SHOOK LIN & BOK EST 1918 KUALA LUMPUR

LEGAL UPDATE

Vol 3 No 2 PP13906/8/2007

Issue No 2 2007

Shook Lin & Bok sponsors 2007 In-house Counsel Summit in Hong Kong

The firm was once again a co-sponsor of the 2007 Asia Law & Practice, Asia Pacific In-house Counsel Summit in Hong Kong on 14th and 15th March 2007. The full report follows inside.

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KIM & CHANG


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SHOOK LIN & BOK


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Shook Lin & Bok sponsors 2007 In-house Counsel Summit in Hong Kong

As the economies in the Asia Pacific region continue to register sustained economic growth, investment in the region and the challenges of multi jurisdictional and cross border business in the region have assumed increasing importance for businesses worldwide.

The annual Asia Law & Practice, Asia Pacific In-house Counsel Summit provides an opportunity for discourse on, and sharing of, the experience of doing business in the region.

The firm is honoured to have been invited to be a co-sponsor of the conference for the second year running.

This year's topics ranged over the following topics: The M&A Boom: Consolidation as the Key to Competitiveness, Labour and Employment Law, Corporate Governance, Dispute Resolution, Private Equity Investment: China, India or Elsewhere, Intellectual Property, Antitrust Law, Islamic Finance and Capital Markets.

This firm's Michael Soo, Jal Othman and Ivan Ho delivered papers in the Intellectual Property, Islamic Financing and Regional M&A Sessions respectively, and the firm hosted the workshop on Malaysia.

Here are excerpts from the Asia Law publication for April 2007 on the conference.

> " Asia Law & Practice hosted its largest annual conference on March 14-15 2007, the Asia-Pacific In-house Counsel Summit, at the Intercontinental Hotel in Hong Kong. A record number of delegates registered for the conference, which brought together leading in-house practitioners from across Asia, Europe, the United States and the Middle East.
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> Participants attended a variety of sessions addressing some of the main regulatory issues for those with business activities or investments in Asia. Individual country workshops provided additional insights into the leading concerns for commercial enterprises in specific jurisdictions.
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> Now in its fourth year, the summit once again provided a forum for discussion and an excellent networking opportunity for those charged with advising businesses on how to complete deals across the region.

Regional M&As

A session entitled '*M&As: Consolidation as a Key to Competitiveness?*' addressed some of the issues related to cross-border and domestic mergers or acquisitions in various jurisdictions...

Ivan Ho of Shook Lin & Bok in Malaysia also emphasized the importance of due diligence, advising delegates to keep a sharp eye out for the sometimes inaccurate assumptions that are often made about companies involved in a merger or acquisition...

The rise of Islamic finance

Islamic finance has become a burgeoning area of practice in Asia as Malaysia, Indonesia and even Singapore compete to become the region's hub for Islamic transactions. The possibility of luring money from the Middle East has proved an irresistible attraction, and those nations that have seen this potential early have had a head start in developing shari'a-compliant products while financial centres like Hong Kong continue to rely on their strengths in the conventional markets...

Jal Othman of Shook Lin & Bok in Malaysia pointed out that because Islamic financing transactions must avoid trading in risk, they require a higher level of certainty, which he said makes them more equitable. And such financing should not be seen as something exclusively for Muslims. "It's for anyone who is interested in a more equitable form of financing," he said.

Persistent IP challenges

The protection of intellectual property (IP) rights remains a paramount issue in the region, as China and other manufacturing centres continue to churn out pirated goods. Counterfeiters are becoming more sophisticated and organized in their approach, while rights owners struggle to not only protect their IP assets but to maximize the returns on them...

Shook Lin & Bok's Michael Soo emphasized that local lawyers and investigators should cooperate with law enforcement and customs officials in combating counterfeiting. Moreover, he said, infringers should receive help if and when they decide to "go legit"."

Malaysian Investors Forum 2006

The firm's Partner in the Islamic Finance practice, Jal Othman, was one of the speakers at the Malaysian Investors Forum held at the Mandarin Oriental Hotel from 14th August, 2006 to 15th August, 2006. The conference was the first of its kind, being a joint collaboration by the main regulatory bodies in Malaysia including the Securities Commission (SC) , Bank Negara Malaysia, the Labuan Offshore Financial Services Authority (LOFSA) and the Companies Commission of Malaysia.

The Conference was touted as one of the world's largest Islamic Finance related event for the year, with over 1,000 individuals attending and over 30 countries being represented. There were 65 of the industry's leading practitioners in attendance over the two days.

The firm was one of only two law firms invited to present papers at the Conference. The theme of the Conference was the future direction of Islamic Finance in Malaysia. The Governor of Bank Negara, Tan Sri Dato' Sri Dr Zeti Akhtar Aziz officiated the opening of the two day Conference.

Jal Othman was one of five panellists in the session entitled "Successfully Meeting Local and International Regulatory Requirements."

The session was moderated by Dr Nik Ramlah Nik Mahmood, Senior Executive Director for Strategy and Development, SC. The session touched upon the legal and regulatory issues facing the Islamic Finance industry. The firm shared its experience in the challenges facing Islamic Finance practitioners. Amongst the issues and observations raised by the firm and presented for discussion by the panel were as follows:

- the pro-active approach adopted by the regulatory bodies as reflected in the facilitative nature of the rules, regulations and guidelines issued by these bodies;
- the unique dual banking and monetary system incorporating both the conventional finance and Islamic finance models;
- the open door policy to foreign institutions to establish and carry on Islamic finance practices in Malaysia;
- the mono jurisdictional nature of Islamic finance and how this has been a catalyst to the rapid development of the industry;
- the need to develop the human capital resources of the industry;

The firm is honoured to have been invited to such an international and high profile conference and is grateful to have been given the opportunity to advance the views and outlook of the firm in the vast developing industry of Islamic Finance. Islamic Finance is one of several primary areas of practice of the firm and the firm continues to be involved in both domestic and international forums to contribute to the development of this industry.

Amendments to Exchange Control Act

By Gazette Notification PU(B)339 dated 28th December, 2007, the date of 1st January, 2007 has been declared as the date of the coming into force of a new section 10A of the Act which was passed as law since 2005 under Act A1241/05.

Giving a guarantee, indemnity or undertaking

(1) With effect from 1st January, 2007, the prior approval of the Controller of Foreign Exchange is required for a Malaysian resident to guarantee, indemnify or to undertake or to do any act which involves, is in association with or is preparatory to the giving of a guarantee, indemnity or similar undertaking in respect of the debt, obligation or liability:

(a) of a Malaysian resident owed to a non resident, or

(b) of a non resident irrespective of whether it is owed to a Malaysian resident or owed to a non resident.

Receiving a guarantee, indemnity or undertaking

(2) With effect from 1st January, 2007, the prior approval of the Controller of Foreign Exchange is also required for a Malaysian resident to receive a guarantee, indemnity or undertaking or to do any act which involves, is in association with or is preparatory to the receiving of a guarantee, indemnity or similar undertaking from a non resident.

