SHOOK LIN & BOK EST 1918 KUALA LUMPUR

LEGAL UPDATE

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IN THIS ISSUE

LOOKING FORWARD TO 2007

As we usher in 2007, the firm extends to its readers and clients, wishes for a happy, fulfilling and productive new year. As the firm approaches the 90th anniversary of its founding, we would like to take this opportunity to thank and express our gratitude and appreciation to all our clients, many of whom have supported the firm through the years and through thick and thin. The firm's Chief Executive Partner Too Hing Yeap shares with us some brief thoughts on the development of the firm and its future direction.

Q. *How does the firm today compare with the time you joined it?*

A. Well, when I joined the firm in the early 70's, we had less than 20 partners and lawyers altogether. Today we have 28 partners and 59 lawyers. At that time, the firm had four or five main clients who accounted for more than 70% of the firm's work. The Partners through the years consciously moved to expand and diversify the firm's client base. We now have 12 departments, each specialising in different aspects of commercial law practice (both litigation and non-litigation). Our clients are from all over the world.

Q. *What has been the secret of the firm's success and longevity?*

A. The firm which was the first to be set up by a local lawyer during the British colonial rule, is one of the oldest and largest law firms in Malaysia today. The fact that it has not only endured but thrived, is a testament to the foresight of the founders in anchoring the practice in certain core principles and philosophies, namely professionalism and integrity (underpinned by a strong work ethic). The firm, over the years has had the good fortune to attract and retain lawyers of a very high calibre. Some of our lawyers are amongst the best in the country in their fields of specialisation. We have been very fortunate in this respect.

Q. *Please describe the biggest strengths of the firm.*

A. We are very focused in what we do and what we would like to achieve. All lawyers are urged constantly to challenge themselves to be better lawyers, to improve their skills and their craft, to be better problem solvers and so forth. The best research facilities are wasted if lawyers do not know how to use it to provide solutions for our clients - not just any solution or occasional good solution, anybody can do that, we are talking about being able to consistently provide high quality solutions. Lastly, but not the least important, all our partners are full-time practitioners. None of the partners are involved in any business outside our practice. To us this is a full-time calling.

Q. *What do you see as the challenges facing the firm?*

A. To improve our skills and craft and adapt the practice to a fast changing landscape in order to stay relevant to the needs of our clients - the most important component to the firm's survival and well-being.

The firm held its annual dinner for 2006 over the weekend of 16 September 2006 at the Avillion Hotel at Port Dickson, the popular beach resort town. This revived the tradition of weekend getaways at various resort locations for the firm's annual dinners, with the participation of all staff and lawyers and their spouses.








Highlights for the weekend included competitive beach games among teams, culminating in a gala dinner on the beach with revue and dance performances by the lawyers and staff. The firm celebrated its 88th anniversary in 2006.

The Lawasia 40th Anniversary International Conference in Goa, India

The Lawasia 40th Anniversary International Conference on International Trade, Technology, Communications and Energy was hosted by inter alia, the Bar Association of India, at the Hotel Intercontinental The Grand Resort, Goa, India, from September 29 to October 2, 2006.

The Conference attracted the participation of delegates from the business community and legal fraternity in more than 20 countries. The conference programme presented papers covering two streams namely Trade Law (papers included "Trade Law & WTO", "Globalisation of Trade & Services" and "International Money Laundering"), and Technology and Communication (papers included "Outsourcing & Offshoring", "Global e-Commerce" and "Computer Crimes"). The conference also included a special plenary panel session on "Impact of Global Terrorism on Cross Border Trade".

The firm's Dato' Dr Cyrus Das chaired the session on "Information Technology Contracts: Universal Stumbling Blocks" under the Technology and Communication stream. One of the papers was presented by Amir Singh Pasrich, managing partner of International Law Affiliates New Delhi. The paper addressed the novel issues and challenges posed by the new forms and methods of formation of contracts introduced by the information technology era and the internet, both at the conceptual level in the context of their reconciliation with traditional contractual principles, and at the evidentiary level, in terms of new kinds of evidence in the form of electronic records.

In summary, in the paper, he postulated as follows:

" E-commerce is undeniably a revolution. Can we try and fit it within an existing legal framework? I believe we can fit e-commerce contracts, sale contracts, software contracts and almost any agreement arrived at through an electronic interface or electronic exchange into the classical contractual components of offer, acceptance, consideration, legal intention etc ... the stumbling blocks are not the I.T. Contracts so much as proof, enforcement, dispute resolution, conflict of laws and applicable law, public policy ... not to mention unfair contract terms, mistake, fraud, misrepresentation, incorporation by reference, trade usage; and antitrust and consumer law, stock market, banking and other statutory regulations."

" The old kind of contract involved an offer (possibly an invitation to treat), acceptance, consideration, legal intention, certainty and performance. Under our legal system it would be difficult to reinvent the wheel and to start afresh with new concepts that change legal theory into what lawyers love most – component parts. The information technology era challenges the foundation of contract theory but perhaps this tremor will not call for re-building ... only minor modifications to accommodate what might have been seen as an unanticipated, certainly unplanned reconstruction of traditional contractual theory."

The 7th Lawasia Business Law Conference in Mongolia: The Firm Presents Paper on Islamic Financing

The firm's partner in its Islamic Finance practice, Jal Othman, was one of the speakers at the recent 7th Lawasia Business Law Conference held in Hohhot City, Inner Mongolia Autonomous Region, China on 10 to 15 July 2006.

The firm is honoured to be the only representative from Malaysia to deliver a paper on Islamic Finance. The paper was entitled "Islamic Finance As An Effective Means of Financing – The Malaysian Experience". The paper was intended to introduce the people of Mongolia to Islamic Finance as a viable alternative to raising funds. Being an active practitioner in the field of Islamic Finance, the firm believed that this was an opportune occasion to introduce Islamic Finance to the vast economic basin of China.

The Conference was very well received with over 300 participants from the various countries in the Asia Pacific region. The Conference was organized under the auspices of Lawasia (The Law Association for Asia and the Pacific). Being an active member of Lawasia over the years, the Conference also provided the opportunity for the firm to renew ties and relationship with the many other members from the various countries.

