Shearn Delamore &Co.

NEWSLETTER

▪ Vol 12 No 2 ▪ June 2013 KDN NO. PP 12544/10/2012 (030886)

INTELLECTUAL PROPERTY

The Malaysian Competition Commission Guidelines

IN THIS ARTICLE, TASHA PRASHEELA CHANDRA CONSIDERS THE GUIDELINES ISSUED BY THE MALAYSIAN COMPETITION COMMISSION ("MyCC"), WHICH ACTS AS A REFERENCE ON HOW THE MYCC INTERPRETS THE COMPETITION ACT 2010.

The Malaysian Competition Act 2010 ("the Act") came into force on 1 January 2012. The Guidelines were subsequently issued in May and July 2012. The Guidelines, which will be discussed in more detail below, provide insight as to how the MyCC interprets the Competition Act 2010 .[1]

The MyCC has issued four Guidelines:

- Guidelines on Market Definition
- Guidelines on Anti-Competitive Agreement
- Guidelines on Abuse of Dominant Position, and
- Guidelines on Complaints Procedures.

The Guidelines on IP rights and Franchise Agreements will be issued later.

Market Definition

The definition of "market" is the crucial starting point once the MyCC receives a complaint about an enterprise. Under section 2 of the Act, an "enterprise" means any entity carrying on commercial activities relating to goods or services, and for the purposes of the Act, a parent company and its subsidiary shall be regarded as a single enterprise if, despite being separate legal entities, they form a single economic unit within which the subsidiary does not enjoy real autonomy in determining its actions in the market. The term "market" means a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

The purpose of defining a market is to determine the level of competition and to establish market power of an enterprise. Once the relevant market of an enterprise is defined, the MyCC can then establish whether a particular enterprise is dominant in the market and whether agreements between competitors have a significant anti-competitive effect in the market. For example, anti-competitive agreements between competitors with a small market share may be allowed as the effect of such agreements is likely to be insignificant[2].

Anti-competitive Agreements

The Act prohibits anti-competitive agreements between enterprises and anti-competitive decisions by associations. Essentially, an anti-competitive agreement is an agreement which has the object or effect of significantly preventing, restricting or distorting competition in any market for

▪ In This Issue ▪

01 ▪ The Malaysian Competition Commission Guidelines

03 ▪ Hoh Kiang Ngan & Ors v Hoh Han Keyet

05 ▪ The Revised Guidelines on Private Debt Securities and Guidelines on *Sukuk*

07 ▪ Limited Liability Partnership Act 2012

09 ▪ Has the Minimum Retirement Age Act 2012 Sounded the Death Knell for Fixed-term Contracts?

11 ▪ PETRONAS Penapisan (Terengganu) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

14 ▪ Medical Device Act 2012

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

goods or services in Malaysia.

Agreements include both written and oral agreements, whether legally enforceable or not and may either be vertical agreements between manufactures or distributors and resellers or horizontal agreements between enterprises at the same level. The main concern is the collusion between competitors to fix prices and therefore, all forms of communication with other competitors where price is likely to be discussed should be avoided.

Resale Price Maintenance ("RPM")

One of the prohibited agreements under section 4(2) of the Act is an agreement to fix prices, also known as Resale Price Maintenance ("RPM"). This is where a seller imposes a fixed price or minimum price at which the product must be resold. In general, the MyCC will take a strong stance against minimum RPM and find it anti-competitive while other forms of RPM such as maximum pricing or recommended retail pricing may sometimes be deemed as anti-competitive if the object or effect of such actions significantly prevents, restricts or distorts competition. The exercise of RPM results in retailers not being able to compete with each other since the manufacturers have fixed their resale prices[3].

Information sharing

Information such as technology and standards of products can improve competition in the market. However, sharing of price information could fall within the conduct deemed to be anti-competitive. Competition in the market would be increased if competitors are not privy to certain confidential information such as information on their competitors' prices. The rationale behind this, as exemplified in the Guidelines, is that competitors are never sure what their rivals would do to gain a competitive advantage in the market. Sharing information on pricing could eliminate or reduce this uncertainty and in turn reduce competition significantly. The exchange of information on price may also facilitate price fixing which, as discussed above, is deemed anti-competitive[4]

Non-price restrictions

According to the Guidelines, anti-competitive non-price vertical agreements may not be considered to have a significant anti-competitive effect if the individual market share of the seller or buyer does not exceed 25% of their relevant market. An example of a non-price agreement is where there is a requirement that a buyer must buy all or most of their supplies from a particular supplier. If the supplier already has a significant part of the downstream market then an exclusive vertical agreement with the buyer can close that market to other suppliers.

Abuse of Dominant Position

In assessing whether there is an abuse of dominance, the MyCC will first have to determine whether the enterprise being complained about is dominant in a relevant market in Malaysia. If there is dominance, the MyCC will assess whether there is abuse of that dominant position. Briefly, dominance is determined based on the market power that an enterprise holds in that relevant market. Generally, the MyCC considers that a market share of above 60% would be indicative of dominance[5].

There are however other factors that would be taken into account such as whether there are barriers to entry into the market for potential competitors. The Guidelines indicate that if new enterprises can easily enter a market even if one enterprise has 100% market share, the existing enterprise may not be dominant.

The Guidelines deal with two kinds of abuse. The first is exploitative abuse which mainly concerns setting high prices and the second is exclusionary abuse which is essentially predatory conduct which stops competitors from competing. Exploitative abuse may occur in situations where an enterprise, upon believing that no new entrants are likely, sets a high price to exploit customers. Exclusionary abuse on the other hand prevents other equally efficient competitors from competing. It is interesting to note however that it may not be a breach of the Act if a dominant enterprise engages in competitive conduct which benefits consumers, even if an inefficient competitor is harmed. This approach ensures good economic outcomes, which is consistent with the aims of the Act.

Conclusion

These Guidelines are not exhaustive and may be amended to include other areas of concern. The issuance of these Guidelines is however helpful for enterprises that intend to conduct an assessment of their businesses in order to ensure that their businesses are conducted in a competitive manner and do not infringe the provisions of the Act.

TASHA PRASHEELA CHANDRA
INTELLECTUAL PROPERTY & TECHNOLOGY PRACTICE GROUP

For further information regarding Intellectual Property matters, please contact

Wong Sai Fong
saifong@shearndelamore.com

Karen Abraham
karen@shearndelamore.com

1 The details and information herein have been obtained and reproduced in parts from the Competition Act Guidelines as issued by the Malaysian Competition Commission.
2 Paragraph 1.7 of the Guidelines on Market Definition
3 Paragraph 3.15 of the Guidelines on Anti-Competitive Agreements
4 Paragraph 3.8 of the Guidelines on Anti-Competitive Agreements
5 Paragraph 2.2 of the Guidelines on Abuse of Dominant Position.

CASE NOTE

Hoh Kiang Ngan & Ors v Hoh Han Keyet

IN THIS ARTICLE, TEH SOO JIN EXAMINES THE DECISION OF **HOH KIANG NGAN & ORS V HOH HAN KEYET**[1].

