SHOOK LIN & BOK EST 1918 KUALA LUMPUR

LEGAL UPDATE

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INAUGURAL ISSUE

Welcome to the inaugural issue of the firm's Legal Update. Published quarterly, the objectives of the newsletter are to present a chronicle of legal developments relevant to the country, which would be timely and relevant to the interest of our readership. The body of judicial pronouncements is large and multifarious, and therefore the reports in the newsletter will of necessity be selective and will be but only a snapshot of the legal developments, but what we regard to be of the greatest significance and relevance. We welcome any comments and communication, which may be addressed to the Editor, Shook Lin & Bok Legal Update.

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2004 saw the physical expansion of the firm's premises with the addition of five new conference rooms and a major function room, as well as renovations in other areas of the premises.

The firm celebrated its 85th Anniversary at a cocktail reception at the Mandarin Oriental on 12 September 2003. The guests comprised of dignitaries and clients. A highlight of the evening was the launch of the firm's website.

ASIA LAW IP AWARDS 2004

The firm was shortlisted as "IP Firm of 2004 for Malaysia", along with three other firms, by Asia Law & Practice. The head of the firm's Intellectual Property Department, Michael CM Soo (second from left) attended the presentation ceremony in Hong Kong on 3rd November 2004.

EUROMONEY CONFERENCE

Euromoney organised a conference on Remaking Malaysia: Investing in the New Malaysia in Kuala Lumpur on 3rd and 4th August, 2004. Over a thousand government officials, business leaders and investors attended the forum, making it the largest and most high profile investment and capital markets event of 2004 in Malaysia.

Speakers and members of panel discussions addressed the market and policy developments in the country and the initiatives aimed at attracting investment into Malaysia.

The Prime Minister and Governor of Bank Negara delivered keynote addresses at the forum.

Shook Lin & Bok was a co-sponsor of the conference. The firm's Dato' Dr. Cyrus V. Das chaired one of the panel sessions and Jalalullail Othman was a panelist for one of the sessions.

JUDICIAL REVIEW OF FINANCIAL REGULATORY BODIES

Summary of paper presented by Dato' Dr Cyrus V Das at the 6th Lawasia Business Conference, Kuala Lumpur, 7th and 8th October 2004

Introduction

Regulatory bodies have today become an indispensable feature of the financial landscape of many countries. In most countries with a developed market system, there is a danger of a surfeit of regulatory bodies and the danger of over-regulation. But the compelling argument is that confidence in the financial market and protection of investors cannot be achieved without regulation.

There are many types of regulatory bodies. In England they are largely self-regulatory bodies, without statutory basis. But in most other countries the regulatory bodies enjoy statutory underpinning like the Securities Commission of Malaysia. There is general acceptance that financial regulatory bodies everywhere wield considerable power in the market, with licensing and approval functions on the one side and investigative and inquisitorial functions on the other. With this power arises the *quist custodiet* question, who is to regulate the regulator? Can an aggrieved person hold the regulators accountable for their decisions in a court of law?

Are Regulatory Bodies Amenable to Judicial Control?

As a conceptual question, all statutory bodies or bodies performing public duties are subject to judicial review. But the experience of England has shown that amenability to judicial review was not an assumed thing where the regulatory body lacked statutory backing. Many of the financial regulatory bodies in England are non-statutory like the Panel on Take-Overs and Mergers. The question whether the Panel was subject to judicial review first arose in the *Datafin* case (*R v. Panel on Take-overs & Mergers exparte Datafin plc* [1987] 1 All ER 564).

The Court of Appeal held that the Panel was amenable to judicial review as it was performing a public duty and public law function, and the City Code On Takeover and Mergers which it administered had important public consequences, and it should be subject to public law remedies. The *Datafin* decision set the trend towards the amenability of such regulatory bodies to judicial review and was followed in later cases.

Lord Donaldson had observed in the *Datafin* case that the Panel's non-statutory character was a historical anomaly peculiar to the City's traditions of self-regulation but that the experience of comparable markets worldwide was different. That observation is borne out by the experience of Commonwealth countries like Malaysia, India and Australia. The Malaysian Panel on Take-overs and Mergers enjoys a statutory foundation under the Take Over Code (previously under the Companies Act 1965 and now under the Securities Commission Act 1994). In *Petaling Tin Bhd v. Lee Kian Chan* [1994] 1 MLJ 657, the Court held that if the English Panel was amenable to judicial review, *a fortiori* the Malaysian Panel should be, as the Malaysian Code, unlike the London Code, is promulgated by Parliament and not a mere gentleman's agreement.

The Malaysian position is made much simpler by Order 53 of the Rules of the High Court 1980 which provides that the decision of "any public authority" is amenable to judicial review. Therefore any regulatory body functioning under a statutory scheme would be subject to judicial review.

