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This Newsletter is produced by the Knowledge Management Department. Please contact the Department or the Newsletter Editorial Committee at km@shearndelamore.com, if you need any further information on this Newsletter.

NEWSLETTER EDITORIAL COMMITTEE

Goh Ka Im
Rabindra S. Nathan
Christina S. C. Kow
K. Shanti Mogan
Putri Noor Shariza Noordin

Shearn Delamore &co.


KUALA LUMPUR OFFICE:
7TH FLOOR
WISMA HAMZAH-KWONG HING
NO. 1, LEBOH AMPANG
50100 KUALA LUMPUR, MALAYSIA
TEL 603 2027 2727
FAX 603 2078 5625
E-MAIL info@shearndelamore.com

PENANG OFFICE:
6TH FLOOR
WISMA PENANG GARDEN
42, JALAN SULTAN AHMAD SHAH
10050 PENANG
TEL 604 226 7062
FAX 604 227 5166
E-MAIL shearnd@po.jaring.my

WEBSITE www.shearndelamore.com




## PARTNERS AND PRACTICE GROUPS

### CORPORATE & COMMERCIAL

Grace C. G. Yeoh
gcgyeoh@shearndelamore.com

Dato' Johari Razak
jorazak@shearndelamore.com

Lorraine Cheah
l_cheah@shearndelamore.com

Putri Noor Shariza Noordin
shariza@shearndelamore.com

Swee-Kee Ng
sweekeeng@shearndelamore.com

Marhaini Nordin
marhaini@shearndelamore.com

### DISPUTE RESOLUTION

Robert Lazar
rlazar@shearndelamore.com

Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

Rabindra S. Nathan
rabindra@shearndelamore.com

Rodney Gomez
rodney@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Muralee Nair
muralee@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Sagadaven Thangavelu
sagadaven@shearndelamore.com

Nad Segaram
nad@shearndelamore.com

Yee Mei Ken
mkyee@shearndelamore.com

Alvin Julian
alvin.julian@shearndelamore.com

Lai Wai Fong
waifong@shearndelamore.com

Jimmy Liew
jimmyliew@shearndelamore.com

### PENANG OFFICE

J. A. Yeoh
yeoh@shearnpg.com.my

J.J. Chan
jchan@shearnpg.com.my

### EMPLOYMENT & ADMINISTRATIVE LAW

N. Sivabalah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

Suganthi Singam
suganthi@shearndelamore.com

### FINANCIAL SERVICES

Christina S. C. Kow
christina@shearndelamore.com

Tee Joe Lei
joelei@shearndelamore.com

Pamela Kung Chin Woon
pamela@shearndelamore.com

### INTELLECTUAL PROPERTY & TECHNOLOGY

Wong Sai Fong
saifong@shearndelamore.com

Karen Abraham
karen@shearndelamore.com

Indran Shanmuganathan
indran@shearndelamore.com

Timothy Siaw
timothy@shearndelamore.com

Zaraihan Shaari
zara@shearndelamore.com

Gary Lim
garylim@shearndelamore.com

Jyeshta Mahendran
jyeshta@shearndelamore.com

Cheah Chiew Lan
chiewlan@shearndelamore.com

Toh Yoong San Janet
janet.toh@shearndelamore.com

### IMMIGRATION

See Guat Har
guat@shearndelamore.com

### REAL ESTATE

Sar Sau Yee
sysar@shearndelamore.com

Aileen P. L. Chew
aileen@shearndelamore.com

Anita Balakrishnan
anita@shearndelamore.com

Ding Mee Kiong
mkding@shearndelamore.com

### TAX & REVENUE

Goh Ka Im
kgoh@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Irene Yong Yoke Ngor
irene.yong@shearndelamore.com


PRINTER Inch Design & Communications (001291647-h) A88, Jalan Tuanku 2, Taman Salak Selatan, 57100 kuala Lumpur, malaysia. Tel 603 7983 3141 Fax 603 7983 2961

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FRONT PAGE FOCUS

# EMPLOYMENT LAW

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PUBLISHER
Shearn Delamore Corporate Services Sdn. Bhd. (557186-x)
Suite 10.05, 10th Floor
Wisma Hamzah-Kwong Hing
No. 1, Leboh Ampang
50100 Kuala Lumpur.
Tel 603 2027 2727
Fax 603 2078 5625

## Performance Review – the Employer is the ultimate arbiter?

IN THIS ARTICLE, WONG KIAN JUN CONSIDERS THE IMPACT OF THE INDUSTRIAL COURT'S DECISION IN THE CASE OF **PERSATUAN PEGAWAI-PEGAWAI HSBC MALAYSIA BERHAD SEMENANJUNG MALAYSIA V HSBC BANK MALAYSIA BERHAD**[1] IN RELATION TO THE EMPLOYER'S RIGHT TO APPRAISE AND EVALUATE THE EMPLOYEE'S PERFORMANCE.

**Facts**

The case was a reference by the Honourable Minister of Human Resources to the Industrial Court as a trade dispute pursuant to section 26 (2) of the Industrial Relations Act 1967 arising out of the complaint by an employee of the Bank regarding her appraisal rating for the year 2004.

