SHOOK LIN & BOK EST 1918 KUALA LUMPUR

LEGAL UPDATE

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Shook Lin & Bok celebrates 90th Anniversary

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90th Anniversary cocktail reception

This year, the firm celebrated the 90th Anniversary of its founding in 1918. In the previous special commemorative issue of the newsletter (which may be accessed on our website), we assembled together snippets of stories and glimpses of colourful personalities from the firm's history, with the hope of conveying the rich heritage and tradition of the firm.

The occasion was marked by an anniversary cocktail reception at the JW Marriot Kuala Lumpur on 10th July 2008, attended by the firm's guests and clients. Among the guests who graced the event, was retired Chief Judge of Malaya Tan Sri Siti Normah Yaakob. The firm's Chief Executive Partner Too Hing Yeap led with a speech welcoming the guests for the evening. The highlight of the entertainment for the evening was an appearance by well known Malaysian artiste Syafinaz, who gave a glorious rendition of "Nessun Dorma" from Puccini's opera Turandot, the aria which has gained pop status as the signature and swansong of the late tenor Luciano Pavarotti.

Among the guests in attendance during the cocktail, were many ex-lawyers of the firm who are now clients or business associates of the firm. The firm's "alumni" outnumber its existing lawyers by a great degree and may be found in all walks of life. It was a wonderful opportunity for a reunion of the firm's extended family. All lawyers past and present have contributed to the development of the firm. We took the opportunity to catch up with several of the firm's ex lawyers for some reflections about the significance of their time in the firm.

R. Rajeswaran is now Adjunct Professor of Law at the University of Technology Mara. He was a lawyer and then partner in the firm over a period of 20 years in civil litigation practice until he retired in 1993 for academia. He teaches civil trial and advocacy and advanced civil procedure in the law programme at the University. Professor Rajeswaran professes a soft spot for the firm and remains in close contact with the firm, and recommends the firm highly to his students, steering many of the graduates towards the firm. "Almost every few days, I have comments about the firm to my students which stir their interest in joining the firm. I am impressed by the loyalty of the staff. Many of the support staff who were at the firm when I started out are still there. I was similarly impressed by the loyalty of clients. At the cocktail, I met many clients of the firm whom I recognize from my time in the firm".

A distinctive feature of the law programme at the University is the experiential learning components in the professional honours year of the programme which are very practical in nature and which are modelled on the programmes at the College of Law and Leo Cussen Institute in Australia. Professor Rajeswaran is a member of the committee of the Bar Council drawing up the curriculum for the proposed common bar exam for Malaysia, which will be similarly grounded in experiential learning. "My experience in the firm stood me in good stead for my academic career. My professional experience is immensely useful and translates into greater effectiveness in my teaching of the practical courses at the University."

"I have spent more than half my professional life at the firm and am grateful to have had the privilege, and I congratulate the firm on its achievements."

Lau May Ling was a member of the firm's banking litigation department from 1991 to 1998 when she left for CIMB Investment Bank Berhad. She is now an Associate Director, Corporate Recovery at the Bank, and handles recovery and corporate restructuring.

"My experience in the firm laid a good foundation for me in principles and doing things the right away, not compromising on integrity and not cutting corners. It also helped hone my skills in anticipating legal problems in drafting legal documents and structuring deals and debt resolutions. The intensity of practice in the firm prepares one well for any other career and is a great springboard. I enjoyed the evening. It was a wonderful and a cozy atmosphere."

We also welcomed Mohamed Sufyan Mokhtar who was with the firm's banking litigation team from 1994 to 1996. Post Shook Lin & Bok, Sufyan's subsequent career path saw him in the Prosecution Department of the Securities Commission and in the legal team at Pengurusan Danaharta Nasional Berhad. He is presently the head of the Civil Litigation section at the Companies Commission of Malaysia.

Sufyan also singled out the ethical grounding he received at the firm. "I value the tradition of the firm and am grateful for the training in ethical conduct, honesty and good service to clients. I am grateful to have started off in one of the best legal firms in the country. I have adopted the best of the training I gained in the firm and applied them to my own dealings with my team members".

Sufyan summed up the evening as follows: "Classy, great entertainment and excellent company. I wish the firm all the best".