Renewal of a guarantee, indemnity or undertaking

(3) Any renewal of a guarantee already received or issued would also be subject to the restriction.

Pledges of security issued or registered in Malaysia or property in Malaysia

(4) The restriction is also applicable to pledges of security issued or registered in Malaysia or of any property in Malaysia.

Notwithstanding the coming into force of section 10A of the Exchange Control Act, 1953, the Balance of Payments Department at Bank Negara is still continuing with its practice of registering guarantees on-line.

It is arguable as to whether it is correct to continue with this practice and whether the mere registration constitutes approval of the Controller of Foreign Exchange for the purpose of section 10A of the Exchange Control Act, 1953. There is no general directive or regulation issued by the Controller of Foreign Exchange whereby approval is given by the Controller of Foreign Exchange under section 10A of the Exchange Control Act, 1953 subject to such securities being registered and setting out the procedures or mechanisms for on-line registration.

Pending clarification from the Controller of Foreign Exchange and any further directive from the Controller of Foreign Exchange, parties should apply to the Controller of Foreign Exchange under section 10A of the Exchange Control Act, 1953 when the securities fall within the ambit of the circumstances described above. If the Balance of Payments Department at Bank Negara proceeds to register the security after having received the application without giving any clear approval under section 10A of the Exchange Control Act, 1953, there is a case to argue that the Controller of Foreign Exchange has impliedly given his approval for the purpose of section 10A of the Exchange Control Act, 1953.

Exemption from compliance with Real Property Gains Tax Act, 1976

The Minister of Finance has by Gazette Notifcation P.U.(A)146, exempted all persons from all provisions of the Real Property Gains Tax Act ("RPGT Act") in respect of any disposal of a chargeable asset after 31st March, 2007.

In effect, this means that :

(a) any disposal of a chargeable asset on 1st April, 2007 and thereafter will not be subject to the payment of Real Property Gains Tax ("RPGT"),

(b) Sale and Purchase Agreements signed on 1st April, 2007 and thereafter need not include any provision for the retention of part of the purchase price for the payment of RPGT,

(c) Sale and Purchase Agreements signed on 1st April, 2007 and thereafter need not include any provision for the submission of Notification of Disposal (Borang CKHT 1) or Notification of Acquisition (Borang CKHT 2) under the RPGT Act and there is no further need to submit such Returns to the Inland Revenue,

(d) the exemption will apply to all persons, i.e. both individuals and companies and whether local or foreign,

(e) disposals made or Sale and Purchase Agreements signed and dated before 1st April, 2007 would still have to comply with the provisions of the RPGT Act.

Case Updates

Banking

Whether vesting order from one High Court effective throughout Malaysia

The case of *Lee Hui Jian v. Public Bank Berhad*, a decision of the High Court of Sabah and Sarawak, concerns the validity in Sabah and Sarawak of a vesting order made by the High Court of Malaya under section 50 of the Banking and Financial Institutions Act 1989 ("the BAFIA"). The order vested the assets and liabilities of Public Finance Berhad in Public Bank Berhad and was made to implement the acquisition by the Bank of its finance company's assets and liabilities under a merger exercise. The BAFIA provides for a vesting order by the High Court as a compendious route to give effect to mergers between financial institutions, thereby avoiding the cumbersome transfers and assignments of individual assets which would otherwise have been necessary. Section 50(3) of the BAFIA provides that the vesting order will be effective to vest the assets in the acquirer notwithstanding anything in law.

The defendant in the suit was the administratrix of one of the customers (deceased) of Public Finance in Sarawak. The defendant was also the guarantor of the loan. The customer's loan was acquired by the Bank. The Bank claimed against the defendant for the outstanding loan, and obtained summary judgment in the Sessions Court, Sibu, Sarawak. On appeal, the High Court in Sibu allowed the defendant's appeal and set aside the summary judgment.

The High Court's decision was premised on section 23 of the Courts of Judicature Act 1964 which provides:

"23(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:-

(a) the cause of action arose, or
(b) the defendant or one of several defendants resides or has his place of business, or
(c) the facts on which the proceedings are based exist or are alleged to have occurred, or
(d) any land ownership of which is disputed is situated,

within the *local jurisdiction* of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing, within the local jurisdiction of the other High Court."

"*Local jurisdiction*" is defined in the Act to mean, respectively, the states in Peninsular Malaysia (for High Court of Malaya) and the states of Sabah and Sarawak on Borneo island (for High Court of Sabah and Sarawak).

Section 23(1) of the Courts of Judicature Act is the touchstone for the jurisdiction of the civil courts. The test is territorial - if the dispute arises within the territorial boundaries of, or has a connection with, a particular High Court, then that High Court can claim jurisdiction over the dispute.

(The existence of the two High Courts in Malaysia is a legacy and product of its history. When Sabah and Sarawak agreed to join the states of Malaya to form Malaysia, it was agreed that they will have a separate High Court. The Federal Constitution provides for the creation of the two High Courts.)

The Judge's decision was two pronged: *firstly* that the High Court of Malaya had no jurisdiction to make the vesting order in respect of the defendant's debt as the cause of action arose in Sarawak (implying that a vesting order is required from the High Court of Sabah and Sarawak), and *secondly* that an order of the High Court of Malaya has no effect in Sabah and Sarawak. The judge thus held that the vesting order obtained in the High Court of Malaya at Kuala Lumpur was not effective to vest the debt of the defendant in the Bank.

On the first aspect of the decision, in relation to section 23(1) of the Courts of Judicature Act, the contrary viewpoint may be made that the vesting application was within the jurisdiction of the High Court of Malaya. The subject matter of the application was within the local jurisdiction of the High Court of Malaya as:

(a) the head offices of both Public Finance and Public Bank, are in Kuala Lumpur (in Peninsular Malaysia),

(b) the agreement for the business transfer and the transfer itself took place in Kuala Lumpur, even though part of the assets may be loans granted in Sarawak.

Further it may be contended that section 23(1) of the Courts of Judicature Act which relates to the jurisdiction of the court where there are disputes between parties to be adjudicated upon, is not relevant where an application is made pursuant to a federal legislation such as the BAFIA, having regard to several salient provisions therein as follows:

(a) Section 50(1) of the Act which contains the provision for an application to be made to the High Court to give effect to a merger, does not stipulate that the application has to be made to any particular High Court, or that an application has to be made to more than one High Court. In fact, only one application is contemplated under section 50(1).

(b) Section 50(3) provides that " where the order of the High Court… provides for the transfer of any property or business vested in … the transferor…then by virtue of that order, the property or business shall, on and from the transfer date, become vested in … the transferee… *notwithstanding anything in any law or in any rule of law…"*

(c) Section 50(6) which provides for the High Court to serve a copy of the vesting order on the Registrar of Titles in Peninsular Malaysia, or the Registrar of Titles in Sabah or in Sarawak, where the vesting order relates to land situated in each of the territories, respectively. The inference is that a vesting order may be made in one High Court affecting even land within the territory of another High Court.