Facts

This case involves a dispute between two factions within a family, wrestling for control of a family-owned company ("the Company"). The Company was incorporated on 26 September 1968 as a company limited by shares with the patriarch of the family and his late wife being its initial subscribers. The Articles of Association ("the AA") of the Company stipulate that the membership of the Company shall be restricted to only the natural male descendants of the patriarch and that a director of the Company shall be required to hold ordinary shares. Dispute subsequently arose between the shareholders of the Company and amongst the allegations was that one of the branches of the family was being sidelined and deprived of participation in the management of the Company. Following from a string of litigation, a Settlement Agreement was entered into between the shareholders of the Company on 9 December 2010. The Settlement Agreement was intended to put an end to the litigation and ultimately, to ensure that each branch of the patriarch's direct descendants would be equally represented on the Board of Directors of the Company. Clause 1.9 of the Settlement Agreement expressly provides that:

> *"Each branch of the late Hoh Ying Chye's direct descendants shall be eligible to have one (1) male member thereof elected as a director of the Company. To the extent that as at the date of this Settlement Agreement, Derek Hoh and Richard Hoh are not represented on the Board of Directors of the Company, the parties further agree that they and/or such of their eligible male descendants as they may each nominate shall be appointed as the directors of the Company within one (1) month of the withdrawal order."*

Accordingly, to ensure equal participation on the Board of Directors, during the Annual General Meeting ("AGM") of the Company on 12 July 2011, one of the resolutions tabled for approval of the Board was for the re-election of Hoh Han Keyet as a director of the Company. In breach of the terms of the Settlement Agreement, the majority of the shareholders voted against the re-election of Hoh Han Keyet as a director of the Company notwithstanding that Hoh Han Keyet is the only natural male descendant representing his branch of the family. Four other directors were appointed at that AGM, two of whom were undisputedly non-resident directors.

Hoh Han Keyet, being dissatisfied with his "removal", commenced an action in the High Court against Hoh Kiang Ngan and 15 others ("the appellants"). The High Court allowed Hoh Han Keyet's claim and ordered that a fresh general meeting of the Company be convened during which each of the appellants was compelled to vote in favour of the re-election of Hoh Han Keyet. An appeal was filed by the appellants against the decision of the High Court.

Issues

Among the issues considered by the Court of Appeal were:

(a) Whether clause 1.9 of the Settlement Agreement was correctly construed and interpreted?

(b) Whether there was a breach of section 122(1) of the Companies Act 1965 ("the Act") following the non re-election of Hoh Han Keyet as a director of the Company?

Decision and Analysis

Whether clause 1.9 of the Settlement Agreement was correctly construed and interpreted?

The merits of Hoh Han Keyet's case hinges upon the correct interpretation of clause 1.9 of the Settlement Agreement. Hoh Han Keyet premised his case on that clause as giving rise to his legitimate expectation to be appointed as a director of the Company, and that the conduct of the appellants in voting against his re-election was in clear violation of clause 1.9. The appellants, in turn, argued that clause 1.9 amounts to nothing more than Hoh Han Keyet's "eligibility" to be appointed as a director and that it can in no way compel the shareholders to vote against their wishes. In interpreting clause 1.9, the Court of Appeal was guided not only by a conjunctive reading of the clauses in the Settlement Agreement, but also by considering the history and background facts leading to the signing of the Settlement Agreement. It was with the ap-

preciation of these facts that Court of Appeal agreed with Hoh Han Keyet's contention that the word "eligible" in clause 1.9 could only mean "entitled to be elected", as opposed to a mere "eligibility" as contended by the appellants. This approach taken by the Court of Appeal appears to be in line with the recent decision of the Federal Court in **Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd**[2], where it was held that the Court in construing an agreement is not confined only to the four corners of the relevant agreement, as they are also entitled to look into the factual matrix forming the background of the transaction.

It would further appear that on the facts of the case, the construction adopted by the Court of Appeal effectively compelled the shareholders of the Company to cast their votes in a manner stipulated under the Settlement Agreement.

Whether there was a breach of section 122(1) of the Act following the non-re-election of Hoh Han Keyet as a director of the Company?

Hoh Han Keyet argued that one of the appellants, X, was not a resident director within the meaning of section 122(1) of the Act. Having considered the evidence tendered by both parties, the High Court decided that X was not a resident director within section 122(1) of the Act, a finding that was subsequently affirmed by the Court of Appeal.

Section 122(1) of the Act imposes a mandatory requirement that a company shall have at least two directors, each having their principal or only place of residence within Malaysia. This is one of the many commonly known legal requirements imposed by the Act on a company incorporated thereunder. While it may be simple to determine whether a director has his only place of residence within Malaysia, how do we determine a director's principal place of residence within the meaning envisaged under section 122(1) of the Act?

Until recently, the reported Malaysian case of **Fong Poh Yoke v The Central Construction Co (Malaysia) Sdn Bhd**[3] merely defined "residence" to connote residence in one place with some degree of continuity. This seems to be consistent with the English case of **Levene v Commissioner of Inland Revenue**[4] where the term "resident" connotes residence in one place with some degree of continuity, apart from accidental or temporary absences.

The question that arises then is whether X, being a director with Malaysian passport but with evidence of his citizenship overseas, is deemed to be a resident director pursuant to section 122(1) of the Act. The Court of Appeal unanimously held that X did not have a principal residence in Malaysia as, among others:

"*(i) X and his family **migrated to Australia** in the 1980s and **live permanently** in Melbourne;*

*(ii) X is a **citizen of Australia and is a registered voter**;*

*(iii) X when he visits Malaysia would either **stay with his brother or in hotels**, the expenses for which would be met by the Company. X stayed at the Hilton Hotel when he came to Kuala Lumpur to attend a director's meeting on 15/6/11, one month before the AGM;*

*(iv) The purported change of his principal place of residence from Melbourne, Australia to Shah Alam and then to Subang Jaya took place only after the AGM was held on 12/7/11. Moreover, the Subang Jaya **address provided by X is in fact the address of a relative with whom X was staying**;*

*(v) That although X had affirmed that he is a Malaysian citizen and holds a valid Malaysian Passport (presumably on a dual citizenship basis) **X did not exhibit the relevant pages of his Malaysian passport to show that the periods of time spent in Malaysia** (since the issuance of the passport on 14/6/11) was longer than the periods of time spent in Australia…"*
[emphasis added]

The Court of Appeal further spelt out that the considerations to be taken into account in determining whether one qualifies as a resident director are:

(a) length of time spent at one place;

(b) connection the person has with that place;

(c) frequency of residence;

(d) element of regular occupation (whether past, present or intended for the future, even if intermittent); and

(e) some degree of permanency in the occupation of such residence.

Hence, with the finding of the Court of Appeal that X did not have his principal place of residence in Malaysia, it follows that the number of directors with a principal place of residence in Malaysia fell below 2, and thus the Company was in breach of section 122(1) of the Act.

