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CORPORATE LAW

Companies Bill 2015: Improving the Ease of Doing Business in Malaysia

IN THIS ARTICLE, PRISCILLA CHEAH SIOW WEN HIGLIGHTS CERTAIN ASPECTS OF THE COMPANIES BILL THAT AFFECT THE SETTING UP AND GOVERNANCE OF COMPANIES.

Introduction

The Companies Bill 2015 ("Bill") was passed by the *Dewan Rakyat* ("House of Representatives") on 4 April 2016 and the *Dewan Negara* ("Senate") on 28 April 2016. Once Royal Assent is obtained, the new Companies Act will come into operation on a date to be notified in the Federal Gazette of Malaysia. When it becomes law, the Bill will replace the existing **Companies Act 1965** ("Act") to modernise the corporate legal setup in Malaysia in line with current international standards. The purpose of this article is to highlight some of the salient features of the Bill and how the changes simplify the incorporation of companies and doing business in Malaysia.

Single shareholder and director

Under the Act, every company requires a minimum of two resident directors[1] and two shareholders[2] at incorporation. The new legal framework under the Bill allows a company to be formed by a single shareholder[3]. For private companies, only one resident director is required[4] while the requirement of two resident directors for public companies remains unchanged[5].

Age limit of directors

In addition, under the Act, unless a resolution is passed at an annual general meeting ("AGM") by a majority of not less than three-fourths of the members of a public company or its subsidiary, no person of or over the age of 70 can be appointed or reappointed as a director of the company. Such appointment or reappointment is only valid until the next AGM. However, the Bill is silent on the age limit for directors. This implies that a director of a public company or its subsidiary can be aged 70 years or above when the Bill comes into effect. Nevertheless, the minimum age of 18 for directorship remains[6].

Optional constitution

Unlike the present requirement of a mandatory memorandum and articles of association[7] as the constitutional documents of a company, the Bill provides that a company (other than a company limited by guarantee) may choose whether to adopt a constitution[8]. A company limited by shares may or may not have a constitution. If a company has a constitution, the company, its directors and shareholders are bound by the rights, powers, duties and obligations set out in the Bill, except to the extent that such provisions are modified by the constitution and the modifications are permitted under the Bill[9]. If a company has no constitution, the rights, powers, duties and obligations of the company, each of its directors and shareholders as set out in the Bill will apply by default[10].

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Unlimited capacity of a company

Currently, the legal capacity of a company to undertake any business or activity may be restricted by the powers specified in the object clauses of its memorandum of association as the powers set out in the Third Schedule of the Act may be expressly excluded or modified by its memorandum of association[11]. Under Clause 21 of the Bill, a company will be clothed with full capacity to carry on or undertake any business or activity including to sue and be sued, to acquire, own or dispose any property, and to do any act which it may do or to enter into transactions[12]. In the explanatory statement to Clause 21, it is stated that a company shall have "*powers and functions without having to rely on the same being specified in the company's constitution*". Nevertheless for a company that has a constitution, Clause 21 needs to be read against Clause 35 of the Bill which provides that if the constitution sets out the objects of a company the company shall be restricted from carrying on any business or activity that is not within those objects. This may be particularly relevant for existing companies where, upon the coming into force of the Bill, the memorandum and articles of association as originally registered or as altered in accordance with the Act will be deemed as the constitution under the Bill.

The object clauses in the current memorandum of association may restrict the capacity of a company to carry on certain business activity. If an existing company decides to retain its memorandum of association, it may need to undertake amendments to the object clauses in order to take the benefits of unlimited capacity under the Bill.

Optional common seals

In addition, the Bill provides that a company may, but does not need to, have a common seal[13]. If a company does not have a common seal, a document is deemed validly executed by a company if it is signed on behalf of the company by at least two authorised officers, one of whom is a director; or where the company has only a single director, by that director in the presence of a witness who attests the signature[14]. "*Authorised officer*" is defined under the Bill to mean a director, a company secretary or any other person approved by the Board of Directors[15].

AGM

Another important feature of the Bill is that the holding of an AGM is no longer mandatory for private companies. Only public companies are required to hold an AGM in every calendar year[16]. Hence, for private companies, audited financial statements and reports will no longer be laid before an AGM. Instead, the audited financial statements and reports of a private company are required to be approved by the Board of Directors[17] and be circulated to its shareholders within six months of its financial year end[18].

The annual return of a private company is required to be lodged with the Companies Commission of Malaysia within 30 days from each anniversary of its incorporation date, and not the current timeline of one month from the AGM[19].

