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

NEWSLETTER EDITORIAL COMMITTEE

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

Shearn Delamore &CO.

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

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

WEBSITE www.shearndelamore.com

PARTNERS AND PRACTICE GROUPS

CORPORATE & COMMERCIAL

Grace C. G. Yeoh
gcgyeoh@shearndelamore.com

Dato' Johari Razak
jorazak@shearndelamore.com

Lorraine Cheah
l_cheah@shearndelamore.com

Putri Noor Shariza Noordin
shariza@shearndelamore.com

Swee-Kee Ng
sweekeeng@shearndelamore.com

Marhaini Nordin
marhaini@shearndelamore.com

DISPUTE RESOLUTION

Robert Lazar
rlazar@shearndelamore.com

Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

Rabindra S. Nathan
rabindra@shearndelamore.com

Rodney Gomez
rodney@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Muralee Nair
muralee@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Sagadaven Thangavelu
sagadaven@shearndelamore.com

Nad Segaram
nad@shearndelamore.com

Yee Mei Ken
mkyee@shearndelamore.com

Alvin Julian
alvin.julian@shearndelamore.com

Lai Wai Fong
waifong@shearndelamore.com

Jimmy Liew
jimmyliew@shearndelamore.com

TELECOMMUNICATIONS & TECHNOLOGY

Gary Lim
garylim@shearndelamore.com

PENANG OFFICE

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

EMPLOYMENT & ADMINISTRATIVE LAW

N. Sivabalah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

Suganthi Singam
suganthi@shearndelamore.com

FINANCIAL SERVICES

Christina S. C. Kow
christina@shearndelamore.com

Chen Lee Won
leewon@shearndelamore.com

Tee Joe Lei
joelei@shearndelamore.com

Fiona Sequerah
fiona@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

Cheah Chiew Lan
chiewlan@shearndelamore.com

REAL ESTATE

Sar Sau Yee
sysar@shearndelamore.com

See Guat Har
guat@shearndelamore.com

Aileen P. L. Chew
aileen@shearndelamore.com

Anita Balakrishnan
anita@shearndelamore.com

TAX & REVENUE

Goh Ka Im
kgoh@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Irene Yong Yoke Ngor
irene.yong@shearndelamore.com

PRINTER Inch Design & Communications (001291647h) No. 39, Jalan Brunei Barat, Off Jalan Pudu, 55100 Kuala Lumpur, Malaysia Tel 603 2141 3141 Fax 603 2141 2961

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FRONT PAGE FOCUS

REAL ESTATE

Life After FIC – 2010 Guidelines on the Acquisition of Properties issued by the EPU

IN THIS ARTICLE, ANITA BALAKRISHNAN PROVIDES AN INSIGHT INTO THE 2010 GUIDELINES ON THE ACQUISITION OF PROPERTIES ISSUED BY THE ECONOMIC PLANNING UNIT WHICH CAME INTO EFFECT ON 1 JANUARY 2010.

In June 2009, the Malaysian Government announced that the scope of the Foreign Investment Committee ("FIC") of Malaysia with respect to property transactions would be substantially rationalised with immediate effect, to enhance Malaysia's value proposition as a place to do business and invest. In line with such rationalisation, the Government also announced the disbanding of the FIC with immediate effect and the setting-up of a new department at the Economic Planning Unit of the Prime Minister's Department ("EPU"), which would only process transactions involving the dilution of Bumiputera interests and/or Government interest in properties valued at RM20 million and above, whether bought directly or indirectly through the acquisition of companies owning properties.

Following the announcement, the Guidelines on the Acquisition of Properties By Local and Foreign Interests ("the FIC Property Guidelines") issued by the FIC, which came into effect on 1 January 2008, was replaced by the Guidelines on the Acquisition of Properties issued by the EPU, which came into effect on 30 June 2009 ("2009 EPU Guidelines"). The 2009 EPU Guidelines were in turn replaced by a new set of Guidelines on the Acquisition of Properties issued by the EPU ("the New EPU Guidelines"), which came into effect on 1 January 2010.

Some of the matters provided under the New EPU Guidelines are summarised below.

A. Acquisitions requiring the approval of the EPU

A property acquisition, except for residential units, that requires the approval of the EPU is as follows:

(a) the direct acquisition of property valued at RM20 million and above, resulting in the dilution in the ownership of the property held by Bumiputera interest and/or Government agency; and

(b) the indirect acquisition of property by other than Bumiputera interest through the acquisition of shares, resulting in a change of control of the company owned by the Bumiputera interest and/or Government agency, having property more than 50% of its total assets, and its' property asset being valued at more than RM20 million.

Bumiputera interest is defined as any interest, associated group of interests or parties acting in concert, which comprises the following:

(a) a Bumiputera individual; and/or

(b) a Bumiputera institution or trust agency; and/or

IN THIS ISSUE

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

(c) a local company or local institution whereby the parties as stated in paragraphs (a) and/or (b) above hold more than 50% of the voting rights in that local company or local institution.

