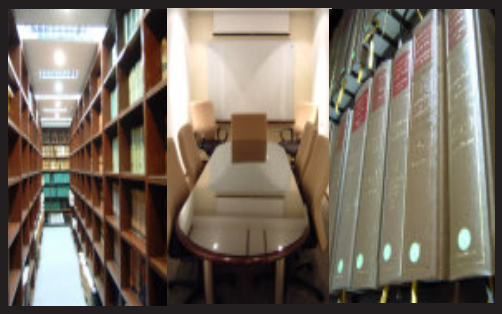


SHOOK LIN & BOK EST 1918 KUALA LUMPUR

LEGAL UPDATE

2nd Quarter 2005 Vol 1 No 2 PP13906/8/2005

IN THIS ISSUE

In this issue, spotlight is placed on some of the legal art adorning the firm's premises, reproduced from some of the finest legal art work from the common law tradition. A noticeable feature of the layout of the firm's office, on the 16th, 19th and 20th Floors, is the wall paintings and legal prints. In particular, the 16th Floor, where the conference rooms are located, resembles a legal art gallery.

The consultation
Reproduction of the engraving by Vautier. The classic lawyer and client picture. A touching depiction of the trust between lawyer and client.

The Plea
Reproduction of a spectacular Victorian engraving by W.P. Frith. A scene of a trial in the Old Bailey, London's Central Criminal Court. This painting on the wall of the firm's Main Conference Room and measuring 8 feet by 4 feet, is probably the largest of its type.

Dock brief – The Nine Pleaders
Jedd's snapshot of a bench of barristers awaiting dock briefs, from a bygone era of dock briefs for a guinea each time.

Intellectual Property News

The Intellectual Property Corporation of Malaysia, the governing body for the Registry of Trade Marks, Registry of Patents, Industrial Designs Registration Office and Registration of Geographical Indication and Names Office, has changed its name to Malaysian Intellectual Property Office ("MyIPO"). The change was launched by the Prime Minister at the National Intellectual Property Day held at the Malacca International Convention Centre on 3rd March 2005.

One of the developments attracting attention was the proposal by Malaysia to adopt the Intellectual Property Rights Strategic Modernisation Plan proposed by the European Union.

The plan, which is the result of collaboration between Malaysia and the European Union, is a comprehensive endeavour aimed at boosting and strengthening the intellectual property legal framework, and in particular, the enforcement of intellectual property rights in Malaysia.

The Domestic Trade and Consumer Affairs Minister Datuk Shafie Apdal, stressed the importance of initiatives to protect intellectual property rights as an inducement for European Union investment in the country. The initiatives are part of the country's strategy to enhance its competitive advantage and move towards a knowledge based economy. The government is also exploring the institution of specialised courts to hear intellectual property disputes.

The head of the firm's Intellectual Property Department, Michael Soo, who is also the Malaysian Intellectual Property Association president, was a participant at the conference.

Liberalisation of Capital Controls

Bank Negara Malaysia (the Malaysian Central Bank) has on 23rd March 2005 announced that with effect from 1st April 2005, there will be substantial relaxation of the foreign exchange and capital controls put in place since September 1998 to address the Asian financial crisis of 1997. The easing of the controls effectively brings to an end the bulk of the control measures. The salient elements of the new rules are:

Overseas Investment

(a) Residents without domestic credit facilities are free to invest abroad in foreign currency. This can be funded either from their own foreign currency or from conversion of ringgit funds.

(b) Residents with domestic credit facilities may only invest abroad any amount of their foreign currency funds or convert up to RM100,000 per annum for such purposes.

(c) Corporations with domestic credit facilities are free to use their foreign currency funds or convert ringgit up to RM10 million per annum for investment in foreign currency assets provided that the corporations have a minimum shareholders' fund of RM100,000 and have been operating for at least one year.

(d) The limit on investments abroad by unit trust companies of funds attributable to residents is increased to 30% of the net asset value of all resident funds managed by the unit trust company.

(e) Fund managers may invest abroad, any amount of funds belonging to non-resident clients and resident clients who do not have any domestic credit facilities. They are also free to invest abroad up to 30% of funds of resident clients with domestic credit facilities.

Foreign Currency Account

(a) Residents can now open Foreign Currency Accounts (FCA) onshore or offshore (except for export FCA) without any prior approval and there is no limit on the amount of foreign currency funds a resident is able to retain in the FCA.

(b) Residents without domestic credit facilities may convert any amount of ringgit funds into their FCA.

(c) Resident corporations with domestic credit facilities are allowed to convert up to RM10 million in a year for credit into their FCA.

