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TACKLING THE INTRICACIES
OF CORPORATE LIABILITY FOR CORRUPTION

by Annabel Kok Keng Yen

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Section 17A ("**S17A Offence**") of the Malaysian Anti-Corruption Commission Act 2009 ("**MACC Act 2009**"), which came into force on 1 June 2020, marks a significant step in Malaysia's efforts to tackle and combat the scourge of corruption and bribery, particularly against those delegated with power and authority in commercial organisations.

It was reported that whilst there have been positive developments in the nation's economic recovery post the Movement Control Order (**MCO**), MACC is concerned that businesses affected by the COVID-19 crisis might lean towards corrupt practices to earn profits quickly, particularly in the commercial sector when it comes to bidding for tenders for projects and contracts worth millions of ringgit[1]. This concern is supported by a study, which revealed that corruption and bribery involving commercial organisations were widespread during economic crises primarily because companies are bent on recovering their businesses as soon as possible[2].

This article aims to elucidate the law on the S17A Offence and sets out key practical recommendations for business and firms of all sizes and sectors to adopt in order to comply with the requirements under the law and prevent the occurrence of corrupt practices in relation to their business activities.

1 *Datuk Shamshun Baharin Mohd Jamil, Malaysian Anti-Corruption Commission (MACC) Deputy Chief Commissioner (Prevention), Bernama, The Malaysian Reserve, 20 July 2020, "Section 17A of MACC Act can curb graft post-MCO" <https://themalaysianreserve.com/2020/07/20/section-17a-of-macc-act-can-curb-graft-post-mco/>*
2 *Ibid.*

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What And How S17A Offence Affects Corporations

Prior to the introduction of the S17A Offence, liability for corruption and bribery under the MACC Act 2009 primarily focused on the individual involved in the corrupt act. This meant that commercial organisations and their top-level management or representatives were not held liable for the corrupt acts committed by their directors or any persons associated with the commercial organisations.

S17A of the MACC Act 2009 introduces the concept of corporate criminal liability of a commercial organisation if a "person associated" with the commercial organisation corruptly gives, promises or offers to any person any gratification with intent to retain business or an advantage in the conduct of business for the commercial organisation.

"Persons Associated"

It is also crucial to note that a "person associated" with the commercial organisation is widely defined under section 17A(6) of the MACC 2009 to include a director, partner or an employee of the commercial organisation or any person who performs services for or on behalf of the commercial organisation, which would include the companies' third party vendors, suppliers, distributors, agents, contractors and their subsidiaries.

The section goes on to induce the question of whether or not a person performing services for or on behalf of the commercial organisation shall be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between him and the commercial organisation.

Strict Liability

The S17A Offence is one of strict liability, as the commercial organisation would be held liable, irrespective of whether its top-level management or representatives had actual knowledge of the corrupt acts of its employees or any "persons associated" with the commercial organisation.

Penalties

If the commercial organisation is found guilty under the S17A Offence, its director, controller, officer or partner, or any person who is concerned in the management of its affairs at the time of the commission of the offence, will be deemed to have committed the offence. Severe legal ramifications will be imposed on offenders of the S17A Offence – with penalties of a fine not less than ten times the value of gratification or RM1 million, whichever is higher, and/or imprisonment for a term not exceeding 20 years, or both.

Potential Defence

If a commercial organisation is charged with a S17A Offence, the only defence against corporate liability is for the commercial organisation to prove that it had in place "adequate procedures" to prevent any associated person from committing the act which constitutes the offence.

Furthermore, where it is proven that a commercial organisation has committed the S17A Offence, a person who is its director, controller, officer or partner, or is someone concerned in the management of its affairs at the time of the commission of the offence will be deemed to have committed that offence unless that person proves that the offence was committed without his consent or connivance and that he exercised due diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his function in that capacity and to the circumstances.

"Adequate Procedures"

It is therefore of utmost importance that commercial organisations put in place "adequate procedures" in accordance with the 'Guidelines on Adequate Procedures (the "**Guidelines**") published by the Prime Minister Department (issued pursuant to Section 17(5) of the MACC Act 2009). However, such Guidelines are not intended to be a "one-size-fits-all" solution and are intended to be prescriptive and should be applied practically, in proportion to the nature, scale, industry, risk and complexity of the organisation.