An acquisition of properties in any of the above instances will be subject to the following equity and paid-up capital conditions:

(a) The company shall have at least 30% Bumiputera interest shareholdings;

(b) The paid-up capital of local companies owned by local interests shall be at least RM100,000 whilst the paid-up capital of local companies owned by foreign interests shall be at least RM250,000.

Under the New EPU Guidelines, the period for satisfying the equity and paid-up capital conditions depend on whether the acquisition is of the property or shares.

B. Acquisitions not requiring the approval of the EPU

The following property acquisitions by foreign interest do not require the approval of the EPU but fall under the purview of the relevant Ministries and/or Government departments:

(a) an acquisition of commercial unit valued at RM500,000 and above. Under the FIC Property Guidelines, any acquisition of commercial unit would require the prior written approval of the FIC, regardless of the value of the property;

(b) an acquisition of agricultural land valued at RM500,000 and above or at least five acres in area for the following purposes:

(i) to undertake agricultural activities on a commercial scale using modern or high technology;

(ii) to undertake agro-tourism projects; or

(iii) to undertake agricultural or agro-based industrial activities for the production of goods for export.

(c) an acquisition of industrial land valued at RM500,000 and above. Under the FIC Property Guidelines, the acquisition of industrial land regardless of value required the prior approval of the FIC unless the acquirer company possessed a manufacturing licence issued by the Ministry of International Trade and Industry; and

(d) transfer of property based on family ties, which is only allowed among immediate family members.

A foreign interest is defined as any interest, associated group of interests or parties acting in concert which comprises:

(a) an individual who is not a Malaysian citizen;

(b) an individual who is a Permanent Resident;

(c) a foreign company or institution; and/or

(d) a local company or local institution whereby individuals who are not Malaysian citizens, individuals who are permanent residents and/or foreign companies or institutions hold more than 50% of the voting rights in the local company or institution.

Immediate family members are individuals related though marriage (husband and wife) or blood ties (grandparents, siblings and children including step children) and adopted children certified by the National Registration Department.

Save and except for the transfer of property based on family ties, all acquisition of properties referred to above are subject to the following conditions:

- that the property must be registered under a locally incorporated company;
- that such incorporation and the notification to the EPU of such incorporation shall be done prior to the transfer of the property to the foreign interest. The equity and paid-up capital conditions imposed in relation to acquisitions involving the dilution of Bumiputera interest, will be applicable to the acquisitions referred to above also.

Save and except for the acquisition of industrial land, all the above acquisitions will be subject to the prior written approval of the relevant State authority pursuant to the provisions of section 433B of the National Land Code 1965 (“NLC”).

The acquisition of residential units valued at RM500,000 and above by a foreign interest does not require the approval of the EPU. However, the requirement for the foreign interest to obtain the prior written approval of the relevant State authority pursuant to the provisions of section 433B of the NLC continues to be in effect.

Foreign interests continue not to be subject to any restriction on the number of properties that may be acquired by the foreign interests nor to any condition requiring the properties acquired by the foreign interest to be held by the foreign interests for a certain period of time before such properties

may be disposed . Foreign interests continue also to enjoy the option of financing their acquisitions from internal and external sources.

C. Restrictions

Foreign interests are not allowed to acquire the following:

(a) Properties valued less than RM500,000 per unit. Under the FIC Property Guidelines, foreign interests were only not allowed to purchase residential units valued at RM250,000 and below;

(b) Residential units under the category of low and low-medium cost as determined by the relevant State authority;

(c) Properties built on Malay Reserve Land; and

(d) Properties allocated to Bumiputera interests in any property development projects as determined by the relevant State authority.

Based on the above, the restriction imposed in the FIC Property Guidelines with regard to the acquisition by a foreign interest of agricultural land developed on the basis of a homestead concept has been removed under the New EPU Guidelines.

D. Exemptions

The New EPU Guidelines do not apply to the following transactions:

(a) any acquisition of residential unit under the "Malaysia My Second Home" Programme;

(b) any acquisition by Multimedia Super Corridor ("MSC") status companies of any property in the MSC provided that the property is only used for their operational activities including as residence for their employees;

(c) any acquisition of properties in the approved area in any regional development corridor by companies that have been granted the status by the local authority as determined by the Government;

(d) any acquisition of properties by a company that has obtained an endorsement from the Secretariat of the Malaysian International Islamic Financial Centre;

(e) any acquisition of residential units to be occupied as a hostel for a company's employees. However, such acquisition is subject to the condition that local companies owned by foreign interest are only allowed to acquire residential units valued at RM100,000 and above and such acquisition shall also be subject to the jurisdiction of the relevant State authorities;

