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NEWSLETTER

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REAL ESTATE

Payment of Policy Moneys upon Death of a Policy Owner — Does it Form Part of the Estate of the Deceased Policy Owner?

IN THIS ARTICLE, DING MEE KIONG CONSIDERS THE PAYMENT OF POLICY MONEYS UPON THE DEATH OF A POLICY OWNER.

The payment of policy moneys upon death of a policy owner is regulated by the **Financial Services Act 2013** ("FSA"). Schedule 10 of the FSA sets out the provisions for the payment of policy moneys of a policy owner under a life policy, including a life policy under section 23 of the **Civil Law Act 1956** and a personal accident policy effected by the policy owner upon his own life.

Section 23 of the **Civil Law Act 1956** provides as follows:

> *"(1) A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts."*

Power to make nomination[1]

A policy owner who has attained the age of 16 years may nominate an individual to receive policy moneys payable upon his death under the policy by notifying the licensed insurer in writing. The policy owner may nominate one person or several persons and, where there is more than one nominee, the policy owner may direct that specified shares be paid to the nominees and, in the absence of such direction by the policy owner, the licensed insurer shall pay the nominees in equal shares.

The policy owner has to assign the policy benefits to his nominee if his intention is for his nominee, other than his spouse, child or parent, to receive the policy benefits beneficially. In the absence of an assignment, the nominee shall receive the policy moneys payable on the death of the policy owner as an executor and any payment to the nominee shall form part of the estate of the deceased policy owner and be subject to his debts.

■ In This Issue ■

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Revocation of nomination[2]

A nomination shall be revoked upon the death of the nominee or where there is more than one nominee, upon the death of all the nominees, by written revocation to the licensed insurer or by a subsequent nomination. A nomination shall not be revoked by a will or by any other act, event or means.

Payment of policy moneys where there is nomination[3]

Where there is a nomination, the licensed insurer shall pay the policy moneys according to the direction in the nomination. If the nominee fails to claim the policy moneys within 12 months of the licensed insurer becoming aware of the death of the policy owner despite notification from the licensed insurer to the nominees, the licensed insurer shall pay the policy moneys to the lawful executor or administrator of the deceased policy owner's estate as though no nomination was made.

Trust of policy moneys[4]

A nomination by a policy owner, other than a Muslim policy owner, shall create a trust in favour of the nominee of the policy moneys payable upon the death of the policy owner, if the nominee is his spouse or child, or where there is no spouse or child living at the time of nomination, the nominee is his parent. The policy moneys shall not form part of the estate of the deceased policy owner or be subject to his debts.

Assigned or pledged policy moneys[5]

Where the policy moneys, wholly or partly, have been pledged as security or assigned to a person, the claim of the person entitled under the security or the assignee shall have priority over the claim of a nominee under Paragraph 2 of the Tenth Schedule or the creation of a trust under Paragraph 5 of the Tenth Schedule.

Payment of policy moneys where there is no nomination[6]

Where a policy owner dies without making a nomination, subject to any pledge or assignment, the licensed insurer shall pay the policy moneys to the lawful executor or administrator of the estate of the deceased policy owner. Where the licensed insurer is satisfied that there is no lawful executor or administrator of the estate of the deceased policy owner at the time of payment of policy moneys, the insurer may pay the policy moneys to the deceased policy owner's spouse, child or parent in accordance with section 6 of the **Distribution Act 1958** and where there is no spouse, child or parent and:

(a) where the policy moneys do not exceed one hundred thousand ringgit or such greater amount as may be prescribed by Bank Negara Malaysia ("BNM"), the insurer may pay all such policy moneys without requiring a grant of probate or letters of administration or distribution order to a person who satisfies the insurer that he is entitled to the property of the deceased policy owner under his will or under the law relating to the disposition of property or that he is named as an executor in the will or has the consent of all the lawful beneficiaries to be the administrator of the estate of the deceased policy owner; or

(b) where the policy moneys exceed one hundred thousand ringgit, or such greater amount as may be prescribed by BNM, the insurer may pay to the person referred to in paragraph (a) the amount referred to in that paragraph and pay the balance of the policy moneys to the lawful executor or administrator of the estate of the deceased policy owner.

Conclusion

In conclusion, where there is a nomination and the benefits are assigned to the nominee, or where there is a creation of trust, or where the policy moneys have been pledged as security or assigned, the policy moneys shall not form part of the estate of the deceased policy owner.

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1 Paragraph 2 of the Tenth Schedule of the FSA.
2 Paragraph 3 of the Tenth Schedule of the FSA.
3 Paragraph 4 of the Tenth Schedule of the FSA.
4 Paragraph 5 of the Tenth Schedule of the FSA.
5 Paragraph 7 of the Tenth Schedule of the FSA.
6 Paragraph 8 of the Tenth Schedule of the FSA.

CORPORATE LAW

Insider Trading in Malaysia

IN THIS ARTICLE, NOR ALYSHIA DAUD DISCUSSES THE PROVISIONS IN THE CAPITAL MARKETS AND SERVICES ACT 2007 ("CMSA") REGULATING INSIDER TRADING.