(d) A resident individual with domestic credit facilities is allowed to convert for credit into FCA the following:-

i. For education or overseas employment purposes - up to USD150,000 for onshore and offshore FCA and up to USD50,000 for overseas FCA
ii. For other purposes - up to RM100,000 per annum

(e) Exporters may retain any amount of their foreign currency export proceeds with onshore banks. All export proceeds continue to be required to be repatriated to Malaysia.

Foreign Currency Credit Facilities

(a) Resident corporations, on a per corporate group basis, may obtain foreign currency credit facilities up to the aggregate of RM50 million equivalent. Up to RM10 million equivalent of the foreign currency borrowing may be used to finance overseas investments.

(b) The aggregate limit for foreign currency borrowing by individuals is increased from iRM5 millon to RM 10 million equivalent and the funds may be used for any purposes.

Hedging

(a) Residents and non-residents are allowed to enter into selected hedging arrangements with onshore banks.

Domestic borrowing by Non-Resident Controlled Companies

(a) The current RM50 million limit and the 3:1 gearing ratio requirement governing domestic borrowings by Non-Resident Controlled Companies are removed.

Fixed Deposit Rates

(a) Interest rates for fixed deposits placed by non Small and Medium Enterprise corporations and non-residents are now fully negotiable with banks and no longer subject to floor rates set by Bank Negara.

Notwithstanding the above, the following transactions are required to be registered with Bank Negara:

1. remittance of funds exceeding RM50,000 equivalent from Malaysia for investment abroad;

2. procurement of foreign currency credit facilities exceeding RM1 million; and

3. proposals by residents to enter into forward foreign exchange contracts to hedge current account transactions on anticipatory basis and all transactions under financial account transactions exceeding the equivalent of USD 10 million.

Creation of Investment Banks

On 23rd March 2005, Bank Negara Malaysia announced that the government would permit the creation of investment banks. Merchant banks, stockbroking companies and discount houses within the same banking group may be merged and rationalised into investment banks. The integration is expected by Bank Negara to enhance the market by minimising duplication of resources and overlapping of activities, leveraging on common infrastructure and reaping benefits of synergies and economies of scale.

The key features of investment banks as set out by Bank Negara are as follows:-

(a) They will retain all activities based on the types of licences held prior to the rationalisation.

(b) They will be issued two licences pursuant to the Banking and Financial Institution Act 1989 and the Securities Industry Act 1993 respectively.

(c) They will be jointly regulated by Bank Negara and the Securities Commission with the view of balancing financial stability whilst promoting efficiency and competition. Both Bank Negara and the Securities Commission will have the powers to prescribe and enforce regulations, supervise and conduct inspections on investment banks to meet their objectives.

(d) The minimum capital requirement for investment banks that are not part of greater banking groups will be RM500 million, while that for investment banks which are part of greater banking groups will be RM2 billion on a group basis.

(e) The limit for foreign equity participation in investment banks will be increased to 49%.

Real Estate Investment Trusts

On 3rd January 2005, the Securities Commission released new Guidelines on Real Estate Investment Trusts (REITs) taking immediate effect to govern the operation and administration of REITs. The new Guidelines replace the previous Guidelines which were issued on 13th November 2002 on property trusts funds, which are now called REITs. The Guidelines are available from the Securities Commission website.

In addition, in the 2004 and 2005 Budgets, the Government had proposed the following to stimulate the development of REITs:-

(a) all instruments of transfer of real property to REITs approved by the Securities Commission are exempted from stamp duty.

(b) chargeable gains accruing on the disposal of any chargeable assets to REITs approved by the Securities Commission are to be exempted from real property gains tax.

(c) REITs are to be exempted from tax on income distributed to unit holders, whereas undistributed income are to be taxed at 28%.

(d) income distributed to unit holders are to be taxed at their respective personal tax rates, and non-residents will be taxed through a withholding tax of 28%.

(e) the accumulated income that has been taxed and subsequently distributed is to be eligible for tax credit in the hands of unit holders.

The above proposals are aimed at stimulating the growth of property trusts in Malaysia, as vehicles to enable the general public to own shares and interests in big ticket properties, such as shopping malls, commercial properties and hotels, which would otherwise be beyond their reach. REITs offer the liquidity of a stock market as they are traded like shares and yet provide relatively lower risk yields. REITs enable companies holding major properties to unlock the value of their investments by transferring them to REITs.

Guidelines for Fund Managers

The Securities Commission has on 15th March 2005 introduced the Guidelines on Compliance Function for Fund Managers with a view to strengthening the level of investor protection. Fund managers are given until 15th March 2006 to comply with the Guidelines.