(f) any transfer of property to a foreign interest pursuant to a will and court order;

(g) any acquisition of properties by manufacturing companies (under the FIC Property Guidelines, only acquisition of industrial property by manufacturing company licensed by the Ministry of International Trade and Industry for own manufacturing was exempted from obtaining the approval of the FIC);

(h) any acquisition of properties by Ministries or Government departments (Federal and State), Ministry of Finance Incorporated, Menteri Besar Incorporated or Chief Minister Incorporated, State Secretary Incorporated or listed Government Linked Companies;

(i) any acquisition of properties under privatization projects, whether at the Federal or State level, provided that it involves the companies that are the original signatories to the contracts for the relevant projects; and

(j) any acquisition of properties by companies that have been granted the status of an International Procurement Center, Operational Headquarter, Representative Office, Regional Office, Labuan Company, and Bio-Nexus or other special status by the Ministry of Finance, Ministry of International Trade and Industry and other ministries.

E. Application

The onus of submitting an application is on the acquirer.

F. Removal of Notification Requirement

The New EPU Guidelines have removed the notification requirement imposed by the FIC Property Guidelines with regard to the acquisition of property which is valued at RM10 million and less than RM20 million that involve the following parties:

(a) acquisitions by Bumiputera interests from other Bumiputera interests; or

(b) acquisitions by Bumiputera interests from non-Bumiputera interests; or

(c) acquisitions by non-Bumiputera interests from other non-Bumiputera interests; or

(d) acquisitions by local interests from foreign interests.

G. Charging of Properties to Foreign Interests and Disposal of Property by Foreign Interests

There is no requirement under the New EPU Guidelines for the approval of the EPU to be obtained in relation to the charging of properties in Malaysia to foreign interests or the disposal of properties by foreign interests.

SD

ANITA BALAKRISHNAN
REAL ESTATE PRACTICE GROUP

For further information regarding the New Guidelines on the Acquisition of Properties issued by the EPU, please contact

Sar Sau Yee
sysar@shearndelamore.com

Aileen Chew
aileen@shearndelamore.com

DISPUTE RESOLUTION

Enforcement of arbitral awards in Malaysia

IN THIS ARTICLE, SHANTI MOGAN EXAMINES THE CASE LAW IN RELATION TO ENFORCEMENT OF ARBITRAL AWARDS IN MALAYSIA.

The Arbitration Act 2005 ("the 2005 Act") which repealed the Arbitration Act 1952 ("the 1952 Act") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("the 1985 Act") was enacted to address the various inadequacies in those Acts. However, Malaysia faces continued challenges in the enforcement of foreign arbitral awards under the 1985 Act.

Once such challenge, which was of considerable concern to the international community, was the decision of the Court of Appeal in **Sri Lanka Cricket v World Sport Nimbus Pte Ltd**[1]. **Sri Lanka Cricket** concerned the construction of section 2(2) of the 1985 Act. Section 2(2) provides as follows:

> *"s.2(2) The Yang Di Pertuan Agong may, by order in the Gazette, declare that any State specified in the order is a party to the New York Convention, and that order shall, while in force,* ***be conclusive evidence that that State is a party to the said Convention****".*

No such Gazette notification was issued by the Yang Di Pertuan Agong under section 2(2) in respect of any of the Contracting States to the New York Convention[2] (each a "Convention State").

In **Sri Lanka Cricket**, the Court of Appeal, faced with an application for the registration and enforcement of a Singapore arbitral award, held that as Singapore had not been gazetted as a Convention State under the 1985 Act, the award could not be summarily enforced under the 1985 Act. The Court of Appeal took comfort in the fact that there was other recourse to enforce the award in Malaysia;

- having the award registered as a judgment in the jurisdiction in which the award was made and seeking its enforcement in Malaysia under the provisions of the Reciprocal Enforcement of Judgments Act 1958 ("the REJA"); or
- suing on the award at common law.

These alternative modes of enforcement provide little relief. They were clearly not the "ready fix" that the international community was looking for in having its disputes resolved efficaciously. The REJA recognises judgments of a limited number of Commonwealth jurisdictions and is capable of enforcing only money judgments, leaving claimants without recourse in respect of non-monetary claims. A common law action on the award does not strictly limit the defences available to impugn the award, which the New York Convention does, leaving the claimant with the daunting task of having to deal with various issues already determined in the arbitration. The timelines required of the alternative methods of enforcement also militate against their being the preferred mode of enforcement.

