTABLISH CAUSATION IN A NEGLIGENCE SUIT.

In the tort of negligence, it is essential that a claimant must establish the following elements:

- to show a duty was owed;
- there was a breach of that duty; and
- the causal link between the breach of that duty and the damage or injury suffered.

A claimant must establish these elements on the balance of probability against the wrong doer to succeed in his claim. The issue, more often than not, is how one could prove or establish the causal link. What test is to be adopted to establish causation?

The classic test to establish causation is known as the "but for" test. This is also known as the factual test. The factual test is a concept whereby the law is concerned with the facts of the case to determine the imposition of liability. It is the physical nexus between the claimant and the wrongdoer that the court is concerned with. In applying this test, the hypothetical question is whether "but for the wrongdoer's negligent act or omission would the injury or damage have occurred?" If the answer is in the affirmative, then causation is said to be established. The test is simple, straightforward and easy. Nevertheless, it carries with it uncertainties and ambiguities. The problem arises when there are overlapping factors which bring about the same result.

Another test which is applied is the "material contribution test". The test was first pronounced by Lord Reid in the case of **Bonnington Casting Ltd v Wardlaw**[2]. In applying this "material contribution" test, the courts are only concerned with the material causes which had contributed to the injury or damage claimed. Any trivial factor is excluded and the courts will consider only the material factor.

The Federal Court in **Wu Siew Ying** had an opportunity to consider the following question of law on what the correct legal test for causation should be when there are overlapping factors:

"Whether in a negligence action where there are overlapping factors causing harm to a plaintiff, the test to be employed is that as pronounced by the House of Lords in **Bonnington Casting Ltd v Wardlaw** referred to by the Federal Court in **Lembaga Letrik Negara, Malaysia v Ramakrishnan**[3] and not the "but for test"."

Facts

The Plaintiff ("the Owner") was the owner of a plant nursery situated on a piece of land in Kampar, Perak. The first Defendant ("Operator") was an operator of a natural limestone quarry on a plot of land adjacent to that of the Owner.

On 29 December 1987, following a heavy downpour and thunderstorm a large part of a hill collapsed causing limestone debris to fall onto the Owner's land and destroy the nursery.

The High Court Judge applied the well entrenched "but for" test to determine the effective cause of the damage but could not conclude that the immediate cause that resulted in the collapse of the hill was the vibrations from the operation of the Operator's quarry, as there was evidence of other possible causes. The High Court ruled that the Owner had failed to prove conclusively that the collapse of the hill was caused by the quarrying operation of the Operator based on the "but for" test and dismissed the Owner's claim.

The Owner appealed to the Court of Appeal which affirmed the High Court's findings. The Owner then appealed to the Federal Court.

Issue

The issue before the Federal Court was whether the "but for" test should be resorted to if there were overlapping causes or factors which could have caused the injury or damage.

Conclusion

The Federal Court made it unequivocally clear that for a claimant to succeed in a claim for tort of negligence, it is essential to prove amongst

others that the injury or damage was caused by the negligent act or omission. There must be a "causal link".

The Federal Court concluded that in light of its previous decisions such as the case of **Lembaga Letrik Negara, Malaysia v Ramakrishna, Majlis Perbandaran Ampang Jaya v Stephen Phoa Cheng loon & Ors**[4] and the various authorities in England and Australia the "but for" test is not the exclusive test to be applied to determine causation of the injury or damage when there are overlapping factors. The Court held that the "but for" test is to be applied when there is no other possible cause, factor or event that could have materially contributed to the injury or damage. In summary, if there are multiple causes the test to be applied is the "material contribution test" and not the "but for" test.

As most cases involving the tort of negligence have overlapping factors, the Federal Court's decision appears to have rendered the "but for" test redundant.

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[1] [2011] 1 CLJ
[2] [1956] All ER 615
[3] [1982] 2 MLJ 128
[4] [2006] 2 CLJ 1

INTELLECTUAL PROPERTY

Regulatory Approval vs Patent Protection: Which Prevails?

IN THIS ARTICLE, MICHELLE LOI DISCUSSES THE SCOPE OF THE LAW THAT GOVERS REGULATORY APPROVAL AND PATENT PROTECTION.