> Where the commercial organisation is found guilty under the S17A Offence, its director, controller, officer or partner, or any person who is concerned in the management of its affairs at the time of the commission of the offence, will be deemed to have committed the offence.

The Guidelines focuses on five guiding principles that should underpin a commercial organisation's "adequate procedures", which spells out the acronym of **T**.**R**.**U**.**S**.**T**. Commercial organisations may be guided to put in place "adequate procedures" by adhering to the following principles and illustrations –

T – Top-Level Commitment

(a) Top-level involvement in preventing corruption

The top-level management is primarily responsible for ensuring that the commercial organisation practices the highest level of integrity and ethics and fully complies with regulatory requirements on anti-corruption. Hence, the management is advised to be involved in ensuring, amongst others, the following –

- to establish, maintain, and periodically review an anti-corruption compliance programme which includes clear policies and objectives that adequately address corruption risks;
- to assign and adequately resource a competent person or function (which may be external to the organisation) to be responsible for all anti-corruption compliance matters,
- to ensure that the results of any audit, reviews of risk assessment, control measures and performance are reported to all top-level management, including the full Board of Directors, and acted upon.[3]

3 Prime Minister's Department, 'Guidelines on Adequate Procedures' (4 December 2019).
4 Ibid.

(b) Communicating the organisation's anti-corruption stance

The top-level management must be able to provide assurance to its internal and external stakeholders that the organisation is operating in compliance with its policies and applicable regulatory requirements.[4]

R – Risk Assessments

Risk assessment is a management process which allows identification and prioritization of corruption risks, for instance, risks relating to conflict of interests, nepotism, insider trading, so that an organisation can design an anti-corruption framework to effectively manage and mitigate and monitor such risks. Such corruption risk assessment should form the basis of an organisation's anti-corruption programme and tailored to reflect the organisation's particular business risks, circumstances and culture.[5]

U – Undertake Control Measures

Depending on the risks identified, appropriate processes, systems and controls approved by the top-level management and proportionate to the corruption risks identified should be put into place. The following measures play a significant role as risk mitigation tools:-

(a) Due diligence

Commercial organisations should set out procedures for conducting due diligence on any relevant parties or personnel (such as Board members, employees, agents, vendors, contractors, suppliers, consultants and senior public officials) prior to entering into any formalized relationships to counter corruption risks in business relationships.[6]

(b) Reporting channels

Commercial organisations should –

- establish an accessible and trusted channel, which may be used anonymously, for internal and external parties to raise concerns in relation to real or suspected corruption incidents or inadequacies of the anti-corruption programme or to report violations (whistleblowing) in confidence without risk of reprisal;
- establish a secure information management system to ensure the confidentiality of the whistleblower's identity and the information reported; and
- prohibit retaliation against those making reports in good faith.[7]

5 Ibid (n5).
6 Ibid (n5).
7 Ibid.

S – Systematic Review, Monitoring and Enforcement

The corruption risks that a commercial organisation faces may change over time, as may the nature and scale of its business activities. As such, the senior management should ensure that the adequacy, efficiency, and suitability of its anti-corruption programme is regularly reviewed and assessed.

Results of the review may prove useful for any continual improvement of its existing anti-corruption control measures. Commercial organisations may accordingly carry out the following –

(a) plan, establish, implement and maintain a monitoring programme, which covers the scope, frequency, and methods for review;

(b) identify competent person(s) and/or establish a compliance function to perform an internal audit, in relation to the organisation's anti-corruption measures; and

(c) carry out continual improvement by establishing procedures to address weaknesses identified with a documented corrective action plan and a timetable for action.[8]

In addition to the foregoing, internal employee surveys, questionnaires and feedback from training can also serve as important sources of information during the evaluation of the effectiveness of its anti-corruption programme and the means by which employees and other associated persons can be informed.

T – Training and Communication

(a) Communication

Commercial organisation should, through its top-level management, ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication.[9]

(b) Training

In addition, training which is proportional to the organisation's corruption risk should also be provided to equip employees with knowledge and skills needed to employ the organisation's anti-corruption procedures and deal with any potential corruption-related problems or issues..