The paper was structured along the following themes:

- the dual financial system in Malaysia
- the facilitative legal framework
- the growth and development of the industry
- the financial instruments employed in practice
- the projects
- the challenges and rising to meet such challenges
- the future and the way forward

Some of the salient issues discussed were as follows:

The dual financial system in Malaysia

- the establishment of the Islamic window during the pioneering days
- the progression to full fledged Islamic banking institutions and Islamic banking subsidiaries
- the introduction of foreign players into the domestic market

The facilitative legal framework

- the jurisdictions of the civil and syariah courts
- the various legislation, enactments and guidelines
- the Syariah Advisory Council

The growth and development of the industry

- the establishment of the first Islamic Bank in 1983
- the introduction of interest free windows in 1993
- the introduction of Islamic Interbank Money Market in 1994
- the establishment of National Advisory Council in 1997
- the establishment of the second Islamic Bank in 1999
- the issuance of licenses to three foreign banks in 2004
- the incorporation of Islamic subsidiaries in 2005

The financial instruments employed in practice

- early years focus on sale transactions e.g. BBA and Murabahah
- recent emphasis on equity-based and profit-sharing schemes: Musyarakah and Mudharabah
- Malaysian Global Sukuk

The challenges

- divergence of Shariah interpretation
- the absence of a common international adjudicating body
- product innovation: not easy to replicate: may be rejected by the Shariah committee
- islamisation of conventional products
- operational complexity

- liquidity problem: lack of secondary market for fixed income instrument: issuance of Shariah compliant Government Bonds

Rising to the challenge

- harmonization preferred over acceptance
- standardization of standards AAOIFI
- increased emphasis on research and development
- supportive case law
- tax and fiscal breaks: exemption from stamp duty and real property gains tax and income tax

The way forward

- compliance with Shariah must be given
- emphasis is on comparable if not better returns than conventional financing
- Islamic financial activities moving away from financial institutions to non-financial institutions
- to have off balance sheet financing facility: to securitise the cash flow to allow immediate cash inflow
- branding: to push the "Islamic credibility advantage"
- effective communication with customers
- product innovation: to continue the push to innovate

Amendments to Listing Requirements of Bursa Malaysia: Announcements and Circulars

Bursa Malaysia Securities Berhad (Bursa Securities) (the Malaysian securities exchange) has, by a letter dated 31 October 2006 to listed companies and which is posted on its website, amended its Listing Requirements as well as the Listing Requirements for the MESDAQ exchange in relation to announcements and circulars. The amendments take effect from 15 November 2006.

The amendments include the following:-

(a) the requirement that an information circular must be issued by a listed company in relation to a non related party transaction, where any one of the percentage ratios is equal to or exceeds 15%, has been removed. However, the company is required to send a copy of the announcement made by the company on Bursa Securities in respect of the transaction, to its shareholders not later than ten market days after the date of the announcement. The minimum contents of such announcement has also been generally increased pursuant to these amendments (see paragraph (d) below);

(b) in relation to the valuation of foreign property assets in connection with a foreign acquisition, a listed company is now allowed to appoint a foreign valuer provided it complies with the Securities Commission's Guidelines on Asset Valuation;

(c) there is currently a requirement in the Listing Requirements for the disclosure of a statement (Best Interest Statement) to be contained in a circular to shareholders, by the board of directors stating whether a proposal is in the best interests of the company and if voting is required, the recommendation (Voting Recommendation) by the board of directors as to the voting action that shareholders should take. Pursuant to the amendments, directors who are interested in the proposal are now not required to make the Best Interest Statement/Voting Recommendation. However, there is now a requirement that where a director disagrees with the Best Interest Statement, the circular must contain a statement by such

director setting out the reasons and the factors taken into consideration in forming that opinion;

(d) additional disclosures are required in the minimum contents of announcements and/or circulars, including:-

- the conditionality of the proposal on other corporate exercises of the company which have been announced but have yet to be completed
- the effects of the proposal on the gearing of the company
- the estimated timeframe for completion of the proposal
- the existence of a conflict of interest on the part of an adviser or expert
- in relation to new issues of securities, provisions which may permit an underwriter to withdraw from its obligations under the underwriting agreement and/or terminate the same
- in the case of a disposal, whether it would result in the listed company being deemed to be a cash company (i.e. falling under PN16) or to have inadequate financial condition and/or level of operations (i.e. falling under PN17)
- in relation to the acquisition or disposal of estate or plantation land, the size, location, tenure, date of expiry of the lease (if applicable), present and future usage, production for the past five years and quantification of the market value of the plantation as appraised by an independent registered valuer, if applicable;

(e) removal of certain disclosures from the minimum contents of announcements and/or circulars, including:-

- in relation to foreign acquisitions:

  (i) the expected dividend income to be received by the company;

  (ii) the expected timeframe for repatriation of profits to Malaysia; and

  (iii) the estimated financial commitment required of the company in undertaking the transaction and putting the assets or businesses on-stream.

Registration with the Securities Commission for trust companies to act as bond trustees

Trust companies which intend to act as trustees for debentures (whether conventional or Islamic) approved by the Securities Commission (SC) will be required to be registered with the SC. This new requirement applies to debentures or Islamic securities approved by the SC on or after 2 January 2007.

On 12 October 2006, the SC issued its Practice Note on "Registration by the Securities Commission for the Purpose of Acting as a Bond Trustee" which sets out the regulatory requirements and procedures for the registration of a bond trustee by the SC.

The Practice Note prescribes, inter alia, that an applicant seeking registration must:-

- have a prescribed minimum amount of shareholders' funds
- have a prescribed minimum amount of professional indemnity insurance coverage
- have a sufficient number of qualified, experienced and competent trustee officers and ensure that its trustee officers maintain a sufficient level of monitoring rigour
- not have any material adverse record with the SC of negligent or reckless acts or omissions nor any incidence of conflict of interest, in bond trusteeship
- procure that each director, chief executive and trustee officer of the applicant is a fit and proper person

In addition, the trustee's registration is subject to the SC's review from time to time. The SC may suspend, withdraw or vary the terms of the registration if there are circumstances involving the trustee that may jeopardise the interests of bondholders or integrity of the bond market. For continued registration, the trustee must diligently discharge its duties and functions which include reporting material events and events of default to the SC in a timely manner.

Single Pricing for Unit Trust Funds

The Securities Commission (SC) has on 20 October 2006 issued its Circular on Guidelines on Unit Trust Funds (the Circular) stating that with effect from 1 April 2007, the quoted price for units in a Malaysian unit trust fund (UTF) will be based on a single pricing regime.

The Circular states that the SC's Guidelines on Unit Trust Funds (UTF Guidelines) will be amended to reflect the above changes and that all parties concerned are expected to take the necessary steps and actions to ensure compliance with the new pricing regime by 1 April 2007.