Address by the firm's Chief Executive Partner

Extracts from the welcoming address by the firm's Chief Executive Partner, Too Hing Yeap at the firm's 90th Anniversary cocktail reception

Today Shook Lin & Bok celebrates its 90th year as a law firm – celebrating 90 years of success actually. We are celebrating 90 years of success! Starting as a sole proprietorship in 1918 by Yong Shook Lin, it is today one of the largest law firms in the country with over 90 lawyers. It has now evolved into a leading full service law firm offering a comprehensive range of legal services to clients spanning the globe.

Before we forget, let us remember that we the current partners would not be celebrating today, if not for the diligence, foresight, sacrifices and commitment on the part of those who founded the firm and those who sustained it throughout the years – the firm's former partners, lawyers and of course the firm's clients. Shook Lin & Bok is nothing without the support of its clients.

On this occasion, the 90th year of the firm's founding, our clients certainly deserve a tribute for they are the very reason for the firm's existence. We regard our clients as our partners and it is a pleasure to have been of service to them. As we celebrate our 90th year, my partners and I would like to take this opportunity to thank all our clients for their loyalty and support. To all our clients a big thank you from all the partners of Shook Lin & Bok!

We the current partnership, have the privilege of reaping what our forefathers and predecessors have sown for us. In turn, we must be attuned to the fact that we are merely stewards for the future generations of lawyers and all the clients we serve.

I believe the firm is well placed to meet the challenges of today, not the least because of the amount of talent and dedication that is found in my fellow partners. The relentless drive by the partners to improve their skills and that of our lawyers and ultimately to be masters of our craft augurs well for the firm.

The honour is truly mine to be among a team of outstanding lawyers that make up the partnership of Shook Lin & Bok. Please enjoy yourselves and have a pleasant evening.

Abdul Hamid Tun Azmi

The previous special commemorative issue of the newsletter carried an interview with our founder Yong Shook Lin's daughter Madam Phyllis Yong Hamid Azmi, about her father and his family. Due to inadvertence, the interview omitted to mention Madam Phyllis' husband, Abdul Hamid Tun Azmi, who was a senior partner in the firm when he passed away in 1984.

Hamid held the honour of being the youngest person appointed as a magistrate in 1955 at the age of 20. Two months before the country's independence in 1957 he was posted to the Foreign Affairs department in London as a Protocol officer.

As fate would have it, Hamid met Phyllis, who was in a different department at the Protocol Service, at a dinner hosted by Tunku Abdul Rahman, Malaysia's first Prime Minister. Their courtship was encouraged by the Prime Minister, who flew specially to London to sponsor their wedding, in place of Hamid's father, Tun Azmi who was indisposed to attend. Tunku called it the best union that could happen between the children of two of the most prominent families in Malaysia. Hamid was later conferred the K.M.N. by the King.

Hamid was the eldest son of Tun Azmi Haji Mohamed, the country's second Lord President (Chief Justice), and is the brother of Tan Sri Zaki Tun Azmi, Malaysia's new Chief Justice. Hamid joined the firm as a partner in 1970, and was a senior partner when he passed away in January 1984 leaving behind his wife and a son, Shahryn.

Case Updates

Banking

Forgery of cheques

In *Melewar Apex Sdn Bhd v Malayan Banking Berhad* [2007] 3 MLJ 687, the effect of section 73A of the Bills of Exchange Act 1949 was considered by the High Court. Section 73A which was an amendment to the Act made with effect from 1st July 1998, was an alteration of the common law position with regard to inter alia, the right of a bank to debit its customer's account where the bank has paid a cheque on which the signature is forged.

At common law, the bank is not entitled to debit the customer's account where the signature is forged, however clever the forgery may be, and will have to bear the loss itself. The position is strict and absolute, and it is of no avail that the bank has exercised reasonable care in payment, or that the customer has not exercised reasonable care in the custody of its cheques or otherwise, unless by some conduct of the customer, it is estopped (precluded) from denying the authenticity of the signature.

The reasons why the bank cannot debit the account are:

(a) the bank's duty to honour the customer's mandate, like any contractual duty is a strict one, and a forged cheque does not embody the customer's mandate;

(b) Section 24 of the Act provides that where an essential signature on a cheque is forged, the forged signature is wholly inoperative. The strict liability of the banker is also a reflection of the policy of the law to place the burden of the loss on the bank rather than the customer in such a situation.

Section 73A effected a change in the common law position by providing that:-

"73A. Notwithstanding Section 24, where a signature on a cheque is forged.... and the person whose signature it purports to be knowingly or negligently

> contributes to the forgery... the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque..."

Therefore, the bank may now be exonerated from bearing the loss if it is proven that the forgery was due to negligence on the customer's part.