Passing of shareholders' resolutions

The Bill allows a shareholders' resolution of a private company to be passed either by a written resolution or at a meeting of the shareholders[20]. Nevertheless, a resolution of the shareholders of a public company must be passed at a physical meeting[21]. Under the Act, the shareholders of a company must unanimously approve a written resolution to have the resolutions treated as duly passed at a physical general meeting[22]. However, the Bill abolishes this requirement in relation to private companies and allows ordinary and special resolutions to be passed as shareholders' written resolutions with the same threshold, that is, ordinary resolutions to be passed by a simple majority of shareholders and special resolutions to be passed by a minimum of 75% of the total number of shareholders[23]. The proposed changes ease the burden of holding physical meetings. It is also useful to note that the Bill allows a written resolution to be circulated in hard copy to the address of a shareholder or in electronic form to be transmitted to the electronic address provided by the shareholder[24].

Conclusion

This article provides an overview of how some of the key changes of the Bill will affect the corporate landscape in Malaysia. By revamping the existing Act, which is more than 50 years old, the Bill aims to promote a new business environment in Malaysia that encourages entrepreneurships and facilitates the start-up of small and medium enterprises. It is expected that new regulations, rules and guidelines for the new Companies Act will be drawn up by the Companies Commission of Malaysia.

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[1] Section 122(1), Companies Act 1965.
[2] Section 14(1), Companies Act 1965.
[3] Clause 14(1), Companies Bill 2015.
[4] Clause 196(1)(a), Companies Bill 2015.
[5] Clause 196(1)(b), Companies Bill 2015.
[6] Clause 196(2), Companies Bill 2015.
[7] Section 18, Companies Act 1965.
[8] Clauses 31(1) and 38(1), Companies Bill 2015.
[9] Clause 31(2), Companies Bill 2015.
[10] Clause 31(3), Companies Bill 2015.
[11] Section 19(1)(c), Companies Act 1965.
[12] Clause 21(1), Companies Bill 2015.
[13] Clause 61(1), Companies Bill 2015.
[14] Clause 66(2), Companies Bill 2015.
[15] Clause 66(5), Companies Bill 2015.
[16] Clause 340(1), Companies Bill 2015.
[17] Clauses 251(1)(a) and 252(2)(a), Companies Bill 2015.
[18] Clause 258(1)(a), Companies Bill 2015.
[19] Clause 68(1), Companies Bill 2015.
[20] Clause 290(1), Companies Bill 2015.
[21] Clause 290(2), Companies Bill 2015.
[22] Section 152A, Companies Act 1965.
[23] Clause 301(4), Companies Bill 2015.
[24] Clauses 300(1) and 300(2), Companies Bill 2015.

DISPUTE RESOLUTION

Are Investigative Statements Recorded under Section 134 of the Securities Commission Malaysia Act 1993 ("SCA 1993") Protected from Disclosure in Civil Proceedings?

IN THIS ARTICLE, MAH SUE ANN CONSIDERS WHETHER INVESTIGATIVE STATEMENTS RECORDED UNDER SECTION 134 OF THE SCA 1993 MAY BE DISCLOSED IN CIVIL PROCEEDINGS.

Introduction

Under section 134(1) of the SCA 1993 read with section 134(2), an investigating officer of the Securities Commission of Malaysia ("SCM") carrying out investigation under any securities law may record statements made by any persons in connection with the investigation.

The Federal Court in **Suruhanjaya Sekuriti v Datuk Ishak Ismail**[1] had the opportunity to consider whether the statements made to and recorded by an investigating officer of the SCM pursuant to section 134 of the SCA 1993 may be disclosed in civil proceedings.

Brief facts of the case

The SCM, the appellant in this case, filed an action against the respondent, Datuk Ishak bin Ismail ("Datuk Ishak"), seeking:

a) declarations that Datuk Ishak had breached various provisions of the **Capital Markets and Services Act 2007** ("CMSA"); and

b) an order that Datuk Ishak pay the SCM RM18.9 million under the CMSA in respect of profits made unlawfully.

High Court proceedings

In the High Court, Datuk Ishak applied for disclosure of various documents in the possession of the SCM including the statements recorded from 38 persons pursuant to interviews carried out by the investigating officers of the SCM under section 134 of the SCA 1993 ("Section 134 Statements") and the investigation papers of the SCM. The High Court ordered disclosure of all documents in the possession of the SCM except the internal memoranda of the SCM.

Court of Appeal proceedings

The appellant appealed to the Court of Appeal against the decision of the High Court which ordered the disclosure of the Section 134 Statements and the investigation papers of the SCM. The Court of Appeal affirmed the High Court decision to order the disclosure of the Section 134 Statements but reversed the High Court decision to order the disclosure of the investigating papers. In ordering the disclosure of the Section 134 Statements, the Court of Appeal relied on section 134(4) of the SCA 1993 which provides that any statement made and recorded under section 134 of the SCA 1993 shall be admissible as evidence in any proceeding in any Court.