Substantive Review

In the *CCSU* case (*Council of Civil Service Unions v. Minister of Civil Service* [1984] 3 All ER 935 HL) Lord Diplock had neatly, and now widely accepted as authoritatively, identified the touchstones of judicial review:

> " one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety" ... By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it... By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ... I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision..."

It may be stated confidently that financial regulatory bodies are subject to the Diplock rules of judicial review for the decisions they make. An outline of the qualifications on the exercise of the powers of regulatory bodies, judicially elucidated, is set out below.

Illegality

Ultra vires is the first and probably most important control mechanism to ensure regulatory bodies keep within their limits.

Irrationality
The other Diplock ground is 'irrationality'. As stated, it is a convenient short-hand description by Lord Diplock of *Wednesbury* unreasonableness. The decisions of financial regulatory bodies are not exempt from this test.

On the subject of irrationality, there are two principles which would undoubtedly apply, as a matter of principle, to decision-making by financial regulatory bodies. The first is that if the statutory provision leaves it to the decision-maker to determine the relevant factors that should be taken into account, it is open to the courts to decide whether the particular factor is relevant although the weight to be assigned to it is entirely a matter for the regulatory body as it thinks fit.

Secondly, financial regulatory bodies must be alert to the public and sensitive nature of their decision-making. Their decision must be merit-based and not influenced by extraneous considerations. Thus it should not be subject to political dictates.

An Important Limitation
Judicial review of merit-based decisions by financial regulatory bodies is subject to an important limitation. The courts will not second-guess the informed judgment of responsible regulators steeped in knowledge of their particular market. Moreover, there is a time honoured principle that in matters like public expenditure, price or rate fixation or incidences of tax burdens and the like, which Parliament has confided to a specialist body, the courts will not ordinarily interfere in the decisions they make.

Procedural Review
Most financial regulatory bodies wield enormous influence over the fate of persons and transactions in the financial market. Persons aggrieved are bound to inquire whether the regulatory body had conducted itself in accordance with established procedure and made a decision justly and fairly.

The first principle in this regard is that the decision must be arrived at fairly; that the required procedure must be followed, and that additional procedural safeguards to ensure fairness may well be read into the prescribed procedure.

But the courts are less likely to interfere on grounds of natural justice where the regulatory body is discharging its investigative or inquisitorial role. The Courts are also unlikely to put fetters on methodology in the investigative function. Nevertheless there is recognised an overriding duty on the part of the regulatory body to act fairly. It operates both at the time of the institution of an investigation and during the course of the investigation.

The principle of fairness is, however, flexible and if the regulatory body had acted fairly from an objective standpoint, the court will not interfere in the absence of bad faith. In deciding whether to institute an investigation into the affairs of a company, the persons exercising the power must not exceed or abuse the discretion which is granted to them.

Bias is often a complaint especially of the inspectors investigating a company. However, it is not relevant in this context, as the investigators are acting in "a policing role" but not a judicial or quasi-judicial role of making a determination.

Another Important Limitation
Several cases have said that the public interest is the overriding factor and the procedural safeguards sought by the aggrieved party may in certain circumstances have to give way to the public interest. The need for urgency in intervention may necessitate dispensing with giving the affected persons an opportunity to be heard first. However, it would be fair for a regulatory body to hear representations after the event.

Conclusion
It is appropriate that financial regulatory bodies be subject to judicial scrutiny for their decisions and actions. Regulatory bodies can only inspire confidence in the market if they are not seen as despotic and arbitrary but possessed of integrity and competence. Such attributes are vital to obtain market confidence and to maintain confidence in the financial system.

CODE OF CORPORATE GOVERNANCE: ONE SIZE FITS ALL?

Summary of paper presented by Jalalullail Othman at the 6th Lawasia Business Law Conference, Kuala Lumpur, 7th and 8th October 2004

Corporate governance issues are not just for emerging markets but also for developed markets. The emerging structure of corporate governance in Asia is plagued with global standards and local practice. The real challenge before us is whether we are to take standards that are applicable globally and apply these in a manner that they will take into account different stages of economic development coupled with differences in local culture and practices. Where do we go from here? Do we really want to accept these standards in our local setting, bearing in mind that an ideal set of standards should be based on the needs of a country and should not hamper economic growth. We must be careful not to readily transplant practices from the developed West to Asia, without thinking through the differences we have with them with respect to corporate governance. So the question is, does one size really fit all?

This paper is intended to give some insight into the Corporate Governance environment in Malaysia and some measures that have been taken and put in place to further enhance and strengthen the level of Corporate Governance. The reader is introduced to some of the business culture and ethics in corporate Malaysia and how this culture and ethics fit into the corporate governance mould. The paper is not intended to be a thesis of all the regulatory and legislative provisions and safeguards in Malaysia but rather is intended to highlight some pertinent measures taken to promote Corporate Governance. These pertinent measures are introduced to the reader by reference to some of the issues and corporate incidents that have occurred in Malaysia. In each of these incidents, the reader is taken through four salient principles of Corporate Governance namely, accountability, transparency, predictability and participation and how these principles have faired

against the onslaught of corporate manoeuvres.