Introduction

As reported in the Securities Commission Malaysia ("SCM") Annual Report for year 2015 ("the SC Report"), a significant proportion of the SCM's investigative resources in that year were devoted to work on cases concerning possible insider trading activities. Out of 53 then ongoing cases that the SCM was handling in various courts, 30% or the highest number of the cases were in relation to insider trading[1].

Understanding the offence of insider trading

Insider trading is an offence under section 188(2) of the CMSA. By virtue of that provision, a person who is an insider, shall not, whether as a principal or agent, in respect of any securities to which the information in subsection (1) of section 188 relates, acquire or dispose of, enter into an agreement for or with a view to the acquisition or disposal of such securities, or procure, directly or indirectly, an acquisition or disposal or the entering into an agreement for or with a view to the acquisition or disposal of such securities.

The offence of insider trading has the following three elements:

a) the trading is effected by a person who possesses the information[2];

b) the person should know, or ought reasonably to know that the information is not generally available[3]; and

c) when the information becomes generally available, a reasonable person would expect the information to have or tend to have a material effect on the price or value of securities.

In the context of insider trading, "*information*" that is not generally available or non-public information, can include any of the matters described in paragraphs (a) to (f) of section 183, such as, matters relating to the intentions, or likely intentions, of a person or matters relating to the future.

In determining whether the information if generally known would or would tend to have a material effect on the price or value of the securities, further guidance is provided in section 185 of the CMSA that such information refers to such information which would or would tend to, on becoming generally available, influence reasonable persons who invest in securities in deciding whether or not to acquire or dispose of such securities or enter into an arrangement with a view to acquire or dispose of such securities[4].

Who is an "*insider*"?

The legislation has departed from the restricted fiduciary notions of the term "*insider*" as a nexus between the insider and the company is no longer required[5]. The CMSA provides that any person, regardless of a connection or relationship with the company or entity whose shares are being traded, can be found guilty of this offence if the person is found to have misused non-public information.

In line with the above, direct or indirect proximity of the insider to a company need not be shown to establish a contravention of the insider trading prohibition. The mere act of improperly using the price-sensitive information is sufficient[6].

The SC Report also disclosed that, in 2015, insider trading charges were brought against 16 individuals, five of whom were directors of companies. The remaining 11 individuals were charged for abetting the commission of the offence by the directors[7]. In the case of **Lei Lin Thai v Public Prosecutor**[8] ("Lei Lin Thai"), the accused was charged with 53 counts of insider trading offences under section 188(2) (a) of the CMSA. Four others were charged for abetting the accused.

The accused had applied to strike out the charges on the grounds, among others, that the charges were defective and illegal both in substance and form. The argument by the accused's counsel was that the charges which referred to the acquisition of shares through a third party's account is not an offence under section 188(2)(a) of the CMSA that he was charged with. As stated earlier, the accused appeared to have acquired the shares through accounts belonging to third parties who have been jointly charged with him.

In holding that the contention was untenable, the learned Judge held, as follows:

> "*On this issue, the word 'acquire' is not defined in the CMSA but according to the Oxford Dictionary, it means 'come into possession; or gain by oneself'. Hence, the meaning of 'acquire' is wide and includes anything obtained directly or indirectly. The word is wide enough to cover the acquisition of shares through a third party.*"

Sanctions for insider trading

Insider trading is a criminal offence punishable with imprisonment for a term not exceeding 10 years and a fine of not less than RM1 million[9]. A person guilty of abetting the commission of this offence faces the same punishment as the insider. Apart from criminal prosecution, a civil action may be instituted by:

a) persons who suffered loss or damages by reason of, or by relying on, the conduct of the alleged insider[10]; and

b) the SCM[11],

whether or not the alleged insider or any other person involved in the offence has been charged and a contravention has been proven in a prosecution in relation to the same offence.

The civil enforcement powers of the SCM allows it to institute a civil action against the alleged insider, if the SCM considers that it is in the public interest to do so, to obtain one or both of the following remedies[12]:

a) to seek from the perpetrators disgorgement of up to three times the ill-gotten gains made orlosses avoided by them; and/or

b) to claim civil penalty in such amount as the Court considers appropriate having regard to the seriousness of the contravention, being an amount not more than RM1 million.

The monies recovered would be used to reimburse the SCM for all costs of investigation and proceedings in respect of the contravention and compensate the victimised investors who had suffered losses as a result of the contravention[13].