8 Ibid.
9 Ibid (n4).

Deferred Prosecution Agreement

Interestingly, countries such as Singapore and the United Kingdom allow corporate entities to resolve allegations of corporate wrongdoing without having to face a full criminal trial and the risk of a criminal conviction by entering into a deferred prosecution agreement ("**DPA**") with the prosecution.

The introduction of corporate liability for corruption creates a level-playing field, fuels competition in the market and attracts domestic and foreign investment in this tough new business environment.

The concept of DPA enables a proceeding against a corporate entity to be stayed and in return, sets out, amongst others, admission of facts, financial penalties and terms relating to the implementation of, or improvements to a compliance programme to ensure future compliance with the law in return for a suspended prosecution or dismissal of charges by the prosecution. As such, offending organisations are given opportunities to make full reparation for their failure to put in place "adequate procedures" without having to face any painful collateral reputational damage or debarment from participation in public tendering as a potential consequence of a conviction.

As at the date of this article, the mechanism of DPA has not yet been introduced in Malaysia, despite numerous calls to do so from several senior former regulatory officials from the MACC.

Conclusion

The introduction of the S17A Offence without the DPA mechanism would mean that businesses and commercial organisations will not be given a chance to take remedial actions prior to a conviction under the S17 Offence. It is hence crucial for top-level management to swiftly prepare and implement the necessary measures proportionately to prevent the occurrence of corrupt practices in relation to their business activities so that they will be able to raise the defence of "adequate procedures" if a charge under S17A Offence is brought against them – failing which may lead to severe consequences.

10 *Coventus Law, 'Singapore Adopts Deferred Prosecution Agreements' (22.05.2018) <http://www.conventuslaw.com/report/singapore-adopts-deferred-prosecution-agreements/>.*

11 *Ben Lucas, 'Deferred prosecution agreements required in Malaysia before corporate failure-to-prevent-bribery offense is enforced, MACC chief says' (28 October 2019). <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/anti-bribery-and-corruption/deferred-prosecution-agreements-required-in-malaysia-before-corporate-failure-to-prevent-bribery-offense-is-enforced-macc-chief-says>.*

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DEVELOPING COVID-19 VACCINE

SOME IMPORTANT INTELLECTUAL PROPERTY ISSUES

by Kenny Lam

As at the date of writing this article, at least 8 – 9 months have gone by since the outbreak of one of the worst pandemics to strike modern civilization, in the form of a disease known as Coronavirus Disease 2019 (hereafter referred to as "**Covid-19**"). In the outbreak of viral diseases, vaccines are crucial in the containment and eradication. Thanks to vaccines, the world saw the end of, among others, smallpox (1972); polio (1979); diphtheria (1920); and rubella (2015).[12]

The value for the said intellectual property would be worth billions of dollars considering that the demand for a vaccine is universal throughout the global population.

Therefore, public and private institutions are competing to develop an effective vaccine for Covid-19 on a global scale. Malaysia is no exception as the Malaysian government has identified several partners to collaborate on the development of the Covid-19 vaccine, including China, Russia[13], and Turkey[14]. Malaysia is also set to become the testing location for a potential Covid-19 vaccine in the third phase of the vaccine research by China.[15]

With so many developments taking place, one issue of major concern for all stakeholders would be the issues concerning the intellectual property (hereinafter referred to as "**IP**") created in the process of researching and developing the vaccine for Covid-19. The value for the said intellectual property would be worth billions of dollars considering that the demand for a vaccine is universal throughout the global population.

This article attempts to take a birds-eye view on these issues.

What Are Vaccines?

Vaccines are biological preparations that confer immunity against specific diseases, typically by provoking a response from the body's immune system.

It helps the body's immune system to recognize and fight pathogens like viruses or bacteria, which then keeps us safe from the diseases they cause. Vaccines protect us

12 *'From Smallpox to Rubella, Here Are 6 Infectious Disease You Can Avoid Thanks to Vaccines', link at: https://www.businessinsider.com/vaccines-infectious-diseases-you-wont-get-2019-6?utm_source=hearst&utm_medium=referral&utm_content=allverticals#polio-leaves-survivors-with-lifelong-disabilities-2, accessed as at 26 June 2020.*