Currently, the UTF Guidelines require all UTFs to adopt dual pricing for units in a UTF, where two prices are quoted by the unit trust management company, i.e. the buying price and the selling price, and where the charges of the management company are reflected in the spread between the buying and selling price.

Under the new pricing regime, the buying and selling price are the same, and charges are separately disclosed and paid. The Circular states that the adoption of a single pricing regime, should make the pricing of UTFs easier to understand and fairer to investors as they can see what they are being charged; such transparency would also facilitate a comparison by investors of the different charges imposed by the various distribution channels.

Amendments to the Securities Commission's Guidelines for the Issue of Structured Warrants

On 31 October 2006, the Securities Commission (SC) amended its Guidelines for the Issue of Structured Warrants. Pursuant to the amendments, issuers are now allowed to issue structured warrants over shares of a corporation quoted on a securities exchange outside Malaysia (Foreign Quoted Shares), and over indices. Previously, structured warrants could only be issued over shares quoted on a local stock exchange (Locally Quoted Shares).

Criteria for Foreign Quoted Shares and indices

Where the underlying financial instrument for the structured warrant is a Foreign Quoted Share, the following criteria must be satisfied:-

(a) the Foreign Quoted Share must be listed or quoted on a securities exchange which is a member of the World Federation of Exchanges and is approved by the SC (the factors which the SC will consider in determining whether such securities exchange is acceptable are stated in the amended Guidelines);

(b) the corporation or issuer of the Foreign Quoted Shares must have a minimum average daily market capitalization specified in the amended Guidelines;

(c) the corporation must fully comply with the listing rules and requirements of its home exchange; and

(d) information on the price, volume, financial information and price-sensitive information relating to the corporation must be available to investors in Malaysia.

Where the underlying financial instrument for the structured warrant is an index, the following criteria must be satisfied:-

(a) the index must be derived from a local stock exchange, or an index approved by the SC. The factors which the SC will consider in determining whether the index is acceptable include whether the index is broadly based, has transparent components and is a recognized benchmark; and

(b) information on the composition and performance of the index derived from a securities exchange outside Malaysia must be available to investors in Malaysia.

Requirements for structured warrants over Foreign Quoted Shares and indices that are different from over Locally Quoted Shares

Structured warrants where the underlying financial instrument is a Foreign Quoted Share or an index:-

(a) are not subject to the size of issue limit set out in the Guidelines and applicable to structured warrants whose underlying financial instrument is a Locally Quoted Share, i.e. that the aggregate outstanding structured warrants at any one time including those already issued by third-party issuers on the same shares

that are still outstanding, shall not exceed 20% of the share capital of the company; and

(b) must be settled by way of cash. In contrast, where the underlying financial instrument is a Locally Quoted Share, settlement may either be by delivery of the underlying shares or cash.

Other general amendments

Other amendments to the Guidelines include the following:-

(a) the requirement that the settlement price of a structured warrant (in the case of cash settlement) must be verified by an independent third party to be appointed by the issuer, has been removed;

(b) pricing information on a particular structured warrants issue is now allowed to be furnished to the SC two clear market days after each date of issue. Previously, such pricing information was required to be furnished one clear market day prior to each date of issue; and

(c) all proposals for the issue of structured warrants submitted to the SC must now be accompanied by a plan for the marketing and promotion of the issue. Previously, there was no such requirement.

Case Updates

Defamation

***Reynolds* privilege: a judicial landmark**

The English House of Lords in *Jameel and Others v. Wall Street Journal Europe Sprl* [2006] UKHL 44 has reaffirmed the defence of publication in the public interest, to a defamation action in the context of media publications, or what has become known as "*Reynolds* privilege", named after the earlier House of Lords decision in *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127.

In a nutshell, the defence is available where the publication is on a matter of public interest and is the product of responsible journalism. The creation of the defence is a judicial landmark which promotes free and courageous reporting.

An action for defamation serves to vindicate the reputation of a claimant which has been injured by false aspersions made against the claimant. The law of defamation attempts to strike a balance between the protection of reputation and freedom of expression. Traditionally, in English common law, the law has been weighted in favour of the claimant in defamation suits. For instance the law presumes the statement complained of to be false, and places the burden on the defendant to prove that it is true.

In the past, the common law has recognized that in certain circumstances, the public interest in the protection of a person's reputation must yield to a greater public interest in certain circumstances where public interest demands the freedom of expression or communication of the statement. Thus an absolute privilege or unconditional defence applies to statements made in parliamentary or judicial proceedings. More usually the privilege or defence is qualified in that it can be defeated by proof that the defendant was actuated by malice, i.e. acting with an ulterior motive, or knowing the statement to be false, or with reckless indifference as to its truth.

The classic situations in which qualified privilege arise are where the person who makes the statement has a legal, social or moral duty to make it, and the person who receives the statement has a corresponding interest or duty to receive it. Reciprocity of duty and interest is required. Common instances of these are employment references and information given to the police or authorities about suspected crimes. The requirement for reciprocity of duty and interest confines the defence to situations where the maker and recipient are in a special position in relation to each other, and thereby extends it only to publication to a person or a limited audience.

Prior to the *Reynolds* case, there was some limited recognition that publication to a wider public audience or the world at large may be privileged where the public interest requires it. As an instance, fair and accurate reports of parliamentary and judicial proceedings have long been recognized as protected by qualified privilege. Other than such reports of parliamentary and judicial proceedings, the steps taken towards widening of qualified privilege to broader publication have been cautious and tentative.

However, in *Reynolds*, the House of Lords took a more decisive step towards the broadening of the privilege and its application to publications to the world at large on a matter of public interest and importance, provided the publication is the result of responsible journalism, which imports that reasonable steps have been taken to verify the facts.

The decision lays the rationale for the broadening of the privilege squarely on the value to a democratic society of free and informed discourse on matters of public interest and importance. What is of public interest is to be distinguished from what is of interest to the public. There is no protection for items that are merely of general interest or are sensational in nature.

The *Reynolds* decision is a significant step in favour of freedom of expression on a matter of public interest, and is thus a seminal and ground breaking decision. The case itself concerned a newspaper report, but although what was at immediate stake was freedom of investigative journalism and publication by media, it appears that the principles enunciated are broader in nature. The intention in *Reynolds* was of liberalization in favour of freedom of the press, and the decision reflected similar developments in the United States and some other common law jurisdictions. The House of Lords did not find it necessary to fit the decision within the strict confines of the duty-interest reciprocity test of traditional qualified privilege.