Hence it became important to address the **Sri Lanka Cricket** decision urgently. This happened very recently with the decision of the Federal Court in **Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd**[3]. In **Lombard Commodities**, the Federal Court was faced with a similar issue regarding the enforcement of an arbitral award, this time emanating out of the United Kingdom. The Federal Court took the opportunity to set out, in clearly defined terms, that a gazette notification pursuant to section 2(2) of the 1985 Act declaring the United Kingdom to be a party to the New York Convention was not a condition precedent to an award's being regarded as a Convention Award under the 1985 Act. The Federal Court held that the use of the word "may" in section 2(2) of the 1985 Act simply confers a power without a corresponding obligation to exercise the power. The provision in section 2(2) was held to be evidential in effect and could not be regarded as a pre-condition to the enforcement of an award. It was primarily designed to dispense with the need to prove that a State is a Convention State. Further there was nothing to preclude the adducing of such other evidence as appropriate to establish a State as a Convention State.

In so holding, the Federal Court drew a parallel with the interpretation of section 7(2) of the English Arbitration Act 1985 and the English case of **Minister of Public Works of Kuwait v Sir Frederick Snow & Partners**[4]. In that case, Mocatta J drew a distinction between the terms "conclusive evidence" and "exclusive evidence" and held that the language of section

7(2) is conclusive, not exclusive. A contrast was made with a provision in another statute where the language used made the relevant Orders in Council essential.

The concerns of the international community with respect to the enforceability of arbitral awards in Malaysia under the 1985 Act will be allayed with the clear statement by the Federal Court that the imposition of an additional condition (the need for Gazette notification) before a Convention Award may be enforced in Malaysia is contrary to the stated object of the 1985 Act, wholly repugnant to Article III of the New York Convention and undermines the regime for the enforcement of Convention Awards.

The 2005 Act has also done away with the reference to a Gazette notification, thus clearing the way for all arbitral awards to be enforced under both the old and the new regimes on the basis of Articles III and IV of the New York Convention.

SD

K SHANTI MOGAN
DISPUTE RESOLUTION PRACTICE GROUP

For further information regarding Arbitration practice matters, please contact

Robert Lazar
rlazar@shearndelamore.com

K Shanti Mogan
shanti@shearndelamore.com

[1] [2006] 2 CLJ 316
[2] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
[3] [2010] 1 CLJ 137
[4] [1981] 1 Lloyds' Rep. 59

Personal Data Protection Bill 2009 – Highlights

IN THIS ARTICLE, SF WONG AND GARY LIM HIGHLIGHT SOME OF THE PERTINENT PROVISIONS OF THE PERSONAL DATA PROTECTION BILL 2009.

Personal Data Protection Bill 2009

The Personal Data Protection Bill 2009 ("the Bill") seeks to regulate the processing of personal data of individuals in commercial transactions. The object is to safeguard against the misuse of such individuals' personal data and thereby protecting their interests.

With advancing technology and evolving market trends the value of useful information whether of a commercial kind or which relates to particulars of individuals useful for commerce has become a valuable commodity. There is mounting pressure to regulate the processing and use of personal data in trade and commerce so as to protect the interest and particulars of individuals.

The first draft of the Bill was first introduced in 2000 for public consultation. Upon receiving comments and feedback from the public, it was revised by the then Malaysian Ministry of Information, Communication and Culture. After almost a decade, the revised Bill was finally tabled in the Parliament for first reading on 19 November 2009. It is expected to be enacted by the second quarter of 2010.

The Application of the Bill

In its current form, the Bill applies to "personal data" held, used or to be used in Malaysia (whether recorded / processed manually or electronically), subject to certain exemptions.

"Personal data" means any information in respect of commercial transactions, which:

(a) is being processed wholly or partly by means of equipment operating automatically in response to instructions given for that purpose;
(b) is recorded with the intention that it should wholly or partly be processed by means of such equipment; or
(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,

that relates directly or indirectly to a data subject (the individual), who is identified or identifiable from that information or from that and other information in the possession of a data user, including any sensitive personal data and expression of opinion about the data subject.

Personal data does not include any information that is processed for the purpose of a credit reporting business carried on by a credit-reporting agency, which will be regulated separately under credit reporting agency legislation which is expected to be tabled in Parliament in March 2010.

Personal data processed by an individual held for the purposes of his personal, family or household affairs, including recreational purposes is wholly exempted from the ambit of the Bill. Varying degrees of exemption are also provided for the use of personal data for the purposes of crime prevention, national security, tax collection, healthcare, preparing statistics and carrying out research, court administration, discharging regulatory functions as well as for journalists, literary or artistic purposes.

The Personal Data Protection Principles

The object, principles and thinking that form the basis for protection of personal data and the free flow of information provided in the Bill may be summarised as follows:

(a) General Principle
This General Principle relates to the processing of personal data, including sensi-

tive personal data. A data user shall not process personal data from the data subject unless consent is given to the processing of the personal data. There are certain circumstances where the consent of the data subject is not required for the processing of such personal data. In the case of sensitive personal data of an individual, the data user shall not process such personal data unless in accordance with the provisions of section 40 of the Bill.