Conclusion

The Court of Appeal's decision provides useful guidance on the factors to be taken into account in determining whether a director qualifies as a resident director and highlights the possible ramifications arising from a failure to properly identify a resident director particularly in the context of a corporate dispute.

SD

TEH SOO JIN
DISPUTE RESOLUTION PRACTICE GROUP

For further information regarding Corporate Litigation matters, please contact

Robert Lazar
rlazar@shearndelamore.com

Rabindra S. Nathan
rabindra@shearndelamore.com

1 [2013] MLJU 210
2 [2010] 1 MLJ 597
3 [1998] 4 CLJ Supp 112
4 [1928] AC 217

FINANCIAL SERVICES

The Revised Guidelines on Private Debt Securities and Guidelines on *Sukuk*

IN THIS ARTICLE, HONG JAYEEN LOOKS AT THE REVISED GUIDELINES ON PRIVATE DEBT SECURITIES AND GUIDELINES ON *SUKUK*.

In tandem with the coming into force of the Capital Markets and Services (Amendment) Act 2012 ("CMSAA 2012"), the Securities Commission ("SC") issued the revised Guidelines on Private Debt Securities ("PDS") and Guidelines on *Sukuk* (collectively, "the Guidelines") on 28 December 2012 to incorporate and reflect the amendments effected by CMSAA 2012, and also to provide a framework for the newly introduced retail PDS and *Sukuk*.

The revised Guidelines overhaul and replace the previous PDS Guidelines and the Islamic Securities Guidelines respectively, both of which were issued on 12 July 2011. The revised Guidelines are now re-organised into the following four parts to enhance the clarity of the Guidelines[1] :

- Part A: General;
- Part B: Requirements for an issuance, offering or invitation to subscribe or purchase PDS or *Sukuk*;
- Part C: Approval for an issuance, offering or invitation to subscribe or purchase PDS or *Sukuk*; and
- Part D: Requirements for an issuance, offering or invitation to subscribe or purchase retail PDS or *Sukuk*.

Below are the newly incorporated features set out in the Guidelines on PDS and Guidelines on *Sukuk*:

Guidelines on PDS and Guidelines on *Sukuk*

Retail PDS and Sukuk

The approval framework for retail PDS and *Sukuk* is a major addition to the Guidelines wherein the SC has laid down a number of requirements that issuers of retail PDS and *Sukuk* would have to meet, in addition to the other requirements that are set forth in the Guidelines. These additional requirements are summarised briefly here.

Retail PDS and *Sukuk* were introduced to retail investors in a response to meet their demand for access to a wider range of investment products and also to be in line with the SC's Capital Market Masterplan 2 initiative to promote greater retail participation in the PDS and *Sukuk* markets[2].

Unlike PDS and *Sukuk*, which can be issued by a corporation within the meaning of subsection 2(1) of the Capital Markets and Services Act 2007 and a foreign government, retail PDS and *Sukuk* may only be issued by:

(i) a public company whose shares are listed on the stock market of Bursa Malaysia Securities Berhad;

(ii) a bank licensed under the Banking and Financial Institutions Act 1989 or Islamic Banking Act 1983;

(iii) Cagamas Berhad; and

(iv) an unlisted public company whose PDS and *Sukuk* are guaranteed by Danajamin Nasional Berhad, Credit Guarantee and Investment Facility or any of the eligible issuers mentioned in (i) to (iii).

However, as presently retail PDS and *Sukuk* are still at its first phase, only the Malaysian Government and any company whose issuances are guaranteed by the Malaysian Government are eligible to issue retail PDS and *Sukuk*.

Retail PDS and *Sukuk* must be denominated in ringgit with tenure of more than one year and carry the characteristics laid down in paragraph 16.04 or 21.04 of the Guidelines, which include, amongst others, fixed term with principal and any

profit rate payable at expiry, fixed or variable profit rate and rank at least equally with amounts owing to unsecured and unsubordinated creditors. Asset-backed securities ("ABS") or PDS or *Sukuk* that are structured like ABS do not qualify as retail PDS or *Sukuk*.

Like the issuers of PDS and *Sukuk*, issuers of retail PDS and *Sukuk* are also required to comply with a number of disclosure requirements as laid down in the Guidelines. Among those requirements are

(i) the issuer is to publish a summary advertisement of its prospectus/disclosure document in at least one national newspaper which is widely circulated, and

(ii) the advertisement must contain the information set forth in paragraph 16.13 or 21.13 of the Guidelines, which includes a brief description of the retail PDS or *Sukuk*, the risks specific to the retail PDS or *Sukuk* referred to in the advertisement and the date of the prospectus/disclosure document.

Guidelines on Sukuk

Sukuk Wakalah Bi Al-Istithmar

In addition to the approval framework for retail Sukuk, the SC has also introduced a new type of *Sukuk*, ie *Sukuk Wakalah Bi al-Istithmar* ("*Sukuk Wakalah*").

Defined as "certificates of equal value which evidence undivided ownership of the certificate holders in the investment assets pursuant to their investment through the investment agent" in the Guidelines on *Sukuk*, *Sukuk Wakalah* is a contract whereby a party authorises another party to act on its behalf, based on agreed terms and conditions. Usually, *Sukuk Wakalah* involves the creation of a special purpose vehicle which is appointed as a "*wakil*" or intermediary to manage the *Shariah*-compliant investment on behalf of investors or *Sukuk* holders[3].

Based on paragraph 8.04 of the Guidelines on *Sukuk*, which outlines the *Shariah* rulings applicable to the issuance of *Sukuk Wakalah*, the investors must enter into a *Wakalah* (agency) agreement with the issuer to appoint the issuer as their *Wakeel* (agent) for the purpose of investment, with or without a fee. In the absence of a *Wakalah* agreement, a clause providing for the appointment of the *Wakeel* must be provided in the trust deed. Further the Sukuk Wakalah's structure, which complies with paragraph 8.04 (iii), may be guaranteed by (i) a third party; (ii) a *Wakeel*/sub *Wakeel* appointed by the issuer; or (iii) related party or associated company of the issuer subject to compliance with the conditions set out in paragraph 8.04(ii) of the Guidelines on *Sukuk*.

Revision to Principal Terms and Conditions

Previously, it was stated in the Islamic Securities Guidelines, that during the tenure of the *Sukuk* issuance, any revision to the terms in the *Sukuk* documents, such as the maturity date and the profit rate, can only be made by replacing the initial contract with a new contract stating the new maturity date and profit rate. This requirement has been modified by the Guidelines on *Sukuk*.

In the Guidelines on *Sukuk*, executing a new contract is not the only approved method to revise the principal terms and conditions; a revision can also be effected by executing a supplemental contract — whether any revision can be made by executing a new contract or a supplemental contract depends on the type of *Sukuk* issued and also on the nature of the revision (see paragraphs 17.03 to 17.07). For example, in the case of *Sukuk Bai`Bithaman Ajil*, *Sukuk Murabahah and Sukuk Istisna*`, a revision to increase the profit rate may only be effected by executing a new and separate contract, which will terminate the initial contract; while in the case of *Sukuk Musharakah*, *Sukuk Mudharabah*, *Sukuk Wakalah Bi al-Istithmar* and *Sukuk Ijarah*, revision to the profit rate (be it increasing or reducing the profit rate), may only be effected by executing a supplemental contract subject to the agreement of all parties.