In essence the affected employee's contention was that she should have obtained a higher rating for her performance in the year 2004 than the one given to her by the Bank. The affected employee argued that the appraisal was not done in a fair manner and in fact she had done work which was beyond her normal duties which was not taken into account.

The main issue before the Industrial Court was whether the Industrial Court may interfere with an employer's right to appraise and evaluate the performance of its employees.

**Case law**

The Industrial Courts have consistently held that when it comes to the performance of the employee, it will rely on the subjective opinion of the employer so long as the employer's dissatisfaction was genuine and *bona fide*. One such decision was **Samsuddin B. Mat Amin v Austral Enterprises**[2].

Lord Denning MR in **Alidair Ltd v Taylor**[3] went on to say that it is not necessary for the employer to prove that the employee is in fact incapable or incompetent. Therefore a genuine and *bona fide* believe on the part of the employer would be deemed sufficient.

Sir Geoffrey Lane LJ, in the same case held that the function of the Industrial Tribunal was to decide,

> *"… whether the employer honestly and reasonably held the belief that the employee was not competent and whether there was reasonable ground for the belief."*[Emphasis added]

Therefore as long as the employer was genuinely dissatisfied with the employee's performance and such a belief was *bona fide*, the employee's dismissal should be upheld as was held by the Industrial Court in **United Plantation Bhd. v Ahmad Zaini Bin Mohamed Tahir**[4].

**Industrial Court Ruling**

The Industrial Court held that whilst the court had the jurisdiction to review the decision of the employer on the appraisal of the performance of the affected employee, the Industrial Court will only substitute the decision of the employer on the following grounds:-

a) there was evidence shown that the appraisal was done *mala fide*;
b) there was evidence of victimization; and

c) the decision was so perverse that no reasonable person would have made that decision.

In the same decision the Industrial Court had reaffirmed earlier case law acknowledging that the employer still retained managerial prerogative to assess the performance of its employees.

In this case the Industrial Court found that there were three levels in the assessment of the affected employee. The affected employee was provided opportunity to seek clarification from her immediate superior on performance assessment. The Industrial Court found the procedure in assessing the affected employee to be fair and there was no evidence whatsoever of *mala fide* or victimization before the court nor was the decision by the employer perverse in any way.

Therefore the decision and performance rating of the affected employee for the year 2004 was retained.

**Conclusion**

Despite the court's consistently deciding that the employer retains the right to assess the performance of its employee, such a right is not an unfettered right. As the above case shows, in the event an employee is able to show evidence of *mala fide* or victimization or that the decision was perverse in any way, the Industrial Court will be entitled to interfere in the employer's discretion and furthermore may even change the appraisal that was conducted by the employer.

SD

WONG KIAN JUN
EMPLOYMENT & ADMINISTRATIVE
LAW PRACTICE GROUP

For further information regarding Employment Law matters, please contact

N.Sivabalah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

[1] Award No 467 of 2011
[2] Award No 47 of 1974
[3] [1978] ICR 445
[4] [1996] 1 ILR 632

TAX LAW

# Price Control and Anti-Profiteering Act 2011

IN THIS ARTICLE, FOONG PUI CHI EXAMINES THE PRICE CONTROL AND ANTI-PROFITEERING ACT 2011: A PRELUDE TO THE IMPLEMENTATION OF THE GOODS AND SERVICES TAX ("GST") IN MALAYSIA.

**Introduction**

The Price Control and Anti-Profiteering Act 2011 ("PCAPA" or "the Act"), which came into force on 1 April 2011, was enacted not only to replace the Price Control Act 1946, but also to introduce measures to prevent excessive profiteering among traders.

**Price Control**

The PCAPA empowers the Price Controller[1], with the approval of the Minister of Domestic Trade, Co-operatives and Consumerism ("Minister"), to determine:

- the maximum, minimum or fixed prices for the manufacturing, producing, wholesaling or retailing of any goods, classes of goods or any unit or quantity of any goods, including the charges for the supply, delivery, repair, maintenance, packing, carriage or storage of such goods (section 4); and
- the maximum, minimum or fixed charges for any services, classes of services or any unit or quantity of any services (section 5).

The prices of goods or charges for services which are determined by the Price Controller shall include all government taxes, duties and other charges[2] and in exercising the powers under sections 4 and 5, the Price Controller may also determine different prices or charges for different areas in respect of like or similar goods or services[3].

Unlike the repealed Price Control Act 1946, there is no requirement under the PCAPA that a licence be issued by the Price Controller for the sale of price-controlled goods at any premise or place. Therefore, under the PCAPA a trader is no longer required to display a licence to sell price-controlled goods but merely has to display the list of the prices of the price-controlled goods or charges of the charge-controlled services in a conspicuous position so that it can be easily read by potential purchasers[4].

By virtue of section 10 of the Act, the Minister may also impose requirements that certain goods or services be marked with or accompanied by information concerning the prices of, or charges for, the same.

Under Part III of the PCAPA, it is an offence if a person:

- sells or purchases or offers to sell or purchase any price-controlled goods otherwise than in accordance with the prices which have been determined by the Price Controller (section 11);
- provides or obtains or offers to provide or obtain any charge-controlled services otherwise than in accordance with the charges which have been determined by the Price Controller (section 12); or
- in selling any price-controlled goods or in providing any charge-controlled services, imposes any illegal condition of sales in relation to the prices of goods or the charges for services (section 13).