It is well established law that a patent claim governs the scope of what the patentee seeks to claim exclusivity over. The scope that is not found in the patent claims is deemed disclaimed[1] and third parties can exploit the disclaimed portion without constraints or restraints from the patentee. Many if not all Intellectual Property ("IP") practitioners believe if a patent claim were a house, then the ideal position for a patentee would be one where the fence that surrounds the house (or, rather, the claim) so that it is unambiguously defined. Any trespasser that enters the surrounding fence without consent or approval commits acts of infringement. Implicit in this simple analogy is that the crux of an act of trespass of the house, or in the case of Patents Act, patent infringement, is one done without the consent or authorization of the patent owner.[2]

Sometime in February 2010, a declaration for non-infringement and invalidity action was sought by a pharmaceutical company, Ranbaxy against E.I. du Pont over the latter's Patent No. MY-110414-A entitled "Angiotensin II Receptor Blocking Imidazoles and Combinations thereof with Diuretics and Nsaids" ("414 Patent"). The 414 Patent, amongst others, claims "losartan potassium" as its invention. Losartan is an angiotensin II receptor antagonist drug used mainly to treat high blood pressure ("hypertension"). Hypertension is a cardiac chronic medical condition in which the systemic arterial blood pressure is elevated[3]. What that means is that the heart has to work harder than it should to pump the blood around the body. It was not denied by Ranbaxy that it has already and or submitted for tenders generic medicines which contain "losartan potassium". Going by the example above, this is a clear cut case where the scope of what is covered by the claim (or the fence around the house) is not challenged.

A declaration for non-infringement of a patent at the instigation of an interested party is not uncommon. Section 62 (1) of the Patents Act 1983 provides that any interested person shall have the right to request that the Court declare that the performance of a specific act does not constitute an infringement of the patent. Invariably, such an action is instituted together with proceedings to invalidate the patent, as provided by section 62 (5) of the same Act. Invalidity is usually the route taken by non-patentees to defend any claims of patent infringement. The reasoning is that a party cannot be taken to infringe a patent that is declared invalid.

In addition to the usual challenges that the patent is not valid for want of novelty and inventive step at the time of its priority filing date, Ranbaxy further alleged that it is entitled to exploit losartan potassium because it was already granted the regulatory approval from the National Pharmaceutical Control Bureau ("BPFK" or "NPCB") to do so. In the words of the example given earlier, this is akin to a third party claiming that it has obtained approval from a government authority to enter upon the premises of the house.

It was not denied by Ranbaxy at any juncture that its product that has been approved, that is Covance, contains losartan potassium. In support of this, Ranbaxy had relied on Regulation 7(1)(a) of the Control of Drugs and Cosmetics (Amendments) Regulations 1984 (As amended in 2006) ("1984 Regulations"). Specifically, the relevant 1984 Regulations provide that, no person shall manufacture, sell, supply, import,

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possess or administer any product (which has been defined to include a medicinal drug in dosage unit intended to be administered to humans) unless the product is a registered product that has been licensed to be manufactured. (See Regulation 12). This was a clear encroachment of the statutory exclusivity that the Patents Act 1983 is affording patentees in Malaysia. Just how the 1984 Regulations are expected to be reconciled with the prevailing piece of patent legislation was not explained by Ranbaxy. Instead, Ranbaxy had cleverly couched its argument above along competing public policy reasoning. More particularly, Ranbaxy spoke of the comparatively cheaper alternative that Malaysians could avail themselves to, if and should Covance products are allowed sales in the market despite the patent grant to E.I. Du Pont. In other words, it was asking the court to ignore the statutory and exclusive entitlement every patentee has over its patent, albeit for a limited period of time. Ranbaxy tried to persuade the court to ignore the statutory right of the patent owner in favour of the availability of cheaper alternative drugs. Just what this repercussion would have over the well-established "trespass" principle and reasoning is unimaginable.

Balance to be struck between parties

The Patents Act 1983 is often thought to be a well considered statute that seeks to balance the interests of both the inventor and the public. It is a piece of legislation that seeks to reward and encourage innovation amongst deserving inventors on the one hand, and yet, reward the public by allowing a more affordable range of medication to them in the long run.

The former objective is achieved by allowing inventors a period of exclusivity by which they are allowed the rights to exploit exclusively their patented inventions. The rationale is that an inventor ought to be given the time (that is the period of exclusivity of monopolizing its patent) to recoup whatever research costs and expenses that it has expended for otherwise, there is no incentive to do so.

The latter objective on the other hand is achieved by allowing generics of the patented medication to enter the market after the expiry of said period of exclusivity. Patents Act 1983 is thus, a piece of legislation that seeks to and balances the interests of the public and the contribution made by inventors and innovation aimed at improving the public's health and lifestyle.