On the second aspect of the decision, that an order of the High Court of Malaya has no effect in Sabah & Sarawak, it is noted the decision did not consider:

(a) Article 121 of the Federal Constitution which provides that any order or judgment of the High Courts will have effect throughout the Federation (the country); and

b) Section 7(2) of the Courts of Judicature Act which similarly provides that an order of a superior court will have effect throughout the Federation. Therefore an order of any High Court is effective throughout the country.

The case has enormous ramifications for the banking industry as the decision may affect the vesting of East Malaysian assets arising from mergers which had taken place from as far back as the early 1990s. Public Bank is pursuing an appeal to the Court of Appeal, which is currently pending.

Land

Fraud of agent imputed to principal

A registered interest of a person in land may be defeated on the ground of fraud of such person's agent. So held the Court of Appeal, based upon the provisions of section 340(2)(a) of the National Land Code 1965 (NLC), in *Abu Bakar Bin Ismail & Anor v. Ismail Bin Husin & Ors.*

In this case the plaintiffs, the owners of the land in question, entered into an agreement to sell three pieces of land ("the Lands") to the 1st Defendant ("the Purchaser") for RM7.5 million. The agreement was prepared by a solicitor, the 2nd Defendant ("the Lawyer") who was a partner in the 3rd Defendant firm of solicitors ("the Law Firm"). The Purchaser made two payments totalling RM200,000 to the Plaintiffs. The balance of RM7.3 million was to be paid subsequently, but in the events that transpired, was never paid. The Plaintiffs deposited the titles to the Lands with the Law Firm, together with transfer forms which were signed in blank. Having not received the balance of the purchase price, the plaintiffs made enquiries and discovered to their shock that the lands had been charged to the 4th Defendant bank ("the Bank"), to secure a loan of RM10 million in favour of the 5th Defendant company ("the Borrower"). The manager of the Borrower had absconded with the loan sums.

The plaintiffs sued the defendants to recover the lands and to set aside the charge to the bank.

The trial Judge in the High Court found, inter alia, that:

(a) the plaintiffs' signatures were forged on the charge documents creating the charge in favour of the Bank,

(b) the Purchaser, the Lawyer, and the representatives of the Borrower, were privy or parties to the fraudulent scheme,

(c) the Lawyer and the Law Firm were the solicitors and agents of the Bank in the loan transaction.

Despite finding that the Lawyer and the Law Firm were agents of the Bank, the High Court found for the Bank in respect of the Plaintiffs' claim against it, on the ground that the Lawyer's knowledge of fraud could not be imputed to the Bank. The court relied on common law authorities establishing that the general rule that knowledge of an agent is imputed to the principal, is subject to an exception in cases of fraud by the agent. Knowledge of a fraud by an agent is not imputed to the principal.

The Court of Appeal, by a majority decision, reversed the decision of the High Court and found in favour of the Plaintiffs, and set aside the Charge of the Lands to the Bank. The Court of Appeal arrived at its conclusion on account of the terms of Section 340(2)(a) of the NLC which provides:

"340(2). The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, *or any agent of the person* or body, was a party or privy."

Thus, in the context of land law in Malaysia, fraud of the agent is imputed to the principal rendering the principal's title in land defeasible due to the agent's fraud. Having found for the Plaintiffs on the basis of Section 340(2)(a), the Court did not find it necessary to decide on an alternative claim of the Plaintiffs that the Bank's Charge was defeasible, as it was obtained by a forged instrument, pursuant to Section 340(2)(b) of the NLC.

The dissenting Judge in the Court of Appeal was of the view that on the evidence, the Lawyer and the Law Firm were not the Bank's solicitors, but were the Borrower's solicitors, as the latter had paid their legal fees.

While it is an issue of fact whether solicitors in a loan transaction are solicitors of the borrower or the bank, commonly it is the latter, where there is only one set of solicitors, or where the solicitors are solicitors for both parties. Even if the borrower pays the legal fees, the borrower is usually regarded as reimbursing the bank for its legal expenses.

Applicability of Islamic personal law or civil law

In *TM Feroze Khan & 2 Ors v Meera Hussain bin TM Mohamed Mydin* [2006] 5 AMR 31, the plaintiff and defendant were the children of the deceased father (a Muslim) by his marriage to his first and second wives respectively. In 1968, while the defendant was 8 years old, the father transferred a piece of land to himself as trustee for the benefit of the defendant. The transfer was registered at the Land Registry. Simultaneously, the father executed a trust deed declaring himself to be trustee holding the property on trust for the defendant. This was also registered.

As the property was occupied by tenants, physical possession of the property was never given to the defendant, nor was the property vested in the name of the defendant during the lifetime of the father. The father passed away in 1991 and in 1992, the defendant obtained an ex-parte vesting order from the High Court vesting the property in his own name, which order was registered at the Land Registry and the property vested in the name of the defendant.

Subsequently, the plaintiff challenged the vesting in the defendant and contended that the purported gift of the property was null and void under Islamic law (which applies to persons of Muslim faith in personal aspects of their lives), as possession of the property was never given to the defendant, nor was the property vested in his name, during the lifetime of the deceased. The plaintiff contended that as the gift was void, the property formed part of the deceased's estate entitling all of the deceased's beneficiaries to their share as provided under Islamic law.

The Court of Appeal upheld the High Court's decision in favour of the defendant. The Court held that the applicability of Islamic law is subject to the civil law which is applicable to all irrespective of whether the parties are Muslims or non Muslims. In the National Land Code 1965, there is no preservation or saving provisions for Islamic law, and therefore the applicable law is the civil law on land and trusts. In this case the trust deed was registered and the intention to give the property as a gift to the defendant was clear. The gift was complete.

In any event, even under Islamic law, the gift was valid. Under Islamic law, a person may lawfully make a gift of his property during his lifetime subject to these conditions:

(a) a manifestation of the wish of the donor to give;
(b) the acceptance by the donee either impliedly or expressly; and
(c) the taking of possession of the subject matter of the gift by the donee, either actually or constructively.

Although under Islamic law, delivery of possession by the donee is an essential element to constitute a complete gift, an exception applies in cases where the gift is from a father to his minor son in which case, delivery of possession is not necessary. All that is required is a bona fide intention to give. In this case, as the property was tenanted, no physical possession was possible, but only legal possession. As the deceased had executed a transfer of the property to himself on trust for the defendant, legal possession has been given to the defendant. The deceased's bona fide intention to make the gift is clear, and there was a valid gift.

Intellectual Property

Copyright

In *ODVD Manufacturer Sdn. Bhd. V. Columbia Pictures Industries, Inc*. the Plaintiff is the copyright owner for the film "Stuart Little 2" in Malaysia. The exclusive licensee for reproducing and distributing the film in VCD format in Malaysia is Media Max Com. Sdn Bhd. The Plaintiff alleged that the Defendant infringed its copyright by reproducing the film and distributing copies of it in Malaysia without its authority.

On September 4 2002, Enforcement Officers from the Ministry of Domestic Trade and Consumer Affairs raided the Defendant's premises and seized 550 discs containing the film. The Defendant's premises were raided again on September 13 2002 and two exemplar discs were seized from the Defendant's replication lines. The two exemplar discs were examined and found to have the same characteristics and defects as the 550 discs seized earlier by the Ministry.