HONG JAYEEN
FINANCIAL SERVICES PRACTICE GROUP

For further information regarding the dept capital market, please contact

Christina S. C. Kow
christina@shearndelamore.com

Tee Joe Lei
joelei@shearndelamore.com

1 See "Generic FAQs on CMSA 2012", http://www.sc.com.my/main.asp?pageid=1238&menuid=&newsid=&linkid=&type=

2 See "FAQ on Retail Bonds and Sukuk", http://www.sc.com.my/main.asp?pageid=1220&menuid=&newsid=&linkid=&type=

3 See "Malaysian ICM, Quarterly Bulletin of Malaysian Islamic Capital Market by the Securities Commission Malaysia", http://www.sc.com.my/eng/html/icm/0906_msianicm.pdf.

CORPORATE LAW

Limited Liability Partnership Act 2012

IN THIS ARTICLE, DEBBIE WOO PUI HAAN ANALYSES THE LIMITED LIABILITY PARTNERSHIP ACT 2012.

The Limited Liability Partnership Act 2012 ("the Act") is effective from 26 December 2012 and generally provides for the registration, administration and dissolution of a limited liability partnership ("LLP"). The coming into force of the Act gives entrepreneurs an alternative business vehicle in addition to the common sole proprietorship, partnership and body corporate business structures currently available to entrepreneurs.

The LLP model combines features of a private company and a conventional partnership, creating an attractive and viable business structure for entrepreneurs. An LLP structure protects the partners by limiting their liability to the assets of the LLP and the obligations of the LLP (similar to the limited liability of a shareholder of a limited liability company) whilst providing the partners the flexibility to deal with its internal arrangements (a feature of conventional partnerships).

Formation of an LLP under the Act

An LLP is formed when there are two or more persons (whether individuals or body corporate) associated for carrying on any lawful business with a view to profit and is conducted in accordance to the terms of its LLP agreement[1] . Subject to the approval of the registrar of LLPs ("Registrar"), it is possible for an LLP to carry on business with less than two partners for six months, or with an extension of time, for no longer than 12 months[2] .

If the LLP is for the purpose of carrying on a professional practice, there are additional requirements to be complied with, which are:

(i) the partners must consist of natural persons who are practising the same professional practice; and

(ii) there must be a valid professional indemnity insurance cover for an amount that is not less than the amount approved by the Registrar or by the Registrar after consultation with the governing body of the profession for chartered accountants, advocates and solicitors or secretaries under the Companies Act 1965, where applicable.

Once an LLP is formed, it is a body corporate with a separate legal personality from its partners[3] .

Conversion to an LLP

A private company and a conventional partnership may convert to an LLP. The term "convert" is defined under section 29(2) of the Act as a "*transfer of the properties, interests, rights, privileges, liabilities, obligations and the undertaking of the conventional partnership*" to an LLP.

A private company is permitted to convert to an LLP only if:

(i) there is no subsisting security interest in its assets at the time of application; and

(ii) all the shareholders of the private company will be the partners of the LLP and no one else.

For conversion of a conventional partnership to an LLP, section 29(1) of the Act provides that the conversion can only take place if all the partners to the conventional partnership become partners in the LLP.

Terms governing an LLP

The mutual rights and duties of the partners in an LLP and the LLP are governed by the LLP agreement except as otherwise provided in the Act. In the event the LLP agreement does not govern or provide for any matter set out in the Second Schedule of the Act, the LLP is governed by the provision(s) of the Second Schedule relating to that matter.

Section 9(2) of the Act states that the LLP agreement must be in Bahasa Malaysia or English and consist of the following particulars:

(i) the name of the LLP;

(ii) the nature of business of the LLP;

(iii) the amount of capital contribution by each partner; and

(iv) that the partners have agreed to become partners of the LLP.

If the above requirements for the formation of an LLP are satisfied, a person may submit an application for registration of the LLP to the Registrar in accordance with section 10 of the Act. In the event the LLP is for a professional practice, the application for the registration of an LLP must be accompanied with an approval letter from the relevant governing body of the professional practice, without which the Registrar will not approve the registration of the LLP.

Differences between LLP, private company and conventional partnership

The fundamental differences between an LLP and a private company are that in the case of the LLP, it does not have:

(i) issuance of shares;

(ii) to convene annual general meetings; and

(iii) to submit financial statements to the Companies Commission of Malaysia.

The primary difference between an LLP and a conventional partnership is that for an LLP, the liability of partners is limited, that is any debts and obligations of the LLP will be satisfied out of the assets of the LLP (as the LLP has a separate legal personality from its partners). However, in conventional partnerships, partners are jointly and severally liable, with the personal assets of the partners at risk.

In addition, LLPs are not subject to the Partnership Act 1961 or the rules of equity and common law applicable to partnerships[4] .

Limited liability of partners

Section 21(2) states that a partner to an LLP is not personally liable, directly or indirectly, by way of indemnification, contribution, assessment or otherwise for any obligation of the LLP. However, the above provision will not affect the personal liability of a partner in tort for his own wrongful act or omission. Nonetheless, a partner will not be personally liable for the wrongful act or omission of any other partner[5] . All liabilities of the LLP will be borne out of the property of the LLP[6] .

Comparison between the Act and the Limited Liability Partnership Act 2000 of the UK ("LLPA 2000")

It is interesting to note that for LLPs under the UK LLPA 2000, the liability of a partner extends to the wrongful acts and/or omissions of any other partner in the LLP, which is similar to the concept of "joint and several liability" in a conventional partnership that appears to have been retained in the UK's present LLP business structure.

The Act has done away with the concept of "joint and several liability" for LLPs under the Act by limiting the liability of partners for the obligations of the LLP to the assets of the LLP.

Application and practicality

The features of an LLP under the Act may appear attractive and to some extent, a compelling choice for a business structure. However, an entrepreneur should give due consideration to other factors such as the nature of business, regulatory/compliance requirements as well as other practical considerations which may be specific to the business proposed to be carried out by the LLP. It would be interesting to see whether there will be any changes to the existing regulatory framework applicable to certain industries with the creation of LLP as an alternative business structure.

SD

DEBBIE WOO PUI HAAN
CORPORATE & COMMERCIAL PRACTICE GROUP

For further information regarding Corporate Law matters, please contact

Grace C. G. Yeoh
gcgyeoh@shearndelamore.com

Lorraine Cheah
l_cheah@shearndelamore.com

1 Section 6 of the Act
2 Section 7 of the Act
3 Section 3 of the Act
4 Section 4 of the Act
5 Section 21(3) of the Act
6 Section 21(5) of the Act.

EMPLOYMENT LAW

Has the Minimum Retirement Age Act 2012 Sounded the Death Knell for Fixed-term Contracts?