Upon conviction of any of the above offences, the following penalty will be imposed pursuant to section 18 of the PCAPA:

- under the individual category – first time offenders will be liable to a fine of up to RM100,000 or three years' imprisonment or both, while the second or subsequent offence will result in a penalty of up to RM250,000 or five years' imprisonment or both; and
- under the corporation category – first time offenders will be liable to a fine of up to RM500,000, while the second or subsequent offence will result in a penalty of up to RM1 million.

Under section 59(1) of the PCAPA, where a body corporate commits an offence under the Act, any person, who at the time of the commission of the offence, was a director, chief executive officer, manager, secretary or other similar officer or was purporting to act in any such capacity or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate or was assisting in such management may be charged severally or jointly in the same proceedings with the body corporate and upon the body corporate being found guilty of the offence, that person shall be deemed to be guilty of the same offence unless, having regard to the nature of his functions in that capacity and to all circumstances, he proves that:

(i) the offence was committed without his knowledge, consent or connivance; and
(ii) he had taken all reasonable precautions and exercised due diligence to prevent the commission of the offence.

**Anti-Profiteering**

The PCAPA may be used to weed out unscrupulous traders who take advantage of the changing economic environment, such as the future implementation of GST or when there is an increase in petrol prices, to raise prices of their goods or charges for their services indiscriminately.

Under section 14 of the PCAPA, a person who, in the course of trade or business, profiteers or makes an unreasonably high profit in selling or supplying or offering to sell or supply any goods or services commits an offence and shall, on conviction, be liable to the same penalties as set out above.

A major concern with the PCAPA, however, is the fact that it contains no definition of what amounts to "unreasonably high profit" and the Ministry of Domestic Trade, Cooperatives and Consumerism has yet to come up with any mechanism to determine the same. This concern, if not addressed urgently, will obstruct the effective operation of the anti-profiteering provision and defeat its objectives.

**Powers of Investigation and Enforcement**

Under the PCAPA, the Assistant Controller[5] may commence investigation into an offence where he has reasonable grounds to suspect that the offence is or will be committed[6] or upon receiving a complaint of the commission of the offence[7]. For the purpose of carrying out the investigations, Parliament has prescribed wide powers under the section 21 of the PCAPA to the Assistant Controller to gather information and evidence. In line with the modern mode of information storage, the PCAPA not only grants the Assistant Controller access to books, records, accounts and documents, but also to any recorded information, computerized data or digitalized data, whether stored in a computer or otherwise[8].

Under Part VI of the PCAPA, it is an offence if a person:

- refuses or fails to comply with the directions of the Assistant Controller under sections 21 and 23;
- fails to disclose any relevant information, document or evidence, or knowingly provides false or misleading information, document or evidence, in the course of investigation by the Assistant Controller (section 26);
- destroys, conceals, mutilates or alters any book, record, accounts, document, computerized data, thing or matter (section 27(a)); or
- sends or attempts to send or conspire with another to remove or sends out of Malaysia, such book, record, accounts, document, computerized data, thing or matter from his

premises (section 27(b)).

Apart from information gathering powers, the Assistant Controller is also given the following powers in relation to search and seizure:

- access any business places or premises for the purpose of collecting or monitoring prices of goods or charges for services (section 28);
- enter and search any premises, whether with or without a warrant, and to seize any evidence or thing which contains or is reasonably suspected to contain information on any offence or is otherwise necessary to conduct an investigation into any offence (sections 29 and 30);
- whilst conducting a search under sections 29 or 30, search any person who is in or on the premises; and
- exercise the powers in relation to police investigation in seizable cases under the Criminal Procedure Code (section 40).

Any person who obstructs the Assistant Controller in the conduct of any investigation or execution of his duties or powers commits an offence under section 39 of the Act. Save for communication which is protected by legal professional privilege, section 32 also makes it an offence for a person to disclose to another any information or matter which is likely to prejudice an investigation or proposed investigation.

**Other Provisions**

Similar to its predecessor, the PCAPA also allows for the compounding of offences under section 58 whereby the Price Controller may make a written offer to the person suspected to have committed the offence to compound the offence by paying a sum not exceeding 50% of the amount of maximum fine for that offence within a specified time.

The PCAPA also provides that a Price Advisory Council may be established to advise the Minister on matters relating to prices of goods, charges for services and anti-profiteering issues[9]. Its members shall comprise, amongst others, persons who are experienced and knowledgeable in matters relating to business, industry, commerce, law, economics, public administration, fair trade, competition, consumer protection or any other suitable qualification as the Minister may determine[10].

An interesting provision in the PCAPA is section 55 which provides that the court, when imposing a fine on a person convicted of an offence under the Act, may direct that a reward be given to the person who gave the information leading to the conviction in the form of a payment of any part of the fine, the amount of which shall not exceed one half of such fine.

**Conclusion**

Although price control measures are not something new in the country, with the expected implementation of GST looming in the background, the introduction of the PCAPA is indeed a welcomed move by the Legislature as it seeks to further protect and safeguard the interest of consumers by way of the added anti-profiteering feature therein. However, the effectiveness of the anti-profiteering feature remains to be seen and tested in light of the unresolved issue of what constitutes an "unreasonably high profit".