The influence of the Asian values and culture in the context of Corporate Governance can most be seen in the area of minority shareholders activism. An important aspect of Corporate Governance is the protection of the weak from the powerful, of the minority from the majority. It is the Asian culture to agonise rather than to antagonise. It is not the Asian culture to be confrontational. These aspects of the culture have resulted in minimal shareholders activism in Asia. Minority shareholders would rather accept their fate than to confront the majority in power. The bulk of the minority shareholders do not know of their rights. The mindset of these minority shareholders is such that they view themselves as shareholders rather than share owners. As owners they have a stake in how the company is being managed. As holders of shares, they accept the manner in which the company is being run. The reluctance to confront and antagonise means they would rather be spectators to the event instead of drivers and catalyst for change.

Corporate Governance is about governing the way business is being conducted. Local culture and values shape the way business is being conducted. Business in Malaysia is influenced by a large extent by Asian values and Asian cultures in the way it is transacted. Corporate Governance in Malaysia must therefore be formulated and practised and judged in the context of and taking account of the Asian way of doing business and how business is being done in Malaysia. Corporate Governance can therefore never be static or permanent whether the same be used as a tool to govern or an indicator of good governance. It should always be likened to the liquid adjusting or expanding to take the shape of the container in which it is placed.

At present , there are several fundamental differences between the Western corporate world as compared to most of the developing world in Asia. Firstly, in Asia, the government is the visible hand that guides the economy. They are significant players in the Asian economy, employing multi-faceted roles as regulator, shareholder, and active players in trying to assure economic growth. In the Western corporate world, there exists the classical model that only the free play of economic forces can assure the optimum allocation of resources. In this respect, a balance has to be struck between the two extremes of allowing unfettered free play of the invisible hand of economic forces and the guiding and visible hand of government, and this balance to be struck would vary from country to country.

Secondly, it can also be observed that big businesses in Asia co-exist with government and is to a certain extent beholden to the government for access to capital or for licence and special operating conditions. More often than not, large enterprises play strategic roles and claim government protection in the name of national interest.

The third difference is that in Asia, the structure of business is different and economic power is concentrated in dominant shareholder groups i.e. families or government. Because of this notable difference, would standards applicable to the United States of America ("US") and the United Kingdom ("UK") corporations be applicable to family-dominated companies?

Fourthly, in Asia, professional managers are not yet separated from positions of corporate control. In the West, there is a marked separation of ownership of a business from its management and control. The situation is different in Asia, where the interest of management and the major shareholders are usually identical. Owners in Asia have a paternalistic outlook over the minority and their employees and expect loyalty from them. They do not make decisions by committee and do not like to be interrogated.

Fifthly, there are obvious differences between the cultures in the West and in Asia. Successful businesses in Asia requires an intricate network of contacts and building interpersonal trust and harmony. In the Western model, it is mainly based on the rule of law and merit. Thus, if a global code of corporate governance is transplanted in the Asian context, would this not detract Asia from its culture and identity; and would it lead to more confrontation than harmony? The establishment of the Minority Shareholders Watchdog Group ("MSWG") has to a large extent altered this traditional mindset and lifted shareholders activism to a higher level.

There have been four major changes that occurred in the Corporate Governance arena in Malaysia in the last five years which can be said to be pivotal in moulding and guiding the way forward for Corporate Governance in Malaysia. The changes are the commissioning of the Report on Corporate Governance by the High Level Finance Committee (February 1999), the revamp of the Bursa Malaysia Listing Requirements, the formation of the MSWG and the Malaysian Code on Corporate Governance issued by the Malaysian Institute of Corporate Governance (January 2001).

The Report on Corporate Governance (1999) highlighted many flaws and shortcomings in the area of Corporate Governance and it contained many recommendations to address these flaws and shortcomings in corporate Malaysia.

The MSWG was formed to include promoting shareholder activism among the minority shareholders. Subsequent to the formation of the MSWG, there has been several notable cases where issues were raised and objections made in respect of matters which affect the interest of the minority shareholders. It has become one of Malaysia's resource centre's for minority shareholders, influencing the decision-making processes in listed companies, recommending actions against the management of listed companies by aggrieved minority shareholders, and continuously monitoring listed companies for breaches and non-adherence to good corporate governance practices that are detrimental to the rights and legitimate interests of its minority shareholders.

Thus, it can be illustrated that an important ingredient of corporate governance is providing a mechanism which promotes easy accessibility and participation by shareholders regardless of size. To facilitate this, transparency is an

important element. With greater transparency, shareholder participation can become more real and effective.