In Lei Lin Thai, one of the grounds argued to strike out the charges against the accused relates to the constitutionality of section 188(2) of the CMSA. The accused argued that the sanctions for insider trading were discriminatory and therefore in contravention of Article 8(1) of the Malaysian Federal Constitution which provides that "*all persons are equal before the law and entitled to the equal protection of the law*". It was argued for the accused that in view of the different sanctions that may be exercisable for this offence, the criminal punishment which is more severe in comparison to the civil action or enforcement is discriminatory. The Court however rejected this argument and held as follows:

> "*It is clear that these provisions (Sections 188 and 201 of the CMSA) apply to any person who contravenes the said provisions which relate to insider trading under the CMSA. The impugned law applies to everyone who has committed the said offence and all those who infringe the said provisions can be taken criminal action under section 188(2) and punishable under section 188(4) or civil proceeding under section 201 of the CMSA. Therefore, as the impugned law applies to everybody who contravene the said law, it is not discriminatory in nature.*"

The Court further held that any criminal action under section 188 may be taken by the Public Prosecutor whereas the civil actions can be taken by any person who suffers loss or damages or by the SCM. As there are different parties who may exercise the powers or rights to take action, the contention that the sanctions are discriminatory and in contravention of Article 8(1) of the Malaysian Federal Constitution was thus devoid of any merit.

Fairness in the capital markets to anchor the investors' confidence

Insider trading is a grave offence as it gives an advantage to the insider who has information that an outside investor does not have. Such unfair trading is detrimental to market integrity and investors' confidence. As it is crucial for investors to have equal opportunity to obtain and evaluate information before making any investment decision, combatting insider trading activities is imperative in order to uphold and safeguard the fairness and orderliness of capital markets in Malaysia.

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[1] Annual Report of Securities Commission Malaysia (2015) p 184

[2] Section 188(1)(a) , CMSA

[3] Section 188(1)(b), CMSA

[4] "*Information*" is further elaborated in sections 183, 184 and 185 of the CMSA

[5] Prior to the amendments in 1998 to the Securities Industry Act 1983 ("SIA") (which has since been repealed by the CMSA), insider trading provisions were encapsulated in sections 89 and 90 thereof. Section 89 of the SIA referred to dealing by an officer, agent or employee of a corporation.

[6] "Insider Trading Law Reform in Malaysia: Lessons from the Down Under" [2000] 2 MLJ xxxiii by Janine Pascoe

[7] Annual Report of Securities Commission Malaysia (2015) p 50

[8] [2016] MLJU 230 p 10

[9] Section 188(4), CMSA

[10] Section 201(1), CMSA

[11] Section 201(5) and (6), CMSA

[12] Section 201(7), CMSA

DISPUTE RESOLUTION

Chong Fui Shipping & Forwarding Sdn Bhd vs Steel Industries (Sabah) Sdn Bhd

IN THIS ARTICLE, ASWATH RAMAKRISHNAN ANALYSES THE COURT OF APPEAL'S DECISION IN **CHONG FUI SHIPPING & FORWARDING SDN BHD VS STEEL INDUSTRIES (SABAH) SDN BHD.**

Introduction

This was an appeal to the Court of Appeal against the decision of the Kota Kinabalu High Court in dismissing the application by the appellant, Chong Fui Shipping & Forwarding Sdn Bhd ("Chong Fui Shipping & Forwarding"), for determination of a preliminary issue under Order 33 of the Rules of Court 2012. The preliminary issue relates to the application of paragraph 6 of Article III of the Hague Rules in Sabah.

Application of the Hague Rules in Malaysia

The Hague Rules are the provisions of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading concluded in Brussels on 25 August 1924 to which the United Kingdom was a signatory and a party. Sabah became a party through the United Kingdom. The Convention was amended by the Visby Protocol in 1968 and consequently the Hague Rules later became known as the Hague-Visby Rules. The rules applicable in the context of this appeal are the Hague Rules made applicable to Sabah in 1961.

In Peninsular Malaysia, the Hague Rules were made part of domestic law through the **Carriage of Goods by Sea Act 1950**.

The legislature of Sabah, however, chose the route of regulations made by the Governor in Council. Using the power conferred on the Governor in Council under sections 277 and 278 of the Merchant Shipping Ordinance 1960 of North Borneo, the Governor in Council made the Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 ("Sabah Regulations"), applying, among others, the Sarawak Regulations in North Borneo with effect from 1 April 1961.

Paragraph 6 of Article III of the Hague Rules (as applied by the Sarawak Regulations and made applicable to Sabah by the Sabah Regulations) provides as follows:

> "*Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.*
>
> *The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.*
>
> *In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.*
>
> *In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.*"

Facts

The plaintiff, Steel Industries (Sabah) Sdn Bhd ("Steel Industries"), was a steel manufacturer based in Sabah. Chong Fui Shipping & Forwarding was the owner of a vessel called "Builder's Success". Steel Industries engaged Chong Fui Shipping & Forwarding to transport 2,000 metric tonnes of steel bars purchased from a company in Penang to Kota Kinabalu. Progressive Insurance Bhd was the insurer.

Upon arrival in Kota Kinabalu, it was discovered that the steel bars had corroded. Steel Industries sued both Chong Fui Shipping & Forwarding and Progressive Insurance Bhd jointly and severally for the sum of RM710,157.

Decision of the High Court

In the High Court, Chong Fui Shipping & Forwarding applied for a preliminary issue to be determined under Order 33 of the Rules of Court 2012. The preliminary issue was whether Steel Industries's claim was barred by limitation under paragraph 6 of Article III of the Hague Rules which provides that a suit for loss or damage must be brought within one year after delivery of the goods or the date when the goods should have been delivered. Steel Industries filed the claim one year and one month after the goods were received by them.