Qualified privilege is itself premised on broader considerations of public interest, and it is that public interest on which justification is found for broadening the privilege. Nevertheless, on a publication of public interest, there may be found a duty on the newspaper to publish it and an interest on the part of the public to receive it.

Which brings us to *Jameel and Others v. Wall Street Journal Europe Sprl*. The case concerned a report in the newspaper in the wake of the September 11 2001 destruction of the World Trade Centre in New York. It was established that the majority of the hijackers came from Saudi Arabia and strongly suspected that sources in the same country had financed them. The report centered on joint U.S. and Saudi efforts to stem the funding of terrorists, and reported that the Saudi government at the request of the U.S. was monitoring the bank accounts of some prominent Saudi individuals and companies that wittingly or unwittingly have been used to finance terrorism, and named some of the parties, including the plaintiff who sued the newspaper.

The trial court and the Court of Appeal found against the newspaper, on the ground that it had not acted reasonably or responsibly in not delaying the publication of the plaintiff's name to enable him to make a comment. The newspaper had made attempts to contact him the day before publication but he was unavailable at the time, and proceeded with publication even though asked to postpone it.

On appeal, the House of Lords endorsed and reaffirmed the *Reynolds* privilege and held that clearly the report was in the public interest. The defence had been rejected on too narrow a ground in the courts below and this subverted the liberalizing intention of *Reynolds*. The Wall Street Journal was a serious newspaper and the report was unsensational in tone, in other words it was a case of neutral investigative journalism. Baroness Hale summed up by saying "We need more such serious journalism in this country and our defamation law should encourage rather than discourage it".

Banking

Whether payments into overdraft facility to be taken as reducing facility limit

In *OCBC Bank (Malaysia) Berhad v Au Kee Sian & Anor* [2006] 5 AMR 742, the issue that arose for determination was whether payments made by the borrower towards his overdraft facility should be considered as having reduced the overdraft limit, if the payments were not specifically stated to be for the purpose of reducing the overdraft limit.

The bank had granted the borrower loan facilities, including an overdraft facility of RM380,000, secured by a charge on a third party chargor's land.

By a letter on April 18 1995, the borrower informed the bank that the company at its general meeting had resolved to reduce the facility by the following sums by the respective dates: RM50,000 by December 31 1995; a further RM100,000 by December 31 1996; a further RM100,000 by December 31 1997, and the facility to be fully repaid by January 31 1998. The borrower subsequently made two payments of RM50,000 each, accompanied by letters stating that the payments were to reduce the overdraft limit from RM380,000 to RM330,000, and then to RM280,000. Subsequently the borrower made further payments (subsequent further payments) but not accompanied by a letter evincing intention to further reduce the overdraft limit. The bank continued to allow the borrower to draw on the account, with the overdraft balance standing at RM198,629.96 as at September 30 1998.

The borrower defaulted on the loan facilities and the bank instituted action to realise the land. The chargor resisted the realisation contending in effect that the subsequent further payments should also have been taken to have reduced the overdraft limit further, and that the bank should not have permitted further drawings on the account. The High Court dismissed the bank's application, agreeing with the chargor that there existed a cause to contrary against the grant of an order for sale.

On appeal to the Court of Appeal, the bank argued that it could not use a payment to reduce the overdraft limit unless it was made specifically for that purpose, as was the situation with the first two payments of RM50,000 each. The subsequent further payments were not made specifically for the purpose of reducing the overdraft limit. The borrower had reduced the overdraft limit to RM280,000 only. Conversely, if the bank did not permit the borrower to draw on the account further, it would have been in breach of contract. Agreeing with the bank, the Court allowed its appeal.

Garnishee order: claim for dishonour of cheques

If a bank is served with a "limited" garnishee order against its customer's account, i.e. where the amount stated to be attached is only part of or less than the total credit balance in the account, the bank may freeze the account only up to the limit in the garnishee order, and no more. This is the effect of the decision of the High Court in *Top A Plastics Sdn. Bhd. & Ors v. Bumiputra Commerce Bank Bhd.* [2006] 5 MLJ 620.

A garnishee order is where a judgment creditor attaches a debt owed by a third party to the judgment debtor, in order to satisfy the judgment debt obtained by the creditor against the debtor. In this case, a judgment creditor had attached by a garnishee order, the balance in the judgment debtor's current and fixed deposit accounts kept at the bank. As a result the bank froze the accounts totalling RM655,088.66. A further sum of RM98,888.06 paid into the current account after the garnishee order was served, was also frozen. Fourteen cheques amounting to RM24,074 drawn by the debtor on the current account were dishonoured by the bank. The debtor sued the bank in contract and for defamation, for wrongful dishonour of the cheques.

The garnishee order was not an "unlimited" garnishee order (i.e. one that binds the whole debt owed by the bank to the customer), but a "limited" garnishee order (i.e. one that binds the debt up to a certain specified sum only). The garnishee was expressed to attach only the judgment debt sum (RM8,800 with further interest), and costs, which could be ascertained. However the bank froze the entire accounts the total sum of which far exceeded the judgment debt amount attached by the order.

The court held that as the garnishee order was only a limited one, the bank was in breach of its duties as banker, in freezing the whole accounts. The bank should have transferred from the accounts to a suspense account, a sum sufficient to satisfy the garnishee order. The balance should have been left at the customer's disposal. The customer should be notified of this. Furthermore, the bank was wrongful in freezing the sum of RM98,888.06 paid in after the garnishee order was served, as a garnishee order only binds debts in existence at the date of service of the order. The court awarded the customer special damages of RM1,495,318.79, general damages of RM1 million and exemplary damages of RM500,000.

Labour

Doctrine of superior orders

An employee's most fundamental duty is that of obedience to the employer's lawful and reasonable orders. This is the doctrine of superior orders which was applied by the Federal Court in *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 5 MLJ 113.

In this case, the company entered into two agreements to sell three properties to a purchaser. The appellant, the general manager of the company, executed the agreements on its behalf. In both the agreements, a 10% deposit was intended to be paid up front with the balance to be paid subsequently. In the agreements signed by the appellant, the deposits under both agreement were acknowledged as having been received, even though the Appellant was aware that this was not true.