IN THIS ARTICLE, REENA ENBASEGARAM DISCUSSES THE MINIMUM RETIREMENT AGE ACT 2012 AND HOW IT AFFECTS FIXED-TERM CONTRACTS.

The Minimum Retirement Age Act 2012 ("the MRA") which comes into effect on 1 July 2013 will effectively change the employment landscape of the private sector. Currently, there is no mandatory retirement age although some companies do implement a retirement age policy to be in-line with the government service or pursuant to internal policies as in the case of multinational companies.

With the enforcement of the MRA, the minimum retirement age of an employee shall be upon the employee attaining the age of 60 years[1]. The MRA expressly provides that an employer shall not prematurely retire an employee before the employee attains the minimum retirement age[2] and contravention of the foregoing is deemed an offence and upon conviction, the employer shall be liable to a fine not exceeding RM10,000[3]. The MRA further provides that any retirement age in a contract which is less than the minimum retirement age shall be deemed void and substituted with the minimum retirement age[4].

Whilst the MRA has the potential to cause disruption to various companies which currently apply a lower retirement age and have planned their operations and budgeted their finances accordingly, the provision that arguably seems to have created the most controversy is item 1(h) of the Schedule to the MRA ("the Schedule").

The Schedule, to be read together with section 2 of the MRA, lists the categories of persons who would fall outside the scope of the MRA. Item 1(h) provides for, "*a person who is employed on a fixed term contract of service, inclusive of any extension, of not more than twenty four months*".

Item 1(h) suggests that if the initial fixed-term contract itself is for a term longer than 24 months or the initial period plus the extension(s) collectively exceed 24 months, the MRA would apply. The exception which is limited to a contract/series of contracts which collectively do not go beyond two years apparently recognises that, in certain cases, short-term contracts are required, for example, on a limited-duration project.
One possible practical effect of the MRA is that it converts all employees currently engaged on fixed-term contracts, inclusive of extensions, of more than 24 months into permanent employees, and these employees shall be subject to the minimum retirement age of 60 years. In other words, fixed-term contracts exceeding a period of two years shall be deemed void.

So, wither the concept of the fixed-term contract? It can be argued that the MRA does not radically do away with the fixed-term contract as when dealing with a case involving a fixed-term contract, the Industrial Court will first determine whether the relevant contract is genuine or otherwise.

In the *locus classicus* **Penang Han Chiang Associated Chinese School Association v National Union Of Teachers in Independent Schools, West Malaysia**[5], the Industrial Court accepted the existence of genuine fixed-term contracts in the context of section 11 of the Employment Act 1955[6] and section 20 of the Industrial Relations Act 1967[7] and held as follows:

> "*In a framework of statute-guaranteed security of employment however, where the termination of a workman's employment without just cause or excuse may be subject to an award of reinstatement by the Industrial Court ... it would be an obvious loophole if any employer could evade the statutory protection by making a series of contracts of finite duration with his workmen.*
>
> *xxx*
>
> *The Court, however, is aware that on the other hand there are genuine fixed term contracts, where both parties recognise there is no understanding that the contract will be renewed on expiry ... This type of fixed-term contracts are therefore to be differentiated from the so-called fixed-term contracts which are in fact ongoing, permanent contracts of employment*".

In the event that the contracts in question are deemed to be genuine fixed-term contracts, the issue of whether there was a dismissal and whether that dismissal was with just cause or excuse does not arise as the employee's contract of employment automatically ends upon the expiry of the fixed term. In the following cases, the Industrial Court had held that the fixed-term contracts were genuine and ended upon expiry of the stated term, and, accordingly, there was no dismissal to speak of.

In the case of **Sarfuddin Othman v Global Carriers Berhad & Anor**[8], the Industrial Court held as follows:

> "*The same can be said of this case where the fixed term was for two years and it expired on 31 December 2005 thereby it terminated itself. The Claimant was never dismissed*". [underlining emphasis is ours]

In the recent case of **Chong Yew Seng v Asia Pacific Engineering Consortium Sdn Bhd**[9], the Industrial Court concluded as follows:

> "*Apa yang penting di sini adalah pertamanya perlantikan Yang Menuntut adalah untuk tempoh satu tahun dan akan berakhir pada 28 Februari 2006. Ini adalah merupakan kontrak tempoh tetap. Keduanya tempoh satu tahun tersebut boleh dilanjutkan hanyalah atas permintaan Syarikat*". [underlining emphasis is ours]

In the case of **Syarikat Joginder Singh v Cik Lai Swee Lin**[10], the Industrial Court stated as follows:

> "*... it is the considered opinion of the Court that both parties genuinely intended the employment to be for a fixed term of two years. Also, this was obviously not an ordinary on-going employment dressed up in the form of a fixed term contract to circumvent the law - and it must therefore be recognised for what it is and treated as what it was meant to be*". [underlining emphasis is ours]

In the case of **Kesatuan Pekerja-Pekerja Resorts World, Pahang v M Vasagam Muthusamy**[11], M Vasagam Muthusamy's contract was extended twice from 15 April 1994 to 15 April 1995 and subsequently from 15 April 1995 to 15 April 1996. The Industrial Court held as follows:

> "*The contract was a genuine fixed term contract of employment. Such a contract automatically comes to an end of itself, in the absence of express renewal*".

The High Court upheld the aforesaid decision[12] , concluding that "*once it is established that there is a genuine fixed term contract, the dissolution of the contract upon reaching the expiry date of the fixed term would clearly spell the end of the worker's tenure with the relevant Company.*"

The Court of Appeal agreed stating "*that the contract in our present case is a genuine fixed term contract terminable upon the expiry of the fixed term agreed upon*"[13] .

None of the foregoing cases would have run foul of the MRA in the event the MRA has been in force at the material time as the contracts in question were for a period of 24 months or less.

On the other hand, the Industrial Court in the following cases found that the contracts in question were not genuine fixed-term contracts and the employees concerned were in fact permanent employees.

As a court of equity and good conscience, the Industrial Court will look beyond the four corners of the contract to ensure that unscrupulous employers do not deprive essentially permanent employees the security of tenure by labeling the contracts as fixed-term contracts. It is arguable that the MRA seeks the same objective.

The Industrial Court in **Lim Ean Choo & 12 Ors v Tadika Tzu Yu (Tzu Yu Kindergarten)**[14] stated as follows:

> "*On whether the claimants' contracts of employment had been genuine fixed term contracts, there had been genuine long-term factors present in their employment contracts inter alia that many of the claimants had taught in the kindergarten for more than 20 years and had had their contracts renewed unfailingly during those years, the teachers had been given an automatic renewal of their contracts at the expiration of the 2 year period,...Thus the employment status of the claimants had been ordinary employment contracts dressed up in the form of a succession of fixed-term contracts. They had not been genuine fixed-term contracts*".