There have been some problems which plague some of the regulatory bodies and other machinery that have been formed to enhance the level of Corporate Governance in Malaysia. A common critique is in the area of enforcement and prosecution of claims. One issue is the requirement of seeking the consent of the Attorney General for initiating any prosecution under the relevant legislation in particular offences under the legislation relating to securities laws and company laws. Obviating the need to obtain such consent would speed up the prosecution and eventual conviction process.

There is also the criticism that the present legislative structure provides for multiple bodies with the authority to investigate crimes. Currently, there are at least five legislative bodies which are vested with the authority and powers to investigate offences of company and securities laws, namely the police, Anti-Corruption Agency (ACA), the Companies Commission of Malaysia (CCM), Securities Commission and Bursa Malaysia.

To address these problems, certain remedies and steps have been taken to overcome the problems at hand. For example the Bursa Malaysia Listing Requirements provides for the submission of various financial and accounting reports, amongst other steps taken to ensure good corporate governance. Failing to comply with the reporting requirements can result in the delisting of the company from the exchange.

Suggestions to overcome the reluctance to boost corporate governance include devising a rating system on the companies which would reflect the level of corporate governance practised by the company. Weak corporate governance can undermine a company's creditworthiness in many ways.

The other is to set up an investigative audit by the Securities Commission to check into the past dealings of the company before approving any application for restructuring.

The Bursa Malaysia Listing Requirements have sought to address these shortcomings. It has sought to achieve this objective by regulating the type of transactions that are undertaken, by regulating the type of relationship between the transacting parties, by prescribing certain types of information that should be disclosed, by subjecting the transactions to the approval of shareholders, by requiring independent advisers to advise the shareholders and lastly by requiring the interested party and the related party to abstain from both deliberations and decision making.

Corporate Governance should be localised and domesticated in order to be most effective to address the problems that it is intended to solve. Corporate Governance is there to facilitate business rather than impede business. It is no longer sufficient merely to do business but it is necessary to do business the right way. The greatest challenge in the way of exhorting good Corporate Governance is the mindset change and paradigm shift in entrenched customs and ethics. The paradigm shift that is required is to view the regulators as partners in the quest to achieve good corporate governance rather than to look to the regulators as a watchdog. There will be increasing reliance by the regulators on the company and the advisers in ensuring that the representations made by the company and its advisers are true and accurate. It is a common misconception that Corporate Governance is an internal matter for the company and has little effect on the macro picture of the capital market. Hence it is viewed that any failure in this area will only affect the company concerned. This misconception should be corrected. Good Corporate Governance is necessary for the effective and efficient functioning of the capital markets.

Globally, corporate governance has been recognised as a tool to fight, among other ills, corruption, corporate scandals, poverty and the agency problem, i.e. ensuring that managers avoid serving their own interests and serve those of the share owners and other stakeholders.

It is hoped that the increased consciousness of Corporate Governance would not see a significant increase in matters that end up in the legal system. The present legal system is barely coping with the matters brought before it. The direction taken in Malaysia has been to resist the inclination to engage in confrontational approaches which invariably end up in the legal system. Malaysians would rather subject the issues of Corporate Governance to the court of public opinion and decide matters publicly. This method has worked and produced the desired results. This is the Malaysian brand of Corporate Governance.

In a nutshell, whilst the issues surrounding corporate governance may be different in various parts of the world and there is no "one size fits all" code of corporate governance, one thing remains unchanged: the importance of corporate governance is a matter that is not going away.

WINDING UP LAW: AN OVERVIEW

Summary of paper presented by Adrian Hii at Lexis Nexis seminar on legal developments in winding up on 12th October 2004

Insolvent compulsory liquidation

In a dynamic market economy, enterprises depend on credit as a crucial source of financing. It is the nature of risk that entrepreneurial risk taking will inevitably result in some failures and insolvencies (i.e. inability to pay all debts). Insolvency laws have a substantial impact and are therefore one of the most important of legal disciplines in a market economy. Insolvency laws serve the following primary socio-economic objectives:

(a) To provide an orderly procedure for the termination of failed businesses.

(b) To minimise the stifling of responsible risk taking and enterpreneurism, by not excessively penalising business failure.

(c) To facilitate the recovery of companies in financial difficulty.

(d) To fix rules which determine the relative burden of the loss of business failure to be borne, between the creditors and shareholders, and to achieve a fair and equitable distribution of the company's assets.

(e) To ascertain the cause of failure and impose punishment for any culpable conduct by directors.

Distilled to the fundamentals, insolvency laws perform the following objectives. Firstly, to impose financial discipline and eliminate weak and inefficient enterprises. Competition underpins a market economy and the play of competitive market forces by itself ensures that inefficient enterprises will be weeded out. This is a desirable and necessary phenomenon and ensures efficient allocation of resources in an economy.