(b) Notice and Choice Principle
Under this Notice and Choice Principle, a data user shall by written notice in the national or English languages inform an individual that personal data of which that individual is the data subject is being processed by, or on behalf of the data user. The notice shall contain such matters that include the purpose for which the personal data is being processed, the source of the personal data and whether it is obligatory or voluntary for the individual to provide the personal data. The data user shall also provide the data subject a choice and means of limiting the processing of personal data, including personal data relating to other persons who may be identified from that personal data.

(c) Disclosure Principle
This Disclosure Principle provides that personal data shall not without the consent of the data subject be disclosed for any purpose other than the purpose for which the personal data was to be disclosed at the time of collection of the personal data or a purpose directly related to it, or be disclosed to a third party other than that specified in the notice.

However, this principle is subject to section 39 of the Bill that sets out the circumstances where personal data may be disclosed without the consent of the data subject.

(d) Security Principle
This Security Principle provides that, when processing personal data, a data user shall take all practical steps to protect the personal data from any loss, misuse, modification, unauthorised or accidental access or disclosure, alteration or destruction.

(e) Retention Principle
This Retention Principle provides that personal data processed for any purpose shall not be kept longer than is necessary for the fulfilment of that purpose.

(f) Data Integrity Principle
This Data Integrity Principle specifies that personal data must be accurate, complete, not misleading and kept up-to-date.

(g) Access Principle
This Access Principle provides that a data subject shall be given access to his personal data and be able to correct that personal data, except where compliance with a request to such access or correction is refused under the Bill.

Trans-Border Personal Data Transfer

The Bill also aims to regulate the flow of personal data outside Malaysia by prohibiting the transfer of personal data to any place outside of Malaysia unless the receiving country has in place equivalent data protection regimes. If no equivalent protection is available in the country to which the data is to be transferred, the data subject must consent to the transfer. The Bill sets out certain exceptions to the requirement for equivalent protection or consent, such as where the transfer is necessary for the performance of a contract between the data subject and the data user.

Further Safeguards

Further safeguards on the use of personal data in certain circumstances are provided in the Bill. For instance, if personal data is used for direct marketing, the data user must inform the data subject and must cease to use the personal data if the data subject so requests. In addition, the use and handling of personal data which is deemed to be sensitive is subject to further conditions, such as the need for explicit consent of the data subject, or that the data is to be used for medical purposes or legal proceedings.

Under the Bill, a "data user" is required to register with the Commissioner (as defined below), who will keep and maintain a register of data users. The Bill provides that the Minister will specify, by published orders, the class of data users that will be required to register with the Commissioner. Once a user is registered with the Commissioner, a certificate of registration will be issued. Failure to register if required to is an offence, liable to a fine of not more than RM500,000 or to imprisonment for a term not exceeding three years or to both.

A Commissioner of Personal Data Protection ("Commissioner") will be appointed to supervise the implementation of the Bill when enacted. An Appeal Tribunal will also be established, which will have powers to review any decision of the Commissioner. The Bill provides for an element of self-regulation in that the Commissioner may establish a Data User Forum that will be responsible for preparing the Codes of Practice under the Bill. The Bill further provides that a Personal Data Protection Advisory Committee ("Committee") shall be set up to advise the Commissioner. However, the Commissioner will not be bound by any advice of the Committee.

Any individual or relevant person can lodge a complaint in writing with the Commissioner and the Commissioner may authorise an officer to carry out investigations. The authorised officer shall have all the special powers of a police officer of whatever rank in relation to police investigations. This includes the power to search and seize and access to computerised data.

Transitional Provisions

The transitional provisions in the Bill provide that personal data collected or used before the coming into force of the Bill must within three months of the enactment of the Bill be regulated and brought into compliance with the provisions and requirements of that statute.

SD

SF WONG AND GARY LIM
TELECOMMUNICATIONS & TECHNOLOGY LAW PRACTICE GROUP

For further information regarding Telecommunications and Technology laws, please contact:

Wong Sai Fong
saifong@shearndelamore.com

Timothy Siaw
timothy@shearndelamore.com

CORPORATE LAW

Practice Note No. 6/2010 Issued by the Companies Commission of Malaysia

IN THIS ARTICLE, LEE MUN YI LOOKS AT THE PRACTICE NOTE NO. 6/2010 ISSUED BY THE COMPANIES COMMISSION OF MALAYSIA ON 11 JANUARY 2010 IN RELATION TO THE GUIDELINES FOR THE APPLICATION TO STRIKE OFF A COMPANY WHICH IS BEING WOUND UP.

A company exists to carry on business. If the company is no longer operating for the purposes it was set up, the company's existence may be terminated by its being struck off the Register of Companies ("the Register") or dissolved as a result of liquidation or winding up proceedings.