The High Court had referred to several cases, in particular, **Aries Tanker Corp v Total Transport Ltd**[1] and the Court of Appeal case of **Cosco Container Lines Co Ltd & Anor v Trengganu Forest Products Sdn Bhd & Another Appeal**[2] ("Terengganu Forest Products case") and **PDZ Lines Sdn Bhd v Master Agencies (M) Sdn Bhd**[3]. The High Court was of the view that the limitation period of one year in paragraph 6 of Article III of the Hague Rules applied.

However, the High Court noted that the defendant in the Terengganu Forest Products case also attempted to strike out the plaintiff's claim by relying on the limitation period of one year in paragraph 6 of Article III of the Hague Rules. The High Court further noted that the decision of the High Court in the Terengganu Forest Products case in allowing the defendant's striking out application was reversed by the Court of Appeal and the claim was ordered to proceed to trial. The High Court concluded that the decision of the Court of Appeal in the Terengganu Forest Products case was binding, and consequently, dismissed Chong Fui Shipping & Forwarding's application and ordered Steel Industries' claim to proceed to trial.

Chong Fui Shipping & Forwarding appealed to the Court of Appeal against the decision of the High Court.

Decision of the Court of Appeal

The Court of Appeal in this case held that there were two issues that needed to be addressed:

1) whether the limitation period in the bill of lading as provided in paragraph 6 of Article III of the Hague Rules was inapplicable for being contrary to section 29 of the Contracts Act 1950; and

2) whether the decision of the Court of Appeal in reversing the decision of the High Court on the interlocutory striking out application in the Terengganu Forest Products case and ordering the case to proceed to full trial was binding.

The first issue before the Court of Appeal

Steel Industries's contention was that the limitation period in paragraph 6 of Article III of the Hague Rules was contrary to section 29 of the **Contracts Act 1950**. It relied on the judgement of the Supreme Court in **New Zealand Insurance Co Ltd v Ong Choon Lin**[4].

Section 29 of the **Contracts Act 1950** reads as follows:

> "*Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.*"

The Court of Appeal held that section 29 of the **Contracts Act 1950** applied only in relation to the terms of an agreement limiting the time for a party to enforce his rights as formulated by the parties themselves and distinguished **New Zealand Insurance Co Ltd v Ong Choon Lin** on that basis.

In **New Zealand Insurance Co Ltd v Ong Choon Lin** the clause in dispute was Condition 19 of a fire policy issued by the appellant that disallowed the respondent from bringing an action after 12 months from the happening of the loss or damage. Condition 19 was a term imposed by the appellant, not a term required by statute to be inserted into the policy.

In this case, the limitation period of one year was found in the bill of lading due to the provisions of regulations 2 and 4 of the Sarawak Regulations made applicable in Sabah by the Sabah Regulations. The limitation period was not inserted in the bill of lading by the agreement of the parties.

The Court of Appeal was of the view that the limitation period in the bill of lading was not contrary to section 29 of the **Contracts Act 1950** and was therefore a valid term.

The second issue before the Court of Appeal

The Court of Appeal then analysed the Terengganu Forest Products case which involved a contract of carriage of a cargo of 56 containers of plywood.

Relying on the bill of lading, the shipper submitted documents, including the bill of lading, to the negotiating bank for payment pursuant to the letter of credit.

The cargo was not loaded on board the vessel stated in the bill of lading, neither was it discharged at the designated port but was discharged at a different port and subsequently transhipped to its destination port on another vessel.

The dispute between the shipper and its buyer went to arbitration and the shipper was ordered to pay compensation to the buyer.

The shipper then sued the carrier for the tort of deceit claiming fraudulent misrepresentation in the bill of lading. The carrier applied under Order 18 rule 19(1) of the Rules of the High Court 1980 (as it then was) to have the shipper's writ of summons and statement of claim struck out on the ground that the claim was barred by limitation under the Hague Rules as made applicable in Peninsular Malaysia by the **Carriage of Goods by Sea Act 1950**. The shipper however submitted that the limitation period under the Hague Rules did not apply as the shipper's claim was based on tort, not contract, and the limitation period in the Hague Rules only applied to contractual liabilities.

The High Court in the Terengganu Forest Products case allowed the carrier's application and struck out the shipper's claim on the grounds that the words "all liability" in paragraph 6 of Article III of the Hague Rules was wide enough to cover the shipper's claim. On appeal, the Court of Appeal allowed the shipper's appeal and ordered the shipper's claim to be reinstated for full trial. The carrier did not appeal against the decision of the Court of Appeal on the issue of limitation.

After full trial, the High Court entered judgement for the shipper. The High Court did not allow the carrier to raise the issue of limitation at trial since the carrier did not appeal against the decision of the Court of Appeal on the issue of limitation. On appeal, the Court of Appeal was also of the view that the carrier should not be able to raise the issue of limitation at trial since there was no appeal by the carrier on that point. The Court of Appeal however held that the High Court fell into error in assessing the evidence and set aside the judgment entered for the shipper.