Duties of Fund Managers

Pursuant to the said Guidelines, fund managers have to, inter alia, adhere to best practices for trading and portfolio management, comply with the Anti-Money Laundering Act 2001 and do the following:-

(a) ensure that their clients have adequate authority and capacity to enter into an agreement with the fund manager for the management of monies and properties;

(b) establish and understand each client's investment objectives, instructions, risk profile and investment restrictions, and ensure that the investment policy or investment recommendations and transactions are in line with their client's mandate; and

(c) ensure that agreements are entered into with the clients before any fund management services are provided or transactions carried out on behalf of clients.

Written Policies and Procedures

Written policies and procedures are required to be established, maintained and implemented by the fund managers to, inter alia,:-

(a) ensure fair and equitable allocation of orders among clients;

(b) prevent misuse of material non-public or price sensitive information;

(c) ensure that associated persons' interest do not supersede their clients' interest;

(d) ensure that research done by fund managers is independent and impartial, to provide a reasonable and adequate basis for making investment decisions and taking investment actions;

(e) provide for adequate risk assessment, risk monitoring and risk management policies;

(f) ensure "best execution" of trades for clients through dealers and financial institutions;

(g) avoid any conflicts of interest between fund managers' proprietary accounts and clients' accounts;

(h) maintain confidentiality of clients' information; and

(i) ensure that complaints from clients are handled appropriately.

Rebates and Commissions

Fund managers are only entitled to rebates and commissions from the relevant clients and not from any dealer, financial institution or unit trust management company, arising from transactions on behalf of the clients. The receipt of cash or non-related items under soft commission arrangements are prohibited except for soft commission received in respect of research and advisory services that assist in the decision-making process relating to their clients' investment.

Reporting Requirements

The Guidelines also impose reporting requirements on fund managers. These include providing each client with, inter alia, the following:-

(a) statements of account (at least on a monthly basis);

(b) reports on the client's portfolio turnover measure pertaining to all transactions carried out, including cross trades, if any; and

(c) regular written reports on the performance of each client's monies and assets (at least on a quarterly basis).

Disclosure Requirements

The disclosure required of fund managers to their clients and prospective clients, range from information relating to the nature, basis, structure and amount of fees, charges and other remuneration in the investment management agreement, to providing adequate information on the fund manager.

Fund managers are to ensure that any representation or communication made or any information contained in their marketing, advertising and promotional materials is complete, accurate and not misleading.

Amendments to Listing Requirements

Employee Share Option Schemes

Bursa Malaysia Securities Berhad (the Malaysian securities exchange) has amended the Listing Requirements for the Main and Second Boards as well as the MESDAQ Market Listing Requirements, in relation to employee share option schemes (ESOS) with effect from 10th January 2005.

For such share option schemes, the Listing Requirements previously had a rule that where adjustments are made to the subscription or option price or number of shares under the ESOS, arising from corporate exercises such as rights or bonus issues, such adjustments must not affect the amount to be paid by an option holder when exercising his option (the Capital Outlay Rule).

The amended rules require new ESOS established after 10th January 2005, to have formulae for the aforesaid adjustments incorporated into the by-laws of the ESOS. Bursa Malaysia Securities Berhad has stated that these amendments are consistent with the approach taken in relation to adjustments relating to warrants where formulae for adjustments are expressly set out in the relevant documents. Companies with such new ESOS need only comply with the formulae in the by-laws and need not comply with the Capital Outlay Rule. The formulae cannot be altered to the advantage of employees without prior approval of shareholders.

For ESOS established prior to 10th January 2005, companies have the option to amend their ESOS by-laws to insert the aforesaid formulae, in which case the amended rules will also apply to such ESOS. Companies which do not opt to amend their ESOS by-laws in this way will still have to comply with the Capital Outlay Rule.

Public Spread Requirement

On 10th January 2005, Bursa Malaysia Securities Berhad (the Malaysian securities exchange) amended the Listing Requirements in relation to the public spread requirement. The public spread requirement stipulates that at least 25% of shares in listed companies must be in the hands of at least 1000 public shareholders holding not less than 100 shares each. Previously, the Listing Requirements provided for a possibility of de-listing upon the announcement, by the acquirer of shares in a listed company in a take over offer pursuant to the Malaysian Code on Take-Overs and Mergers (the Code), that acceptances have been received resulting in the acquirer holding at least 90% of the shares.

The amendments, inter alia, extend the possibility of de-listing to situations other than take-over offers pursuant to the Code.

The requirement now is for a listed company to make an announcement, in the event a take-over offer for shares in the company pursuant to the Code or a corporate proposal undertaken in relation to company, results in a shareholder either singly or jointly with associates, holding 90% or more of the shares. Upon such announcement being made, all the securities in the company may be de-listed.