Federal Court proceedings

The SCM appealed to the Federal Court solely against the decision of the Court of Appeal to order the disclosure of the Section 134 Statements. The question of law for the determination of the Federal court was:

> "*Having regard to the principle of law in criminal proceedings that all statements made to and recorded by an investigating Officer of the Securities Commission pursuant to Section 134(4) of the Securities Commission Act, 1993 are not to be disclosed to the defence, whether the Court of Appeal was right in law in ruling that all such statements are however disclosable in civil proceedings.*"

The Federal Court decided in favour of the SCM and set aside the decision of the Court of Appeal. In summary, the Federal Court took the position that:

a) The reasoning of the Court of Appeal in allowing the disclosure of the Section 134 Statements by relying on section 134(4) of the SCA 1993 was an over simplification of the crucial issue in the case especially in view of a claim of privilege from disclosure of the Section 134 Statements.

b) Section 134(4) of the SCA 1993 must be read subject to the rules of privilege and prohibition on the grounds of public policy. In this regard, the relevant and applicable rules for consideration are section 123 and 124 of the **Evidence Act 1950** ("EA 1950"). Section 123 of the EA 1950 prohibits disclosure of any unpublished official

record relating to the affairs of State while section 124 of the EA 1950 prohibits disclosure of communications made to any public officer in official confidence.

c) In this case, the Section 134 Statements are privileged documents falling within the ambit of section 124 of the EA 1950.

The applicability of privilege under section 124 of the EA 1950

Section 124 of the EA 1950 reads as follows:

> "***124. Official communications***
>
> *No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure:*
>
> *Provided that the court may require the head of the department of the officer to certify in writing whether or not such disclosure would be detrimental to the public interest and, if the head of the department certifies that such disclosure would not be prejudicial to the public interest, then the officer shall disclose the communications.*"

The Federal Court held that, in applying section 124 of the EA 1950, the Court would have to first determine whether the communication in question had been made to a public officer in official confidence. If the answer is in the negative, the Section 134 Statements will have to be disclosed. However, if the answer is in the affirmative, then it is for the officer concerned to decide whether the statements concerned should or should not be disclosed.

In the present appeal, and relying on the affidavit filed by the appointed investigating officer ("Investigating Officer") of the SC for this case, the Federal Court was satisfied that the communications were made to a public officer in official confidence. Therefore, it was then up to the Investigating Officer to determine whether it was against public interest to disclose the Section 134 Statements.

In this regard, the Investigating Officer gave, among others, the following reasons as to why it was against public interest to disclose the Section 134 Statements:

a) The Section 134 Statements were communication made by each of the 38 persons to the Investigating Officer in the course of their official duties as public officers under the SCA 1993 and that the communication was made to the Investigating Officer in official confidence.

b) If the Section 134 Statements were ordered to be disclosed, future witnesses will not give their information to the SCM with the assurance that their statement will be confidential.

c) This will greatly prejudice the appellant's ability to carry out future investigations into offences under the securities law in the current company or any other company.

Based on the above, the Federal Court held that it will not interfere with the determination of the Investigating Officer.

Conclusion

Notwithstanding the provision in section 134(4) of the SCA 1993 that the statements made and recorded under section 134 of the SCA 1993 shall be admissible as evidence, Section 134 Statements may be protected from disclosure if the prohibitions in section 123 or section 124 of the EA 1950 apply.

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[1] [2016] 3 CLJ 19

FINANCIAL SERVICES

Liberalisation of the Financial Assistance Prohibition

IN THIS ARTICLE, CHERYL LIEW XIN YI DISCUSSES THE LIBERALISATION OF THE FINANCIAL ASSISTANCE PROHIBITION UNDER THE COMPANIES BILL 2015.

Present position under the Companies Act 1965 ("Companies Act")

Under section 67 of the Companies Act, a company shall not give, whether directly or indirectly, any financial assistance for the purpose of or in connection with the purchase of or subscription for its own shares or the shares of its holding company. The primary rationale for this prohibition is to protect creditors and to preserve the capital of a company.

Below is an extract of section 67 of the Companies Act:

> *"Section 67. Dealing by a company in its own shares, etc.*
>
> *(1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan, guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares."*

As the scope of the existing rule under section 67 is very wide, it may, in practice, cover certain innocuous transactions that arguably do not fall within the mischief sought to be addressed by the prohibition.