In **Innoprise Corporation Sdn Bhd, Sabah v Sukumaran Vanugopal, Sabah**[15], Sukumaran Vanugopal, who had served the company as Senior Group Investment Officer (Utility) for nine years through successive three-year contracts, claimed against the company for unfair dismissal. It was held as follows:

> "*The cardinal issue therefore that falls to be decided is whether the claimant's employment with the company which continues for nine years on the basis of successive renewals, was permanent taking into consideration also the verbal assurance given to the claimant and the policy and practice of the company to renew and to routinely renew contracts of Senior Managers and Senior Officers in the absence of misconduct or poor performance which created and induced a reasonable legal expectancy in the claimant's mind that he was in fact a permanent employee of the company.*"

Industrial law also recognises the distinction given to fixed-term contracts which are entered into post-retirement.

In the case of **Thavaratnam Thambipillay v Om Education Sdn Bhd**[16], the Industrial Court confirmed as follows:

> "*The court concludes that the one-year contracts offered to the claimant after retirement age of 60 were genuine fixed term contracts. This being so there is no duty on the respondent to give reasons for the non-renewal of the contract for the academic year 2005.*"

This principle that any contract entered into post-retirement is employment-at-will is in tandem with the provisions of the MRA. Item (i) of the Schedule confirms that the MRA would not apply to "*a person who, before the date of*

coming into operation of this Act, has retired at the age of fifty five years or above and subsequently is re-employed after he has retired".

With the implementation of the MRA, if the employee's services are terminated solely on the expiry of a fixed term prior to attaining the age of 60 years (the exception in item 1(h) of the Schedule not applying), this would amount to a premature retirement. Hence, in the event the employer wishes to terminate the services of such an employee before he attains the age of 60 years, it must justify the same that is, either the employee was redundant or surplus to its needs, or had committed misconduct warranting the penalty of dismissal or his performance was so sub-par that he could not be retained in employment.

This is no different from the current situation where, upon determining that a fixed-term contract is not genuine, the employer must proceed to satisfy the Industrial Court that the termination of services of the employee in question was with just cause or excuse.

REENA ENBASEGARAM
EMPLOYMENT & ADMINISTRATIVE LAW PRACTICE GROUP

For further information regarding the Minimum Retirement Age Act 2012, please contact

N. Sivabalah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

1 Section 4(1) MRA
2 Section 5(1) MRA
3 Section 5(2) MRA
4 Section 7(1) MRA
5 [1988] 2 ILR 611
6 Section 11(1) of the Employment Act 1955 provides, "*(1) A contract of service for a specified period of time or for the performance of a specified piece of work shall, unless otherwise terminated in accordance with this Part, terminate when the period of time for which such contract was made has expired or when the piece of work specified in such contract has been completed*"
7 Section 20(1) pf the Industrial Relations Act 1967 provides, "*Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed*"
8 [2011] 2 LNS 1672
9 [2012] 2 LNS 1667
10 [1987] 2 ILR 155
11 [1999] 1 ILR 368
12 *M Vasagam Muthusamy v Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2003] 5 CLJ 448
13 *M Vasagam Muthusamy v Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2005] 4 CLJ 93
14 [2008] 4 ILR 317
15 [1993] 1 ILR 373B
16 [2010] 2 ILR 201.

CASE NOTE

PETRONAS Penapisan (Terengganu) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

IN THIS CASE NOTE, FOONG PUI CHI AND ANAND RAJ REVIEW THE RECENT HIGH COURT CASE OF **PETRONAS PENAPISAN (TERENGGANU) SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI**[1] .

Brief Facts

PETRONAS Penapisan (Terengganu) Sdn Bhd's ("PPTSB") main source of income has always been from its principal business of refining crude oil and condensates into petroleum products and sale thereof. PPTSB also derived interest income from placements of its excess funds in short-term call deposits with commercial banks and financial institutions ("Placements"). Such interest was treated by PPTSB as gains or profits from a business income under section 4(a) of the Income Tax Act 1967 ("ITA") for years of assessment ("YAs") 2003 and 2004.

However, following a tax audit in August 2006, the Director General of Inland Revenue ("DGIR") took the view that PPTSB's interest income should be subject to tax under section 4(c) and accordingly raised Notices of Assessment in Forms J charging PPTSB to additional taxes and penalties. PPTSB lodged Notices of Appeal in Forms Q to appeal against the said Forms J to the Special Commissioners of Income Tax ("SCIT"). As the Revenue subsequently agreed to remit the penalties imposed upon PPTSB under the Forms J, this appeal therefore proceeded in respect of the dispute on the tax only.

Section 4 of the ITA provides as follows:

> "*Classes of income on which tax is chargeable.*
>
> *Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of –*
>
> *(a) gains or profits from a business, for whatever period of time carried on;*
> *(b) gains or profits from an employment;*
> *(c) dividends, interest or discounts;*
> *(d) rents, royalties or premium;*
> *(e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs;*
> *(f) gains or profits not falling under any of the foregoing paragraphs.*" [emphasis added]

In cases in which income is classified under section 4(c) of the ITA (that is, a non-business source), only expenses which are incurred in the derivation of such interest income can be deducted against the same. Any business losses suffered by the taxpayer would be regarded as arising from a different source of income and such losses cannot be set off against its interest income under section 4(c) ITA.

However, if such interest is treated as gains or profits arising from a business under section 4(a) of the ITA (that is, business income), any business losses suffered (whether in regard to the same business source or another business source) can be set off against the business income (arising from the interest) and this would eventually reduce the amount of income chargeable to tax.

Analysis of Precedents

PPTSB contended that interest received from the Placements should be taxed as gains or profits from a business under section 4(a) and not under section 4(c) because the interest received was business income or was ancillary or incidental to its principal business. PPTSB relied upon various Malaysian superior court cases in support of its contention, such as:

- **Ketua Pengarah Hasil Dalam Negeri v Pan Century Edible Oils Sdn Bhd**[2] ("**PCEO**")
  Like PPTSB, PCEO also carried on the business of refining (that is, refining of palm oil) and the facts in **PCEO** are, in general terms, analogous to the facts of **PPTSB**. PCEO placed its excess cash on short- and long-term deposits. The placements were done regularly and repetitively and skill was exercised to manage the placements. The Court of Appeal held that the interest received by PCEO, despite the fact that it was referred to in section 4(c) ITA, could nevertheless constitute business income under section 4(a) ITA as such interest was receivable in the course of carrying on a business of putting the taxpayer's excess cash to gainful and profitable use by placing it on short- and long-term deposits.

- **American Leaf Blending Co Sdn Bhd v Director General of Inland Revenue**[3] ("**ALB**")
  The Court of Appeal in **PCEO** applied the decision of the Privy Council in **ALB** which held that the rents received from the letting out of property, which would ordinarily be classified under section 4(d) ITA, could constitute gains or profits from a business under section 4(a) ITA. The Privy Council held that the classes of income under section 4 of the ITA are not mutually exclusive and, as such, there is room for overlapping between one paragraph and another.