Pursuant to section 308 of the Companies Act 1965 ("CA 1965"), where the Registrar of Companies ("Registrar") has reasonable cause to believe that a company is not carrying on its business or is not in operation, the Registrar is empowered to strike the name of the company off the Register. The Companies Commission of Malaysia ("CCM") had on 11 January 2007 issued the Guidelines on Application to Strike Off the Name of Company ("CCM Guidelines"), setting out the procedures and requirements for the application to strike off:

(i) companies which are not carrying on business or is not in operation pursuant to section 308(1) of the CA 1965; and

(ii) companies which are being wound up pursuant to section 308(3) of the CA 1965.

Section 308(3) of the CA 1965 provides that where a company is being wound up and the Registrar has reasonable cause to believe that:

(a) no liquidator is acting;

(b) the affairs of the company are fully wound up and for a period of six months the liquidator has been in default in lodging any return required to be made by him; or

the affairs of the company have been fully wound up pursuant to a winding-up by the Court under Division 2 of Part X of the CA 1965 and there are no assets or the assets available are not sufficient to pay the costs of obtaining an order of the Court dissolving the company,

the Registrar may publish in the Government Gazette and send to the company or the liquidator (if any)by registered post a notice that at the expiration of three months from the date of that notice, the name of the company will be struck off the register and the company be dissolved, unless cause is shown to the contrary.

On 11 January 2010, Practice Note No. 6/2010 was issued by the CCM ("Practice Note No. 6/2010") which repealed the procedures and requirements set out in the CCM Guidelines for companies which are being wound up pursuant to section 308(3) of the CA 1965.

Set out below are some of the new procedures and requirements listed in Practice Note No. 6/2010:

Where No Liquidator is Acting

The Registrar may exercise his discretion to strike off a company undergoing voluntary winding-up if he has reasonable cause to believe that no liquidator is acting for such company due to:

(a) death or resignation of the liquidator and the absence of any substitution after one year upon the death or resignation of such liquidator;

(b) the whereabouts of the liquidator appointed being unknown for more than one year upon his appointment;

(c) failure or refusal on part of the liquidator appointed to lodge his notice of appointment with the Registrar and the Official Receiver in accordance with section 280 of the CA 1965 for more than six months upon his appointment;

(d) failure or refusal on the part of the liquidator to carry out his duties as a liquidator for more than six months upon his appointment;

(e) the liquidator ceases to act for a period of more than one year at any time during his appointment; or

(f) the Registrar in the exercise of his discretion is of the view that no liquidator is acting for such company undergoing the winding-up for any reason whatsoever.

Shareholders of a company which has been wound up, either by way of members' or creditors' voluntary winding up, may apply to strike the company off the Register.

Where the Affairs of A Company are Fully Wound Up and for a Period of Six Months, the Liquidator has Failed to Lodge any Return

The Registrar may exercise his discretion to strike off a company where he has reasonable cause to believe that the affairs of the company are fully wound up and for a period of six months, the liquidator has failed to lodge a Return by Liquidator Relating to Final Meeting (Form 69). This is only applicable where the company has been voluntarily wound-up.

Shareholders or liquidators of the company which has been wound up either by way of members' or creditors' voluntary winding up may apply to strike the company off the Register.

Where the Affairs of A Company are Fully Wound Up by the Court and there is Insufficient Funds to Obtain a Dissolution Order

The Registrar may exercise his discretion to strike off a wound-up company if he has reasonable cause to believe that the affairs of the company have been fully wound-up by the court and there are no assets or the assets available are not sufficient to pay for the costs of obtaining a court order to dissolve the company. An application under section 308(3)(c) of the CA 1965 may only be made where a company has been wound-up pursuant to a court order.

The liquidator of the company which has been wound-up by the court may apply to the Registrar for the company to be struck off.

Where the Registrar strikes the name of the company off the Register and publishes a notice in the Government Gazette, the company shall be dissolved on the publication of the notice in the Government Gazette. Liquidators and shareholders applying for the striking off process under section 308(3) of the CA 1965 are required to notify the official receiver forthwith of the status of the company upon the dissolution of the company, in order to enable the official receiver to update his records in respect of the company.

The forms of notification, as appended to Practice Note No. 6/2010, which are to be submitted to the CCM for the application to strike off the name of a company which has been wound-up, provides more clarity as to the information required by the CCM for the striking off exercise.

SD

LEE MUN YI
CORPORATE & COMMERCIAL PRACTICE GROUP

For further information regarding Practice Note No. 6/2010 issued by the Companies Commission of Malaysia, please contact

Grace C.G. Yeoh
gcgyeoh@shearndelamore.com

Lorraine Cheah
l_cheah@shearndelamore.com

CASE NOTE

Revisiting the Court of Appeal decision in Multi-Purpose Holdings v KPHDN[1]

IN THIS ARTICLE, CYNTHIA LIAN RE-CONSIDERS THE COURT OF APPEAL DECISION IN **MULTI PURPOSE HOLDINGS** IN THE CONSTRUCTION OF THE TERM "DATE OF DISPOSAL" AS THE SAME TERM IS USED IN THE REAL PROPERTY GAINS TAX ACT 1976.