In addition, the amendments now provide for mandatory de-listing in the aforesaid situations, except as described below:

(a) in relation to a take-over offer pursuant to the Code, mandatory de-listing upon the requisite announcement being made, unless the acquirer has provided in the offer document:

  (i) its intention to maintain the listing status and not to invoke the provisions of section 34 of the Securities Commission Act (i.e. regarding compulsory acquisition of shares) and

  (ii) detailed plans of the steps to be taken to achieve full compliance with the provisions of the Listing Requirements, which includes the public spread requirement.

(b) in relation to corporate proposals, mandatory de-listing upon the announcement that 100% of the shares are held by a shareholder either singly or jointly with associates, unless the corporate proposals include plans approved by the shareholders, of the steps to be taken to achieve full compliance with the provisions of the Listing Requirements.

In summary, if a listed company involved in a take-over offer pursuant to the Code or any other corporate proposal which would result in the public spread requirement being breached, intends to maintain its listing status, the plans to maintain its listing status and comply with the Listing Requirements, including the public spread requirement, should be clearly stated in the offer document, or approved by the shareholders before the corporate proposal is undertaken.

Case Updates

Land Law

Lien-holder's caveat

In *Hong Leong Finance Berhad v. Staghorn Sdn Bhd,* the ambit of the provisions in the National Land Code 1965 (the Code) on statutory liens over land, came into issue before the Court of Appeal.

The two registered proprietors of the land in question agreed to sell the land to Staghorn. The Court found that subsequently Teck Lay Realty became substituted as the purchaser, and paid the balance of the purchase price. Teck Lay Realty then received the document of title and memorandum of transfer executed by the vendors but did not have the title registered in its name. Subsequently Teck Lay Realty deposited the title with Hong Leong Finance to secure a loan granted by the latter to a third party borrower. It was intended that a Charge under the Code be granted by Teck Lay Realty to Hong Leong Finance, but the Charge could not be registered due to a private caveat on the land. Eventually this private caveat was withdrawn. In the meantime, Hong Leong Finance entered a lien-holder's caveat, under the Code against the land. The borrower having defaulted, Hong Leong Finance enforced its lien-holder's caveat and obtained a court order for sale of the land. The land was sold by public auction. Staghorn then applied to set aside the order for sale and the sale itself, which application the High Court allowed.

On appeal, the Court of Appeal held that the sale should be set aside on the ground that there was no lien validly created under the Code in favour of Hong Leong Finance, on the court's construction of Section 281(1) of the Code. The Court held that since a statutory lien can be created only:

(a) by the deposit of title by the registered proprietor, and

(b) to secure a loan granted to the registered proprietor, but not a loan granted to a third party,

and as both these conditions were not met in this case, Hong Leong Finance's lien-holder's caveat was invalid. However, the court also found that Hong Leong Finance did have an interest in the land and allowed it to retain the title. It would follow that lien-holder's caveat in such instance would still be able to protect its right to the land, either by perfecting a Charge in its favour or by applying for a court order for a sale of the land and for the proceeds of sale to be paid to the lender in view of its said interest in the land. Hong Leong Finance (now merged with Hong Leong Bank) has filed an application for leave to appeal to the Federal Court, as have the purchaser at the auction and Staghorn.

Banking Law

Loan agreement cum assignment

If a lender has granted a loan secured against an assignment of contractual rights and title to landed property (where no individual title or strata title had been issued at that point in time), and subsequently, the title to the property is issued, is it necessary for the lender to obtain and register a statutory Charge under the National Land Code (the Code) over the property, before the lender may realise its security?

There have been differing and hotly debated views on this issue.

In *Phileo Allied Bank (M) Bhd v. Bupinder Singh a/l Avatar Singh* [2002] 2 MLJ 513, the Federal Court established as follows. Where title has not been issued, the lender has an equitable security interest in the property arising from the assignment, and may proceed to realise the assigned rights, without having to obtain a court order for sale, which would be required where a statutory Charge has been registered. In that decision, it was not necessary to decide what the position would be when the title is subsequently issued.

In *Ooi Chin Nee v. Citibank Berhad* [2003] 1 CLJ 548 and *Jashin Scaffolding (M) Sdn Bhd v. Chew Ai Eng*

Sdn Bhd [2004] 6 CLJ 497, the High Court took the view that upon the issuance of title, by virtue of the contractual provision in the assignment that upon issuance of the title, the borrower shall execute a Charge over the same, the lender may no longer realise its security outside of court, but must take a statutory Charge and then obtain a judicial sale pursuant to the Code.