New position under the Companies Bill 2015

The Companies Bill 2015 ("Bill") seeks to replace or liberalise certain provisions in the current Companies Act. The Bill introduces, *inter alia*, a new legal framework which includes the liberalisation of the financial assistance prohibition[1].

The Bill introduces a whitewash procedure that assists companies to overcome the prohibition contained in the existing section 67 by allowing companies to give financial assistance provided that certain prescribed procedures and solvency requirements have been complied with.

Below is an extract of clause 126 of the Bill:

> *"Financial assistance not exceeding ten per centum of shareholders' funds*
>
> *126. (1) This section shall not apply to a company whose shares are quoted on a stock exchange.*
>
> *(2) A company may, by a special resolution, give financial assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for such an acquisition if —*
>
> *a) the directors resolve, before the assistance is given, that—*
>
> *(i) the company may give the assistance;*
>
> *(ii) the giving of the assistance is in the best interest of the company; and*
>
> *(iii) the terms and conditions under which the assistance is to be given are just and reasonable to the company;*
>
> *b) on the same day that the directors passed the resolution, the directors who voted in favour of the resolution make a solvency statement that complies with provisions in relation to the giving of the assistance;*
>
> *c) the aggregate amount of the assistance and any other financial assistance given under this section that has not been repaid does not exceed ten per centum of the aggregate amount received by the company in respect of the issue of shares and the reserves of the company, as such aggregate amount is disclosed in the most recent audited financial statements of the company;*
>
> *d) the company receives fair value in connection with the giving of the assistance; and*
>
> *e) the assistance is given not more than twelve months after the day on which the solvency statement is made under paragraph (b)."*

Under the above new whitewash procedure, a company not listed on the stock exchange may give financial assistance for the purpose of the acquisition of its shares or the shares of its holding company if not less than 75% of the members/shareholders of the company authorise the assistance by passing a special resolution.
Further, the giving of financial assistance requires the directors of the company to pass a directors' resolution setting out in full the grounds for the directors' resolution made under clause 126(2)(a) of the Bill[2]. At the same time, each director who voted in favour of the financial assistance is also required to make a solvency statement.

In addition, the aggregate amount of the assistance and any other financial assistance previously given that has not been repaid (which includes the amount of any financial assistance given in the form of a guarantee or security for which the company remains liable at the time the financial assistance in question is given[3]) must not exceed 10% of the company's current shareholders funds/issued share capital and the company must receive fair value in connection with the provision of the assistance.

Within 14 days from the giving of financial assistance, the company will need to send to each member/shareholder of the company a copy of the solvency statement and a notice containing the following information:

a) the class and number of shares in respect of which the assistance was given;

b) the consideration paid or payable for those shares;

c) the name of the person receiving the assistance and, if a different person, the name of the beneficial owner of those shares; and

d) the nature, the terms and, if quantifiable, the amount of the assistance[4].

This new financial assistance regime is long overdue and will provide much greater flexibility for structuring and implementation of corporate exercises by companies. With this amendment to relax its financial assistance provisions, Malaysia will move into alignment with other major jurisdictions such as the UK, New Zealand, Australia and Singapore.

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[1] Clause 126, Companies Bill 2015.
[2] Clause 126(3), Companies Bill 2015.
[3] Clause 126(4), Companies Bill 2015.
[4] Clause 126(5), Companies Bill 2015.

INTELLECTUAL PROPERTY

The Impact of the Trans-Pacific Partnership Agreement ("TPPA")

IN THIS ARTICLE, KHOO YEE MUN CONSIDERS THE IMPACT OF THE TPPA ON MALAYSIAN INTELLECTUAL PROPERTY LAW.

The TPPA is a regional trade agreement with the aim of creating a platform for economic integration across the Asia Pacific region. It brings 12 countries together from both sides of the Pacific — Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam ("Member States"). These countries represent 40% of the global economy, one-third of the world trade, and comprise a population of approximately 800 million[1], making the TPPA the largest trade accord in history. The TPPA was signed on 4 February 2016 in Auckland, New Zealand and all Member States are to ratify the deal through their respective legislative procedures within two years from the date of signing, or by at least six Member States, which together have a GDP of more than 85% of the GDP of all the signatories, in order to bring the Agreement into force.

This article briefly discusses the key areas in the Intellectual Property Chapter of the TPPA which will bring about significant changes to the law of intellectual property in Malaysia.