- **Ketua Pengarah Hasil Dalam Negeri v Isyoda (M) Sdn Bhd**[4] ("**Isyoda**")
  Isyoda involved a construction company which was compelled to place monies in fixed deposits for the purposes of obtaining banking facilities for its business and Isyoda succeeded before the SCIT, High Court and Court of Appeal in arguing that interest income arising from the fixed deposits falls to be taxed under section 4(a) ITA.

The DGIR however urged the SCIT to apply the following cases:

- **Avos (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri**[5] ("**Avos**")
  In the case of Avos, the taxpayer, which was also a construction company compelled to place monies with banks, lost before both the SCIT and High Court. The High Court affirmed the approach taken by the SCIT of looking at the nature of the business activities of the taxpayer and held that since Avos was not in the business of financing, the placements were not an integral part of its business. As such, income from the placements could not be treated as the business income of Avos under section 4(a) of the ITA.

- **Ketua Pengarah Hasil Dalam Negeri v Nilai Cipta Sdn Bhd**[6] ("**Nilai Cipta**")
  In **Nilai Cipta**, the taxpayer (another construction company which was compelled to make placements of funds) succeeded before the SCIT and High Court with largely similar facts as **Avos** and **Isyoda**. However, the Revenue appealed to the Court of Appeal and the Court of Appeal allowed the appeal but did not provide any grounds of judgment. Only a draft of the Court of Appeal Order was tendered before the SCIT in **PPTSB**'s case.

Decision of the SCIT

Having heard the evidence and arguments of the parties, the SCIT dismissed PPTSB's appeal in purported reliance upon the decisions in **Nilai Cipta** and **Avos**.

Decision of the High Court

PPTSB appealed to the High Court and the High Court held that the decision of the SCIT was flawed for the following reasons:

- **The reasons behind the Court of Appeal's decision in Nilai Cipta remain speculative and PCEO is still good law.**
  As there is no written judgment of the Court of Appeal, the reasons behind the Court of Appeal's decision in **Nilai Cipta** cannot be equivocally ascertained. As such, any attempt to rely upon it would be based purely on speculation. Accordingly, the decision of the Court of Appeal in **PCEO**, which followed **ALB**, is still good law and the SCIT had erred, and disregarded the doctrine of judicial precedent, in failing to follow the binding decisions of the Privy Council in **ALB** and the Court of Appeal in **PCEO** respectively. Further, as **Nilai** Cipta and PCEO are both decisions of the Court of Appeal, it is therefore wrong to suggest that **Nilai Cipta** took precedence over **PCEO**.

- **The SCIT had disregarded primary facts found and reached a conclusion which was inconsistent with the primary facts. The SCIT also failed to recognise the material similarities between the facts in this case and the facts in PCEO.**
  The SCIT's decision was inconsistent with its own findings of fact because on the one hand, the SCIT had placed emphasis on the content of PPTSB's board paper to show that the placement of excess funds on call deposits was merely for investment purposes but on the other hand, the SCIT accepted that PPTSB's excess funds arose from its core business operations and were part of its working capital.

  The SCIT also tried to distinguish the present case with that of **PCEO** in that, in **PCEO**, the taxpayer exercised managerial skills in the placement of its funds whereas in the present case, the Placements were not done by PPTSB but by its holding company. However, although the Placements were done by PPTSB's holding company, PPTSB also exercised managerial skills in deciding the amount of the funds to be placed on call deposits and the period of such Placements.

  Like in **PCEO**, PPTSB had no intention to place its excess funds on long-term basis but had placed them on short-term call deposits instead. However, despite making extensive findings of fact which clearly established that PPTSB clearly intended to make numerous temporary placements of its excess funds, turn them over for a quick profit and plough the proceeds back into its business (like in **PCEO**), the SCIT had ignored these primary facts and other documentary evidence when they concluded that the Placements were not made in the course of PPTSB's business or ancillary or incidental to the same, but were done for investment purposes. It is therefore clear that the SCIT had acted inconsistently with the primary facts found and reached a perverse conclusion.

- **The SCIT had disregarded the presumption of business.**
  The SCIT have failed to appreciate that PPTSB is clearly covered by the presumption of business as it is a company incorporated for profit. This presumption is difficult to displace as stated in **ALB** or "sukar disangkal" as stated in **Oil (Asia) Pte Ltd v Ketua Pengarah Hasil Dalam Negeri**[7] . Accordingly, as PPTSB had put its excess funds to gainful and profitable use, this would trigger the presumption that any income derived therefrom should be treated as business income under section 4(a) of the ITA.

- **The SCIT also ignored the principle that any ambiguity in statutory provisions should be construed in favour of the taxpayer.**
  The Privy Council in **ALB** had recognised that there is room for overlapping between one paragraph and another in section 4 of the ITA and as such overlapping gave rise to ambiguity, such ambiguity should be construed in favour of the taxpayer.

This ambiguity is further reinforced by the introduction of a new section 4B into the ITA, which has effect from YA 2013 onwards, as follows:

> "*Non-business income*
>
> *4B. For the purpose of Section 4, gains or profits from a business shall not include any interest that first becomes receivable by a person in the bases period for a year of assessment other than interest where subsection 24(5) applies.*"

It is clear from the language of the above that the Revenue seeks to codify their position that interest income received from placement of funds could not be regarded as business income under section 4(a) for future YAs. However, if it had been clear that such income falls under section 4(c) and not under section 4(a), it would not have been necessary for the Revenue to specifically introduce a new provision in the Finance Bill 2012[8] to clarify the same.

Accordingly, whilst the insertion of a new section 4B into the ITA is strictly within the powers and functions of Parliament, the learned High Court Judge agreed with PPTSB's contention that the proposal to introduce section 4B into the ITA is in itself fatal to the Revenue's case in the

instant appeal as it clearly demonstrates that but for the new section 4B, the interest received from the placement of funds would fall under section 4(a) as per **ALB**, **PCEO** and **Isyoda**.

Conclusion

The Revenue has appealed against the decision of the High Court to the Court of Appeal and it remains to be seen whether the Court of Appeal will follow the decision of **PCEO** or **Nilai Cipta**.

FOONG PUI CHI AND ANAND RAJ
TAX & REVENUE PRACTICE GROUP

For further information regarding Tax matters, please contact:

Goh Ka Im
kgoh@shearndelamore.com

Anand Raj
anand@shearndelamore.com

---

1 MTKL No. R2-14-23-2011
2 [2002] MSTC 3,967
3 [1979] 1 MLJ 1
4 Civil Appeal No W-01-46-2008
5 Tax Appeal No 14-01-2006-1
6 Civil Appeal No W-01-201-09
7 Tax Appeal No R2-14-15-96. The decision of the High Court was affirmed by the Court of Appeal in Civil Appeal No W-01-4-1997
8 Finance Act 2013 was gazetted on 10 January 2013.

Medical Device Act 2012

IN THIS ARTICLE, CHAI YEE HOONG INTRODUCES THE MEDICAL DEVICE ACT 2012.