The Plaintiff subsequently commenced civil proceedings against the Defendant and claimed inter alia, for loss and damage to its goodwill and reputation and to its trade and business and diminution in value of its licensing activities and sought an injunction against the Defendant from further infringing the Plaintiff's copyright in the film.

In its Defence , the Defendant disputed the Plaintiff's copyright in the film and alleged that it had the necessary licence to carry out its business lawfully without clearly pleading that it had the right to reproduce and distribute the film. The Defendant also counterclaimed for defamation.

The Defendant applied to strike out the suit on the grounds that the action disclosed no reasonable cause of action, was scandalous, frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action or was otherwise an abuse of process of the Court. The Defendant's contention was that the Plaintiff's claim was obviously unsustainable since information gathered during criminal anti-piracy operations conducted by the Ministry could not be disclosed to the Plaintiff as to do so would be unlawful under the Copyright Act 1987. Therefore, the Plaintiff would have no evidence to support its claim against the Defendant.

The High Court in dismissing the application held that this is not a case where there was no reasonable cause of action as sufficient facts were disclosed in the Statement of Claim which showed that the Plaintiff's case merited consideration. The High Court also held that the mere fact the Plaintiff's evidence may be weak and that it may be unlikely to succeed at trial is not a ground to strike out the action.

On appeal, the Court of Appeal dismissed the Defendant's appeal and upheld the High Court's decision allowing copyright holders to file civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies.

Trade Marks

In *Syarikat Zamani Hj Tamin Sdn Bhd v. Yong Sze Fun* [2006] 5 MLJ 262, Tamin and another party manufactured and distributed foodstuffs, including sauces, vermicelli and syrups, bearing the TAMIN trademark. Tamin brought a passing-off action against Yong Sze Fun and another party for the use of an identical and/or confusingly similar mark in relation to syrups and cordials.

Yong claimed that they have used the trademark TAMIN since 1991 and were the first to use it in relation to syrups and cordials. They counterclaimed for passing off by the plaintiffs and slander to title and goods.

The High Court held that Yong had passed off their goods as the goods of Tamin by manufacturing and selling syrups and cordials bearing the TAMIN trademark. The court held that misrepresentation is dependent not on whether the products traded under the marks are the same, but rather on whether confusion and/or deception might arise from the defendants' subsequent use of the TAMIN trademark.

Yong also alleged that Tamin did not own the goodwill in the TAMIN trademark, claiming that the goodwill belonged to the registered proprietor of the TAMIN trademark, Sharifah bte Hj Tamin, the executive chairman of Tamin, who was not a party the action. Yong alleged that Tamin was merely the licensee. However, the court held that the registered proprietor and Tamin should be treated as one, and that Tamin should not be defeated or deprived of compensation on a technical point. The court further held that any alleged licensing agreement on the common law right to the mark was between the registered proprietor and Tamin and Yong cannot escape liability. In any event, the court held that there was clear evidence to show that Tamin had taken over the businesses of its predecessors, including all goodwill associated therewith.

Yong adduced market survey evidence to show that (i) they were the first to use the TAMIN trademark, and (ii) the mark was distinctive of Yong through use. However, the court was critical of the way in which the market survey was conducted, as the survey evidence was limited to a particular geographical area and the target respondents of the survey were Yong's customers; therefore, they were not representative of a cross-section of the public. The court ultimately placed little, if any, weight on the market survey evidence.

In dismissing Yong's counterclaim for slander to title and goods, the court held that Tamin's statement to the Ministry was true since it had shown that it was the rightful owner of the TAMIN trademark. Further, Yong failed to show any malice on Tamin's part in making the complaints.

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 a traditional refrigeration apparatus that existed prior to the said date.

In coming to its decision, the 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. It was also held that the totality of the design features taken as a whole, and the overall appearance of the common articles, are a paramount consideration.

Further, the 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 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.

Protecting Intellectual Property in Malaysia

Outline of paper presented by Michael Soo at the Asia Law and Practice, 2007 Asia Pacific In House Counsel Summit, Hong Kong, 14th and 15th March 2007

Michael was recently appointed to the Asian Patent Attorneys' Association's (APAA) Membership Growth and Development Committee. Members of the newly formed committees are de facto senior officers of APAA who advise the president on their respective areas. Michael is one of the two persons from Malaysia on the committees. He also took office as the President of the APAA for Malaysia for the term 2006 to 2009.

Michael Soo has also been appointed as Chair of the Asia Pacific Sub-Committee of the Geographical Indications Committee of the International Trademark Association (INTA), a leading trademark association since 1878.

Intellectual Property Rights (IPR)

- Trade Marks
- Goodwill and reputation of business associated with a distinctive mark, name, get-up, etc
- Copyright
- Industrial Designs
- Patent
- Layout-Designs of Integrated Circuits
- Geographical Indications
- Confidential Information & Trade Secrets

Modes of Enforcement

Civil proceedings

Remedies available are:-

- Injunction
- Damages or account of profits
- Delivery up
- Anton Piller order
- Additional damages (for copyright infringement)
- Common for a plaintiff to apply for interlocutory injunction to restrain infringing acts pending trial of action.
- In suitable cases, apply for interlocutory mandatory injunction for delivery up of infringing articles and discovery pending trial of action.
- In suitable cases, apply for Anton Piller order which authorizes plaintiff's solicitors and representatives to enter and search identified premises; and seize infringing goods and other relevant materials.
- In suitable cases, should apply for summary judgment for faster and cheaper disposal of action
- In Malaysia, section 70B(1), Trade Marks Act 1976 enables the proprietor of a mark which is entitled to protection under Article 6b of the Paris Convention or Article 16 of TRIPS as a well-known mark to bring an action to restrain by injunction the use in Malaysia in the course of trade and without his consent a trade mark which is identical with or nearly resembles the proprietor's mark, in respect of the same goods or services where the use is likely to deceive or cause confusion.

Difficulties and challenges

- Investigations and evidence gathering are time consuming and costly.
- Delay due to backlog of cases in courts.
- Interlocutory injunctive reliefs: need to act promptly; and obtain reliable and cogent evidence.
- Shortage of manpower and resources.
- Anton Piller Order : need to comply with stringent requirements and procedural safeguards.
- Risk of substantial damages being awarded against a plaintiff if interlocutory injunction or Anton Piller order is set aside.
- Lack of judicial officers and judges who are experienced in IP cases.
- Insufficient or unavailability of courts.
- Lack of specialized Court hearing IP cases (for example, IP Courts in some jurisdictions such as the UK and Thailand).

- Lack of consumers' awareness and support on counterfeit or pirated goods.
- Advent of Internet and advances in information communication technology, for example, peer-to-peer software, console game "mod chips" and other devices designed to circumvent technological protection measures built into entertainment software products.
- Parallel importation is not infringement of patent or of the trade mark affixed on the imported goods so long as there is no express prohibition by the registered proprietor and the imported goods are in the same condition.