Patent term adjustment

Presently in some countries[2], a patent term may be extended if there are unjustified delays at the regulatory approval stage or during the prosecution of the application ("patent term adjustment"). However, such process is currently not available in Malaysia[3], not even for pharmaceutical or agricultural chemical inventions. By Article 18.46 of the TPPA, Member States shall adjust the term of a patent, upon the request of the patent owner, so as to compensate for any unreasonable delay, as defined in the TPPA, which may have arisen in the issuance of that patent.

An unreasonable delay shall at least include a delay in the issuance of a patent of more than five years from the date of filing of the application or three years after a request for examination of the application has been made, whichever is later[4]. However, periods of time that are attributable to the patent applicant[5] are excluded from the determination of such delay. Article 18.46 appears to apply to all types of inventions and not just pharmaceutical and agricultural chemical inventions.

Patent term extensions are particularly welcomed by proprietors of inventions in the field of pharmaceuticals due to prevalent delays in the issuance of regulatory approvals for pharmaceutical products. Currently, the approvals for the manufacture and sale of pharmaceutical products are usually issued by the relevant authorities after the patent's protection term has begun, as a result of which the patent owner has monopoly over commercial exploitation of the products for less than the full patent term. There are, however, concerns that by allowing the extension of patent life beyond the standard 20 years from the date of filing the patent application it would delay the entry of generics into the market and hinder the access to generics at affordable prices.

Data and marketing exclusivity

Data exclusivity is the period of time during which the clinical data of drug producers remain confidential. In Malaysia, data exclusivity is regulated by the Directive of Data Exclusivity[6] ("DDE"). According to the DDE, the period of data exclusivity right:

a) for a new drug product containing a New Chemical Entity ("NCE")[7] is five years from the date the product is first registered or granted marketing authorisation and granted data exclusivity in the country of origin or in any country recognised and deemed appropriate by the Director of Pharmaceutical Services ("DPS");

b) for a second indication of a registered drug[8] is three years from the date the second indication is first approved and granted data exclusivity in the country of origin or in any country recognised and deemed appropriate by the DPS.

No exclusivity period applies to other categories of drugs or drug-related products.

Protection of undisclosed test or other data of pharmaceutical products is provided in Article 18.50 of the TPPA. The scope of protection under this Article is almost similar to the DDE that is currently in place in Malaysia, except that the proposed duration of protection is at least five years for a new pharmaceutical product and at least three years for a new indication, new formulation or new method of administration of a previously approved pharmaceutical product. Additionally, data exclusivity for new pharmaceutical products containing a chemical entity that has not been previously approved may be protected for a period of at least five years.

Separately, Article 18.47 of the TPPA introduces data exclusivity for new agricultural chemical products which are set at a minimum of 10 years. Data exclusivity is also provided for new biologics under Article 18.51, a class that includes new cancer treatments for a period of at least eight years from the date of the first marketing approval of the pharmaceutical products in the TPPA Member States, or, alternatively, a period of at least five years from the date of the first marketing approval of the pharmaceutical products in the Member States along with other measures to provide effective market protection and to deliver a comparable outcome in the market. However, the Malaysian Government has indicated that it will set a five-year limit on data exclusivity for biologics, despite what has been agreed in the TPPA[9].

While the confidentiality of clinical trial results of the drugs is protected, the long period of data exclusivity prevents competitors from utilising such data to obtain marketing authorisation for a generic version of the drug until the relevant exclusivity period expires thereby possibly delaying the availability of generic drugs.

Information relating to published patent applications and granted patents

By Article 18.45 of the TPPA, the prosecution history of published patent applications and granted patents comprising at least the search and examinations results, patent and non-patent citations by the applicants and relevant third parties, and non-confidential communications from applicants is to be made available to the public. At present, with the exception of the bibliographic details, abstracts and patent specifications, such information is not readily available in Malaysia, particularly when the patent applications are still pending.

Industrial designs

According to Article 18.56 of the TPPA, Member States are encouraged to ratify or accede to the Hague Agreement Concerning the International Registration of Industrial Designs ("Hague Agreement") of which Malaysia is not yet a contracting party. The Hague Agreement allows applicants to register their industrial designs by filing a single international application, in one language, accompanied by the payment of a single set of fees, in one currency and with one office, the International Bureau of the World Intellectual Property Organisation ("WIPO"), enabling design owners to protect their designs with minimum formalities in multiple jurisdictions of the Member States[10].

Copyright and related rights

Generally, copyright in any literary, musical or artistic work in Malaysia shall subsist during the life of the author plus 50 years after his death[11] by virtue of section 17(1) of the **Copyright Act 1987**. However, if a work has not been published during the lifetime of the author, copyright in the work continues to subsist until the expiration of 50 years, following the year in which the work was first published. In the case of a work with joint authorship, the life of the author who dies last is used for the purpose of calculating the copyright duration of the work.