In the *Melewar Apex* case, the plaintiff maintained a current account with the defendant bank. The bank paid 69 cheques on which the signature of the plaintiff's authorized signatory was forged by the plaintiff's employee who was in charge of keeping and maintaining its accounts (finance manager). In the suit by the customer for unauthorized payment on the forged cheques, the bank, relying on section 73A, contended that the customer had negligently contributed to the forgery.

The court held that the bank failed to discharge the burden of proving that the customer negligently contributed to the forgery. The court did not accept the contention that the customer was negligent in not checking its monthly bank statements for twenty six months.

It was not usual for the customer to rely on the finance manager to keep the cheque books and to prepare cheques. It does not follow that because an employee is authorized to prepare cheques, the employer must keep, over and above the general supervision over employees, a close supervision over that employee. No evidence was adduced that the customer knew that the finance manager was unreliable or had a bad record, or that the recruitment was so negligently conducted that the reliability of the finance manager was not addressed, and that this contributed to the forgery.

Progressive payments against architect's certificate

A bank may take the architect's certificate certifying completion of stages of construction of property, at face value in making progressive payments to the developer. This was the decision of the Court of Appeal in *Cheah Swee Fah v. Bank Bumiputra Malaysia Bhd* [2007] 7 MLJ 481.

The borrower (customer) obtained a loan from the bank to finance his purchase of a house from the housing developer. The loan agreement was in the common form in which it was provided that the loan was to be released to the developer progressively against certificates issued by the architect certifying completion of progressive stages of construction.

Before full completion, the development was abandoned by the developer, by which time the bank had made eight progressive payments. The customer brought an action against the bank claiming that it was negligent and in breach of contractual duty in releasing the eighth progressive payment against the architect's certificate certifying, incorrectly the purchaser claimed, completion of roads and drains serving the houses.

The Court affirmed that the bank was not duty-bound, in the absence of circumstances raising suspicion, to go behind the architect's certificate and verify its correctness. It would be too onerous to require enquiry by the bank and it was also not in a position or competent to do so. The bank was not in breach of duty to the customer.

Bankruptcy

No further proof of debt other than judgment, required at hearing of petition

The Court of Appeal in *Affin Bank v. Tan Sri Kishu Tirathrai* [2008] 3 MLJ 72 affirmed that at the hearing of a bankruptcy petition based on a judgment debt, no further proof of the debt is required.

In the case, the creditor issued a bankruptcy notice against the debtor based on an unsatisfied judgment obtained by the creditor against the debtor. The Senior Assistant Registrar made a receiving and adjudication order against the debtor at the hearing of the creditor's petition filed upon the failure of the debtor to comply with the bankruptcy notice and settle the judgment debt.

In his appeal to the Judge, the debtor contended that the creditor should prove the debt independently of the normal Affidavit Verifying Petition filed by a petitioner. The debtor relied on section 6(2) of the Bankruptcy Act which provides, inter alia, that at the hearing of the petition, the Court shall require

proof of the debt of the petitioning creditor.

The Judge agreed with the contention and allowed the debtor's appeal. The decision was overturned by the Court of Appeal. The court held that the judgment is prima facie evidence of the debt and the court will not go behind the judgment save for exceptional reasons. There is no necessity for the creditor to prove the debt again at the hearing of the petition, although the debtor may have a right to cross examine the creditor on matters such as the commission of an act of bankruptcy, which the debtor gives notice that he intends to dispute.

Companies

Shareholder who holds share on trust has no standing to present winding up petition where it is against the wish of the beneficiary.

A court in determining a shareholder's petition to wind up a company on the just and equitable ground, is guided by equitable considerations, so that if the shareholder is a trustee of his shares, he will be precluded from winding up the company if that is contrary to the wish of the beneficiary of the shares. This was the decision of the High Court in *Muralidharan Nair a/l Prabhakaran v. Matrix Circle (M) Sdn Bhd* [2008] 3 MLJ 388. In this case, the petitioner was formerly employed by another company along with Charles Penafort (Charles) who was the managing director of that other company.