The Court of Appeal in this case held that the High Court was not bound by the decision of the Court of Appeal in the Terengganu Forest Products case on the interlocutory striking out application. The Court of Appeal reasoned that as there was no written grounds of judgment provided by the Court of Appeal in the Terengganu Forest Products case on the interlocutory striking out application, the Court of Appeal was not in a position to ascertain if the interlocutory striking out application in Terengganu Forest Products case failed because the Hague Rules did not apply or whether further arguments were required.

The Court of Appeal went on to distinguish the facts in the Terengganu Forest Products case. The Court of Appeal noted that the shipper's claim in the Terengganu Forest Products case was based on the tort of deceit by virtue of the fraudulent misrepresentation made by the carrier in the bill of lading.

The shipper's claim was not for the loss of the goods or damage to the goods in the course of carriage by the carrier. The goods had arrived intact. The loss claimed by the shipper was the total value of the goods as well as the compensation it had to pay to the buyer pursuant to the arbitral award.

This case however concerned the limitation provision in the bill of lading. The Court of Appeal held that the Hague Rules are meant for contracts of carriage, as evidenced by a bill of lading or other similar documents. The provision for limitation in paragraph 6 of Article III of the Rules is clearly in relation to loss or damage to the goods during such carriage.

Conclusion

In conclusion, the Court of Appeal in this case was of the view that the limitation period of one year as provided in paragraph 6 of Article III of the Hague Rules is applicable in Sabah. Steel Industries' claim was therefore time barred. The Court of Appeal allowed Chong Fui Shipping & Forwarding's appeal on the preliminary issue and struck out Steel Industries' claim.

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[1] [1977] 1 All ER 398
[2] [2011] 4 CLJ 473
[3] [2012] 5 CLJ 880
[4] [1992] 1 CLJ (Rep) 230

INTELLECTUAL PROPERTY

Intellectual Property Valuation and Monetisation

IN THIS ARTICLE, ARINAH SABTU HIGHLIGHTS THE IMPORTANCE OF INTELLECTUAL PROPERTY VALUATION AND MONETISATION.

Changes in the global economic environment have influenced the development of business models where intellectual property has grown to be a central element for establishing value and potential growth. The foundation of commercial power has shifted from capital resources to intellectual property as an asset which includes:

- trademarks;
- patents;
- copyrights; and
- trade secrets.

Industries were once dominated by corporations which had acquired natural resources and manufacturing facilities. However, in this age, start-up companies are innovating products and services based on intellectual property resources rather than holding extensive resources.

In 2015, the world's largest taxi firm, Uber, owns no cars and the world's largest accommodation provider, Airbnb, owns no real estate1. The power of the internet has provided a platform for the rapid revolution of new business models which emphasises consumer interface, making some of the new enterprises one of most valued brands in the world in a shorter period of time than before.

In Malaysia, according to Brand Finance 20152, the top 10 brands with its Brand Value and Enterprise Value are as follows:

Rating	Brand	Brand Value (USD)	Enterprise Value (USD)	Percentage of Brand Value
1	PETRONAS	9,479m	90,290m	10.49%
2	GENTING	2,917m	15,114m	19.29%
3	Maybank	2,243m	20,987m	10.68%
4	CIMB BANK	1,964m	13,322m	14.74%
5	YTL SINCE 1955	1,914m	12,569m	15.22%
6	Sime Darby	1,699m	19,062m	8.9%
7	maxis.	1,315m	17,030m	7.72%
8	TENAGA NASIONAL	1,244m	29,717m	4.19%
9	DiGi	1,108m	14,198m	7.8%
10	TM	1,094m	8,327m	13.13%

Based on the above, it can be observed that the Brand Value contributes significantly to the Enterprise Value of the listed brands, displaying the vitality of the role played by the brand to those enterprises or businesses. A brand is an amalgamation of intellectual property, usually including a trademark and other connected assets such as designs and a set of characteristics which are typically associated with the relevant branded product.

Valuing intellectual property

Intellectual property has played a significant role to the world economy which has increased by USD40 trillion over the past 15 years — USD18 trillion of which were intangibles[3]. Intangible asset refers to identifiable non-monetary asset without physical substance[4]. However, most companies do not appreciate the value of intellectual property as an intangible asset.

Intellectual property valuation is a process to establish the monetary value of a particular intellectual property. Despite being challenging and indeterminate to some extent, there are three methods of valuing intellectual property:

1) Cost-based valuation which looks at the cost to create the intellectual property historically and the potential cost to recreate the asset at current rates;

2) Market-based valuation which considers comparable market transactions such as sale, purchase, licensing or assignment of similar assets to arrive at a conclusion of the value; and

3) Income-based valuation which calculates the stream of income attributable to the intellectual property based on historical earnings and expected future earnings.

Valuation of intellectual property is relevant for numerous reasons including intellectual property portfolio rationalisation and assessment, taxation, sale and purchase of businesses, technology transfer and monetising intellectual property.