Secondly, and most fundamentally, to provide a system for efficient and orderly termination of failed enterprises and fair distribution of assets. When a business fails, there are insufficient assets to satisfy the claims of all the contributors of capital, namely creditors and shareholders. The law decides who bears the risk of the loss and in what proportion, and in the process determines the priority accorded to different classes of creditors.

Different legal systems strike a different balance in the comparative treatment of stakeholders. Not only must the balance struck be perceived to be fair, but the implementation of the law and procedures must be efficient, transparent and impartial. Fairness and efficiency foster confidence in an economy. Without fair and efficient insolvency regimes for recognition of creditors' and shareholders' rights and collection of their claims, the economy will be unattractive to investors. The insolvency laws of a country is a critical factor in the strength and competitiveness of an economy.

Thirdly, to achieve a proper balance between penalising business failure and creating an environment conducive to entrepreneurism. English bankruptcy laws, from the time the first bankruptcy act was passed in 1542 by Henry VIII, made bankrupts criminals, and focussed on punishment with penalties including death and imprisonment. It was centuries before the harsh penalties were ameliorated. Vestiges of the punitive character of the law remained, however. No one would question the appropriateness of harsh penalties against dishonest or fraudulent debtors. However, some of the provisions in insolvency laws are outdated and make no distinction between whether the failure was honest or dishonest. England has by the Enterprise Act 2002 addressed the shortcomings and moved towards liberalising its personal insolvency law and removing the stigma of bankruptcy, by abridging the period after which bankrupts are automatically discharged, and removing much of the pre-existing penalties, including the statutory prohibitions and disqualifications imposed on bankrupts, irrespective of culpability, which were regarded as too harsh and were feared to be a deterrent to entrepreneurism and responsible risk taking.

The reforms are aimed at encouraging entrepreneurial risk taking by not over-penalising failure. It is the nature of risk taking that there will on occasions be failure, which is not immoral or shameful in itself. Corporate insolvency is still tainted with moral failure. The provisions which impose criminal penalties and personal liability on directors for trading without reasonable expectation of solvency, irrespective whether there was reckless or fraudulent conduct, seem harsh and may deter risk taking. Taken to its logical conclusion, the provisions can precipitate insolvencies by causing corporate paralysis in the face of financial turbulence. The preference for punishment over tolerance has also meant an approach in the past that has discouraged rehabilitation or rescue of temporarily distressed companies, which may otherwise be sound. Rehabilitation should be encouraged, given the costs of insolvency to investors, employees and the public. In English common law jurisdictions, recognition of this objective is a fairly recent phenomenon. The U.S.A. had taken the lead in promoting a rehabilitation culture through the celebrated, and famous or infamous depending on the viewpoint, Chapter 11 proceedings. England adopted formal rehabilitation proceedings in 1986 and Canada, Australia, New Zealand and Singapore have followed suit.

The advantages of formal rehabilitation proceedings are:

(a) A statutory freeze on creditor action forcing payment or liquidation, thus giving the debtor some breathing space to work out a proposal for debt restructuring and restoring the company to profitability, free from constant creditor pressure, and

(b) Restructuring proposals approved by majority creditors bind dissentient creditors, who cannot take action to force payment.

The Chapter 11 regime is more liberal and lenient than that in England and Australia, for instance. Chapter 11 permits " debtor in possession" allowing existing management to stay in place, and longer time periods for the rehabilitation process. Chapter 11 has its adherents and detractors. The criticisms include that it lets failed management go unpunished, and it has kept companies artificially afloat, with some going in and out of Chapter 11 repeatedly (wittily termed Chapter 22 and Chapter 33).

The contrary viewpoint is that Chapter 11 has by and large fulfilled its purpose well, and only deserving companies have been returned to good health. Between being too strict and shutting down companies that are worth reviving, and being lenient and allowing some companies to survive that should not, the choice seems clear. In Malaysia, Section 176 of the Act, the Scheme of Arrangement is the closest approximation we have to the formal rehabilitation proceedings in other countries. Successful rescues mean a win-win situation for all the stakeholders. Rehabilitation should be encouraged as an objective, which calls for assessment whether the existing provisions are effective in meeting that objective.

Here now are the elements of our insolvency law. The most common trigger for a petition for liquidation is failure to comply with a statutory demand under Section 218 (2) (a)

of the Companies Act. In summary, liquidation is a collective process leading to the termination of the life of a company. The role of the liquidator is to collect in and realise the assets, distribute the proceeds among creditors and at the end dissolve the company.