Subsequently, the company ceased business. It was the petitioner's contention that he and Charles decided to set up the respondent company to be in the same business of producing wet cooling towers. The Respondent's capital was RM2 divided into two shares which were registered in the name of the petitioner and Yap Chooi Lee, Charles' wife. The petitioner contended that the respondent was a quasi partnership between him and Yap Chooi Lee, and that he was solely responsible for the running of the respondent. He claimed that Charles and his wife had misappropriated the respondent's funds, intended to increase the capital of the respondent to gain control of the respondent, and excluded the petitioner from the management of the company. The petitioner sought to wind up the respondent under the "just and equitable" ground in section 218 (1)(ii) of the Companies Act 1965, on the basis that there was a breakdown of trust and confidence between him and Yap Chooi Lee. The High Court found that the petitioner's allegations were untrue and accepted the respondent's version of the facts, namely, that the petitioner and Yap Chooi Lee were mere trustees of their shares for Charles, the capital for the company was contributed by Charles alone, and the petitioner was merely employed as an employee of the respondent. It was the respondent's contention that the petitioner had no standing to bring the petition in the light of the objection of the beneficiary of the share, Charles, to the petition.

Under the scheme of the Companies Act 1965, companies deal with and formally recognize only the legal and registered shareholders and not the beneficiaries of trusts of shares.

Nevertheless, the Court noting that in its determination of petition on the just and equitable ground, it is to be guided by equitable principles, held that it is not precluded from going behind the register of shareholders and invoking equity in its determination of the petition, including the standing of the petitioner to file the petition. In the light of the fact that the petitioner was a trustee only, it was inequitable to allow the petitioner to exercise his strict legal powers in the face of the objection of the beneficiary, and the court dismissed the petition.

Defamation

Advertisement for substituted service of bankruptcy notice is privileged

The publication of an advertisement of a notice of a bankruptcy notice in a newspaper pursuant to an order for substituted service of the bankruptcy notice, is privileged where the publisher is not aware that the judgment debt has been satisfied at the time of publication.

In *Anne Lim Keng See v. The New Straits Times Press (M) Bhd* [2008] 3 MLJ 492, MBf Finance Bhd issued a bankruptcy notice against the debtor for failure to satisfy the judgment debt. Ten months after the issuance of the bankruptcy notice, the debtor settled the debt. However a few days after the payment,

the creditor obtained a court order for substituted service of the bankruptcy notice by way of advertisement in a newspaper.

Pursuant to the order, the creditor's solicitors requested the defendant, a newspaper publishing company, to advertise a notice of substituted service in the *Malay Mail*, a newspaper owned by the defendant.

The debtor sued the defendant for defamation. The defendant in its defence relied on section 12 of the Defamation Act 1951 which provides, under a side note "qualified privilege of newspapers":

> "12.(1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the schedule to this Act shall be privileged unless the publication be made with malice".

Paragraph 3 of Part I of the Schedule to the Act reads:

> "(3) A notice, advertisement or report issued or published by or on authority of any court within Malaysia…"

The Court of Appeal noted that the facts suggested that the solicitors who placed the advertisement were not aware that the debt had been settled, and the defendant obviously was not aware of the same either.

In the circumstances, no malice (i.e. an intentional act done with knowledge that the statement is false or with reckless indifference as to its truth) can be imputed to the defendant, which is protected by privilege from the defamation action, for the publication of the advertisement which was published pursuant to the authority of the court.

Labour

Constructive dismissal

In *Hong Leong Bank Bhd v. Phung Tze Thiam John Phung* [2008] 2 MLJ 785, the employee was employed by the bank as its branch manager at its Tawau branch. Following an anonymous complaint to Bank Negara about the employee, the bank carried out an investigation and pursuant to the same, held a domestic inquiry at which the employee was found guilty of various charges. Consequently the employee was demoted and transferred to the head office in Kuala Lumpur and redesignated as a Manager, Remedial Management.

The employee denied that he was guilty of the charges and requested the bank to retract the demotion failing which he would consider himself as having been dismissed without just cause or excuse.

The bank did not rescind the demotion, and the employee filed a complaint under the Industrial Relations Act 1967 against the bank, and the matter was referred to the Industrial Court. The Industrial Court concluded that the bank had failed to prove the charges against the employee, and ruled that the employee was constructively dismissed without just cause or excuse. On appeal, the High Court upheld the Industrial Court's decision. On further appeal, the Court of Appeal upheld the finding of constructive dismissal and stated the following:

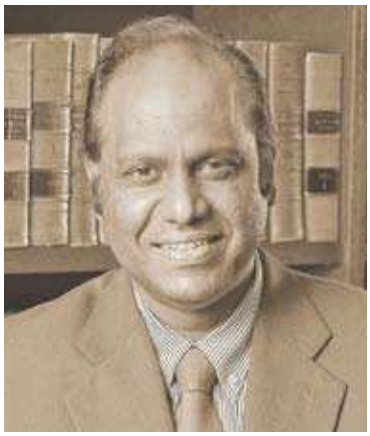
(a) The Industrial Court is not precluded from substituting is own findings on the charges for those of the domestic inquiry. The domestic inquiry's findings are not binding on the Industrial Court which normally hears the matter afresh.