13 *'Kremlin Ready To Talk To Malaysia on Covid-19 Vaccine', link at https://www.freemalaysiatoday.com/category/nation/2020/06/12/kremlin-ready-to-talk-with-malaysia-on-covid-19-vaccine/, accessed as at 30 June 2020.*

14 *'Malaysia-Turkey To Develop Covid-19 Vaccine', link at https://www.pmo.gov.my/2020/05/malaysia-turkey-to-collaborate-to-develop-covid-19-vaccine/, accessed as at 30 June 2020.*

15 *Malaysia May Be Location for Covid-19 Vaccine Trials – Health DG', link at https://www.theedgemarkets.com/article/malaysia-may-be-location-covid19-vaccine-trials-%E2%80%94-health-dg, accessed as at 30 June 2020*

against more than 25 debilitating or life-threatening diseases, including measles, polio, tetanus, diphtheria, meningitis, influenza, tetanus, typhoid, and cervical cancer.[16] It is important to note that vaccines consist of several components and they may consist of several existing inventions as the formulation of vaccines involves an interplay between several biochemical components to work together in order to achieve immunity of targeted diseases.

They are explained further in the patents section below.

Applicable IPs In Vaccines

A. Patents

A patent is in essence, a form of monopoly for the use and manufacture for a product and/or a process. Patents are granted to owners of inventions which are, among others, novel, involves an inventive step, and has industrial application. Some of the key components of vaccines that may be granted patent protection are:[17]

a. Antigens

Antigens are the components derived from the structure of disease-causing organisms, which are recognized as 'foreign' by the immune system and trigger an immune response to the vaccine.[18]

b. Antibodies

Antibodies are Y-shaped proteins produced by B cells of the immune system in response to exposure to antigens. Each antibody contains a paratope which recognizes a specific epitope on an antigen, acting like a lock and key binding mechanism.[19]

Antigens and Antibodies interact hand-in-hand and the disclosure of both components is necessary to achieve patent protection.

c. Adjuvants

Adjuvants are added to vaccines to stimulate the production of antibodies against the vaccine to make it more effective.[20]

In Malaysia, patents are governed by the Patents Act 1983 and the Patent Regulations 1980. The latest development in cases involving pharmaceutical patents in Malaysia is the Federal Court case of ***Merck Sharp & Dohme Group & Anor v Hovid Berhad*** [21] where, among others, the Federal Court held that the invalidity of the independent claim of a patent does not necessarily render its dependent claims invalid as a matter of right. In general, this case was welcomed by many IP lawyers and patent holders as the judiciary has chosen to adopt a more holistic approach in interpreting patent claims, thus conferring a more comprehensive protection for patents.

16 *'Health Topics – Vaccines', link at https://www.who.int/topics/vaccines/en/, accessed as at 7 July 2020.*

17 *'Module 2: Types of Vaccines and Adverse Reactions', link at https://vaccine-safety-training.org/vaccine-components.html#:~:text=Assessment%202-,Components%20of%20a%20vaccine,products%20from%20the%20production%20process., accessed as at 30 June 2020.*

18 *Examples of relevant patents: International Application No.: PCT/EP2017/057481; US Patent Application No.: US9416186B2*

19 *Examples of relevant patents: Japanese Patent Application Nos.: JP6666905B2; US Patent Application No.: US9616112B2*

20 *Examples of relevant patents: European Patent Application No.: EP1948782A2; US Patent Application No.: US7524509B2*

21 *[2019] 12 MLJ 66, at paragraph 169.*

B. Trade Names / Trademarks

Trademarks and trade names help to establish a link between vaccines, their owners, and they provide a mark for distinction in the market for the public to identify genuine vaccines. Famous examples include: ***Quadracel***™ (against polio, manufactured by Sanofi); ***Pediarix***® (against DTaP, hepatitis B, Polio, manufactured by GlaxoSmithKline); ***ProQuad***® (against measles, rump, rubella, varicella, manufactured by Merck); and ***Pneumovax***® (against Pneumococcal, manufactured by Merck).

In Malaysia, trademarks are governed by the Trade Marks Act 2019 and Trade Marks Regulations 2019. Further, all trade names of medicines would need to be registered with the National Bureau of Pharmaceutical Board of Malaysia under the Control of Drugs and Cosmetics Regulations 1985.