(a) Pursuit of remedies by individual creditors is suspended. This is a hallmark of all insolvency laws, namely to replace the pursuit of personal rights with a collective process for orderly distribution of the company's assets among the unsecured creditors, on a pari passu or proportionate basis. However, secured creditors holding a proprietary right or security interest may proceed to realise the security. The assets subject to such interests or trust are not considered to be the company's assets, and may be removed from the reach of unsecured creditors. English common law jurisdictions accord great importance to the sanctity of security and proprietary interests.

(b) Directors are divested of their management powers.

(c) The assets are preserved, collected and recovered. The assets held by the company at the time of winding up will be applied to meet the claims of creditors. A function of insolvency law is to preserve those assets. Any disposition after commencement of liquidation is void unless sanctioned by court. In principle, only the assets of the company at the time it goes into liquidation are available for its creditors. Any payments or dispositions of property already made prior to winding up are undisturbed. To this general rule however there are some exceptions, which operate to avoid and recover dispositions made even before winding up. The underlying policy of pari passu payment of creditors means that it is necessary to protect the creditors against the depletion or the company's assets, in the twilight period leading up to insolvency, which dissipate the assets or unjustly enrich some parties or advantage some creditor, at the expense of others.

(d) The causes of insolvency are investigated and sanctions taken against any culpable management.

(e) The assets are realised and distributed in the statutory order of priority.

(f) Upon the completion of liquidation, the company is dissolved.

Solvent compulsory liquidation

The "just and equitable" ground in Section 218 of the Act is primarily of interest to minority shareholders where there is some oppression or unjust conduct by the majority. The circumstances in which this ground has been availed of include:

(a) Failure of substratum: Impossibility of achieving the company's objects.

(b) Deadlock: where shares are equally divided between two groups of shareholders who are unable to agree, with the result that the business cannot be carried on.

(c) Fraud, impropriety or oppression by majority shareholders, and justifiable loss of confidence in them.

(d) Exclusion of minority shareholder from office.

The last situation above may be regarded as the most far reaching impact of the just and equitable ground pursuant to which the court may subject the exercise by majority shareholders of their legal rights to equitable considerations. A common example of this situation is where the majority shareholders exclude a minority shareholder from the management. Normally a minority will be bound to accept majority rule. The just and equitable ground however gives a minority shareholder a remedy where the shareholders have associated on the basis of a personal relationship of mutual confidence, and understanding that all members will participate in management. In such circumstances the majority rule will not be strictly applied.

Voluntary liquidation

Voluntary winding up is a non-judicial procedure. It reflects a policy of allowing shareholders to manage their own affairs and to voluntarily wind a company up without going to court, by passing a special resolution. There are two types of voluntary liquidation:

(a) Members' voluntary liquidation, if the company is solvent.

(b) Creditors' voluntary liquidation, if the company is insolvent

The practical mechanism to determine this, is whether the directors make a written declaration of solvency. If so, the liquidation proceeds as a members' liquidation. Otherwise it proceeds as a creditors' liquidation.

The policy underlying voluntary liquidation is that control should rest with the group most directly affected. In the case of a solvent company, the control is in the hands of shareholders. However when the company is insolvent, the only persons with any real interest are the creditors, and hence they are given control. Where the company is insolvent, the effect of voluntary liquidation is practically identical to compulsory liquidation including the rules governing the priority of debts and invalidation of transactions.

CASE UPDATES

RECEIVERS

Kim Lin revisited

The Federal Court reconsidered an aspect of the decision in *Kim Lin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd* in the case of *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd v MBf Finance & Ors.*

In *Kim Lin*, one of the grounds for the decision there that the receivers and managers of the chargor company which had been wound up were not entitled to sell the company's land charged to the creditor, was that a receiver and manager is within the definition of a company's "officer" in the Companies Act, and by virtue of section 300(1), all officers of a company in liquidation are bound

to deliver to the liquidator all the company's property, and hence liquidation does not merely terminate the agency of the receiver and manager, but also his powers to realize the charged assets. The reasoning of the Court is not confined to land but movable property as well.

In *Balasubramaniam*, the issue posed was whether the liquidator of the company can compel the receiver and manager to surrender to the liquidator, the movable property of the company charged to the creditor under the debenture, and over which the receiver and manager had been appointed.

The Court held that the decision in *Kim Lin* is to be confined to cases concerning the right of a receiver and manager to sell land charged to the creditors. The decision is not to be extended to movable property.

The Court departed from the dicta in *Kim Lin* that a receiver and manager is an officer of a company for the purpose of section 300(1), and held that a receiver and manager is not an officer for that purpose, and by inference, the property charged to the creditor is not the property of the company, and the receiver and manager's power to realize the movable assets charged to the creditor is unaffected by the company's liquidation.