By Article 18.63 of the TPPA, the duration of copyright for an author's work (literary, musical and artistic) may be extended from the current life of 50 years to 70 years after the author's death. On a basis other than the life of a natural person, the term shall be no less than 70 years calculated from the end of the calendar year of the first publication of the work. If no such authorised publication is made within 25 years of the creation of the author's work, the same 70-year copyright period will be calculated from the end of the calendar year the work was first created. However, critics commented that the additional 20 years of copyright protection does not provide any incentive for new creation for the public domain.

Trade marks

In Malaysia, section 3(2)(a) of the **Trade Marks Act 1987** ("TMA") defines use of a mark to be "*use of a printed or other visual representation of the mark*", including a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof. Thus, non-traditional marks such as sound, scent, texture and taste are presently not allowed for registration under the TMA as they are not visually perceptible. By Article 18.18 of the TPPA, changes may be made to the TMA in the near future to recognise and allow registration for non-traditional marks consisting of sounds or scents. Article 18.19 of the TPPA also seeks to protect certification and collective marks[12].

For more information on the Intellectual Property Chapter, please refer to the full text agreement of the TPPA at the official portal of the Ministry of International Trade and Industry.

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[1] Source is from the Trans-Pacific Partnership Ministers' Statement dated 4 February 2016 available on the official portal of the Office of the United States Trade Representative.

[2] For example, patent term extensions are available in Chile, Japan and the United States.

[3] All Member States, except Peru and Vietnam, are also members to the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") which came into effect on 1 January 1995. It is the most comprehensive multilateral agreement on intellectual property to date. Under the TRIPS Agreement, the term of protection of a patent shall not end before the expiration of a period of 20 years counted from the filing date of the patent application. In Malaysia, the duration of a patent is 20 years from the filing date of the application for all patent applications filed on or after 1 August 2001 (section 35(1) of the **Patents Act 1983**). However, where the filing of the patent application is before 1 August 2001 and the application is pending on that date or a grant of patent was made before that date, the duration of the patent is either 20 years from the filing date of the application, or 15 years from the date of grant, whichever is the longer (sections 35(1B) and (1C) of the **Patents Act 1983**).

[4] Article 18.46 of the TPPA

[5] A Member State may also exclude, from the determination of such delay, periods of time that do not occur during the processing of, or the examination of, the patent application by the granting authority as well as periods of time that are not directly attributable to the granting authority.

[6] The Directive of Data Exclusivity came into force on 1 March 2011 and was issued by the Director of Pharmaceutical Services under regulation 29 of the Control of Drugs and Cosmetics Regulations 1984.

[7] According to the DDE, a new drug product containing any NCE is "a product that contains an active moiety that has not been registered in accordance with the provisions of the Control of Drugs and Cosmetics Regulations 1984".

[8] Second indication for a registered drug product is defined as "a single or cluster of therapeutic indications applied subsequent to the first indication(s) approved at the point of registration of the product in the DDE".

[9] See more at: www.themalaymailonline.com/malaysia/article/minister-malaysia-firm-on-five-year-data-protection-ofbiologics-under-tpp.

[10] The detailed procedures concerning international designs applications under the Hague Agreement are provided on the official portal of WIPO at www.wipo.int hague/en/guide/.

[11] It is a global standard by virtue of the Berne Convention for the Protection of Literary and Artistic Works 1886 and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

[12] The Malaysian TMA only provides for registration of "certification marks". Pursuant to section 56(1) of the TMA, certification marks are marks which are capable, in relation to any goods or services, of distinguishing in the course of trade goods or services certified by any person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristics, from goods or services not so certified. Organisations, bodies, associations or legal government authority which have, as one of their functions, the certification of one or more of the characteristics mentioned in section 56(1) may apply to register their marks as certification marks. The SIRIM certification mark is a good example of a certification mark in Malaysia. "Collective marks" are usually defined as signs which distinguish the geographical origin, material, mode of manufacture or other common characteristics of goods or services of different enterprises using the collective mark. The main feature of a collective mark is that it is used as an indication to the relevant public that goods or services originate from a member of a particular association. It is therefore a sign of membership. The Chartered Institute of Patent Agents mark, CPA, is an example of a collective mark registered to a professional association under the UK **Trade Marks Act 1994**.

EMPLOYMENT LAW

Challenging an Award of the Industrial Court

IN THIS ARTICLE, JAIME GOH MOON HOONG ANALYSES THE EXTENT AN AWARD, DECISION OR ORDER OF THE INDUSTRIAL COURT CAN BE CHALLENGED OR REVIEWED BY WAY OF JUDICIAL REVIEW.