Cf : copyright where parallel importation is infringement: a copyright owner's distribution right under section 13(1)(e), Copyright Act 1987 was not exhausted even after a sale, and thus entitling the owner to control not only the rental but resale of original or infringing copies of his work.

Criminal proceedings

- Infringement of some IPRs attracts criminal liability under the relevant statutory provisions which are enforced by the relevant administrative authorities. In Malaysia, enforcement is by the Enforcement Division of the Ministry of Domestic Trade and Consumer Affairs (MDTCA).

Copyright Act 1987

- Offences under section 41, CA with regards to dealing with infringing copies
- making for sale or hire
- selling, letting for hire, exposing or offering for sale or hire
- distribution
- exhibition to public
- possession otherwise than for private and domestic use
- importation into Malaysia otherwise than for private and domestic use
- Other offences include circumventing or causing the circumvention of technological measures protecting author's rights under CA; and unauthorized removal or alteration of electronic rights management information.
- Provision for use of affidavit as prima facie proof of copyright ownership.

Trade Descriptions Act 1972

- Offence of applying a false trade description (including an infringing trade mark) to goods or supply or offering to supply goods bearing such false trade description: section 3, TDA.

- Trade mark owner may apply to the High Court for a trade description order (TDO) declaring that a trade mark, name, get-up, etc as used by infringer is a false trade description under the TDA. Upon obtaining a TDO the owner may request the Enforcement Division of MDTCA to conduct raids and seize infringing goods and relevant documents.

- Enforcement Division is also empowered to conduct raids against infringers in the absence of a TDO.

Difficulties and challenges

- Shortage of manpower and resources.
- Lack of co-operation and follow-up action from IPR owners in some cases.
- Administrative bureaucracy and red tapes of government agencies.
- Lack of trained and experienced enforcement officers and prosecutors.
- Lack of specialized enforcement unit.
- Lack of judicial officers and judges who are experienced in IP cases.
- Insufficient or unavailability of courts.
- Lack of specialized Court hearing IP cases (for example, IP Courts in some jurisdictions such as the UK and Thailand).
- Lack of consumers' awareness and support on counterfeit or pirated goods.
- Restrictive interpretation of section 16, TDA.
- Advent of Internet and advances in information communication technology

Border measures

In Malaysia, provision under the CA (section 39 and Copyright (Notice of Prohibition of Import) Regulations 1987) which prohibits importation of pirated works but rarely utilized by IPR owners.

Provisions under TMA which allow trade mark owners to apply to the Registrar of Trade Marks to restrict the importation of 'counterfeit trade mark goods'. 'Counterfeit trade mark goods' is defined to mean any goods, including packaging, bearing without authorization a trade mark which is identical with or so nearly resembles a registered trade mark and which infringes the trade mark owner's rights under the Act.

Difficulties and challenges

- Shortage of manpower and resources.

- Provisions under TMA appear to be aimed at protecting registered trade marks only as the definition of `counterfeit trade mark goods' excludes unregistered trade marks; and the goods to be prohibited must be within the specification of the registration.

- Provisions on border measures under TMA are meant to prevent specific instances of importation of counterfeit trade mark goods, as opposed to providing for a "permanent" or indefinite monitoring of importation of counterfeit trade mark goods by the authorities

- Advent of Internet and advances in information communication technology are not necessarily taken into consideration when interpreting and applying the laws under the TMA.

- The requirements under TMA are too onerous and not practical.

Alternative and additional measures for successful IPR protection

- Education on IPRs, their importance and the consequences of infringement on the country's economy and the society at large. The Ministry of Domestic Trade and Consumer Affairs of Malaysia has conducted wide and extensive campaigns through advertisement in the television and in cinemas to warn the public of the criminal nature of breaching IP laws, especially copyright laws.

- IPR owners should provide in-house IP talks or seminars to educate their employees on various IP issues, in particular on the requirements on non-disclosure of trade secret and new inventions, and the need to enforce their IPR vigilantly.

- IPR owners must remain vigilant at all times in enforcing their IPR. Otherwise, it would encourage more infringements and IPR owners may potentially lose their rights (e.g. when their trade marks become generic). IPR owners should accept the fact that enforcement of IPR is a costly and tedious matter.

- IPR owners should include requirements for employees to maintain the confidentiality of proprietary information, and have a policy where access to areas of the company where proprietary information may be seen or heard be limited.

- IPR owners should assist and work closely with enforcement and government agencies for example, conduct seminars and training sessions to educate on IP issues such as methods of detection and identification of counterfeits products.

- In cases of serious cross-border infringements, IPR owners should appoint local lawyers and investigators to work with and support local law enforcement and customs officials, for example, the Entertainment Software Association (with members like Electronic Arts, Microsoft, Nintendo, Sony Computer Entertainment, and Vivendi Universal Games) have established programmes in countries like Hong Kong and Singapore to address game piracy which have successfully curtailed the spread of street-level and retail piracy.

- IPR owners should keep proper records of all proprietary information. This is important when disputes arose as to issues like authorship and ownership.

- When the enforcement agencies manage to seize a considerable and sizable amount of counterfeit products or instruments for producing copyright infringement products, press conferences are held and press releases issued for reporting of the news. There is educational and warning value attached to such reporting.

- Working closely and providing input to the government agencies and judicial authorities when they formulate national laws or policies for promotion of IPR, Competition and Fair Trading in the market.

- Licensed products should be made more readily affordable price-wise as well as availability-wise.

- Licensed retailers are few in Malaysia and situated only at prime commercial areas. Hence purchasers are exposed to the convenience of readily available copyright breaching materials sold by peddlers as opposed to the regimented shopping of original products in licensed retailers. Price that is beyond the reach of the general market also motivates purchasers to favour copyright breaching materials.

Access to aft-sale-service should be made more readily available for example through out-sourcing

- Prices of some parallel import and counterfeit products may not be substantially lower than original products. However, purchasers are sometimes encouraged to purchase counterfeit products and parallel import products without or with limited warranty as when these products are faulty or require servicing, vendors are more willing to replace them or provide maintenance services.

On the contrary, some original products have to be sent back to the manufacturers to be serviced. As a result of the time for transportation and red tape in the process, it takes longer for the products to be returned to the purchasers.

Utilize innovative technological measures

- forced-registration of computer games enabling publisher to verify authenticity; and music CDs which are copy-disabled;

- vending machines for selling of original products, especially copyright protected materials, in order that they would be made more readily available;

- tagging of products with bar codes enabling genuine products to be easily identified;

- Assist infringers to "go legit" by giving incentives such as non-prosecution.

- Certification of original products is a service provided by the Ministry of Domestic Trade and Consumer Affairs of Malaysia whereby original music compact discs, digital versatile discs, video compact discs, video tapes and cassettes are sealed with an embossed logo.

- Companies with strong commitment and rich history of corporate social responsibility have the advantage of moral support of purchasers, which other companies do not enjoy.