The Court of Appeal decision in Multi-Purpose Holdings was previously discussed in an earlier Newsletter[2] where the focus was on the retrospective effect to be given to an amendment to the Share (Land Based Company) Transfer Tax Act 1984 ("STTA")[3].

With the re-imposition of real property gains tax ("RPGT") with effect from 1 January 2010, it would be pertinent to re-consider the Court of Appeal decision in Multi-Purpose Holdings, as it pertains to "date of disposal" as the same term is used in the Real Property Gains Tax Act 1976 ("RPGTA").

Facts of the Case

The taxpayer had entered into an agreement ("the Agreement") with two purchasers to exchange investments whereby some of the shares disposed of by the taxpayer were shares in a land based company as defined under the STTA.

Clause 3(I) of the Agreement provided that the Agreement was conditional upon obtaining the approval of "all relevant and appropriate Governmental and regulatory authorities of the Malaysian Government". Clause 3(I) further required the consent of Bank Negara Malaysia ("BNM") and, if necessary, the Foreign Investment Committee ("FIC").

Pursuant to the Agreement, on 9 July 1984, the taxpayer wrote letters to the FIC and BNM seeking their respective approvals. The FIC replied on 3 October 1984 saying it had no objection and that its reply was subject to BNM approval being obtained. On 8 November 1984, BNM granted its approval.

The Inland Revenue Board ("IRB") contended that the requirement for approval as set out in the proviso to section 5 of the STTA applied. Date of disposal was the date of BNM's approval on 8 November 1984 that was after the date the STTA was (retrospectively) deemed to have come into force on 19 October 1984 so that the disposal was subject to share transfer tax under the STTA.

The taxpayer contended the proviso to section 5 of the STTA did not apply to the Agreement so that the date of disposal would be the date of the Agreement, 6 July 1984, prior to when the STTA retrospectively came into force and hence the disposal would not be subject to share transfer tax.

The Law

The relevant provision, section 5 of the STTA at the material time, provided as follows:

"*A disposal of chargeable asset shall be deemed to take place:*

(a) where there is an agreement in writing or otherwise for the disposal of the chargeable asset, on the date of such agreement; or

(b) where there is no agreement, on the date of delivery of the chargeable asset to the acquirer:

Provided that where in either case the disposal or acquisition of such chargeable asset requires the approval by the Government or an authority or committee appointed by the Government, the date of disposal shall be the date of such approval or where such approval is conditional, the date when the condition or last of the conditions is satisfied." (emphasis added)

As the chargeability to tax depended on the date of disposal, the crucial question that the court had to consider was whether the disposal required approval as contemplated in the proviso to section 5 of the STTA.

The Decision

The taxpayer's appeal was allowed by a 2-1 majority in the Court of Appeal.

Gopal Sri Ram JCA considered the proviso to section 5 of the STTA and held that the word "*requires*" in the proviso was ambiguous as it was unclear if this requirement was imposed by law or a requirement of the term of the agreement of disposal. Due to the lack of clarity, the principle that ambiguity must be construed in favour of the taxpayer was applied and the court held that the word "requirement" meant a "requirement" imposed by law and not merely by Government policy such as the need for FIC approval.

Abdul Aziz Mohamad JCA held that the proviso only applies to a disposal that "required" the approval by the Government or an authority or committee appointed by the Government. His Lordship held that the approval for the purposes of the proviso in section 5 must be an approval "required" by law and not merely Government policy. Parliament clearly had not intended the requirement in the proviso to be a requirement self-imposed by the parties themselves in the Agreement or an administrative requirement that is not backed by law.

As there was no such law requiring the taxpayer to obtain approval for the disposal, his Lordship held that the disposal did not "require approval by the Government or an authority or committee appointed by the Government" within the meaning of section 5 of the STTA. As the proviso did not apply, his Lordship held that the date of disposal would be the date of the Agreement on 6 July 1984.

However, in his dissenting judgment, Arifin Zakaria JCA held that the proviso in the STTA was broad enough to encompass a requirement imposed by law or Government policy or under the Agreement, therefore the Agreement was conditional until the approval from BNM was obtained.

Application of the Decision to the RPGTA

Paragraph 16 of Schedule 2 to the RPGTA contains wording similar to the proviso in section 5 of the STTA as follows:

"16. 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 an authority or committee appointed by the 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."; and

Based on the decision in **Multi-Purpose Holdings**, the phrase "requires approval by the Government or an authority or committee appointed by the Government" in paragraph 16 of Schedule 2 to the RPGTA should be read as being "requirements" of law and not merely a "requirement" of Government policy or a requirement self-imposed by parties in agreements. Only "requirements" of law would come within paragraph 16 of Schedule 2 of the

RPGTA so as to move the date of disposal to a later date.