The evidence accepted by the Industrial Court was that before the appellant signed the agreements, he enquired of the executive director of the company whether the deposits had been paid, and the latter assured him that he would collect all the moneys due. Six months later, vide two deeds of assignments, the purchaser assigned its rights under the agreements to two financial institutions by way of security for loans. The consent of the company to the assignment was obtained through the appellant's endorsements to the assignments, in which he also confirmed that the purchase price for the three units had been paid in full, but this was untrue.

The evidence accepted by the Industrial Court was that the appellant was not aware at the time that he signed the endorsements of consent, that the balance of the purchase price had not been paid. Prior to signing he had enquired whether the balance purchase price had been paid and was assured by the executive director that everything was in order and it was proper for him to sign the endorsements. The endorsements were signed on the instructions of the executive director.

The appellant was subsequently brought by the company before a domestic inquiry on charges of gross negligence and misconduct based on his misrepresentation in the endorsements that the purchase price had been fully paid, when in fact it had not. The appellant admitted the acts but contended that he was merely carrying out the lawful orders of his superior, the executive director. The appellant was found guilty and dismissed from the company's employment.

In the Industrial Court, the court ruled in the appellant's favour and held his dismissal to be without just cause and excuse. The award was quashed by the High Court, the decision of which was affirmed by the Court of Appeal.

On further appeal to the Federal Court, the Federal Court noted that the charges against the appellant related only to his endorsements of consent to the assignments, and held that the High Court and Court of Appeal erred in finding that the appellant knew that his representation in the endorsements of consent that the purchase price had been fully paid was false, and in disregarding the Industrial Court's finding that the appellant was innocent of wrong doing and had merely acted on the representations of his superior.

The Federal Court also applied the doctrine of superior orders. The general rule governing the doctrine of superior orders is nothing more than the duty of obedience that is expected of an employee. The most fundamental implied duty of an employee is to obey his employer's orders. The duty is however confined to all the lawful and reasonable orders. The concept of an order being manifestly wrong has no part in the doctrine of superior orders. An employee is not entitled to disobey the orders of his superior on the ground that the order is manifestly wrong. This exception however is applicable in military or criminal law.

The duty of obedience is subject to two exceptions, firstly that the employer may not order his employee to do something illegal and secondly, an employer may not order his employee to do something dangerous. In the case of doubt as to legality of the order, the proper course is to obey the order first and to challenge the legality in separate proceedings.

Intellectual Property

Industrial designs

In *CKE Marketing Sdn Bhd v Virtual Century Sdn Bhd & Anor* ([2006] 5 CLJ 30), the applicant applied to revoke the 1st respondent's industrial design registration in respect of glass door display chiller/freezer on the basis that the design was not novel at the date of application (i.e. August 12 1999) because such products bearing a similar design had been sold in Malaysia prior to August 12 1999.

The High Court dismissed the application on the ground that the 1st respondent's registered design was novel as at August 12 1999 because its features were materially and visually different from the purported prior art of traditional refrigeration apparatus that existed prior to the said date.

In coming to its decision, the High Court held that in determining whether a design was novel, regard should be had to the nature of the article, extent of the prior art and the number of previous designs in the field in question; and further, the totality of the design features taken as a whole and the overall appearance of the common articles are a paramount consideration.

Further, the High Court also held that where a proprietor claimed that the novelty of its design resided in the shape and configuration of the design, the novelty was being claimed for the design as a whole. Thus, in determining whether the design was novel, it was wrong to divide the design into various parts and to compare them individually with a purported prior art.

It is perhaps interesting to note that the High Court here proceeded to adjudicate the revocation application under section 24 of the Industrial Designs Act 1996, when in an earlier decision of the High Court (with a different presiding judge) in *Arensi-Marley (M) Sdn Bhd v Middy Industries Sdn Bhd* [2004] 4 MLJ 46 it was held that such application should be made under section 27 of the Industrial Designs Act 1996 because section 24 was limited to making, expunging or varying an `entry' in the Register as opposed to section 27 which was concerned with revocation of the registration of a design as a whole. It would appear that the issue of whether section 24 or section 27 should be relied on was not raised in *CKE Marketing Sdn Bhd* and the case of *Arensi-Marley* was not brought to the Court's attention.

Patents

In *Patrick MG Mirandah v Ketua Pengarah Perbadanan Harta Intelek Malaysia* ([2006] 3 CLJ 79), the plaintiff, a registered patent agent, requested from the defendant, the Malaysian Intellectual Property Office (MyIPO), to examine the file of a granted patent and to obtain certified extracts therefrom to enable him to render an opinion to his client on the risks of infringing the said patent. The defendant rejected the request on the basis that some of the documents in the file (i.e. the specification as originally filed, correspondence between the defendant and the patent agent for the patent concerned) were confidential documents which could not be given to 3rd parties without the permission of the patent owner. As a result, the plaintiff filed an application in the High Court seeking a declaration that he be allowed to inspect the file and obtain certified extracts therefrom.

The High Court allowed the application on the ground that under section 33 and section 34(1) of the Patents Act 1983, it is clear that any person may inspect the file relating to a patent, including the file relating to any patent application, after the grant of a patent; and to obtain certified extracts therefrom on payment of the prescribed fee. Further, the High Court was also of the view that the Official Secrets Act 1972 was not applicable as the documents concerned were not classified as "official secrets" under the 1972 Act.

How Secure is Security over Land?

Abridged version of paper presented by Yoong Sin Min at the Asia Business Forum Conference on Land Law, 10th and 11th July 2006, Kuala Lumpur

Effect of liquidation and bankruptcy on land security

A lender, when asked to give a loan, always asks himself: "Can I get my money back?" Next to cash, public quoted blue-chip shares or iron-clad financial guarantees, land is considered as one of the safest form of security to take for a loan. Needless to say, for land to function as good security, it has to have some value. Thus when a borrower defaults on a loan, a creditor who obtained such land security would immediately expect to be able to realise such security without hindrance.

In the context of land to which title has been issued, the commonly held forms of land security are a charge and a lien-holder's caveat. If a charge has been taken as security, the method of realising such security is to proceed to obtain an order for sale, from the Court (if Registry title), or the Land Office (if Land Office title). Thereafter, the Court or Land Office will conduct a public auction to sell the land. For a lien-holder's caveat, the procedure is the same as for realisation of a charge except that the creditor has to first obtain Judgment against the borrower before the creditor can apply for the order for sale.