Islamic Finance: The Malaysian Success Story

Outline of paper delivered by Jal Othman at the Asia Law & Practice, 2007 Asia Pacific In House Counsel Summit, Hong Kong, 14th and 15th March 2007

Malaysia is one of the leading players in Islamic Finance. The presentation seeks to share Malaysia's recipe for success in this industry.

The Landscape

Malaysia is the most successful country to have adopted a dual banking system. The conventional banking system co-exists side by side with Islamic Financing. A sound legal system with clear jurisdictional demarcation between civil laws and Shariah laws provides the platform to nurture the Islamic Finance industry.

The presentation alluded to the Malaysian International Islamic Financial Centre Initiative (the MIFC Initiative). The MIFC Initiative facilitates the setting up of the International Islamic Banks and the International Currency Business Units.

The Sukuk Advantage

The delegates were introduced to the best Islamic Finance invention to come out of Malaysia – the Sukuk. Malaysia is the centre for sukuk origination with approximately 60% of the outstanding sukuks originating from Malaysia.

There has been a shift from cost plus sukuks to lease based sukuks and profit sharing sukuks. This shift is attributable to the desire to market sukuks globally.

The Edge

The advantages that Malaysia enjoyed in making the country a leading player in Islamic Finance.

A strong political will to push Islamic Finance to the forefront of world markets has been the single most important factor in the country's success story. The local market participants have at the outset recognized the distinctive ethical and moral dimension that Islamic Finance provides. A progressive tax regime and an emphasis on human capital development coupled with enhanced disclosure standards provided the needed impetus to catapult the industry to higher ground.

The other contributing factors in providing the edge to Malaysia include the setting up of a central regulatory body and the Shariah Advisory Council, the facilitative accounting and tax framework and the adoption of internationally recognized accounting and prudential standards.

The Challenges

The Malaysian success story is not without its share of challenges.

The challenges facing the Islamic Finance industry globally and in Malaysia

The lack of suitable asset class is a persistent hurdle. This fact has necessitated the need to accelerate product innovation. At the same time, there is the constant discourse as to whether we should push for the "Islamisation" of conventional products.

There is also the lack of a common Shariah understanding with the frequent divergence in various schools of thought and riding in tandem with this is the absence of a common international adjudicating body.

Liquidity has always been a problem. The lack of secondary market for fixed income instruments has to some extent been addressed by the issuance of Shari'a-compliant Government Bonds.

One of the greatest challenges faced by industry players and regulators alike is the risk treatment and management of Islamic finance portfolios. Due to the very different concepts and precepts applicable to Islamic Finance, there is an immediate need to adopt a more focused approach to crafting a separate set of risk policies.

The Way Forward

Islamic Finance is no longer a niche product serving a specialised market. In this respect compliance with the Shari'a is a given.

The emphasis is now on comparable if not better returns than conventional financing. A corollary to this is the constant quest to achieve off-balance sheet financing facility and to securitise the cash flow to allow immediate cash inflow.

Islamic Finance now facilitates cross-border trade.

We are also witnessing a trend whereby Islamic financial activities are moving away from financial institutions to non-financial institutions.

There is a need for Islamic Finance to reach out to small and medium enterprises e.g. agriculture and manufacturing. Micro credit financing should be one of the areas deserving of special attention.

Last but not least, we should not lose sight of the need to communicate effectively with customers and to continue to push for product innovation.

Cross Border M&As

Outline of paper presented by Ivan Ho at the Asia Law and Practice, 2007 Asia Pacific In House Counsel Summit, Hong Kong, 14th and 15th March 2007

Any parties considering Cross Border Mergers and Acquisitions which involve at least one Malaysian company must be mindful of the laws of the country which require authorities' approvals for certain transactions even though they may not immediately relate to the shares of any Malaysian companies. These include the Banking & Financial Institutions Act 1989 ("BAFIA") and the Insurance Act 1996 (see below).

Acquisitions of Malaysian companies involve the following approvals:-

(1)(a) Foreign Investment Committee ("FIC"),

or

(b) Ministry of International Trade and Industry (manufacturing companies)

and

(2) Securities Commission ("SC")

Relevant laws and regulations are as follows:-

(1) *The Companies Act 1965*

Section 67 – Prohibition Against Financial Assistance by Subject Company

(2) *Malaysian Code on Take-Overs and Mergers 1998*

Acquisition of Subject Company Through Upstream Entity – Mandatory General Offer

(3) *Foreign Investment Committee Guidelines*

Or

Manufacturing Licence Conditions

(4) *Securities Commission Act 1993*

M&As involving issuance of public company shares or significant change in business direction or policy of public listed companies – SC approval required

(5) *BAFIA*

Sections 45 & 49 – Acquisitions of interests in financial institutions' shares and business

Approval of Minister of Finance necessary

Implications of "interests in shares" as defined in Section 6A of Companies Act 1965 – inter alia, even acquisitions of shares in certain foreign companies which have interests in shares in financial institutions in Malaysia may require Minister's approval

(6) *Insurance Act*

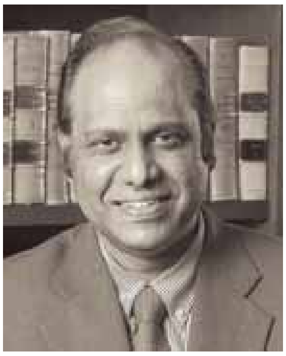
Section 67 – Acquisitions of Licensee's and Controller's shares

Implications of definition of "Controller" – even acquisitions of shares in certain foreign companies seen to be controllers of local licensed insurance companies may require Minister of Finance's approval.

Due to the provisions of the BAFIA and the Insurance Act, where cross border M&As involve ultimately the acquisition of interests in Malaysian financial institutions or insurance companies, Malaysian local counsel should be consulted as soon as possible even before the acquisition of shares in parent companies outside Malaysia.

Enforcement of Awards under the Arbitration Act 2005: An Overview

Abridged version of paper presented by Dato' Cyrus Das at the Kuala Lumpur Regional Centre for Arbitration Seminar on the Arbitration Act 2005, Kuala Lumpur, 9 September 2006



Introduction

The introduction of the new Arbitration Act 2005 w.e.f. 15th March 2006 is the most significant development in the field of arbitration law in Malaysia over several decades. The last Act was the Arbitration Act 1952 (revised – 1972) which was in turn based on the repealed UK Act in force at that time. The 1952 Act remained substantially intact for years except for the introduction in 1980 of the new section 34 relating to non-interference in international arbitrations and arbitrations held under the auspices of UNCITRAL and the KLRCA. Its unhappy wording led to several instances of litigation over its precise scope.

The exponential growth of international arbitrations over the years, coupled with Malaysian law on the subject being somewhat non-cohesive, may be cited as amongst the principal reasons for the introduction of the new Act.

The New Regime For Enforcement

In terms of enforcement of arbitration awards, the new Act seeks to provide a single regime of enforcement for both domestic and international arbitral awards. In this respect it repeals the two principal legislation that dealt with this subject each in its own sphere of operation. By section 51(1) of the new Act, the first to be repealed was the Arbitration Act 1952 that dealt principally with domestic arbitrations. The next was the Recognition and Enforcement of Foreign Arbitral Awards 1985 (the New York Convention Act) that dealt with the enforcement of New York Convention awards in Malaysia.