(b) The Court disagreed with the bank's contention that a demotion in rank cannot constitute a constructive dismissal.

(c) There was a fundamental breach of the contract of service that went to the root of the employment contract, as the bank failed to comply with a term in the terms governing the employment, that "unless it is a severe offence amounting to dishonesty or immorality, an employee shall be given the opportunity to correct his weakness before disciplinary action is taken against him". The bank not having stated that the offences were severe offences, was in breach of the terms of employment in failing to provide prior counselling to the employee before imposing disciplinary sanctions against him.

Access To Justice As A Constitutional Right

Abridged version of paper presented by Dato' Cyrus Das at the 15th Commonwealth Law Conference, Nairobi, Kenya 9th to 13th September 2007



Introduction

In commonwealth countries, the judiciary had discharged its role as a defender of individual liberties and stood against bureaucratic aggression. It was this exponential growth of administrative law in England that led Lord Diplock to say of the English courts that their contribution was `the greatest achievement of the courts in his judicial lifetime'. Even a cursory reading of the law reports of other jurisdictions would show the wide acceptance of English administrative law principles in the Commonwealth.

In some jurisdictions access to justice on human rights issue is regarded as something entrenched in the constitutional system so that it is not repealable. In others it is classified as `a mere common law right' that may be altered, reduced or abolished by ordinary statute.

The scope of this essay is confined to an argument that access to justice especially on fundamental rights questions is pre-eminently a constitutional right.

A Constitutional Right

Although international instruments had by the mid-twentieth century began declaring access to justice as an essential feature of a civilized legal system it was left to the domestic courts to define the status of 'access to justice' as a juristic principle in their respective jurisdictions. The approach did not vary significantly whether the courts functioned under a written constitution or without one. A comparison may be made of the pronouncements of the courts of England and India.

In England there was an early recognition that resort to the King's courts could not suffer the sanction of some ministerial authority, nor could subsidiary legislation providing for dispute-resolution prevent final access to the courts. In *Pyx Granite Co Ltd v. Minister of Housing* (1960) AC 260, it was declared that the declaratory jurisdiction of the court to determine legality of the actions of a public authority could not be excluded except by clear words.

In later cases, the English courts spoke of access to the courts in constitutional terms. It was called a `basic right' by Lord Wilberforce (*Raymond v. Honey* [1982] 1 All ER 756, 760).

In yet another case (*R v. Secretary of State Exparte Leech* [1993] 4 All ER 539, 548), Steyn LJ spoke of `the right of unimpeded access to a court' as `a constitutional right' declaring that it was even so `in our unwritten constitution'.

In a subsequent case (*R v. Lord* Chancellor Exparte *Witham* [1997] 2 All ER 779, 786), Laws J. held that `access to the courts is a constitutional right' which can only be denied by specific legislation `turn(ing) people away from the court door'.

The headnote of the case in the All England Law Report uses the term `common law constitutional right' which is not found in the judgment itself but I think it is an accurate compendious description of the right.

Such terminological difficulties do not or should not arise under written constitutions. *Exparte Witham* itself recognised that no conceptual difficulties would arise where a written constitution guarantees the right. India is a good example, but as our ensuing discussion would disclose it is not the universal experience of all countries possessed of a written constitution.

In India the debate has centered on whether the power of judicial review conferred on the judiciary can be abrogated or diluted, especially the right of direct access to the Supreme Court under Article 32 of the Indian Constitution dealing with the enforcement of fundamental rights.

The question first arose in the context of whether Parliament could validly pass a constitutional amendment that deprives the courts of the right to call in question any amendment of the Constitution. In a landmark decision in the popularly-called *Fundamental Rights* case (*Kesavananda Bharti v. Kerala* AIR 1973 SC 1461), the Indian Supreme Court had decreed that Parliament did not possess the power by way of amendment to alter `the basic features' of the Indian Constitution.