Liquidation of the borrower

For a creditor, time is usually of the essence to try to realise land security, for obvious reasons. However, if a borrower company goes into liquidation, complications may set in. Where a company has been ordered by the Court to be wound up, the company effectively ceases all business operations and the law provides that its affairs will have to be handled by the Official Receiver (OR) or by a liquidator appointed by the Court. The assets of the company are vested in the OR or the liquidator and the company itself (through its board of directors) cannot deal with such assets any more. The rationale is that when a company is compulsorily wound up, the assets of the company have to be preserved for the benefit of the company's creditors and not be dissipated by the directors or the shareholders. The OR/liquidator (liquidator) can then look to see what of the company's assets are capable of being distributed to the creditors of the company and to what extent.

Prima facie, a secured creditor should not have to give up his security in the face of liquidation. However, he would usually have to consider these three matters:-

(a) is the security valid against the Liquidator?

(b) how is the security to be realised or redeemed?

(c) what if the security value is more than the debt itself?

Validity of Security

If the chargor is a company, there is a need to ensure the charge is registered with the Companies Commission of Malaysia (CCM) within 30 days of its creation. Failure to do so would render such charge void against the Liquidator and any creditor of the company. The liquidator can then take steps to have the charge declared invalid. Thus, the creditor, upon discovery of the omission to register the charge with the CCM, has to apply to Court for an extension of time to register the charge with CCM. Such Court application would usually fail if there is a winding up, and where the liquidator invokes section 108(1) of the Companies Act (the Act) to oppose the same.

Realisation of Security

If the charge or lien-holder's caveat is over Land Registry title, the creditor needs to apply to the High Court, by way of an originating summons, for an order for sale. However, if there is a winding up order already made against the chargor, the creditor would require to first file an application to Court to obtain leave to:-

(a) allow the creditor to proceed with such originating summons; and

(b) to proceed with action against the borrower to obtain judgment. This is particularly if there is a lien-holder's caveat, as judgment is required before an order for sale is given.

This is due to the provisions of section 226(3) of the Act which states:-

> "When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except -
>
> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes."

This delays the process of realising the land security and whilst usually the Court would grant leave, should the liquidator discover defects in the security, he may oppose the leave application strenuously and such leave may very well not be granted by the Court. Usually, for Land Office

applications for an order for sale, prior leave of Court is not required, as such application is usually not considered "an action or proceeding" within the context of section 226(3) of the Act, as this phrase is associated with Court actions or proceedings.

Realisation through Receiver & Manager

Sometimes, a creditor may have a debenture charge over the assets of a borrower company, as well as a land charge. The courts have recognised that a debenture charge over assets of a company can create a charge over land owned by the company, if it is so expressed. It follows that a Receiver and Manager (R&M), who is appointed and has been given a Power of Attorney under the debenture to act for the company, does have the power to sell charged land, as agent of the company. Such agency and power to sell land by the R&M terminates if the borrower is wound up but not otherwise (*Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805, *Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd* [2003] 2 MLJ 193).

Thus, if the chargor is wound up, the chargee cannot utilise the services of the R&M to sell the land but would then have to realise his land charge either through the National Land Code (NLC) provisions or, if the liquidator is amenable, through the liquidator selling the land by private treaty and redeeming the charge from the chargee.

Redemption when winding up Petition has been filed

If the chargor company is selling the charged land after a winding up petition has been presented and the creditor is agreeable to allow redemption, a prior order should be obtained from the court (usually from the Court hearing the winding up proceedings) to validate:-

(a) the proposed sale of the land;

(b) the payment of the redemption sum to the creditor;

(c) the delivery of the title deed to the purchaser or his financier.

This is due to the provisions of section 223 which state:-

> " Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company after the commencement of the winding up by the Court shall unless the Court otherwise orders be void."

Security value exceeds debt

For a Liquidator to process the debts of the company, he would require its creditors to file a Proof of Debt (POD). Such POD is required to state:-

(a) the amount due to the creditor as at the date of the winding up order;

(b) whether security has been given to the creditor by the company and its estimated market value; and

(c) whether the creditor is surrendering the security.

If the creditor states he does not intend to surrender the security, the liquidator may admit, as the debt provable, only the balance amount, i.e. the debt less the estimated security value. The dilemma a creditor has is if the debt as at the winding up date is less than the value of the security. In such instance, filing a POD may lock the creditor into only being able to recover the sum as at the winding up date, from realisation of the security, with the liquidator demanding the surplus to be paid to him. In these instances, a creditor may wish to consider standing outside the liquidation process by not filing a POD and proceeding to realise the security to recover his full debt. If a creditor chooses to stand outside of the liquidation process, he cannot vote at any creditors' meeting nor is he entitled to any dividend declared by the liquidator as payable.

Bankruptcy

Many of the concerns caused by the liquidation of a company in respect of land security do not apply to bankruptcies, as the bankruptcy laws are less stringent. The power of the secured creditor to realise or deal with his security is in fact not affected by a receiving order made against an individual debtor (see section 8(2), Bankruptcy Act). There is therefore no need to make a prior application to Court for leave to institute any action Court for realisation of the charged land of a bankrupt, unlike where the chargor is an insolvent company.

Creditors need to consider, the relatively new section 8(2A), Bankruptcy Act, which reads:-

> " Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realise his security within six months from the date of the receiving order."

This provision is especially important to a creditor if he is over-secured. He will thus stand to forego all subsequent interest accrued if he does not realise the security within 6 months of the receiving order. In such instance, a creditor may wish to seriously consider standing aside from the bankruptcy proceedings, to recover the full value of his debt from realisation of the security.

Schemes of Arrangements

The infamous section 176 was a boon and a bane to borrowers and creditors at the height of the Asian financial crisis. Due to constant misinterpretation (some would say misuse) of the provisions, it was amended on 1.11.1998 to ensure its provisions operated in a manner which would assist both debtor and creditor, instead of merely the debtor, as had been the past experience.

Section 176 deals with any compromise or arrangement proposed between a company and its creditors and/or members or any class of them. In the context of a distressed company, section 176 is usually resorted to by the company to compromise its debts with its multiple creditors. This would usually entail the following:-

(a) the company would prepare a proposed scheme of arrangement ("Scheme") which the company would propose to its creditors;

(b) the creditors and members of the company would consider the Scheme and a creditors' meeting as well as members' meeting would be convened for the relevant parties to vote on the Scheme;

(c) if the requisite statutory majority of votes for the Scheme is obtained, the company applies to Court for court sanction of the Scheme;

(d) once the court sanctions the Scheme, it has to be lodged with the CCM;

(e) upon such lodgment, the Scheme is binding on all creditors and members. The original debts of the creditors shall be replaced by the repayment method as stated in the Scheme;

(f) Sometimes, to restrain its creditors from suing the company or realising its security, pending obtaining the creditors' approvals for the Scheme, the company may apply for and obtain a Restraining Order (RO) from the court.