The Medical Device Act 2012 ("the Act"), which took effect on 30 June 2013, provides for the mandatory framework for medical devices registration, establishment of licensing requirements and conformity assessment body ("CAB") registration. The Medical Device Authority ("the Authority") is the body established in the Medical Device Authority Act 2012 to implement the Act.

Prior to the enactment of the Act, there was no system to monitor and control the quality, safety and usage of medical devices, and the public and health professionals did not have adequate information to make informed choices on medical devices. The medical device regulatory framework is put in place to protect public health and safety and to ensure that new technology is made available for use while facilitating the medical device industry. The aims of the framework can be achieved by having a comprehensive regulatory control and licensing system of the medical device products, manufacturers, importers and distributors.

The Act is divided into six parts:

- Part I – Preliminary
- Part II – Registration of Medical Device and Conformity Assessment Body
- Part III – Licence and Permit
- Part IV – Appeal
- Part V – Enforcement
- Part VI – General.

Section 2 of the Act provides for the interpretation of defined terms and the interpretation specifies the scope of the Act. The defined terms in this section include, amongst others, "establishment", "manufacturer", and "medical device".

Part II of the Act sets out requirements for registration of medical devices (from section 3 to 9) and registration of CAB (from section 10 to 14). For registration of medical devices, section 3(1) provides for the establishment to classify medical devices based on the "*level of risk it poses, its intended use and vulnerability of the human body in accordance with the prescribed manner*". If a dispute arises between the establishment and a CAB, section

3(2) provides for the classification to be referred to the Authority for its decision. Section 4 specifies the manufacturer's obligations to ensure that medical devices conform to the prescribed principles of safety and performance while section 5 specifies the requirement for registration for medical devices before the device can be marketed. As for the registration of CAB, the requirements are contained in section 10 to 14 where section 11(1) requires a CAB to be registered under the Act to carry out any conformity assessment related to a medical device.

Part III of the Act sets out the requirements for establishment licences where section 15(1) requires an establishment to hold an establishment licence under this Act to import, export or place in the market registered medical devices. Section 26 empowers the Minister, from time to time, after taking into consideration the risk level of a medical device, the exposure of medical device to public health, patient safety and the degree of complexity of the medical device, to specify a medical device to be a designated medical device by an order published in the Gazette. Section 27(1) requires the person using or operating any designated medical device to hold a designated medical device permit granted under the Act.

Chapter 3 of Part III mainly deals with the requirements of the establishment to:

- maintain a distribution record;
- monitor the safety and performance of its medical device;
- handle complaints relating to the safety and the performance characteristics of its medical device;
- report to the Authority incidents occurring inside and outside Malaysia arising from its medical device;
- undertake corrective or preventive action in relation to its medical device; and
- recall defective medical devices.

Chapters 4 and 5 of Part III specify the general duties and requirements on usage, operation, maintenance, and advertising of medical devices, as well as the provisions on export permits and the revocation of export permits of establishments who undertake export activities.

Parts IV to VI sets out the appeal, enforcement and general provisions of the Act.

Although the Act takes effect on 30 June 2013, there is a transitional period and it will only be fully enforced by year 2014[1].

CHAI YEE HOONG
KNOWLEDGE MANAGEMENT DEPARTMENT

For further information regarding the Medical Device Act 2012, please contact

Wong Sai Fong
saifong@shearndelamore.com

Karen Abraham
karen@shearndelamore.com

1 Medical Device Control Division, Ministry of Health Malaysia website at http://www.mdb.gov.my.

Advocates & Solicitors
Notary Public
Registered Patent Agents
Trade Mark Agents
Industrial Design Agents

Peguambela & Peguamcara
Notari Awam
Ejen Paten Berdaftar
Ejen Cap Dagangan
Ejen Rekabentuk Perindustrian

www.shearndelamore.com

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.

PARTNERS AND PRACTICE GROUPS

DISPUTE RESOLUTION

Robert Lazar
rlazar@shearndelamore.com

Datin 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

Sathya Kumardas
sathya@shearndelamore.com

Alexius Lee
alexius@shearndelamore.com

Sheila Ramalingam
sheila@shearndelamore.com

PENANG OFFICE

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

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

TAX & REVENUE

Goh Ka Im
kgoh@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Irene Yong Yoke Ngor
irene.yong@shearndelamore.com

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

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

Jyeshta Mahendran
jyeshta@shearndelamore.com

Janet Toh Yoong San
janet.toh@shearndelamore.com

Ameet Kaur Purba
ameet@shearndelamore.com

Michelle CY Loi
michelle.loi@shearndelamore.com

ENVIRONMENTAL

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Sheila Ramalingam
sheila@shearndelamore.com

COMPETITION LAW & ANTITRUST

Dato' Johari Razak
jorazak@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Indran Shanmuganathan
indran@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

REGULATORY COMPLIANCE & ENFORCEMENT

Robert Lazar
rlazar@shearndelamore.com

Datin Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

Rabindra S. Nathan
rabindra@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Yee Mei Ken
mkyee@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

Alvin Julian
alvin.julian@shearndelamore.com

EMPLOYMENT & ADMINISTRATIVE LAW

Sivabalah Nadarajah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

Suganthi Singam
suganthi@shearndelamore.com

Reena Enbasegaram
reena@shearndelamore.com

IMMIGRATION

See Guat Har
guat@shearndelamore.com

PERSONAL DATA PROTECTION & PRIVACY LAWS

Rabindra S.Nathan
rabindra@shearndelamore.com

Christina S. C. Kow
christina@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

INFRASTRUCTURE & PROJECTS

Rodney Gomez
rodney@shearndelamore.com

Putri Noor Shariza Noordin
shariza@shearndelamore.com

Muralee Nair
muralee@shearndelamore.com

Tee Joe Lei
joelei@shearndelamore.com

ENERGY, NATURAL RESOURCES & GREEN TECHNOLOGY

Grace C. G. Yeoh
gcgyeoh@shearndelamore.com

Goh Ka Im
kgoh@shearndelamore.com

Christina S. C. Kow
christina@shearndelamore.com

Swee–Kee Ng
sweekeeng@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Anand Raj
anand@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

TELECOMMUNICATIONS & TECHNOLOGY

Wong Sai Fong
saifong@shearndelamore.com

Timothy Siaw
timothy@shearndelamore.com

KUALA LUMPUR Office:
7th Floor
Wisma Hamzah–Kwong Hing
No. 1, Leboh Ampang
50100 Kuala Lumpur, Malaysia
T 603 2070 0644
F 603 2078 5625
E info@shearndelamore.com

PENANG Office:
6th Floor
Wisma Penang Garden
42, Jalan Sultan Ahmad Shah
10050 Penang
T 604 226 7062
F 604 227 5166
E shearnd@po.jaring.my

Newsletter Editorial Committee
Goh Ka Im
Christina S.C. Kow
K. Shanti Mogan
Marhaini Nordin
Zaraihan Shaari
Lai Wai Fong

This publication is issued for the information of the clients of the Firm and covers legal issues in a general way. The contents are not intended to constitute advice on any specific matter and should not be relied upon as a substitute for detailed legal advice on specific matters or transactions.

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