SD

FOONG PUI CHI
TAX & REVENUE PRACTICE GROUP

For further information concerning Tax matters, please contact:

Goh Ka Im
kgoh@shearndelamore.com

Anand Raj
anand@shearndelamore.com

[1] Under Section 2 of the PCAPA, the Price Controller is appointed by the Minister under Section 3 of the Act.
[2] Section 8 of the PCAPA
[3] Section 6 of the PCAPA
[4] Section 9 of the PCAPA
[5] Under Section 2 of the PCAPA, "Assistant Controller" means an Assistant Price Controller appointed by the Minister under Section 3 of the Act and Assistant Price Controllers so appointed shall be under the direction and control of the Price Controller.
[6] Section 19 of the PCAPA
[7] Section 20 of the PCAPA
[8] Sections 23 and 31 of the PCAPA
[9] Section 41 of the PCAPA
[10] Section 42 of the PCAPA

DISPUTE RESOLUTION

# Arbitrator's Duties of Disclosure

IN THIS ARTICLE, AMANDA MAN ANALYSES THE EXTENT OF THE ARBITRATOR'S DUTIES OF DISCLOSURE IN RELATION TO PARTIES TO A DISPUTE.

The High Court had recently considered arbitrators' duties of disclosure in the case of **Sundra Rajoo v Mohamed Abdul Majed**[1]. The central issue in this case was whether a co-arbitrator has a duty of disclosure to the arbitral tribunal in addition to the entrenched duties of disclosure to the parties.

Sundra Rajoo ("SR") and Mohamed Abdul Majed ("MAM") in the suit were co-arbitrators in two arbitration disputes ("the Arbitrations"). In the Arbitrations, the claimant ("Virgoz"), had appointed MAM as arbitrator. The other party chose not to submit to the arbitration proceedings. It came to SR's knowledge that MAM had been nominated as arbitrator by the Virgoz group of companies in over 20 arbitrations and SR took the position that those previous appointments ought to be disclosed to the parties to the Arbitrations. SR was of the view that without such disclosure, there would be a perception of bias on the part of MAM. MAM did not make the requested disclosure when asked to do so by SR. His reason was that he owed no duty of disclosure to the arbitral panel but to the parties who had issued no challenge to his appointment.

SR then filed the above referenced suit to, amongst others, compel the disclosure by MAM of his previous appointments by Virgoz and for consequential orders to remove MAM as arbitrator in the Arbitrations.

In considering the application, the court expressed as trite law that arbitrators have a duty to disclose facts indicating biasness and recognise this duty as well established jurisprudence in the international arena as well as in Malaysia. The court noted that had the parties to the arbitration made the application, the court would have no hesitation to consider the application as it would fall within the ambit of the Arbitration Act 2005 ("AA 2005")[2]. However, the rights of co-arbitrators to make such a disclosure request or challenge was not dealt with in the AA 2005. The court took the position it had the inherent jurisdiction to check a breach or purported breach when a complaint comes from any interested party, not limited to the litigants to the arbitration proceedings *per se*.

The court considered it the crux of the principle of natural justice for an arbitrator to be completely impartial and independent. The argument that the most important element in the requirement of impartiality and independence is disclosure was held to have merit.

The court further considered that fiduciary duties may be applicable to arbitrators as they are, ultimately, in consideration of a fee, entrusted to deliver an award.

Two arguments were raised in support of the counter arguments by MAM, that the duty of disclosure is owed only to the parties to the dispute and cannot be extended to a co-arbitrator, namely,

- section 8 of AA 2005, excludes the court's jurisdiction to interfere in matters not expressly governed by the AA 2005; and
- the arbitrators were not parties to the arbitration proceedings.

The court accepted neither argument. With respect to the first argument, the court held where the AA 2005 is silent on issues outside the scope of the AA 2005 or on matters not governed by the AA 2005, the common law powers of the court cannot be said to be ousted.

With respect to the second argument, the court held as having merit SR's contention, that the arbitrators should be regarded as parties to the arbitration within the meaning of section 2 of AA 2005 and that a contract exists between the parties and the arbitrators.[3 4]

The court held that MAM ought to have disclosed his past and present appointments to preserve the dignity of his office and to avoid the award from being set aside pursuant to section 37(2)(b) of AA 2005. The arbitrators assumed the status of quasi judicial adjudicators with inherent duties and obligations. SR has a legitimate basis to seek the assistance of court at common law to arrest the mischief being a co-arbitrator, having received remuneration for work and being potentially exposed to personal liability in contract/ negligence/ breach of fiduciary obligations for having participated in an award which has a real likelihood of being set-aside.

The court took a serious view of the non-disclosure by MAM and ordered disclosure of past and present appointments, failing which the co-arbitrator would be disqualified as arbitrator.

The decision raises interesting issues not previously considered in Malaysia as to the role of the arbitrators in relation to the parties to the disputes and the extent to which they have responsibility to ensure duties of disclosure by fellow arbitrators are observed.

AMANDA MAN
DISPUTE RESOLUTION PRACTICE GROUP

For further information regarding Arbitration matters, please contact

Robert Lazar
rlazar@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

[1] Judgment dated 23.3.2011

INTELLECTUAL PROPERTY

# IP v Competition : The Face-Off

IN THIS ARTICLE, CAMILLA ANASTASIA DISCUSSES THE SUBTLE DIFFERENCES BETWEEN INTELLECTUAL PROPERTY AND COMPETITION.