During the subsistence of the granted patent, section 37(1A) of the Patents Act 1983 makes it clear that the only acts that are exempted from patent infringement are when those acts are done to make, use, offer to sell or sell a patented invention solely for uses reasonably related to the development and submission of information to the relevant authority related to the development and submission of information to the relevant authority which regulates the manufacture, use or sale of drugs (such as the Ministry of Health). This early working exemption section is part and parcel of the statutory scheme of the Patents Act to allow generic manufacturers to put themselves in a position to enter the market without delay after the expiry of the relevant patent.

The Patents Act 1983 is however silent on the regulatory approval given by the government to interested generic manufacturers and accordingly, it must be the case that this cannot be a defence against patent infringement. If the Act had intended to exclude acts of manufacturing, using or selling of drugs that have been approved by the Drug Control Authority, that would have been expressly stated. It says nothing about the right to manufacture or sell the generic drug in a commercial way before the expiry of the patent. The omission to exclude the latter acts from infringement is consistent with the spirit of the Patents Act 1983. Exclusion under section 37(1A) is presumably given to allow generic versions of the drug becoming available soon after the patent term of the patented drug expires. It does not permit sales before the end of the exclusivity but only permits the applicant for registration of the generics to generate information and data to be submitted (which is usually done sometime before the patent expires) for registration of the drug.

It therefore needs to be understood that whilst the mere act of submitting the necessary documents and particulars for registration of a drug and getting regulatory approval will not infringe; it will if the generic company were to immediately and additionally start manufacturing and marketing the drug in a commercial way or take steps (such as to participate in a tender exercise and being awarded the tender) for the supply of the drug before the patent term of the patented drug expires. E.I. Du Pont's counterclaim against Ranbaxy for infringement of its 414 Patent is not based on the drugs (Covance, presumably) submitted to the Drug Control Authority for evaluative purposes necessary for the registration under the Drugs and Cosmetics Regulations 1984. Rather it is based on the commercial manufacturing and sales activities conducted by Ranbaxy in flagrant disregard of E.I. Du Pont's patent rights.

Therefore, if Ranbaxy's Covance products (which they sell) are proven to fall within at least Claim 7 of the 414 Patent, or any other claims under the 414 Patent for the matter, Ranbaxy commits acts of infringement. This is the case regardless of the fact that Ranbaxy's registration for its Covance products from the Drug Control Authority. While the act of manufacture, and sales of these generic products by Ranbaxy may not render Ranbaxy liable under any of the provisions of the Sale of Food and Drugs Ordinance, 1952, it does not mean that Ranbaxy cannot be found to have breached provisions of another piece of legislation (in this instance, the Patents Act 1983). The burden to prove the nexus lies on Ranbaxy. Ranbaxy has not discharged this onus of proof. There is thus

no defence for Ranbaxy to say that its products have obtained registration pursuant to the Sale of Food and Drugs Ordinance, 1952 and/or the 1984 Regulations.

Decision

The Judge agreed with E.I Du Pont[4] that the issue before the court was not whether the Ranbaxy has validly, invalidly or unlawfully obtained the grant of registration of Covance products by BPFK. While Covance was registered by BPFK, such registration is nothing more than an indication of compliance with the BPFK regulation. The registration does not, at any one point, involve the grant by E. I. Du Pont as patent owner of any authorization under the Patents Act 1983 to manufacture and sell the Covance products which E. I Du Pont asserted had infringed its 414 Patent. The consensus to market and sell, which must necessarily come from E.I. du Pont, was never delegated to BPFK. The Judge noted that: *"NPCB does not concern itself with any patent protection aspects of the drug nor does it purport to grant any authorization to work the patent"*.

The Judge's decision on this point must be a welcome relief not only for E.I. Du Pont but also other patentees in general. The conferment of the exclusive rights on a patentee is immediate upon the grant of the patent, but such exclusivity generally ends at the 20th year from the date of application. In this instance, Ranbaxy will still need to seek approval and consent from E.I. Du Pont or wait out for the exclusivity of the patentee's right to end before it commences sales of the generic products.

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[1] Killowen in EMI v. Lissen (1939) 56 RPC 23 at page 39
[2] See sections 58 and 58A of the Patents Act 1983
[3] Definition from Wikipedia
[4] The case of Asia Television was however not cited in the Judgment

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