A creditor holding land security of the company may be affected if the company proceeds to rely on section 176, as:-

(a) if a RO is obtained, it usually restrains all creditors from taking any action against the company for the duration of RO or any extension thereof. This would usually include any realisation of the company's charged lands;

(b) the Scheme may affect how much a creditor receives despite the creditor being a fully secured creditor.

No full recovery?

A Scheme needs to be passed by a majority in number of creditors holding at least three quarters of the debts. A secured creditor has to be vigilant as its security may be watered down in the following manner:-

(a) categorisation or class of creditors

- The creditor must ensure he is in the correct class of creditors.
- The debtor company may be one of a group of related companies applying for section 176 protection. They may group the secured creditors of all the applicant companies in one class of creditors.
- Such group may comprise fully and partially secured creditors.
- If the Scheme is attractive to the partially secured creditors but not to the fully secured creditors, e.g. on the basis that all the security be sold and the creditors in this group share the proceeds of sale rateably, the fully secured creditors would usually be out-voted.

- It is therefore important for a fully secured creditor of a company to be classified together with other fully secured creditors of that company only. The Court can set aside a Scheme if found to involve wrong classification of creditors.

(b) no full recovery of security value

- The Scheme may not give full returns to the fully secured creditor by under-valuing the land value.
- The Scheme may propose the return of only a percentage of the value of the security land.

(c) long repayment period

- The period for repayment may be stretched for such a long period that will prejudice a fully secured creditor whose security can be realised easily.

(d) exchange land security for IOUs

- A secured creditor's rights under the approved Scheme may involve the secured creditors giving up his security in exchange for bonds or loan stocks issued by a third party.

A creditor can oppose the Scheme in the following manner:-

(a) by applying to set aside the RO;

(b) by voting against the Scheme at the creditors' meeting;

(c) by opposing the application to Court for final Court approval for the Scheme.

The Court will set aside the RO or not approve the Scheme if it is of the view it is not bona fide and is defective, it is doomed to fail or does not safeguard the interests of the creditors. With potential pitfalls in a Scheme which more often than not would dilute a secured creditor's right, a secured creditor must scrutinise the Scheme and ensure his right to the security and that the full value of the security is preserved. Once a Scheme has the requisite statutory majority for the Scheme and is approved by the Court, and once it is lodged with the CCM, it will bind all creditors, including the dissenting, minority creditors.

Partner in Tax Department Returns with Postgraduate Degree with Tax Specialisation

The firm's partner in its Taxation Law department, Sudharsanan Thillainathan, has returned after a study sabbatical to undertake an LL.M (Corporate and Commercial Law) degree at the London School of Economics, specialising in tax law and aspects of finance law. His dissertation for the degree was entitled "*Tax Avoidance after Barclays Mercantile Business Finance Ltd v Mawson: The Quest for Purpose!*"

The dissertation analysed the decision of the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 A.C.684, currently the leading case in the United Kingdom on tax avoidance and sought to address the following issues:

(a) the implications of *Barclays* for tax avoidance jurisprudence;
(b) how the approach to tax avoidance in *Barclays* compares with prior judicial approaches to tax avoidance; and
(c) how Parliament can best give effect to and not subvert the decision in *Barclays*.

It is a hugely important decision and it is likely that it will have a bearing on tax avoidance jurisprudence throughout the Commonwealth.

United Kingdom and Eire Malaysian Law Students' Union Law Convention

For the past few years, the firm has participated in the Students' Union's annual law conventions held in Malaysia. The Union's membership is drawn from Malaysian students at law faculties in the United Kingdom. The convention is intended to provide a bridge between the student of law and the legal profession, and provides opportunity for law firms to showcase career opportunities, and present seminars on legal practice. The convention for 2006 was held on 26 August 2006 at the University of Malaya. Several partners of the firm spoke on various topics of interest.

The Firm Admits New Partners

The firm is pleased to announce the elevation of four new partners for 2007. Of the four, two are home grown, having undergone their pupillage with the firm and served as legal assistants (lawyers) prior to admission to partnership, and the other two joined the firm as legal assistants and have practised in the firm for a few years.

Ong Boo Seng was born in Batu Gajah, Perak and is a graduate in Bachelor of Commerce with Bachelor of Laws from the University of New South Wales Australia. He was called to the Bar in 1998. His specialisation is Intellectual Property. He is a committee member of the Malaysian Intellectual Property Association, and a registered trade mark and registered industrial designs agent.

Kevin Prakash hails from Kuala Lumpur, and obtained a Bachelor's degree in law from the University of London and Master's degree in law from the University of Malaya. He was admitted to practice in 1998. His areas of practice are general civil litigation, building and construction, and shipping. He is an associate member of the Malaysian Institute of Arbitration.

Alvin Tang is from Kuala Lumpur, and was called to the English bar at Lincoln's Inn in 1998, and the Malaysian bar in 1999, after having obtained his LL.B from University of Leicester United Kingdom. His main practice areas are corporate disputes and general civil litigation. He is an associate member of the Malaysian Institute of Arbitration.

Tan Gian Chung originates from Kuantan Pahang, and holds a bachelor's degree in law from the University of London. He was called to the Bar in 1999, and specialises in banking and finance litigation. Previously he was one of the Pahang Bar representatives to the National Young Lawyers Committee.

Extracts from the 2006 and 2007 Editions of the Asia Pacific Legal 500

The following are extracts from the 2006 and 2007 editions of The Asia Pacific Legal 500, published by Legalease, regarding some of the legal practice teams of the firm. Legalease is a leading publisher of information on international legal developments, and reference resources on law firms in over 80 countries, including the Legal 500 series. Its website is the largest legal website outside of North America.

Dispute Resolution

" For many, Cyrus Das at Shook Lin & Bok is the leading litigator and counsel in Malaysia. He is a fine figurehead for the firm and subsequently an army of younger partners are making names for themselves in their own right. Porres Royan is another fine contentious practitioner. Mohanadass Kanagasabai is noted for his international arbitration expertise, particularly in relation to construction and engineering, including LCIA cases."