It is significant that the new Act does not repeal the Reciprocal Enforcement of Judgments Act 1958 (REJA 1958). This Act provides for the enforcement of arbitral awards from Commonwealth countries and scheduled countries as if it were a foreign judgment provided it is first registered as a judgment in the local courts of the country where the award was handed down.

The continued presence of REJA 1958 on the statute books means that the avenue still remains open for the enforcement of foreign arbitral awards from these countries (especially Commonwealth countries) through the process of registering the award first as a judgment of the foreign court. Further the new Act does not abolish the common law remedy of suing on the foreign award as an action in court. This option remains open although in the past it has never been a remedy that was frequently invoked.

In the upshot, although the new Act seeks to bring together foreign and domestic arbitrations under a single legal regime, it does not speak exhaustively on the subject of enforcement of foreign arbitration awards.

Awards under the New Act

Section 2(1) defines an award collectively to refer to both awards of an international and domestic arbitration. By section 36(1) all awards are declared as final and binding. However the ascertainment of whether an arbitration is international or domestic in nature is crucial to determine the scope of application of the Act to arbitral proceedings and their awards. Note that by section 34(1) the arbitral proceedings only terminate with the delivery of a final award.

The relevant provision on the scope of application of the Act is section 3(2). It makes Part III of the Act a variable factor in its application to international and domestic arbitration proceedings. It works in this way. Whilst Part III applies to domestic arbitrations unless excluded in writing by the parties, it is deemed excluded unless expressively included, whether wholly or in part, by the parties to an international arbitration. Herein lies a vital difference between domestic and international arbitrations under the Act.

Part III contains sub-sections 40 to 46 of the Act. They deal essentially with the supervisory jurisdiction of the Malaysian High Court over arbitral proceedings. It reintroduces the thinking under the repealed 1952 Act of the High Court possessing powers of supervision over domestic arbitrations, but with certain changes and new additions.

By section 41 a preliminary point of law which may be decisive of the case may be referred to the High Court by the arbitral tribunal or the parties. Next, section 42 provides in substance a right of appeal to the High Court on any question of law arising out of an award. It has mercifully done away with the unhappy wording of section 24(2) of the 1952 Act which spoke in terms of an arbitrator 'misconducting himself or the proceeding' as a ground of appeal to the High Court. It was in reality a complaint that the arbitrator had gone wrong in law and the word 'misconduct' was not intended to have any pejorative connotation unless that was being specifically alleged. But it made arbitrators unhappy. Therefore the change is welcome. Section 43 declares that the decision stands as a judgment under section 67 of the Courts of Judicature Act 1964 for appeal purposes to the Court of Appeal. This range of intrusive powers of supervision by the Malaysian High Court under Part III is excluded from application to international arbitrations unless declared otherwise by the parties themselves. In this, the new Act seeks to reflect the thinking behind the UNCITRAL Model

Law to exclude interference or supervision by domestic courts over international arbitrations. The new Act however makes an exception to this principle in relation to interim measures (see section 11) or assistance in the taking of evidence (see section 29).

As regards a domestic arbitration, parties could by choosing a set of arbitration rules end up denying themselves a right of appeal to the domestic court although not specifically excluding Part III: see section 2(2)(c). Thus, if in a domestic arbitration the parties decide to opt for any reason to arbitrate by the ICC or LCIA Rules (the London Court of International Arbitration) they may well be precluded from resorting to the state courts by way of appeal on the award as these Rules prohibit appeals (see Rule 28(6) of the ICC Rules and Rule 26.9 of the LCIA Rules). It would then be a matter of debate whether the parties could still invoke section 42 as a statutory right and refer the award to the High Court.

A more interesting poser is the status of KLRCA arbitrations under the new Act? It stood as a special category but with the repeal of the Arbitration Act 1952, section 34 no longer applies to preclude the High Court exercising appellate supervisory jurisdiction over KLRCA awards if they are not otherwise classifiable as an `international arbitration' under the new Act. The Rules for Arbitration of the KLRCA (that applies the UNCITRAL Arbitration Rules as modified) are themselves silent on this question and may not therefore be assumed to deny recourse to the domestic court by way of appeal. If it is intended to give complete finality to KLRCA awards, the solution may be to amend the KLRCA Rules of Arbitration and have the point stated clearly.

Determining Character : Whether An International or Domestic Arbitration?

The above discussion emphasizes the importance of determining the character of the arbitral proceedings as to whether it is an international or domestic arbitration. The question acquires greater importance in the context of the wide definition given to the term `international arbitration' under the Act and in comparison the somewhat unhelpful definition of a domestic arbitration as `any arbitration which is not an international arbitration' (see section 2(1)). Thus the definition of `international arbitration' is the determinative factor for purposes of classification of arbitral proceedings under the Act.

The definition of an `international arbitration' is found in both sections 2(1) and 2(2)(a) of the Act. The definition comprehensively declares that an arbitration would be classified as 'international' if one of the parties is a foreign party or the seat of arbitration is outside Malaysia or a substantial part of the obligations are to be performed in a foreign state. This somewhat loose definition begs the question of the true status of arbitral proceedings where the seat of arbitration is Malaysia and one of the parties is a foreign company doing business in Malaysia. It would seem that the mere fact of a foreign party arbitrating, albeit based in Malaysia, makes what is otherwise a purely local arbitration an `international arbitration'. Section 2(2)(a)(i) may have been inserted to assist in the answer. It provides the `closest connexion' test in relation to place of business and the arbitration agreement. But it does seem open to the possibility that a registered foreign company in Malaysia could only be involved in an arbitration that is classifiable as an 'international arbitration'. It is left to surmise whether that consequence was intended by the draftsman.

Chapter 7 and 8 (Sections 37 to 39)

Sections 37 to 39 are the key provisions relating to enforcement of arbitral awards whether they be domestic or foreign in nature. Of course in the case of domestic arbitration awards there is a wider range of access to the courts through the provisions of Part III which are deemed to apply unless expressly excluded (see sections 40 to 46). Section 37 entitles a party to an award to apply to the High Court to set aside the award without waiting for the successful party to enforce it. This remedy is available on the limited grounds set out in sub-sections (1)(a) and (b) of section 37. They may be summarized as follows:

(a) incapacity of a party
(b) invalidity of the arbitration agreement under the laws of Malaysia or the foreign law concerned
(c) lack of proper notice or that the complaining party was otherwise unable to present its case
(d) the award deals with a dispute outside the submission
(e) the award contains decisions outside the submission
(f) composition of the arbitral tribunal was invalid
(g) subject matter of dispute could not be settled by arbitration under Malaysian law
(h) the award conflicts with the public policy of Malaysia.