In *Minerva Mills Ltd v. Union of India* AIR 1980 SC 1789 the Supreme Court reiterated this juristic doctrine and declared that the attempt at ousting judicial review to determine the validity of a constitutional amendment was itself unconstitutional because judicial review could not be ousted without affecting the basic structure of the Constitution. Bhagwati J. declared that the right of judicial review was hierachically among the most important of fundamental rights.

The principle that the right of judicial review is inviolable for the enforcement of fundamental rights is now firmly embedded in Indian constitutional law.

There are many similarities between the Indian Constitution and the Malaysian Constitution that came ten years later. The Malaysian jurist Tun Suffian once described the Malaysian Constitution as an `Anglo-Indian' product. It is surprising therefore that the Malaysian courts should be unpersuaded by Indian decisions on this subject and find it possible to classify `access to justice' as a mere common law right that could be abrogated by ordinary statute.

The question arose in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701, which examined the constitutional validity of section 72 of the Danaharta Act 1998 which precluded a court of law from granting any order in the form of a stay or an injunction to restrain any acts taken by Danaharta Sdn Bhd (Danaharta is a government corporation specially established to deal with the financial crisis of 1997. It is authorized to purchase the bad debts of an ailing corporation together with the mortgaged property) or its officers or agents. The section proceeds further to declare any such order if granted to be void and unenforceable. The sum effect of the provision was to deny interim relief to an aggrieved person affected or injured by the acts of Danaharta. The Court of Appeal had struck down the provision as unconstitutional as denying access to justice and therefore violative of the rule of law principles embodied in Article 8(1) of the Federal Constitution. The Federal Court reversed the decision by declaring, inter alia, that access to justice was only a common law right and was therefore subject to qualification. The end result was a blanket immunity given to Danaharta against any injunctive relief. It left an aggrieved person with a remedy only in damages over the violation of his property rights but no remedy of safeguard of the property itself.

The Court of Appeal had earlier declared the provision unconstitutional because it denied access to justice and was therefore violative of the equal protection clause viz Article 8(1). Article 8(1) reads:

> `All persons are equal before the law and entitled to the equal protection of the law.'

The Court of Appeal noted that by definition the term `law' in Article 8(1) included the `common law' and noted by reference to English cases that the common law recognised access to justice as a fundamental common law right.

But the Federal Court held that the common law in Malaysia could be modified by statute under the reception provision (Section 3 (1) Civil Law Act 1956). The Federal Court went on to state that the impugned statutory provision in turn did not violate the equality guarantee because it was a reasonable and rational classification that met the objective of the provision.

Our present concern is the aspect of the judgment that classified access to justice as a common law right removable by ordinary statute:

> " Thus access to justice under Art. 8(1) is a general right which can be fulfilled only by laws enacted conferring jurisdiction and powers on the courts under the specific authority contained in Art. 121(1) … with the result that access to justice shall be available only to the extent that the courts are empowered to administer justice … The right is determined by the justiciability of a matter. If a matter is not justiciable there is no right of access to justice in respect of that matter."

The error in the reasoning of the Federal Court was to unqualifiedly equate access to justice with remedy, meaning the jurisdiction of the court to give a remedy. Thus the absence of the latter meant the denial of the former. By this reasoning if a court is deprived of the jurisdiction to give a particular remedy it would follow there was no access to justice in that regard. It follows therefore that if tomorrow the right to habeas corpus is abolished or if it is declared that all persons charged with treason would not be entitled to trial in a court of law, there would by this reasoning be a valid abolition of the right of access to the courts. Surely there is something conceptually wrong with this constitutional approach especially in matters of great consequence to the individual.

The error lies in failing to classify access to justice as a rule of law principle. Under rule of law principles, the legislature, or the executive as the sponsoring body of the legislative curb, could not extinguish the remedy for a legal wrong and thereby deny access to justice to an aggrieved person. Whilst there could be some debate over this statement as a general proposition, it should not be debatable where fundamental rights are involved. The judiciary could not, under the separation of powers doctrine, be disembodied of its judicial powers of determining the legality of legislative and executive action, and its existence rendered otiose except on matters inconsequential to the state. It is a rule as old as *Marbury v. Madison* (5. U.S. 137 (1803)) that it is emphatically the province of the judiciary to declare on the validity of laws and the lawfulness of executive action.

The decisions of the Indian Supreme Court, discussed above, have all classified judicial review of legislative and executive action as a fundamental right that could not itself be abolished.