Monetising intellectual property

Multiple ways of monetising intellectual property have been undertaken over the years in line with the development of intellectual property in Malaysia. Other than licensing and franchising, the use of intellectual property rights as collateral in obtaining financing, by SMEs especially, appears to be gaining ground where security interest in the intellectual property assets is used to secure funds.

In Malaysia, the legislative basis for intellectual property being utilised as collateral for the issuance of asset-backed securities is unclear. Thus far, only the **Industrial Designs Act 1996** ("IDA") has been amended to enable industrial design registration to be used as collateral. Sections 29 and 30 of the IDA provide that industrial design may be the subject of a security interest as in the case of other personal or movable property.

Section 32A of the **Patents Act 1983** prohibits notices of trust to be registered on patents which means a charge cannot be created on patents for a collateral agreement. Section 7 of the **Trade Marks Act 1976** ("TMA") provides that no notice of trust shall be entered on the Register of Trademarks. However, section 34(b) of the TMA provides that any enquiries in respect of a registered trademark registration may be enforced as in the case of any other personal property. In light of this and the current development in monetisation of intellectual property, the Intellectual Property Corporation of Malaysia has proposed amendments to the TMA in its published consultation paper[5].

Despite the unclear legislative position in Malaysia with regard to intellectual property rights as an asset for purposes of securing debt obligations, the Malaysian Government has allocated as much as RM200 million in the Malaysian Budget 2013 to encourage and enable SMEs to use intellectual property as collateral to secure financing through the Intellectual Property Financing Scheme ("IPFS") which was pioneered by the Malaysian Debt Venture ("MDV"). The IPFS offers financing of up to RM10 million or 80% of valued intellectual property, whichever is lower, for a five-year loan.

Since 2013, MDV has provided more than RM40 million financing to companies via the IPFS. Most of the companies that apply for the IPFS are from the information and communications technology sector, and the intellectual property assets used are patents and trademarks.

Conclusion

Local SMEs and entrepreneurs should take advantage of this current trend of commercialising intellectual property assets. This can be further encouraged with the proper platforms where intellectual property assets are to be viewed as a funding advantage which can help accelerate the growth of the Malaysian economy. Therefore it is important to raise awareness of the opportunity in monetising intellectual property assets in order to realise the economic benefit in this.

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1 Tom Goodwin, senior vice president of strategy and innovation at Havas Media, "The battle is for the customer interface".

2 The Brand Finance Top 100 Malaysia Brands 2015; November 2015

3 Samir Dixit,"Trademarks and Other Intangibles: Outlook,Importance,Challenges and Opportunities".

4 Financial Reporting Standard 138

5 MyIPO, "Proposed Amendments to the Trade Marks Act 1976 [Act 175]", Consultation Paper July 2012 Bil 1/2012/PC/TM; MyIPO, "Proposed Amendments to the Patents Act 1983 [Act 291]", Consultation Paper June 2012 Bil 1/2012/PT/PC.

EMPLOYMENT LAW

The Law Relating to Competing Unions Representing the Same Group of Employees

IN THIS ARTICLE, REENA ENBASEGARAM LOOKS AT THE LAW RELATING TO COMPETING UNIONS.

Introduction

The strength of a trade union is derived from its membership which is its paramount asset.

Upon being accorded recognition, a trade union will bargain on behalf of the employees and, in this regard, acts as a principal and not as an agent of its members[1]. The contracting rights — including those of non-union members and future employees — are transferred to the trade union. The collective agreement entered into by the union with the employer binds all employees who fall within the scope of representation of the trade union[2].

The **Trade Unions Act 1959** ("TUA") governs the formation and regulation of unions and ensures the necessary checks and balances are in place.

One union for one group of employees

The guiding principle is that there should not be more than one union representing the same group of employees. The TUA has provisions to prevent a breach of this principle by clearly setting out the power of the Director General for Trade Unions ("DGTU") to uphold this principle.

For example, when a union applies for registration, the DGTU is empowered to refuse to register it if among others, it if he is satisfied that there is already in existence a trade union representing the employees in that particular establishment, trade, occupation or industry[3].

Apart from the above, the DGTU is also vested with the power to, where two or more registered trade unions exist, either cancel the certificate of registration of the trade union(s) which has the lesser number of members4 or issue an order requiring the trade union(s) with the lesser number of members to remove from the membership register those members as are employed in that establishment, trade, occupation or industry[5].

Clearly, the power to register/de-register a union is entrusted to the DGTU. In fact, the TUA itself provides that the Yang di-Pertuan Agong shall appoint a DGTU who "*shall have the general supervision, direction and control of all matters relating to trade unions throughout Malaysia*"[6].

ABOM's Case

Apart from the legislation spelling out the authority of the DGTU to investigate rival claims, the role of the DGTU where there are competing unions was specifically dealt with in the 1999 case of **Yb Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia**[7] ("ABOM's Case") where the Federal Court had the chance to consider a situation where both ABOM[8] and NUBE[9] purported to represent the same group of employees.