For purposes of this article it will be useful to provide a preface to the law in Malaysia. The Malaysian government enacted the Competition Act 2010 ("the Act") and the Competition Commission Act 2010[1] last year. The purpose of the Act is to promote economic development by protecting and promoting the process of competition, which is to ultimately benefit consumers by protecting their interests.

The Act will come into force on 1 January 2012[2].

**Introduction**

**The ActAct [3]:**
The crux of the Act is to ensure that enterprises do not harm, prevent or restrict the process of competition through collusion or abusive conduct by way of market monopolization.

The Act encourages efficiency and innovation, which in turn promotes competitive prices, improvement to quality of goods or services which enables customers the ability to choose from a variety of goods or services on offer. This is achieved by prohibiting anti-competitive conduct.

The Act lists two main prohibitions and these are as follows:

(i) prohibition of anti-competitive agreements – horizontal and vertical type agreements as stated in section 4(1) of the Act; and
(ii) an abuse of a dominant position as stated in section 10(1) of the Act[4].

Under the first prohibition, the Act prohibits a horizontal agreement between enterprises which has the object to:-

- fix, directly or indirectly, a purchase or selling price or any other trading conditions;;
- share market or sources of supply;
- limit or control production, market outlets / access, technical or technological developments or investment; or
- perform an act of bid rigging.

The Act further prohibits (2nd prohibition) enterprises from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position. Such abusive conduct, amongst others, includes imposing unfair trading conditions, limiting or controlling production, market outlets or access, refusing to supply or acting in a predatory manner.

**Intellectual Property ("IP")**
Intellectual property rights ("IPR") are monopolistic rights conferred upon a person or entity by the government for one's creation, invention, designs, and the like. Such rights include trade marks, patents, copyright, industrial designs and confidential information. Malaysia has her own set of IP laws, namely, the Trade Marks Act 1976, Patents Act 1983, Copyright Act 1987, Industrial Designs Act 1996, Geographical Indications Act 2000 and Layout Designs of Integrated Circuits Act 2000.

IPR confers upon the holder an exclusive right to exploit such rights indicative of conduct that is monopolistic on the part of the IP owner.

The time and effort involved in creating and developing products or inventions is laborious often requiring large and costly investments to spur innovation. The enforcement of IPR imposes restrictions and conditions on the use of the products and inventions and give rise to

[2] ***Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor*** [1999] 1 CLJ 632
[3] ***Compagnie Europeene De Cereals S.A.*** [1986] Q.B. (Com. Ct.) 301
[4] ***K/S Norjarl A/S v Hyundai Heavy Industries Co. Ltd.*** [1991] 1 Lloyd's Rep 260, 524

the formation of monopolies.

This creates a tension with competition law. Competition encourages open and competing markets, whereas IP confers upon its owners an exclusive right to produce, manufacture and exploit such rights. This has brought about much debate in mature jurisdictions where competition law has been in force for years. The struggle to strike a balance between IP and competition has been ongoing notwithstanding the fact that there remains a common aim between IP and competition, namely, the promotion of economic efficiency and innovation.

**The Malaysian Landscape**
The Act has not come into force and accordingly, the Malaysian Competition Commission ("MyCC") has yet to draw up guidelines on the application of the Act.

Based on the current environment in Malaysia, in the absence of guidelines, IP owners may have to review the manner in which they conduct their business owing to the fact that the exploitation of IP includes agreements with exclusivity clauses, limitation clauses and provisions regulating market supply or share. Common agreements which encompass IPR used to regulate the day-to-day conduct of business in Malaysia include franchise agreements, distribution agreements, research and development agreements and licence agreements.

It is anticipated that the guidelines will regulate the manner in which such agreements are dealt with and applied in the Malaysian landscape. A good starting point may be Europe as the Act was modelled after the EU legislation.

Whilst competition law does not seek to attack the existence of a monopoly, the MyCC must find a compromise on how a monopoly created by virtue of IPR is protected and exploited.

**Looking Abroad**
In Singapore, the United Kingdom, Australia, Europe and other jurisdictions where competition laws are in force, the law is supplemented by guidelines which assist the regulators in studying and assessing cartels, monopolies and undertakings between parties.

In Singapore, the Competition Commission of Singapore ("CCS") is guided by the "CCS Guidelines On The Treatment of Intellectual Property Rights". The SC guidelines direct the CCS on how to deal with and manage agreements and conduct which contain or encompass IP.

Regulators in the European Union ("EU") are assisted by various regulations in dealing with Article 101[5], which provides:

(a) assistance on the assessment of vertical restraints and its application on categories of vertical agreements;
(b) assistance on the assessment of horizontal cooperation agreements and its application on categories, decisions and concerted practices;
(c) sector specific guidelines; and
(d) assistance on the treatment of technology transfer agreements.

These guidelines direct the European Commission on how agreements containing IP issues are dealt with and in some instances such agreements are exempt under the law[6].

In the United Kingdom, the Office of Fair Trading has released numerous guidelines in dealing with IP and of these, some guidelines are sector specific to address the intricacies within the individual sectors.