Banking and Finance

" Shook Lin & Bok has increased its presence in Islamic finance with Islamic bond issuances of up to RM1bn in value. The firm has advised the Central Bank of Malaysia Law Review Committee on Islamic law. The firm works with all the major banks. It worked on an Islamic bond transaction that involved a three-party debt structure, the first of its kind in Malaysia. The team also derives considerable acumen from the litigation group which has dealt with numerous banking disputes and gives additional insight into transaction documentation and potential problematic issues. The team has also experienced a surge in structured finance and works alongside Slaughter and May, Linklaters, Clifford Chance and several Australian firms on banking and finance matters. Jal Othman and Lai Wing Yong are the most prominent members of the team."

Corporate / M&A

" Shook Lin & Bok has long serviced a prestigious client base of private and public listed companies. In partners such as Patricia David and Wing Yong Lai it retains a stellar reputation and is frequently to be seen in high-value M&A and corporate finance transactions. International investment banks are regular clients of the firm."

Intellectual Property

" Michael Soo heads Shook Lin & Bok's highly esteemed intellectual property practice. The firm is regularly advising high-profile domestic and international clients, spanning software infringement, movie piracy and counterfeit goods."

Shipping

" Shook Lin & Bok boasts leading dispute resolution teams, which have been involved in a number of shipping related issues."

Real Estate and Construction

" Shook Lin & Bok has in Mohanadass Kanagasabai one of its most admired partners, boasting solid experience in construction disputes. He has also been involved in several construction arbitrations throughout Malaysia."

SHOOK LIN & BOK

EST 1918
KUALA LUMPUR

Advocates & Solicitors | Registered Patent Agents | Registered Trade Marks Agents | Registered Industrial Design Agents | Notary Public

PARTNERS

Too Hing Yeap Ext 201
hytoo@shooklin.com.my
Dato' Dr Cyrus V Das Ext 217
cydas@shooklin.com.my
Porres P Royan Ext 212
pproyan@shooklin.com.my
Lai Wing Yong Ext 213
wylai@shooklin.com.my
Patricia David Saini Ext 288
patdavid@shooklin.com.my
Nagarajah Muttiah Ext 216
naga@shooklin.com.my
Michael CM Soo Ext 370
michaelsoo@shooklin.com.my
Romesh Abraham Ext 241
romesh@shooklin.com.my
Jalalullail Othman Ext 204
jal@shooklin.com.my
Yoong Sin Min Ext 242
smyoong@shooklin.com.my
Yuen Kit Lee Ext 246
yuenkitlee@shooklin.com.my
Ivan Ho Yue Chan Ext 225
ivanycho@shooklin.com.my
Khong Mei Lin Ext 221
meilinkhong@shooklin.com.my
Lee Wooi Mien Dahlia Ext 244
dahlialee@shooklin.com.my
Mohanadass Kanagasabai Ext 234
mohan@shooklin.com.my
Steven Thiruneelakandan Ext 236
stevent@shooklin.com.my
Adrian Hii Muo Teck Ext 255
adrianhii@shooklin.com.my
Goh Siu Lin Ext 206
siulin@shooklin.com.my
Hoh Kiat Ching Ext 208
kchoh@shooklin.com.my
Lam Ko Luen Ext 243
koluen@shooklin.com.my
Chay Ai Lin Ext 228
ailinchay@shooklin.com.my
Sudharsanan Thillainathan Ext 227
sudhar@shooklin.com.my
Chan Kok Keong Ext 237
kkchan@shooklin.com.my
Tharmy Ramalingam Ext 233
tharmy@shooklin.com.my
Ong Boo Seng Ext 365
bseng@shooklin.com.my
Kevin Prakash Ext 308
kevinprakash@shookin.com.my
Alvin Tang Wye Keet Ext 250
alvintang@shooklin.com.my
Tan Gian Chung Ext 367
gctan@shooklin.com.my

CONSULTANT

Michael KL Wong Ext 215

PRACTICE AREAS & PARTNERS

CORPORATE
Lai Wing Yong
Patricia David Saini
Jalalullail Othman
Yuen Kit Lee
Ivan Ho Yue Chan
Khong Mei Lin
Hoh Kiat Ching
Chay Ai Lin

BANKING & FINANCE
Lai Wing Yong
Patricia David Saini
Jalalullail Othman
Yuen Kit Lee
Khong Mei Lin
Hoh Kiat Ching
Chay Ai Lin

PROPERTY & CONVEYANCING
Lai Wing Yong
Patricia David Saini
Jalalullail Othman
Yuen Kit Lee
Khong Mei Lin
Hoh Kiat Ching
Chay Ai Lin

INSURANCE, SHIPPING & AVIATION
Porres P Royan
Nagarajah Muttiah
Romesh Abraham
Steven Thiruneelakandan
Sudharsanan Thillainathan
Alvin Tang Wye Keet

BANKING & FINANCE LITIGATION
Too Hing Yeap
Porres P Royan
Yoong Sin Min
Lee Wooi Mien Dahlia
Adrian Hii Muo Teck
Goh Siu Lin
Chan Kok Keong
Tharmy Ramalingam
Tan Gian Chung

CONSTRUCTION, ENGINEERING & ARBITRATION
Dato' Dr Cyrus V Das
Nagarajah Muttiah
Mohanadass Kanagasabai
Lam Ko Luen
Kevin Prakash

GENERAL & CIVIL LITIGATION
Dato' Dr Cyrus V Das
Porres P Royan
Nagarajah Muttiah
Romesh Abraham
Mohanadass Kanagasabai
Steven Thiruneelakandan
Adrian Hii Muo Teck
Goh Siu Lin
Lam Ko Luen
Sudharsanan Thillainathan
Tharmy Ramalingam
Kevin Prakash
Alvin Tang Wye Keet

INTELLECTUAL PROPERTY, INFORMATION TECHNOLOGY & LICENSING
Michael CM Soo
Porres P Royan
Ivan Ho Yue Chan
Ong Boo Seng

PROBATE & ADMINISTRATION
Dato' Dr Cyrus V Das
Goh Siu Lin

EMPLOYMENT & LABOUR
Dato' Dr Cyrus V Das
Romesh Abraham
Steven Thiruneelakandan

TAX ADVISORY & COMPLIANCE
Dato' Dr Cyrus V Das
Sudharsanan Thillainathan

COMPANY SECRETARIAL SERVICES
Too Hing Yeap
Chay Ai Lin

Shook Lin & Bok
20th Floor, AmBank Group Building
55, Jalan Raja Chulan
50200 Kuala Lumpur
Malaysia

Tel: (603) 20311788
Fax: (603) 20311775/8/9

website: www.shooklin.com.my
email: general@shooklin.com.my