Introduction

The Industrial Court is a creature of statute. In determining a particular dispute, the Industrial Court must act in accordance with the purposes and express provisions of the **Industrial Relations Act 1967** ("Act"). The Court must also act according to "*equity, good conscience and the substantial merits of the case without regard to technicalities and legal form*" [1].

Section 30(1) of the Act enables the Industrial Court to hand down an award relating to all or any of the issues raised in a trade dispute referred to it or a reference to it by a Minister for an award. The Industrial Court's award determines the rights of the parties and is accordingly binding on them. The Industrial Court has a wide discretion on the relief that it may grant to the successful party. The main relief is monetary compensation for loss of employment. The Industrial Court's award includes 24 months of back wages and one month's salary for every year of service. Alternatively, in proper cases, the Industrial Court may order reinstatement.

It is pertinent to note that the Act does not make provisions for a direct challenge against an award of the Industrial Court. The only direct method of challenge is by invoking section 33A of the Act. The Industrial Court has the discretion whether to allow the application under section 33A to refer to the High Court a question relevant to its own award and it may only do so where all the conditions in the provision are fulfilled.

Section 33B of the Act expressly states that, subject to section 33A of the Act, an award, decision or order of the Industrial Court is final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called in question in any court. By virtue of this provision, the award of the Industrial Court is, generally, insulated from challenge in any court.

Notwithstanding the above, the Federal Court has expressly ruled that, while the Act may prohibit appeals to the High Court, a decision of an Industrial Court may be challenged or reviewed by way of judicial review under order 53 of the Rules of Court 2012. This is done by applying for an order of *certiorari* to quash a decision of the Industrial Court.

It is trite that judicial review is not an appeal process. The High Court effectively exercises its supervisory jurisdiction over the Industrial Court. The process entails the High Court examining the decision-making process of the Industrial Court. Notwithstanding Section 33B of the Act, the decision or award of the Industrial Court may be liable to be quashed if the Industrial Court has committed an error of law in the course of handing down its award. In **Syarikat Kenderaan Melayu Sdn Bhd v Transport Workers Union**[2], the Court of Appeal held:

> "*It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations or if he misconstrues the terms of any relevant statute, or mis-applies or mis-states a principle of the general law.*"

Previously, in judicial review proceedings, the High Court cannot disturb the findings of fact made by the Industrial Court which is based on the credibility of witnesses[3].

However, the scope of judicial review has been expanded to cases where the Industrial Court reached a decision that is completely devoid of any plausible justification. The reviewing courts may also interfere with the findings of the Industrial Court where it relates to an error of fact in the following situations:

> "…
>
> (a) *reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality; or*
>
> (b) *there is no evidence to support the conclusion reached*[4]."

If a party succeeds in its application for an order of *certiorari*, the High Court will generally quash the award or decision of the Industrial Court and order the Industrial Court to rehear the matter on its merits. The High Court may, in exceptional circumstances, substitute its own decision instead of remitting the matter back to the Industrial Court for re-adjudication. In **Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd**[5], the Federal Court held:

"Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. Rama Chandran[6] is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds."

However, there must be parameters as to the extent a reviewing court may go in examining a decision of the Industrial Court. In **Petroleum Nasional Bhd v Nik Ramli Nik Hashim**[7], the Federal Court stated:

"Not every case was amenable to the Rama Chandran approach. It depended on the factual matrix and/or the legal modalities of the case. This was a matter of judicial discretion on the part of the reviewing judge."

The restriction in section 33B of the Act against challenges of Industrial Court awards in judicial review proceedings has been significantly curtailed by the cases referred to above.

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[1] Section 30(5) of the Act.

[2] [1995] 2 CLJ 748

[3] **Quah Wee Khoon v Sime Darby Bhd** [2001] 1 CLJ 9

[4] **Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd** [2010] 4 ILR 475

[5] [2010] 4 ILR 475

[6] [1997] 1 CLJ 147

[7] [2003] 4 CLJ 625

TAX LAW

Kenny Heights Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri[1]

IN THIS ARTICLE, JESS NGO HUI ZHONG LOOKS AT THE COURT OF APPEAL'S DECISION IN **KENNY HEIGHTS DEVELOPMENT SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI.**

Facts

On 14 August 2000, Kenny Heights Development Sdn Bhd ("KHDSB") entered into two agreements with Mycom Berhad and Olympia Industries Berhad respectively for the sale of lands ("Agreements"). The Agreements were subject to seven pre-conditions ("Conditions"). The respective prices for the sales were later reduced vide two supplemental agreements dated 14 February 2003. All the Conditions were fulfilled as at 27 April 2007.