It is uncertain whether the MyCC will look towards Europe and the United Kingdom for guidance, or beyond. It may be of interest to look at the development of cases from Europe and the United Kingdom.

**Development of case law**
**The Maize Seed Case**[7] is one of the earlier decisions from the EU which affirmed that "licensing" fell within the former Article 81(1) of the Treaty of EU. This case dealt with an exclusive licence pertaining to a plant breeder's right, whether the very nature of the exclusive licence granted under the agreement had the object or effect of restricting competition. The European Courts of Justice ("ECJ") in this case distinguished between an "open licence" and an "exclusive licence", stating that an open licence was preferred as it did not restrict competition by barring third parties, such as parallel importers from distributing the seeds. An exclusive licence on the other hand directly infringed Article 81 as this meant absolute territorial protection.

The ECJ however accepted that the granting of an exclusive licence must be weighed against deterring a licensee of a new technology from marketing and cultivating such technology which would entail competition risks from other licensees within the territory.

In another example involving trade mark rights, the Agreements of Davide Campari-Milano SpA[8] the EU Commission found that a number of restrictions under the licence agreements did not violate Article 81. Campari was the holder of various trade marks worldwide, in particular, "Bitter-Campari". Whilst the Commission could not establish the exact market share of the "Bitter Campari" product, it was apparent that the turnover was substantial and the brand itself had acquired international reputation.

The agreements contained strict obligations upon the licensees such as manufacturing of the product for quality purposes at approved sites, the purchase for subsequent use of a "secret" ingredient from Campari only and the protection of know-how in the manufacturing process, amongst others. The obligations imposed by the licensor, in this case the trade mark owner, were restrictive, nonetheless the EU Commission took the view that such restrictions were necessary to ensure that the licensees did not neglect the "Campari" brand by dealing with competing products in terms of improved distribution.

The following cases deal with copyright, with both cases having very specific and unique facts on which the decisions were based, illustrating the conflict between IP and competition.

The principle established in **Magill's Case**[9] held that if there was a barrier to the entry of a new secondary product for which there was a market and demand, then refusal to supply certain information would infringe competition law.

This case involved several broadcasting companies in the United Kingdom and Ireland, which produced their own weekly magazines of their listings which carried additional information. Based on local copyright laws, each of the companies claimed copyright in their listing for protection of literary works and compilations. The broadcasters would licence their copyrighted works to daily and weekly newspapers and magazines, the condition of the licence in some cases were for two days. Magill created and produced a new product, a publication which contained the listings of all broadcasters on a weekly basis. Locally, the broadcasters had taken out injunctions against Magill for copyright infringement. Meanwhile, Magill lodged a complaint with the EU Commission. On appeal to the ECJ, it was held that whilst the mere possession of IP did not create a dominant position, nonetheless, in this case, the basic information on programme listings by the broadcasting houses created a *defacto* monopoly. It held:

(i) there was no actual potential substitute for a weekly TV guide offering information on a weekly basis (ahead of time) although there was a potential demand for such an offering;
(ii) there was no justification for the refusal by the broadcasting houses to supply the information (notwithstanding the fact that the broadcasting companies owned copyright to such information); and
(iii) the mere conduct of refusing to supply basic information by relying on national copyright laws prevented the appearance of a new product (a secondary product market for a competing product).

The decision saw the EU Commission ordering compulsory licensing on the broadcasting houses, dependent on certain conditions, including that of royalty payments.

In contrast, in the case of **IMS Health GmbH v NDC Health GmbH**[10], IP triumphed over competition. This case concerned copyright in relation to regional sales data on pharmaceutical products. IMS was successful in selling its data format to pharmaceutical companies in Germany. NDC entered the market with an alternative data structure, which was not well received in the market. Subsequently, NDC incorporated the IMS structure in its reports for which IMS was successful in bringing a claim against NDC for copyright infringement at a national level. IMS also denied NDC's request for a licence to use its structure.

Subsequent to a complaint by NDC, the EU Commission found in favour of NDC, imposing a compulsory licence on IMS for abusing its dominant position. It was held in this case that a refusal to supply a licence was not an abuse of a dominant position, although under exceptional circumstances (citing **Magill's Case**), there could be an abuse of a dominant position. The courts had to strike a balance in the interest of protecting a copyright against the interest of balancing an open market. The latter will prevail if the refusal of a licence prevented the development of a secondary market to the detriment of consumers.

In this case, IMS argued that NDC did not intend to create a new product, but merely use the structure to provide an almost identical product in the same market, and the ECJ left the national court to decide whether the conditions of a new product were fulfilled and whether there was a demand for such a product in the same market.

The final case is the **Microsoft Case**, one of many before the EU Commission concerning the software giant. The issue of compulsory licensing again raised tensions between the two tenets of law, IP and competition in **Microsoft Corporation v Commission case T-201/04**[11].

Microsoft ("MS") is a world-renowned software developer of the MS operating system ("OS") for desktops and laptops, found in over 90% of computers. Sun Microsystems alleged that MS refused to provide interoperability information relevant to software products relating to network computing. In the course of investigations, the EU Commission found (on its own accord) that MS was incorporating its "Media Player" into its OS, with the EU Commission incorporating this objection in addition to the one by Sun Microsystems.