In that case, as a result of an upgrading/promotion exercise, tellers and receptionists who were within the scope of membership of NUBE became members of ABOM and, consequently, enjoyed certain benefits over and above what they had enjoyed prior to that exercise. The Minister for Human Resources ("Minister") had later ruled, based on investigations conducted by the Director General of Industrial Relations ("DGIR"), that the employees in question were non-executives which had the result of their ceasing to become members of ABOM and instead returning them within the scope of NUBE's representation.

The Federal Court had noted that there was an acute conflict between ABOM and NUBE as to which union had the right to represent the employees in question. The Federal Court held that the competence of a particular union in the face of a competing claim of representation must first be established by the DGTU before the matter could be considered further.

What is meant by being competent?

The High Court in HSBC Bank Malaysia Bhd v Menteri Sumber Manusia, Malaysia & Anor[10] considered sections 2[11] and 26(1A)[12] of the TUA and explained that "*it is an established principle of Trade Union law that a Trade Union of Employee's is bound by its rules of membership and is only permitted to represent employees who are within the scope of their representation*".

What is important to take from ABOM's Case is that although the DGIR was investigating a complaint raised under section 9(1A) of the **Industrial Relations Act 1967** ("IRA")[13], and had the discretion whether or not to refer to the DGTU, the Federal Court confirmed that the DGIR ought to have done so under section 9(4B)(b) of the IRA[14], as the issue of competency of a union falls within the exclusive jurisdiction of the DGTU.

The Federal Court specifically held that the competence of a particular union in the face of a competing claim of representation must first be established before its complaint under section 9(1A) of the IRA is to be investigated further.

The current situation

In the past decade, various banks have rolled out promotional exercises resulting in deserving and capable non-executive staff being promoted out of the scope of one union, and falling with the scope of another union.

In attempting to reclaim its members through indirect means, the original/former union has been raising trade disputes under section 9(1A) of the IRA alleging that the promotions are in reality unionbusting exercises intended to take its members out of its scope of representation.

Pursuant to section 9(1A) of the IRA, the DGIR will conduct investigations into the job scope of the employees concerned in order to determine whether they are executives or otherwise. These investigations will eventually determine which union may represent the employees in question.

Although the DGTU has the responsibility of determining the competence of a union to represent a particular class of employees, his assistance and views are not sought by the DGIR during the investigations. The DGIR does not even involve the current union, even though it is the latter's members who are being investigated. The Minister, in those spate of cases, had thereafter ruled in favour of the former union, based solely on the investigations/report of the DGIR – despite the undisputed fact that the employees of the subject-matter of the said trade dispute are now being represented by a different union.

Recent efforts to challenge the DGIR's determinations through various judicial review applications have been unsuccessful.

As underscored in ABOM's Case, it is a condition precedent that the DGTU should first determine if the union raising the trade dispute is in fact competent to represent the said employees before the DGIR can proceed to entertain the said complaint.

However, in these recent cases, the High Court had affirmed the position taken by the DGIR and Minister that the only relevant investigation is that as provided for under section 9(1A) of the IRA. In so doing, the authorities had failed to consider that sections 9(1A) and 9(1)[15] of the IRA are only concerned with ensuring that employees who are in the managerial, executive, confidential or security categories are not covered by the scope of the collective agreement entered into between parties.

The said provision does not cover the issue of whether a union is competent to represent the employees in question.

Conclusion

In light of the conflicting decisions above, it is hoped that the appellate courts will clarify the position soon.

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1 **Korea Development Corporation v Construction Workers Union** [1983] 2 ILR 319

2 **Kelab Lumba Perak v Menteri Sumber Manusia, Malaysia & Ors** [2005] 5 MLJ 193

3 Section 12(2) TUA provides, "*The Director General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment trade, occupation or industry and it is not in the interest of the workmen concerned that there be another trade union in respect thereof*".

4 Section 15(2)(a) TUA provides, "*Where two or more registered trade unions exist in a particular establishment, trade, occupation or industry, as the case may be, the Director General may, if he is satisfied that it is in the interest of the workmen in that establishment, trade, occupation or industry so to do (a) cancel the certificate of registration of the trade union or trade unions other than the trade union which has the largest number of workmen in the said establishment, trade, occupation, or industry as its members*".

5 Section 15(2)(b) TUA provides, "*Where two or more registered trade unions exist in a particular establishment, trade, occupation or industry, as the case may be, the Director General may, if he is satisfied that it is in the interest of the workmen in that establishment, trade, occupation or industry so to do ... (b)issues an order requiring the trade union or trade unions other than the trade union which has the largest number of workmen in the said trade, occupation, industry or place of employment as its members to remove from the membership register those members as are employed in that establishment, trade, occupation or industry and thereafter the trade union or trade unions so ordered shall not enroll as members workmen in that establishment, trade, occupation or industry, except with the permission in writing of the Director General; an order under this paragraph shall have full force and effect notwithstanding any provision of the rules of the trade union concerned*".