The Court of Appeal decision in **Multi-Purpose Holdings** has served to clarify the uncertainty previously faced by taxpayers in not knowing when a requirement came within paragraph 16 of Schedule 2 of the RPGTA.

SD

CYNTHIA LIAN
TAX & REVENUE PRACTICE GROUP

For further information regarding Tax matters, please contact

Goh Ka Im
kgoh@shearndelamore.com
Anand Raj
anand@shearndelamore.com

[1] [2006] 2 MLJ 498
[2] Newsletter Vol 5 No 2.0
[3] STTA was repealed by the Finance Act 1988

CASE NOTE

Dynamic Plantations Bhd v YB Menteri Sumber Manusia[1]

IN THIS ARTICLE, JUANITA CHUA DISCUSSES THE RECENT COURT OF APPEAL DECISION IN **DYNAMIC PLANTATIONS BHD V YB MENTERI SUMBER MANUSIA** IN RELATION TO COMPANIES ENTERING INTO COLLECTIVE AGREEMENTS WITH TRADE UNIONS.

The issue in this case revolved around the contention of, Dynamic Plantations Bhd ("Dynamic") that Malayan Agriculture Producers Association ("MAPA"), a member of an employer trade union, was not entitled to commence collective bargaining with the National Union of Plantation Workers ("NUPW") on grounds that Dynamic had not accorded recognition to the NUPW even though Dynamic had on several occasions in the past entered into collective agreements with the NUPW. The NUPW is an employee trade union for plantations workers.

Facts

Dynamic since 1983 has been a member of MAPA. It, however, ceased being a member of MAPA in May 2000. When Dynamic was a member of MAPA, MAPA had negotiated and concluded several collective agreements for Dynamic with the NUPW. With the execution of such collective agreements, both MAPA, on behalf of Dynamic and NUPW, on behalf of the employees in Dynamic, had generally agreed on the working terms and conditions which would apply to Dynamic's employees. Over the course of time, both the NUPW and MAPA had executed five successive collective agreements.

Dynamic, however, in April 2000 refused to commence collective bargaining with the NUPW on the basis that it had not granted recognition to the NUPW. Dynamic then ceased being a member of MAPA and this was done within the same month it rejected the NUPW's request for parties to commence collective bargaining. NUPW being dissatisfied with the actions of Dynamic then referred the matter to the Industrial Relations Department pursuant to section 18 of the Industrial Relations Act 1967 ("IRA").

The Director-General of Industrial Relations informed Dynamic and NUPW that the Minister of Labour & Manpower had decided to refer the dispute to the Industrial Court under section 26(2) of the IRA.

On hearing this, Dynamic applied to the High Court for judicial review to quash the Minister's decision. The High Court on 22 April 2002 dismissed Dynamic's application and Dynamic filed in an appeal to the Court of Appeal.

The Court of Appeal by a majority decision concluded that though NUPW had not sought recognition from Dynamic under section 9 of the IRA, Dynamic by participating in MAPA as a member and agreeing to be bound by the terms and conditions of the collective agreements, had by conduct recognized NUPW as a trade union of its employees for that category of work.

The Court of Appeal also relied on the fact that the collective agreements were negotiated and entered into by MAPA for and on behalf of Dynamic as Dynamic was expressly named as a consenting member of MAPA in the collective agreements. If Dynamic has not recognized NUPW, the question posed was why then was it prepared to be bound by the terms and conditions of the earlier collective agreements.
According to the Court of Appeal, the acts and conduct of Dynamic amounted to Dynamic recognizing NUPW as a trade union and the issue that it had not been accorded recognition is therefore misplaced.

The dissenting judgment was premised on the fact that NUPW had not been accorded recognition. To conclude that Dynamic had accorded recognition to NUPW by virtue of its conduct would run contrary to the requirements of section 9 of the IRA which lays down the procedure as to how recognition is accorded to a trade union.

Based on the majority decision of the Court of Appeal, companies are urged to be more careful when entering into collective agreements with a trade union which it has not accorded recognition as the consequences of so doing would essentially amount to the trade union being accorded recognition indirectly.

SD

JUANITA CHUA
EMPLOYMENT & ADMINISTRATIVE LAW PRACTICE GROUP

For further information regarding Employment Law matters, please contact

N.Sivabalah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

[1] [2008] 6 CLJ 833

The Partners of Shearn Delamore & Co.

are pleased to announce the admission of

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Dispute Resolution

Ms Cheah Chiew Lan
Intellectual Property & Technology

Mr. Jimmy Liew
Dispute Resolution

as Partners with effect from **1 January 2010**.