Democratic societies are obliged to recognise that the rule of law is the governing principle that animates the written or unwritten constitution. In *Exparte Witham*, Laws J. had expressed the confidence that no ambiguity would arise over access to justice as a right in a written constitution. But the Malaysian experience has shown that notwithstanding a written constitution, the issue can still be bedevilled by common law considerations of repeal and modification.

The principal objection one may take to the Malaysian decision is the premise of classifying access to justice as a common law right in the face of a written constitution. With respect, it would be more appropriate to classify access to justice as a constitutional right and it was unnecessary to found a common law parentage to it.

Exchangeable and Convertible Private Debt Securities

Abridged version of paper presented by Kelvin Loh at the Corporate Finance Law conference organized by Asia Business Forum in Kuala Lumpur, 14th and 15th November 2007

Introduction

Exchangeable bonds (EBs) and convertible bonds (CBs) are essentially private debt securities (PDS) or debt instruments with an added equity feature.

An EB is a PDS where the holder has the option to exchange the EB for existing shares in a company, not being the issuer of the EB. A CB, on the other hand, is a PDS where the holder has the option to exchange the CB for new shares in a company, which could be shares in the issuer or another company. An investor of an EB/CB acquires a fixed income instrument but has the option to participate in the potential equity capital appreciation of the underlying share.

From the Perspective of Investors/ Holders

Investors have the benefit of a built-in diversification option, i.e. an investor of an EB is exposed to the risk/return profile of the underlying share that may have an entirely different risk/return profile from the issuer of the EB.

Investors in EBs/CBs can profit from an increase in the price of the underlying shares. At the same time, if the price of the underlying shares do not increase, the holder can hold on to the EBs and continue to either receive the periodic coupon payments or if it is a zero coupon EB, receive the redemption sum on the maturity date of the EB.

However, investors in EBs/CBs have to accept a lower yield to maturity or coupon rate, depending on the structure of the bond, if compared to a holder of a straight (i.e. non-exchangeable or non-convertible) bond.

Investors in EBs may also gain slight inflation protection. When the share price is high, there may be high correlation between the price of the EBs and the price of the underlying shares. In this sense, EBs provide some inflation protection as compared to straight bonds because prices of straight bonds normally fluctuate based on interest rates and other factors but not the stock market.

From the Perspective of Issuers

By issuing EBs or CBs as opposed to straight bonds, issuers are able to negotiate for lower borrowing costs, e.g. a lower yield to maturity, because issuers are essentially leveraging on shares which they own to borrow money.

However, the cost to the issuer is that it will have to give up some equity in the underlying company, in other words, a dilution as a result of the exchange of the EBs by holders.

Essentially, the amount of equity an issuer is willing to give up on the underlying share will restrict the amount of the EBs that can be issued. One mitigating factor is that in most structures, the issuer is usually given a cash settlement option, i.e. the issue may decide to pay cash to an exchanging/converting holder rather than deliver/issue the shares.

Common Features

Practically all EBs and CBs have anti-dilution adjustments. This protects the rights of holders vis-à-vis the shares that they may acquire by making the holders no worse off should the underlying company undertake a corporate exercise.

The shares of the underlying company are usually listed on a stock exchange. Other common features include a "change in control" put and a "delisting" put given to holders of EBs/CBs.

The issuer is also given certain call options, e.g. a "clean-up" call, where the issuer has the right to early redeem the EBs/CBs if the nominal value of the bonds is less than a specific amount of the initial amount issued. Also, if the price of the underlying shares increases steeply, the Issuer is sometimes given the right to early redeem.

A cash settlement option for the issuer is also common, particularly for CBs. For example, if the issuer is relying on its shareholders' mandate under section 132D of the Companies Act, 1965 to authorize the issuance of new shares arising from the conversion of the CBs, the cash settlement option may be useful if, during the year, the issuer has issued a lot of shares for other purposes.

Principal Legal Framework – Ringgit EBs and CBs

- Capital Markets and Services Act, 2007 (CMSA) - approval of the Securities Commission (SC) for the issue of the EBs/CBs in Malaysia, requirement for a trust deed and for the appointment of a trustee unless exempted under the relevant schedules of the CMSA.

- SC's Guidelines for Issuance of Private Debt Securities OR the Guidelines for Issuance of Islamic Securities (if the EBs/CBs are Islamic) (collectively, PDS Guidelines)

- SC's Guidelines for the Issue/ Offer of Securities ("Issues Guidelines") – in particular, paragraphs 9.07 to 9.12 for CBs. For example, the Issues Guidelines allow for adjustments to be made pursuant to certain corporate exercises only. The Issues Guidelines also state that terms of the CBs once determined cannot be changed midstream.