6 Section 3(1) TUA

7 [1999] 2 CLJ 471

8 Association of Bank Officers, Peninsular Malaysia

9 National Union of Bank Employees, Peninsular Malaysia

10 [2012] 6 CLJ 540

[11] Section 2 TUA inter alia provides that, "trade union or union means any association or combination of workmen or employers, being workmen whose place of work is in Peninsular Malaysia, Sabah or Sarawak as the case may be, or employers employing workmen in Peninsular Malaysia, Sabah or Sarawak, as the case may be —

> (a) within any particular establishment trade, occupation or industry or within any similar trades, occupations or industries".

[12] Section 26(1A) TUA provides that, "*No person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered*".

[13] "*9(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers*."

[14] "9(4B) For the purpose of carrying out his functions under subsection (1B) or (4A) the Director General: ...

> *(b) may refer to the Director General of Trade Unions for him to ascertain the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions; ….*"

[15] Section 9(1) IRA provides, "(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say —

> *(a) managerial capacity;*
> *(b) executive capacity;*
> *(c) confidential capacity; or*
> *(d) security capacity,*

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the above mentioned capacities".

TAX LAW

Maxis Communications Bhd v Director General of Inland Revenue & Anor[1]

IN THIS ARTICLE, HARVEYNDER SINGH TYNDALL EXAMINES THE FEDERAL COURT DECISION IN MAXIS COMMUNICATIONS BHD V DIRECTOR GENERAL OF INLAND REVENUE.

Facts

Maxis Communications Berhad ("Maxis") launched an Employee Share Option Scheme ("ESOS") when it was listed on Bursa Malaysia. This allowed Maxis to grant options to eligible employees to subscribe for shares in Maxis. The eligible employees were sent a letter of offer and could then choose to accept the offer by signing a Share Option Agreement form and paying RM1 which resulted in a binding contract. The options vested one-third of the shares on each anniversary (over a threeyear period) from the date of the offer which is exercisable for up to 10 years from the date of the first grant.

Binariang GSM Sdn Bhd ("Binariang") had made a conditional takeover to acquire all voting shares in Maxis for a cash consideration. In light of the takeover and as requested by Binariang, the Board of Directors of Maxis invoked clause 10 of the ESOS bylaws whereby the holders of the unvested option were entitled to a payment of equivalent cash consideration ("ECC") in accordance with the original vesting schedule of those unvested options. In essence, the employees received cash consideration in substitution or in cancellation of outstanding unvested options.

Issue

The main issue in this case is how eligible employees are to be taxed on a cancellation of all outstanding unvested share options in the ESOS in return for payment of the ECC; that is, would the ECC be taxed as a usual perquisite under section 13(1)(a) of the Income Tax Act 1967 ("the Act") as contended by the Inland Revenue Board ("IRB") or would the value of the perquisite be determined pursuant to sections 25(1A) and 32(1A) of the Act as contended by Maxis.

Decision of the High Court

The High Court decided in favour of Maxis whereby the ECC was taxable under section 13(1)(a)[2] of the Act as a perquisite, but the value of tax payable was to be assessed pursuant to sections 25(1A)[3] and 32(1A)[4] of the Act.

Decision of the Court of Appeal

The Court of Appeal allowed the appeal by the IRB against the decision of the High Court and Maxis subsequently appealed to the Federal Court.

Decision of the Federal Court

The Federal Court upheld the decision of the Court of Appeal and dismissed the appeal. The Federal Court held that the ECC was not based on the ESOS and should be taxed as a perquisite in the usual way and not pursuant to sections 25(1A) and 32(1A) of the Act.

The Federal Court held that sections 25(1A) and 32(1A) of the Act would only apply to an employee's perquisite arising from a right to acquire shares and, in this case, the ECC was not based on the ESOS.

The Federal Court applied the purposive approach to interpretation and referred to the Finance Bill 2005 to ascertain the intention of Parliament in relation to sections 25(1A) and 32(1A) of the Act before concluding that the sections do not apply to perquisites in the form of cash payments received by an employee.

Conclusion

Cash payments received by an employee, even though based on the original vesting schedule of an ESOS, is not taxable in the same way and under the same provision in the Act as a benefit under an ESOS.

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[1] [2014] 6 MLJ 753

[2] **13(1)** Gross income of an employee in respect of gains or profits from an employment includes:

> **(a)** any wages, salary, remuneration, leave pay, fee, commission,bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising the employment.

[3] **25(1A)** The gross income from an employment in respect of any right to acquire shares in a company of the kind to which paragraph 13(1)(a) applies, shall where the right is exercised, assigned, released or acquired in the relevant period be

treated as gross income of the relevant person for that relevant period.

[4] **32(1A) (a)** Where in the relevant period a relevant person acquired any right to acquire shares in a company of the kind to which paragraph 13(1)(a) applies, under his name or in the name of his nominee or agent, the amount in respect thereof to be included in his gross income from the employment shall be:

(i) the market value of the shares where the right shall be exercised, assigned, released or acquired on a specific date or where the right shall be exercised, assigned, released or acquire within a specific period, the first day of that period; or

(ii) the market value of the shares on the date of the exercise, assignment, release or acquisition of the right, whichever is the lower less the amount paid for the shares.

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