C. Confidential Information - Trade Secrets and Know-How

Trade secret is a species of confidential information, which is defined as some proprietary right that is not disclosed to the public, and in the case of vaccines, would relate to the formulation and/or manufacturing process. Know-how is defined as 'practical knowledge and ability'[22], and it may be a more specific form of confidential know-how and/or trade secret.

The know-how and/or trade secret in the development of vaccines may include specific technical insights in respect of its formulation and manufacturing processes, and/or the culmination of many years of experience in testing and manufacturing vaccines. In Malaysia, there is no legislation that protects confidential information such as trade secrets and know-how, unlike article 39.2 of the Agreement on **Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement,** where the criteria for protection of information of confidential nature is are clearly defined.[23]

Nevertheless, confidential information that is proprietary in nature is traditionally protected through the common law principles in Malaysia where the owner of confidential information may initiate a tortious action of breach of confidence against unauthorized disclosure of such information, typically against ex-employees.[24]

22 *https://dictionary.cambridge.org/dictionary/english/know-how, accessed as at 30 June 2020.*

23 *Article 39.2 of the TRIPS Agreement provides:*
"Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:
(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
(b) has commercial value because it is secret; and
(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

24 *For example, see Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors [1998] 3 MLJ 422*

Navigating The IP Issues

I. Identify Potential IP Barriers to The Development of the Vaccine

It is crucial for inventors and stakeholders to: (1) identify relevant patents and/or IP in using patented components for vaccine research and development; (2) approach patent holders and/or IP owners for access if necessary; and (3) in the event that access is not granted by patent holders and/or IP owners, they are to develop an alternative workaround for the inventions.

II. Ownership of the IP

Ownership of the IP giving birth to Covid-19 vaccines is a crucial issue to be predetermined by parties as the IP owner would control the various aspects of the vaccine, including its manufacture, import, export, licensing and distribution, all of which would directly affect the accessibility of the vaccine to the general public.

If the ownership of IP is not agreed beforehand, difficulties may arise in the event of a dispute as it may be impossible to correctly identify the party with the rights to the IP, which would give the party the necessary locus to protect the IP in dispute.

If the ownership of IP is not agreed beforehand, difficulties may arise in the event of a dispute as it may be impossible to correctly identify the party with the rights to the IP, which would give the party the necessary locus to protect the IP in dispute. This proved to be problematic, in particular, to patents. Fortunately, most jurisdictions have provided a default mechanism under its laws to determine the ownership of patents in the event that there is no existing agreement between parties to decide the same. For example, under the Malaysian Patents Act 1983, the rights to a patent shall belong to the inventor.[25] When two or more persons have jointly made an invention, the rights of a patent shall belong to them jointly.[26] If two or more persons have separately and independently made the same invention, and each of them has made an application for a patent, the right to a patent for that invention shall belong to the person whose application has the earliest priority date.[27] Where the right to obtain a patent is owned jointly, the patent may only be applied for jointly by all the joint owners.[28]

III. Conflict of Laws / Choice of Law

In the case of Covid-19, it is highly likely that the research and development for the vaccine would involve border-less collaboration on a global scale. The issues of governing jurisdiction and applicable laws would arise not only in respect of the contractual relationship between the collaborating parties, but are the intellectual property created as a result of the collaboration.

Therefore, it is important for collaborating parties, governmental or private parties alike, to predetermine the governing jurisdiction and applicable laws for the IP of the vaccine. Without resolving the potential for conflict of laws, it is difficult, if not impossible, to determine the body or country with effective jurisdiction to adjudicate, determine and enforce awards and/or judgements arising in disputes on the development and/or delivery of Covid-19 vaccines.

IV. Compulsory Licensing

Compulsory licensing is a tool utilized by the government to compel patent owners to grant licenses at an affordable price point to facilitate access to cheap medicines to the population. In Malaysia, compulsory licensing is governed by, among others, sections 49, 52, and 53 of the Patents Act 1983 which set out the criteria for applications for compulsory licenses and conditions which may be fixed on the issuance of the compulsory license. Further, the Malaysian government may, either on its own or through an authorized 3rd party, use the patented invention without the patent owner's consent in the name of national emergency and/or public interest.[29]

Coupled with the lengthy and time-consuming process to obtain patent registration, inventors may be dissuaded to protect the IP of the vaccine through patents and may rely on the protection of laws concerning confidential information of trade-secrets and know-how to retain control of the vaccine's IP.