Due to the technical nature of this case MS argued that disclosure of the information would amount to free use of its IP. Whilst the EU Commission acknowledged that this case involved some IPR, however, due to the circumstances of this case it was held:

(i) that the refusal to supply IP protected material constituted an abuse of a dominant position and such circumstances must be exceptional;
(ii) the information required (interoperability information) was vital in that without the supply of such information competition could have been eliminated thereby frustrating the emergence of a new product for which there was a demand; and
(iii) that the 'Media Player' was a separate product on its own – the supply of this product together with the OS was seen as tying and bundling, which is against competition policies and was capable of being treated as

a separate one due to demand of competing products in the "software streaming" category of products and this too was seen to be an abuse of MS's dominant position.

**Conclusion**

It appears clear from the cases highlighted above that the tensions between IP and competition law will have to be resolved on a case by case basis taking into account the enterprises' market position, the specific product market and the conditions imposed on the market. A violation may occur when a new player is barred from entering the market, which in turn could potentially harm consumers.

For competition to prevail, new or novel products should be made available where there is a market for the same. The tensions between IP and competition cannot be resolved overnight and it will be interesting to see how the MyCC resolves the tensions.

In competition, 'one size does not fit all'.

CAMILLA ANASTASIA
INTELLECTUAL PROPERTY & TECHNOLOGY PRACTICE GROUP
COMPETITION LAW PRACTICE GROUP

For further information regarding Intellectual Property and Competition matters, please contact

Wong Sai Fong
saifong@shearndelamore.com

Karen Abraham
karen@shearndelamore.com

[1] The Commission had been formed in April 2011 with Tan Sri Siti Norma Yaakob being appointed as the Chairman of the Malaysian Competition Commission; five commissioners were appointed from the private sector and these include, Datuk Dr. Michael Yeoh, Datuk Dr. Sothi Rachagan, Prof. Datin Dr Hasnah Haron, Mr. Ragunath Kesavan and Abd Malek Ahmad. There will also be appointments from the public sector.

[2] [P.U.(B) 410/2010]

[3] An overview of the Act was published in our 2010 Newsletter Edition, Vol. 9 No. 2.0 June 2010

[4] An analysis of an abuse of a dominant position was made in our March 2011 Newsletter Edition, Vol 10 No. 1.0 March 2011

[5] Article101(3) on the Functioning of the Treaty Of the EU was formerly known Article 81 of the Treaty of the EU

[6] For example, EC block exemption no. 772/2004 on Technology Transfer

[7] LC Nungesser KG and Kurt Eisele v Commission case 258/75[1983] 1 CMLR 278

[8] 78/253EEC OJ L70/69

[9] Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of European Communities, C-24191 P and C24291 P (Magill's case) [1995] 3 CMLR 418

[10] C-418/01 [2004] ECR I-5039, [2004] 4 CMLR 1543

[11] R [2005] 4 CMLR 18 (interveners); [2006] 4 CMLR 5 (interim measures); T-201/04, judgment of 17 September 2007 – Commission decision (art. 82); CFI preliminary measures and final judgement



# Malaysia Deposit Insurance Corporation Act 2011

IN THIS ARTICLE, VALERIE TANG PROVIDES AN OVERVIEW OF THE RECENTLY PASSED MALAYSIA DEPOSIT INSURANCE CORPORATION ACT 2011.

**Introduction**

In 2005, the Malaysia Deposit Insurance Corporation Act 2005 ("the MDICA 2005") was enacted and brought into force to provide for the establishment of the Malaysia Deposit Insurance Corporation ("the MDIC"). The main objectives of the MDIC were to administer a deposit insurance under the MDICA 2005, to provide insurance against the loss of part or all deposits of a member institution, to provide incentives for sound risk management in the financial system and to promote and contribute to the financial system[1].

Following on from the recent financial crisis, which resulted in the collapse of large financial institutions around the world and significant declines in economic activity, the Government Deposit Guarantee scheme was put in place on 16 October 2010 as a temporary measure to ensure, among other things, that the confidence of depositors in Malaysia remained intact. The pre-emptive and precautionary measures implemented pursuant to this scheme included[2]:

(a) all Ringgit and foreign currency deposits with commercial, Islamic investment banks, and deposit taking development financial institutions regulated by Bank Negara Malaysia ("BNM"), were fully guaranteed by the Government through the MDIC and the guarantee was extended to all domestic and locally incorporated banking institutions; and

(b) access to BNM's liquidity facility was extended to insurance companies and *takaful* operators regulated and supervised by BNM.

The Government Deposit Guarantee scheme expired on 31 December 2010.

Before the expiry of the Government Deposit Guarantee scheme, the Malaysia Deposit Insurance Coporation Bill 2010 was tabled for first reading in Dewan Rakyat on 30 November 2010 and was subsequently passed by the Parliament as the Malaysia Deposit Insurance Coporation Act 2011 ("the MDICA 2011"). The MDICA 2011 came into force on 31 December 2010, repealing the MDICA 2005.

**MDICA 2011**

The coming into force of the MDICA 2011 significantly strengthened the Malaysian financial system. The changes brought about by the MDICA 2011 include, amongst others:

(a) an increase in the deposit insurance limit;
(b) the establishment of an explicit national *takaful* and insurance benefits protection system and enhancements to the existing national deposit insurance system;
(c) the use of bridge institutions to temporarily assume the commitments of a non-viable member institution; and
(d) the exclusion of member institutions from becoming an affected person.