In the *Ooi Chin Nee* case, the lender appealed to the Court of Appeal where subsequently by consent, the appeal was allowed, with the effect that the High Court decision was overruled.

In the recent case of *Hong Leong Bank Berhad v. Goh Sin Kai* the Judge of the High Court differed from *Ooi Chin Nee* and *Jashin Scaffolding*. In this case, the lender had applied for a declaration (and the application was unopposed), that it may proceed to realise its security i.e. the assignment of rights to the property, even though the title has been issued.

The Judge, in granting the declaration, held that the issuance of the title did not affect the lender's equitable security interest, and it may realise the security as represented by the assignment of rights to the property, without the need to create and register a Charge first and realising the same pursuant to the Code.

As it stands, there are conflicting views on this issue in the High Court. In *Ooi Chin Nee*, the appeal was allowed by consent, and in view thereof no authoritative appellate level decision may be derived from it.

Company Law

Chairman's power to adjourn meetings

In *Cepat Wawasan Group Bhd v. Datuk Lo Fui Ming & Ors* [2004] 4 CLJ 453, the Court of Appeal considered the question relating to the power of a chairman to adjourn a company meeting. Article 61 of the company's articles provides that the chairman may adjourn a meeting with the consent of the meeting. The company had convened an extraordinary general meeting (EGM) for the purpose of considering resolutions to remove certain directors. On the morning of the meeting, the company was served with an ex parte injunction order which restrained the voting rights of some shareholders. The Chairman decided to adjourn the EGM, pending disposal of the inter partes application for injunction. The Chairman rejected a proposal that a motion be put to all members for an adjournment pursuant to Article 61 of the articles.

The reason for the adjournment given by the chairman was to enable the members whose voting rights were restrained, to vote if the injunction were set aside. The reason given for rejecting the proposal to obtain the consent of the meeting for the adjournment, was that the said members would likewise be prevented from voting on the adjournment.

The Court held that the meeting was not validly adjourned by the Chairman. The provisions in the articles lay down a comprehensive code on the matter, and the consent of the meeting must be obtained for an adjournment. Only if the consent could not be obtained, would the chairman have a residual inherent power to adjourn the meeting.

Labour Law

Meaning of workman

In *Chong Kim Sang v Metatrade Sdn Bhd* [2004] 3 MLJ 1, the Court of Appeal held that an employee who was appointed a director remained an workman under the Industrial Relations Act. The appellant who was the executive director commenced an action against the respondent company for wrongful dismissal without just cause and excuse, claiming reinstatement to his former position. The representations to the Director General for Industrial Relations were referred to the Industrial Court for an award pursuant to section 20(3) of the Industrial Relations Act 1967. A preliminary objection was raised that the appellant was not a 'workman' within the meaning of section 2 of the Act.

The Court of Appeal held that based on the evidence, the appellant was a workman under the Act who was engaged under a contract of service. The Court said that the evidence further indicated that the contract of employment between the appellant and the respondent, whereby the former was appointed as an executive director, was a contract of service. It was the Court's view that the appellant was an employee who was initially employed as a general manager and was later appointed as executive director. The appellant was therefore an employee, notwithstanding his appointment as a director. Also, the

fact that the respondent made contributions to the Employee Provident Fund on the appellant's behalf indicated that the appellant was considered an employee.

Terms of collective agreement on pregnancy

A challenge on constitutionality was made to the terms of a collective agreement on pregnancy in *Beatrice a/p A Fernandez v Sistem Penerbangan Malaysia & Anor* [2004] 4 MLJ 466. The issue before the Court of Appeal was whether a clause in the collective agreement which required a female employee to resign if she became pregnant, or otherwise face termination, contravened Article 8 of the Federal Constitution. Article 8(1) declares that all persons are equal before the law and entitled to equal protection of the law, and Article 8(2) prohibits discrimination. The appellant, a flight stewardess with the first respondent, became pregnant and refused to resign. The first respondent proceeded to terminate her services. The appellant sought declarations as to the validity of the collective agreement.

The Court held that there was no constitutional issue involved as constitutional law deals only with contravention of individual rights by the state, but not by another individual. In any event, the case could not be caught by Article 8, as a collective agreement is not 'law' in the context of Article 8, and the terms of the collective agreement on pregnancy is not discriminatory just as giving maternity leave only to women is not discriminatory against men. The appellant's further appeal to the Federal Court has been dismissed.

Transfer of employee

In *Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors* [2004] 3 MLJ 339, the Court of Appeal affirmed that the right to transfer an employee is the implied prerogative of an employer. There were two Divisions in the appellant employer's plantation estate. The respondent employees were employed at one division. They were directed by the appellant that they would be transferred to the other division as the rubber trees in the first division were being felled. The other division was located five kilometres away and entailed additional travelling time of twenty minutes daily. Neither the contract of service between the parties, nor the collective agreement, contained a transfer clause.