- Issues Guidelines – for EBs, to note the "significant change in business direction" requirements in Chapter 12 of the Issues Guidelines and section 212(2)(f) of the CMSA.

- Listing Requirements of Bursa Malaysia Securities Berhad ("Bursa Securities) – for CBs, approval of shareholders for issuance of new shares arising from the conversion of the CBs.

- Listing Requirements of Bursa Securities - for EBs, if the disposer of the shares in the underlying company is listed on Bursa Securities, approval of the shareholders of the disposer if any of the percentage ratios set out in Chapter 10 of the Listing Requirements are met.

- Listing Requirements of Bursa Securities - for CBs, approval of Bursa Securities for the listing/ quotation of the new shares arising from the conversion of the CBs.

- Rules of Bursa Malaysia Depository Sdn Bhd (Bursa Depository) – for EBs, approval of Bursa Depository for the transfer of the relevant number of underlying shares from the central depository system (CDS) account of the disposer to the CDS account of the holder.

- Foreign Investment Committee (FIC) - approval of the FIC, through the SC's Equity Compliance Unit, for the change in shareholding structure of the underlying company due to the conversion or exchange of the CBs/EBs.

- Foreign Exchange Administration Rules of Bank Negara Malaysia ("FEAR") - relevant if the issuer intends to use the proceeds from the issue of bonds for investment abroad or overseas purposes.

Possible Structures in Foreign Currency EBs and CBs

A common structure is where a Malaysian company which wishes to raise funds sets up a wholly-owned special purpose vehicle (SPV) in Labuan which will be the issuer of the foreign currency EBs. The funds raised will then be on-lent to the Malaysian company. In an SPV structure, it is common for there to be a corporate guarantee by the holding company of the SPV.

Depending on the credit standing of the issuer, the lead arranger may wish to negotiate for a charge over the underlying shares (in the case of EBs) or

a bank guarantee by a financial institution. This is because the credit standing of some issuers may be so low such that without these credit enhancements, the cost of issuing the EBs may be too high.

A structure that is not as common in Malaysia is where the West-Malaysian or domestic company directly issues the EBs, rather than via a Labuan SPV. One main difference in terms of regulatory structure is that in this structure, the SC's PDS Guidelines needs to complied with although there are certain exemptions, whereas if a Labuan SPV is used, the requirements of the Labuan Offshore Financial Services Authority (LOFSA) need to be complied with, the LOFSA requirements being generally less onerous than the SC requirements.

Principal Legal Framework – Foreign Currency EBs and CBs

- CMSA - approval of the SC is not required for the issuance of CBs/EBs if these CBs/EBs are offered by an offshore company outside Malaysia. However, approval is still required for the making available of the underlying shares by the disposer to facilitate the exchange of the EBs by the holders and for a "significant change in business direction" if the relevant percentage ratios are triggered.

- Listing Requirements of Bursa Securities – for CBs, approval of the shareholders of the issuer and approval of Bursa Securities for the listing/ quotation of the new shares arising from conversion of the CBs. For EBs, shareholders' approval if the relevant percentage ratios are triggered.

- Rules of Bursa Depository - approval of Bursa Depository for the approved transfer of the underlying shares.

- FIC – approval of the FIC for the change in shareholding structure of the underlying company.

- Labuan International Financial Exchange, Inc. (LFX) – if EBs/ CBs to be listed on LFX, approval of LFX for primary or secondary listing on LFX.

- FEAR - approval of the Controller of Foreign Exchange for the Malaysian/domestic company (being a resident for exchange control purposes) to obtain a foreign currency credit facility from the Labuan SPV (being a non-resident for exchange control purposes) if the amount of the facility exceeds the relevant threshold; and registration of the financial guarantee given by the resident guarantor in favour of non-resident holders or the non-resident trustee if the amount exceeds the relevant threshold.

- Offshore Companies Act, 1990 (OCA) - exemption of the Minister of Finance for various matters, including the appointment of a foreign trustee and for the Labuan SPV to hold debt obligations in a domestic company arising from the on-lending by the Labuan SPV of the issue proceeds from the EBs/CBs to the domestic company.

- OCA – approvals from LOFSA for various matters, including for the on-lending by the Labuan SPV of the issue proceeds from the EBs/CBs to the domestic company and the form and content of the offering circular/information memorandum to be issued to potential investors of the EBs/ CBs.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