**Increase in Deposit Insurance Limit**

From 1 January 2011 onwards, the deposit insurance limit was increased from RM60,000 (under the MDICA 2005) to RM250,000 per depositor per member bank. This means that in the event a member bank fails, each depositor, whether individuals or businesses, of the failed member bank is protected against the loss of their insured deposit up to RM250,000[3]. All commercial banks licensed under the Banking and Financial Institutions Act 1989 and all Islamic banks licensed under the Islamic Banking Act 1983, including foreign-owned banks incorporated in Malaysia, are member banks[4] for such purposes.

The types of deposit initially covered by the deposit insurance are limited to Ringgit denominated deposits in current and savings deposit accounts, fixed deposits and cheques and bank drafts made against a deposit account[5]. Coverage have been extended to foreign currency denominated deposits. However, protection is not accorded to deposits payable outside Malaysia, money market deposits, negotiable instruments of deposits or other bearer deposits or repurchase agreements.

In a survey conducted by the MDIC on deposits held by its member banks, it was revealed that under the new and increased deposit insurance limit, 99% of depositors would now be protected by the MDIC.

**Takaful and Insurance Benefits Protection**

Under the MDICA 2011, the objectives of the MDIC was further expanded to include the administration of a *takaful* and insurance benefits protection system under the MDICA 2011 and to provide protection against the loss of part or all of *takaful* or insurance benefits which an insurer member is liable[6]. In line with the expansion of its role, the MDIC's mandate now includes the administration of the *Takaful* and Insurance Benefits Protection System ("the TIPS"), which was implemented on 31 December 2010. The TIPS replaces the Insurance Guarantee Scheme Fund for the insurance industry to meet the claims of policyholders of failed insurance companies using funds pooled from the insurance industry. All *takaful* operators licensed under the Takaful Act 1984 to conduct family and/or general *takaful* business in Malaysia, as well as insurance companies licensed under the Insurance Act 1996 to conduct life and/or general insurance business in Malaysia are member institutions for such purposes[7].

TIPS provides coverage for Ringgit denominated policies issued in Malaysia. Where a member institution is unable to meet its obligations to its policyholders, the MDIC is required to reimburse the policyholders in respect of the covered benefits up to the specified maximum limits provided under TIPS. The maximum coverage limits vary for the different types of protected benefits, ranging from up to RM10,000 per month for disability or annuity income benefits, to an amount of up to RM500,000 on death or property damage claims. Any premium paid in advance will also be refunded in full[8].

**Bridge Institutions**

The protection of depositors and policyholders will also be further enhanced under the MDICA 2011 with broad powers provided for MDIC to be able to intervene and resolve troubled institutions which have ceased to be viable or which BNM considers likely to become non-viable, in the best interest of depositors and policyholders. The MDIC's intervention and resolution powers include arrangements to transfer such assets, business and affairs of the member institution and such deposit liabilities or *takaful* or insurance liabilities and other liabilities of the member institution as the MDIC may determine to a bridge institution[9] (which shall be a subsidiary of the MDIC and designated as a bridge institution), in order to preserve the continuity and value of investments and protection afforded under existing deposits, insurance policies and *takaful* certificates.

**Affected persons exclude member institution**

The definition of "affected person" in the MDICA 2011 expressly excludes a member institution. This change removes the possibility of a member institution becoming an affected person and having a conservator appointed over it. Therefore, a member institution would, under the MDICA 2011, not be subject to the provisions relating to the appointment of a conservator, but only to the powers of the MDIC to, amongst others, assume control over it.

**Conclusion**

BNM has indicated its plan to carry out a comprehensive review of all the existing legislation governing financial institutions and payment systems under BNM's purview to take into account the changing financial landscape and regulatory developments[10]. The implementation of the MDICA 2011 is in line with its plan.

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VALERIE TANG
FINANCIAL SERVICES PRACTICE GROUP

For further information regarding the Malaysia Deposit Insurance Corporation Act 2011, please contact

Christina S.C. Kow
christina@shearndelamore.com

Tee Joe Lei
joelei@shearndelamore.com

[1] Section 4 of the MDICA 2005.

[2] BNM Press Statement *"Malaysia Takes Pre-emtive Measure"* dated 16 October 2008.

[3] Malaysia Deposit Insurance Corporation (Deposit Insurance Limit) Order 2011.

[4] A list of member institutions can be obtained at the MDIC website at http://www.pidm.gov.my

[5] http://www.pidm.gov.my/About-Deposit-Insurance/Frequently-Asked-Questions-(FAQs).aspx

[6] Section 4 of the MDICA 2011.

[7] See footnote 4 above.

[8] Under ***Coverage*** at page 50 of the Financial Stability and Payment Systems Report 2010 issued by Bank Negara Malaysia.

[9] Sub-sections 99(f) and (g) of the MDICA 2011.

[10] At page 7 of the Financial Stability and Payment Systems Report 2009.

The Partners of
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are pleased to announce the admission of

**Ms. Pamela Kung Chin Woon**
Financial Services Practice Group

as Partner

with effect from **7 February 2011**