The Court of Appeal held that provided that an employer acts in good faith and is not actuated by improper motive, the right to transfer is an implied right of the employer. However, the right to transfer must not entail a substantial change to the detriment of an employee in regard to the terms of his employment. There was no substantial detriment to the employees in this case.

Intellectual Property

Trade Marks

In *Thrifty Rent-A-Car System v Thrifty Rent-A-Car* [2004] 2 AMR 57, the plaintiff opposed the defendant's application to register the 'Thrifty' trademark in Malaysia.

The plaintiff, Thrifty Rent-A-Car System (Thrifty USA) has operated a car rental and leasing business in the United States since the 1950s. It has appointed licensees and franchisees to operate similar business under the Thrifty name and trademark in other countries worldwide.

The defendant, Thrifty Rent-A-Car claimed that it started its car rental business using the Thrifty name and mark in Malaysia in the 1980s, when Thrifty USA did not have substantial business in Malaysia and before it applied to register the THRIFTY mark in Malaysia. Thrifty USA opposed the defendant's application for the THRIFTY mark. The Trademark Office dismissed the opposition on the grounds that -

(a) Thrifty USA failed to prove that it has acquired reputation and goodwill in the mark at the relevant time (i.e. the date of the application under opposition), notwithstanding the fact that the mark was already well known in other countries; and

(b) use of the THRIFTY mark by the Defendant was not likely to cause confusion or deception.

The High Court allowed Thrifty USA's appeal and reversed the decision of the registrar of trademarks and disallowed the registration.

This decision is significant as the court seems to have departed from the traditional approach adopted in some decisions in the UK and Commonwealth courts, which declined to protect marks or names that are well known in other countries, if such marks or names have not acquired reputation or goodwill in the jurisdiction where protection was sought. In this case the court recognised that a well-known trademark is entitled to protection under Article 6(2) of the Paris Convention.

Trade Marks and Passing Off

In *Sinma Medical Products v Yomeishu Seizo Co Ltd* [2004] 4 MLJ 358 Sinma Medical Products appealed against a High Court decision that found it guilty of passing off and infringement of the mark owned by Yomeishu Seizo Co Ltd and granted an order rectifying the Trademark Register.

Sinma commenced the business of selling a product named Lingzhi or New Lingzhi Chiew, which was changed to Chinese Yangmingjiu in 1981. Sinma's product was sold with a logo showing a combination of three kanji characters prefixed with two kanji characters that represent the word 'Chinese'. The full logo read 'Chinese Yangmingjiu'.

Sinma was the registered proprietor of a trademark that contains an English translation of two kanji characters that make up the word 'Chinese' and a transliteration of three other kanji characters into romanized Mandarin to read 'Yangmingjiu', thus forming the mark CHINESE YANGMINGJIU.

Yomeishu's product, which bore a registered trademark consisting of three kanji characters depicting the romanized word 'yomeishu', had been imported into and sold in Malaysia since 1969.

Sinma contended that the five kanji characters described its products and was not used as a trademark.

The Court of Appeal held that the trial judge was correct in finding that there was likelihood of deception and confusion as, when pronounced in Mandarin, Sinma's trademark sounded identical to Yomeishu's three kanji characters in Mandarin. Therefore, the court had correctly ordered rectification of the Trademark Register expunging Sinma's trademark. The fact that the three Chinese characters were used so prominently by Sinma proved that it was a deliberate use as a trademark. Therefore, Sinma's contention that the Chinese characters were merely descriptive of its products was untenable.

There was also no challenge to Yomeishu's expert evidence or the trial judge's finding that the combination of the three characters was not descriptive, but a coined word. It had acquired a secondary meaning to mean Yomeishu's product. Therefore, Sinma's five Chinese characters so closely resembled Yomeishu's three kanji characters as was likely to confuse and deceive and infringement under Section 38(1)(a) was established.

Conventional and the Syariah - Bridging the Conceptual Gap

Summary of paper presented by Jal Othman at the Islamic Retail Banking Conference, Kuala Lumpur, 4th and 5th April 2005

With the fast growing developments in the Islamic banking industry globally, Malaysia has taken pro-active measures and numerous initiatives to set itself to become a major Islamic financial hub in the region. The significant growth of the Islamic banking industry is driving the demands for innovative Islamic banking products and service offering in order to support the industry growth and successfully cater the consumers' needs. In particular, Islamic retail banking has been growing at a rapid pace as an increasing number of Muslim and non-Muslim alike, are gaining awareness of the unique benefits of Islamic retail banking and its products.