On 31 December 2008, the Director General of Inland Revenue ("DGIR") issued a real property gains tax ("RPGT") "Notice of Assessment 2000" and a "Notice of Assessment 2000 (Additional)" ("Notice of Assessment 2000") to KHDSB in respect of the disposal of lands under the Agreements.

Dissatisfied with the Notice of Assessment 2000, KHDSB appealed against it to the Special Commissioners of Income Tax ("SCIT").

Issues

The crucial issues were:

i. what were the disposal dates and the amount of consideration in respect of the disposal of the lands;

ii. whether KHDSB was exempted from paying any RPGT by virtue of the Real Property Gains Tax (Exemption) (No 2) Order 2007, PU(A) 146/2007 ("2007 Order"); and

iii. whether the Notice of Assessment 2000 was statute barred.

Decisions of the SCIT and the High Court

The SCIT held in favour of KHDSB. The DGIR appealed to the High Court and the High Court set aside the decision of the SCIT.

Decision of the Court of Appeal

KHDSB appealed to the Court of Appeal. The Court of Appeal set aside the decision of the High Court and restored the SCIT's decision based on the following reasons:

- The Notice of Assessment 2000 was based upon fiction as the atual consideration price was no longer the consideration price set out in the Agreements of 2000.

- By operation of paragraph 16 of Schedule 2 of the **Real Property Gains Tax Act 1976** ("RPGTA"), the date of disposal was 27 April 2007.

  Paragraph 16 of Schedule 2 of the RPGTA (as it was then drafted) provides that the acquisition and disposal of asset in a conditional contract shall be regarded as taking place at the time the contract was made, unless the amount of the consideration depends on the value of the asset at the time when the condition is satisfied, in which case the acquisition and disposal shall be regarded as taking place when the condition is satisfied[2].

  In this case, the amount of consideration was the actual consideration as at the time the Conditions were satisfied. Accordingly, the date of disposal was regarded as the date the Conditions were satisfied.

  As the date of disposal was 27 April 2007, KHDSB was clearly entitled to the exemption under the 2007 Order. The 2007 Order provides that "*the Minister exempts any person from all provisions of the Act in respect of any disposal of chargeable assets after 13.3.2007*". The 2007 Order remained in force until 31 December 2009.

- The Notice of Assessment 2000 was statute barred by virtue of section 15(1) of the RPGTA.

Under section 15(1) of the RPGTA, there is a limitation of five years after the end of that year of assessment to make an assessment or additional assessment. The five-year limitation applies strictly to assessments determined by the Court on an appeal or review, even though when the determination is made is outside the control of the DGIR. Accordingly, the five-year limitation would similarly apply to this case regardless of the fact that the date by which the Conditions were satisfied was not within the control of the DGIR. The Notice of Assessment 2000 dated 31 December 2008 and served on KHDSB on 2 February 2009 is statute barred by virtue of section 15(1) of the RPGTA.

Conclusion

This case confirms that where an agreement for the sale of land is a conditional contract as defined in the RPGTA, the date of disposal is the date when the condition is satisfied and the five-year limitation period for making an RPGT assessment or additional assessment is to be strictly applied.

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[1] (2015) 4 MLJ 487

[2] It is important to note that paragraph 16 of Schedule 2 to the RPGTA has since undergone significant amendments in 2006 and 2011 vide the **Finance Act 2006** and **Finance Act 2011** respectively. Paragraph 16 of Schedule 2, RPGTA now reads:

> "*Where a contract for the disposal of an asset is conditional and the condition is satisfied (by the exercise of a right under an option or otherwise), the acquisition and disposal of the asset shall be regarded as taking place at the time the contract was made, unless –*
>
> *(a) The acquisition or disposal requires the approval by the Government or a State Government or an authority or committee appointed by the Government or a State Government, the date of disposal shall be the date of such approval;or*
>
> *(b) The approval referred to in subparagraph (a) is conditional, the date of disposal shall be the date when the last of all such conditions is satisfied.*"

In memoriam

the late MR. WONG SAI FONG,

who passed away on 19 May 2016.

Partner of Shearn Delamore & Co.
[Managing Partner from 2007 to 2010]

Plant a flag when tears reverberate in all of us. A man for all seasons, a man of wisdom, a man synonymous with Intellectual Property Law, a man whose first name was charity and compassion and a man who would be anyone's friend. A great lawyer, understanding mentor, true colleague and a kind man. All these attributes embodied in one individual which can only personify the one and only WONG SAI FONG.

He will be dearly missed, lovingly remembered and forever cherished by all whose lives he had touched.

May he rest in peace.

From

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