The noticeable feature of the grounds listed above are that they do not relate to the merits of the award. Two of the features under the New York Convention, under Article 1(3) therein, which permits parties to enter reservations as a pre-requisite for enforcement, namely `reciprocity' and 'commercial nature of the dispute' are omitted under the new Act whether inadvertently or by design. The consequence is a wider scope for enforcement of foreign arbitral awards in Malaysia regardless of whether reciprocity is afforded to Malaysian awards in the foreign state concerned. Secondly, the non-commercial nature of the dispute which is the subject matter of the award is by itself no longer a relevant factor.

Thus the problem of non-gazetting of convention states or reciprocating states as arose in the *Sri Lanka Cricket* case [2006] 3 MLJ 117 would not be an impediment for enforcement under the new Act because it is no longer a requirement nor are `awards' now limited only to `convention awards' under the New York Convention.

Conclusion

The new Act is undoubtedly open to improvement and refinement. After it has overcome its teething problems in terms of implementation, there would be a period of experience which would enable the refinement and improvement to take place by way of amendments, if necessary. But for the present, the new Act may be regarded as an important step in the modernizing of our arbitration system.

Longest Serving Staff

Bohari with his family

As with any organization, the composition of the firm's complement of administrative and clerical staff changes with the passage of time. However the firm takes pride in its large core of senior and long serving staff who have been with the firm for many years, some more than forty years.

The firm pays tribute to its loyal staff and to its full complement of staff, each whom is an essential cog in the wheel of the organization, with a series of interviews with its staff, commencing with the firm's longest serving staff Bohari Ibrahim who is in charge of the firm's off-set printing.

When did you start working with the firm?
I started in (with bated breath) 1960.

How old were you?
16 years of age

How did you come about joining the firm?
My brother brought me here for an interview. He found out that the firm's office boy was ill and a replacement was being sought. Anyway the interview went well and I accepted the offer.

Was this your first job?
Yes.

Given that you are the longest serving employee in the firm, please tell us a little more about how life was at the firm all those years ago.
[laughing] Well maybe this offset printing machine is older but I may not be too far off. Things were very different back then. The firm was located along Jalan Silang in Kuala Lumpur, just a stone's throw away from the Pudu Bus Station. It was a small office where everyone could see each other, unlike now with the two floors we have.

What is the main difference between the firm in those days compared to now?
Well, when I first joined there were only two lawyers at the firm… Mr. Yong Pung How who went on to become the Chief Justice of Singapore and Mr. Tan Teow Bok, who was one of the founding partners. Also there were only 5 or 6 staff members manning the office.
Amazingly, we now have over twenty partners and more than eighty lawyers, not to mention the staff.

Did you ever think about becoming a lawyer at any point in time while working here?
No. Surprising but true.

Who is your all-time hero or person you look up to?
Mr. Tan Teow Bok definitely.

Is it because he was a co-founder of the firm?
Well, I really admire him because he was very much of a mentor to me when I first started. He was kind and patient and in those trying times he gave me a job when no one would. He took a chance on me and I never looked back.

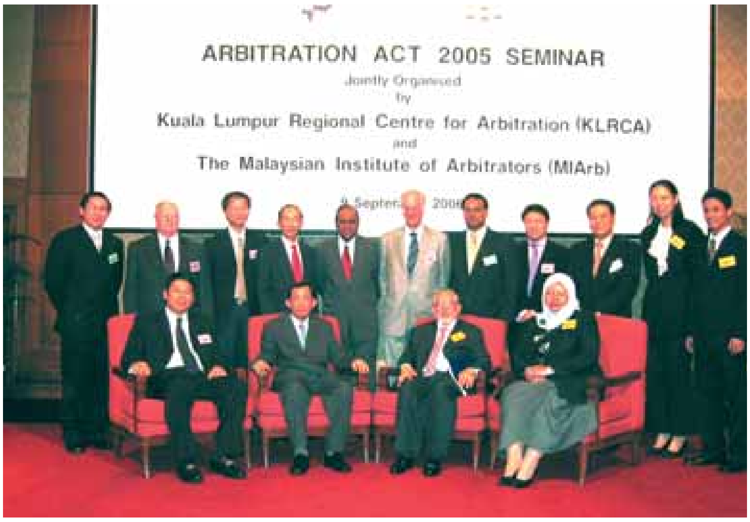
Looking back at the years, what is your fondest memory?
That would be all those times in the past when the lawyers and the staff met up to play football. It was great. It felt like we were all brothers.

What inspired you or kept you going all these years in the firm?
The people of the firm definitely. Yes, the people have changed but over the years everyone here whom I've dealt with was friendly, respectful and sincere. It was and still is a pleasure to work here. I like the culture of the firm which is one of friendship and trust.

Any advice for the younger staff and lawyers?
Just work hard and be honest to yourself and the firm. This will take you a long way.

Please tell us something about your family.
I was married in 1970 and we have two daughters. Our first daughter has two children aged seven and two.

(David Dinesh Mathew assisted in this interview)

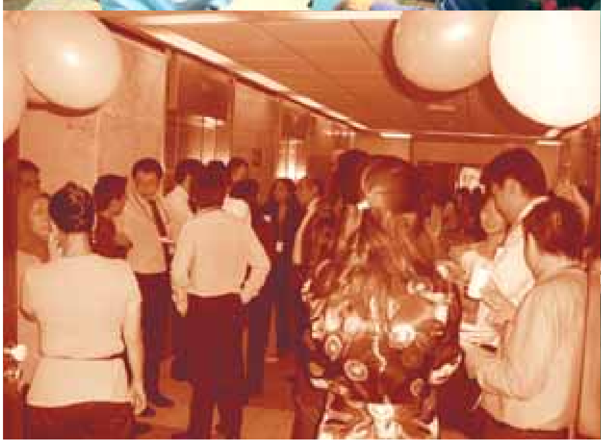


Seminar on Arbitration Act 2005

The Kuala Lumpur Regional Centre for Arbitration and The Malaysian Institute of Arbitrators jointly organized a seminar on the Arbitration Act 2005 on 9 September 2006. The firm's Dato' Dr. Cyrus Das presented a paper on "Enforcement of Awards under the Arbitration Act 2005: An Overview" at the seminar and the firm's Mohan Kanagasabai and Lam Ko Luen chaired the morning and afternoon sessions of the seminar respectively.

Kuching seminar on Arbitration Act 2005

The firm's Lam Ko Luen presented a paper on "The Implications of the Arbitration Act 2005" at the Kuala Lumpur Regional Centre for Arbitration (KLRCA) seminar on the Arbitration Act 2005 in Kuching on 24th March 2007. The opening address by the Chief Judge of the High Court of Sabah and Sarawak, Dato Seri Richard Malanjum, was delivered by Justice Datuk Clement Skinner of the High Court of Sabah and Sarawak. Ko Luen was appointed as an arbitrator on the panel of arbitrators of the KLRCA on 17th November 2006.



Ushering in the New Year The firm bade farewell to 2006 and kicked off the New Year with a tea party on 29 December 2006 at the firm's premises. Here are some snapshots of the festivities.

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The contents of this publication are of a general nature and not intended as legal advice. For any specific legal advice, please contact the partners.

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