In line with the growth opportunity for Islamic retail banking, this paper examines the basic structure of Islamic banking and it further illustrates the differences between conventional and Islamic banking. The paper attempts to bridge the conceptual gap between the principles of Islamic Finance and Conventional Finance.

There are two main streams of principle flowing through Islamic Finance. Islamic Finance introduces equity into the transaction and secondly, it transforms the conventional relationship of distrust into one of trust. Equitable treatment of the debtor is demanded and unjust enrichment of the creditor is frowned upon.

Conventional Finance is premised upon a lending transaction and the relationship of the parties are that of a lender and a borrower. There is a certain inherent degree of distrust and unequal bargaining power as one party requires the funding and the other party has the funds. Islamic Finance is structured upon an underlying trade transaction where parties contract as seller and buyer or as lessor and lessee or as partners in a common enterprise. Money is viewed more as a means of exchange rather than a commodity of trade.

Equity and equitable treatment is not uncommon in transactions under common law. Examples of these are unconscionability, economic duress and unequal bargaining power. Islamic Finance extends these principles to the area of financing transactions. An example of the infusion of equity into the Islamic financing transaction is the requirement in Islamic Finance to distinguish between the recalcitrant debtor and the genuine debtor in need of additional time to settle his debts. The distinction goes directly towards the determination of whether there has been a default by the debtor. In the case of Conventional Finance, the distinction, if at all, goes only towards the decision to withhold enforcement of the defaulting act of the borrower.

The often quoted prohibition on interest or riba in Islamic Finance is an illustration of the broader principle of the infusion of equity into the conventional finance matrix. The prohibition on riba is a facet of a larger multi angled concept which requires the exchange of counter values between counter parties to the transaction rather than merely making money on money. The paper discussed the specifics of these counter values and also the comparative form these values take in the context of conventional finance.

Compensation to the creditor is permitted provided it approximates to the actual loss suffered by the creditor. In conventional finance, the compensation in the form of interest is arbitrarily determined by the creditor and is not refereable to the actual loss suffered by the creditor.

Islamic Finance requires some degree of certainty in transactions. This again can be seem as as aspect of the larger principle of the equitable treatment of the debtor. It is not all uncertainty that is frowned upon. The mischief that is targeted is uncertainty that leads to a deception being practised upon the debtor. This is the gharar or uncertainty that is prohibited.

The issue then arises as to whether the very common and wide ambit of discretion that is afforded to lenders generally under conventional finance gives rise to an unacceptable degree of uncertainty in the eyes of Islamic Finance. The three situations where the wide ambit of the discretion of the lender under Conventional Finance is usually exercised are as follows. First, discretion in the absence of default by the borrower. Secondly, discretion leading to a default by the borrower and thirdly, discretion consequent upon a default by the borrower. Some of the general provisions in a Conventional Finance financing document which may arguably be inconsistent with the principle of gharar were discussed. These include the

provisions relating to periodic review, accelerated payment (in the case of repayments by installments), cross default, suspense account and exhaustion of remedy. The paper explored the question of whether such discretion leads to a deception on the debtor. In determining whether such discretion may potentially lead to deception, the following questions were posed. First, was the debtor aware of the discretion. Secondly, can the debtor be said to be deceived if he was aware of the discretion. Thirdly, how effective is the debtor's consent to the presence of such discretion at the time of the entry into of the financing contracts. Fourthly, has the nature of the transaction changed substantially as a result of the exercise of the discretion.

Whilst there may be conceptual differences between Islamic Finance and Conventional Finance, the common ground between the two more often than not make the differences a distinction without a difference. Both concepts of financing recognise the sanctity of obligations incurred by the parties and the obligation of the debtor to settle his debts.

A trip down memory lane...
Letter from Robert Hoh (extract)

"It was a pleasant surprise to receive a copy of the inaugural issue of the LEGAL UPDATE ....

I think I am correct in saying that I am the oldest surviving former partner in Malaysia, partner since 1963. As such it is gratifying to note that the firm is still as innovative as when it was in my days. Shook Lin & Bok was then the most innovative legal firm in Kuala Lumpur. It was the first firm to have its office in a high rise building, there was a belief then that a firm would lose clients if its office was not on the ground floor of a building. Other innovations were that the partners and assistants would not have interpreters when dealing with their clients. All lawyers in those days used interpreters or their chief clerks when interviewing/ dealing with their clients. It was also the first to use the new IBM typewriters and magnetic tape word processors. It introduced the A4 papers into the legal practice and I remember that we had to make a presentation on the A4 size paper to convince H. T. Ong CJ of its practicability and economy. We were also asked by Bank Negara to put up a paper to argue why Bank Negara and other government departments should use A4 size paper. Once Bank Negara adopted the A4 size the rest, as they say, was history.