ARBITRATION

Interim judicial relief in UNCITRAL or KLRCA arbitrations

In a recent landmark judgment, *Thye Hin Enterprises Sdn Bhd v DaimlerChrysler Malaysia Sdn Bhd* [2004] 3 CLJ 591, the Court of Appeal held that section 34 of the Arbitration Act 1952 (the Act) does not prevent the Court from exercising jurisdiction to grant interim relief or protective measures pending disposal of an arbitration at UNCITRAL or the Kuala Lumpur Regional Centre for Arbitration (the Centre).

Pursuant to a dealership agreement between the parties (the said agreement), the respondent had appointed the appellant as a non-exclusive dealer in Kedah for the sale and service of new Mercedes Benz passenger cars, vans and transporters. Article 17 of the said agreement provided that all disputes between the parties were to be referred for arbitration to the Centre. The respondent sought to terminate the said agreement and the dispute was referred for arbitration to the Centre; however, pending commencement of the arbitration, the appellant filed a writ at the High Court and sought, by way of summons-in-chambers, injunctive relief to preserve the status quo pending the arbitration decision.

The respondent's solicitors raised a preliminary objection that by virtue of section 34 of the Act, the interim relief sought by the appellant was not available to the appellant as the law under which it is sought does not apply to an arbitration held under UNCITRAL arbitration Rules and the Centre. The learned judge upheld the preliminary objection and dismissed the appellant's application for interim injunctive relief.

The Court of Appeal noted that section 34 of the Act only excludes interference with the arbitration itself; section 34 does not apply to cases where interim relief is urgently required. In other words, the grant of interim relief pending outcome of an arbitration held at the Kuala Lumpur Regional Centre for Arbitration is not prohibited by section 34 of the Act. The order of the learned judge was set aside and the appellant's application for interim injunctive relief was remitted to the High Court to be heard on the merits.

BANKRUPTCY

Section 6(3) of the Limitation Act 1953

The applicability of section 6(3) of the Limitation Act 1953 to bankruptcy action was considered by the Federal Court in *Perwira Affin Bank Bhd v Lim Ah Hee* [2004] 2 CLJ 787.

Section 6(3) of the Act provides as follows:

> " An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due."

On 23rd October 1987, the appellant (judgment creditor) obtained a judgment against the respondent (judgment debtor) for the sum of RM2,963,054.86 with further interest from 1st December 1985 to the date of realization. On 28th March 1996, the appellant issued a bankruptcy notice against the respondent claiming interest up to the date of the bankruptcy notice. The respondent challenged the bankruptcy notice on the ground that it included statute barred interest.

The Federal Court held as follows:

(a) A bankruptcy proceeding is within the meaning of the words "action upon a judgment" in section 6(3) and therefore the limitation period in that section applies, and a bankruptcy action must be brought within twelve years of the date of the judgment.

(b) By virtue of the second limb of section 6(3), the interest that can be claimed is limited to six years from its due date, and following *United Malayan Banking Corporation v Ernest Cheong Yong Yin* [2002] 2 CLJ 413 and *Moscow Narodny Bank Ltd v Ngan Ching Wen* [2004] 2 CLJ 241, the six years is to be calculated from date of judgment. Therefore the limitation period for bringing a bankruptcy action is twelve years, but arrears of interest may only be claimed for six years from judgment date.

The import of the decision is that a bankruptcy notice may be issued after six years (but within twelve years) of the judgment, containing a claim for interest, but the interest allowed will be limited to six years.

This is a departure from the *Ernest Cheong* case which had held that a bankruptcy notice cannot even be issued after six years from judgment if it includes a claim for interest (even if the interest is limited to six years from judgment),

as the second limb of section 6(3) bars an action to recover interest after six years, and such a bankruptcy notice will be invalid.

Applying the principles to the facts of the case, the court held that the bankruptcy notice which was issued eight years and five months from judgment, was not out of time, but as it claimed interest up to bankruptcy notice date, i.e. more than six years from judgment, it was invalid.

The court in the course of the judgment also referred to English cases which held that proceedings for execution of judgments are not within section 6(3), and are not subject to limitation, but the recovery of interest in execution proceedings is subject to section 6(3), which would be limited to six years, and the court agreed with English decisions that bankruptcy proceedings are not execution proceedings, for which leave to execute after six years from judgment need not be obtained under Order 46 r 2 of the Rules of the High Court 1980.

LABOUR LAW

Outturn allowance

In *Neoh Choo Ee & Co Sdn Bhd v Vasalamany a/l Govindasamy & Anor* [2004] 4 AMR 357, the issue before the Court of Appeal was the jurisdiction of the Director General of Labour (DG) to deal with the dispute in question, and whether outturn allowance is 'wages' within the meaning of section 2 of the Employment Act 1955 (the Act).

The respondents were rubber tappers, and members of the National Union of Plantation Workers (NUPW), who were formerly employed by the appellant who owned a rubber estate. The collective agreement entered into between the appellant and the NUPW was taken cognizance of by the Industrial Court under section 16 of the Relations Act 1967 (the 1967 Act). The dispute between the parties revolved around Article 14 which deals with outturn allowance, the appellant contending that these were not wages and the respondents contending otherwise. The Director General of Labour (DGL) agreed with the respondents.