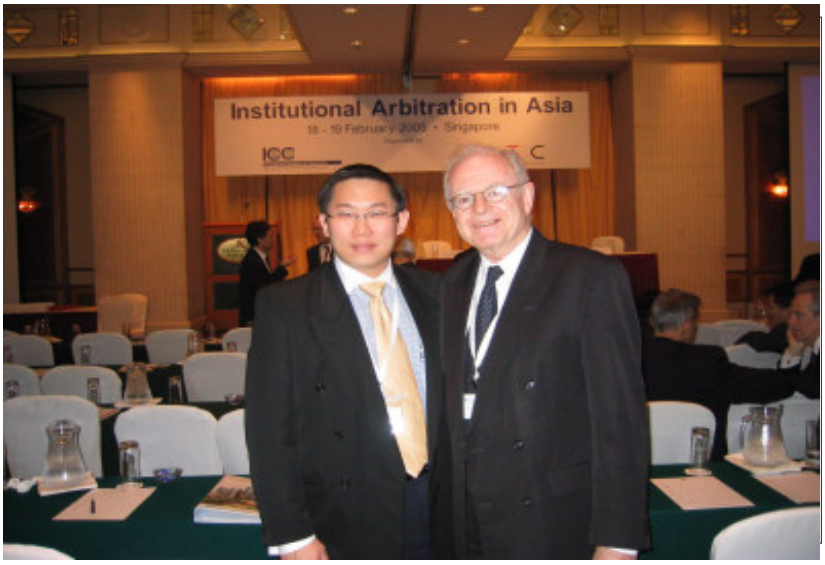
With this background it is reassuring to see that the firm is still as innovative in producing the Legal Update. I congratulate the partners on this. It is a sign of the vibrancy of the partners...."

Robert Hoh
12 February 2005

Montage of Spy's portraits of eminent judges and jurists from a time past.

International Conference on Construction Law and Arbitration at Nikko Hotel, Kuala Lumpur
26 to 28 April 2005

The firm was represented by Dato' Dr. Cyrus V. Das, Mohanadass Kanagasabai and Lam Ko Luen, at the Conference organized by the Kuala Lumpur Regional Centre for Arbitration (KLRCA) and the Malaysian Institute of Arbitrators (MIArb). The firm's Dato' Dr Cyrus Das chaired the plenary sessions on 27 April 2005 on Risk and its Management and Suspension and Termination, and Mohanadass Kanagasabai chaired the sessions on Payment and Certification and The Impact of Tort Negligence on Construction Law on 28 April 2005



Symposium on Institutional Arbitration in Asia in Singapore
18 to 19 February 2005

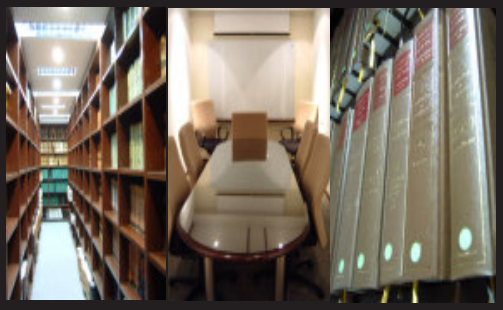
The firm was represented by Dato' Dr. Cyrus V. Das, Mohanadass Kanagasabai and Lam Ko Luen (on the left, above) at the Symposium, organized by ICC International Court of Arbitration and the Singapore International Arbitration Centre.

19th LAWASIA Conference in Australia
21 to 24 March 2005

The 19th LAWASIA Biennial Conference, LAWASIAdownunder 2005, was held at Broadbeach, Gold Coast, Australia. The firm's Dato' Dr. Cyrus V. Das (4th from left, above) presented a paper on Separation of Powers: Adaptation of the Westminster Model, and Steven Thiru (on the left) presented a paper on The Conflict of Jurisdictions in Civil and Islamic Family Law in Malaysia.

Inter-Pacific Bar Association 15th Annual Meeting and Conference in Bali, Indonesia
3 to 7 May 2005

The Inter-Pacific Bar Association (IPBA) 15th Annual Meeting and Conference recently held in Bali, Indonesia was attended by the firm's Mohanadass Kanagasabai (on the right, above) and Lam Ko Luen (on the left). In one of the Committee Programs, Lam Ko Luen played the role as an Engineer Arbitrator in a mock arbitration proceedings titled Witness Conferencing or Witness Confrontation organised by Mr. Michael Hwang, Senior Counsel and Arbitrator, Singapore.



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