The Court of Appeal held that the powers of the DGL under section 69 of the Employment Act 1955 (the 1955 Act) *vis-a-vis* the Industrial Court, can only be excluded if the claim or dispute has been referred to, or is pending before, the Industrial Court.

In dismissing the appellant's appeal, the Court of Appeal also held that on the facts of this case and based on the terms of the collective agreement entered into between the parties, the outturn allowance was part of wages because it was a contractual payment which the appellant employer and NUPW had agreed upon, under section 17(2) of the 1967 Act.

The Court of Appeal took the view that as the object of the 1955 Act was to promote industrial harmony, the 1955 Act must be liberally interpreted. Consequently, wages include all contractual payments other than those excluded by section 2 of the 1955 Act. In the instant case therefore, wages includes the outturn allowance provided under Article 14(a) of the collective agreement.

INTELLECTUAL PROPERTY

Trade Marks

The issue of granting of extension of time to file notice of opposition outside the prescribed statutory period (i.e. 2 months from the date an application is advertised in the Government Gazette) was recently discussed at the Dialogues between the Intellectual Property Corporation of Malaysia ("IPCM") and IP Practitioners held in July 2003 and March 2004. Following the Dialogues, The Registry of Trade Marks, Malaysia ("RTM") has agreed to grant extension of time of up to 3 months if a request for extension of time (without a statutory declaration) is filed on or before the expiry date of the prescribed statutory period. On the other hand, if a request for extension of time is filed after the expiry date of the prescribed statutory period, the granting of extension of time would strictly depend on cogent reasons filed by way of a statutory declaration.

The online search system for public search implemented on a trial basis on 2nd January 2004 has since been suspended. Operations are expected to resume soon although no firm dates have been fixed yet. Also, in the near future, the RTM will also be launching the online filing system which is expected to greatly benefit the public.

Further information may be obtained from the website of the Intellectual Property Corporation of Malaysia at http://www.mipc.gov.my.

Industrial Designs

At a Dialogue with practitioners held on 27th March 2004, the Secretary General of the Intellectual Property Corporation of Malaysia ("IPCM"), Y.B. Datuk Dr. Sulaiman bin Mahbob, and the Director General of IPCM , Encik Ismail bin Jusoh, announced that designs registered under the United Kingdom Registered Designs

Act 1949 would be allowed to be extended for the 4th and 5th terms in Malaysia.

This decision is welcome as the Industrial Designs Registration Office had previously held steadfastly to the view that such designs registration could not be extended for the 4th and 5th terms under the Industrial Designs Act 1997, despite strong differing views by practitioners.

Copyright

In an effort by the government to further stem the tide of piracy in Malaysia, the Copyright Act 1987 was recently amended. The Copyright (Amendment) Act 2003, in force since 1st October 2003, provides for stiffer penalties to punish and deter copyright offenders.

Apart from the increase in penalties and term of imprisonment, the amendments also addressed the lack of arrest powers in the Enforcement Division of the Ministry of Domestic Trade and Consumer Affairs. Under the new amendments, the enforcement officers are given powers of arrest without warrant.

The new powers of arrest are a significant and effective step in the piracy battle and since it came into force, there has been an increase in the number of DVD and VCD traders arrested for possessing illegal copies of films on optical discs.

The firm held its annual dinner on the 1st October 2004 at the Mandarin Oriental. Anticipated as the social event of the year, it is an occasion for the entire firm to get together in the spirit of camaraderie.

CLE PROGRAMME 2005

DATE	TOPIC
Jan 13	Video: "Donoghue v Stevenson" (with introduction by Romesh Abraham)
Feb 17	Talk: by Michael Wong on a Corporate Law topic
Mar 10	Video: "Appellate Advocacy" (with introduction by Dato' Dr. Cyrus V. Das)
Apr 14 .	Talk: "Importance of Team Work" (Speaker to be confirmed)
May 19	Video: "The Trial" – Kafka
Jun 23	Talk: by Lai Wing Yong on a Conveyancing topic
Jul 21	Video: "Cross Examination" (with introduction by Porres P. Royan)
Aug 11	Talk: "Anti Money Laundering Act" (Speaker to be confirmed)
Sep 08	Video: "Interviewing Clients" (with introduction by Yoong Sin Min)
Oct 20	Talk: "Securities Law" (Speaker from the SC)
Nov 10	Video: (To Be Confirmed)
Dec 08	Talk: (To Be Confirmed)

The above is the firm's Continuing Legal Education Programme for 2005, on various topics of legal interest. All sessions are at 5 p.m. Clients of the firm are invited to attend. Please inform the office manager in advance.

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