However, this may be a short-sighted approach because the inventions that come out from the development of the vaccine may be applied against other diseases or in other fields of technology altogether, regardless of whether the vaccine works against Covid-19 or not. In other words, there may be a 'second-use' for these inventions.Therefore, it may be prudent to file patent applications for the key components of the Covid-19 vaccine to ensure that past efforts and investments for these inventions are not wasted and can be developed further for other uses.

In short, patenting the Covid-19 vaccine as an invention may be unavoidable, however, the key lies as to what extent should the vaccine be patented so as to achieve a balance between public good (to avoid compulsory licensing and governmental use thus rendering patents academic), and inventor's rights (to preserve existing efforts on the Covid-19 vaccine for potential second use).

The answer to this problem is a difficult one and it may be technically impossible to achieve the said balance. As such, it will be an interesting point of strategy for biopharma companies and/or governmental institutions in managing the IP of the Covid-19 vaccine.

25 Section 18(2), Patents Act 1983
26 Section 18(3), Patents Act 1983
27 Section 18(4), Patents Act 1983
28 Section 22, Patents Act 1983
29 Section 84(1)(a), Patents Act 1983

Conclusion – The Big Picture

Regardless of the IP complications explained above, it is important to note that IP is only 1 of 6 components identified to ensure global availability of safe, effective, appropriate, and affordable vaccines. The other 5 components that interplay with one another are[30]:

(a) adequate support for research and development;

(b) national regulatory systems to ensure safety and efficacy;

(c) quality and manufacturing facilities;

(d) national and local distribution systems and markets; and

(e) international distribution systems and markets.

Therefore, one could make the argument that IP is only 1 piece of the puzzle to achieve universal access to the Covid-19 vaccine, especially for poor and developing countries. However, it is also crucial to understand that for many years, IP has been the main system to incentivize companies to invest in the research and development ("**R&D**") of new drugs and medicine where the costs of R&D were traditionally recouped through the monopolistic rights granted by way of patents for a period of time. It is very unlikely that the would-be inventors of the Covid-19 vaccine would give up their IP rights to the vaccine in a purely altruistic move.

In the case of Covid-19, we are of the view that considering the demand for a vaccine is universal, proper management of IP is crucial to facilitate the creation of a working Covid-19 vaccine and ease of access of the vaccine to the global population.

30 Vaccines: Accelerating Innovations and Access, World Intellectual Property Organization

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ASSET RECOVERY –
KNOWING YOUR LIMITS

by Yeow Wei Jien

Asset misappropriation remains one of the most common incidents of corporate fraud. In a survey of 114 Malaysian corporations carried out by a global consultancy firm in 2020, asset misappropriation represents 16% of all corporate fraud incidents reported.

As asset misappropriations often take place surreptitiously, they may not be discovered until many years after it has taken place. Sometimes, the misappropriation itself occurs over an extended period of time and many years may have passed before the wrongdoings are finally exposed and see the light of day.

The delay in the discovery of asset misappropriations poses legal and practical challenges for the victim company seeking to recover such misappropriated assets.

The delay in the discovery of asset misappropriations poses legal and practical challenges for the victim company seeking to recover such misappropriated assets.

In particular, the law prescribes a specific time period within which legal actions must be taken to recover those assets and the victim would be barred from pursuing its claim through the legal system once the applicable limitation period has passed.

Asset Misappropriation

In the context of corporate fraud, assets misappropriation means the unauthorised diversion of company's funds or assets out of its corporate structure. In most situations, asset misappropriation involves the participation of the organisation's senior management or board of directors. By virtue of the power and control they hold over the organisation and its employees, they have the capability to sidestep or exploit internal audit or risk management measures in executing the diversion of funds and assets and ensure their concealment for a long period of time. As a result, it is not unusual for incidences of asset misappropriation to remain hidden until a much later time.

When asset misappropriation is discovered, the victim organisation is faced with the formidable task of implementing remedial measure to prevent future occurrence and, perhaps more importantly, of recovering the assets. A victim may not wish to bring civil recovery actions for various commercial reasons, preferring to rely on the authorities to carry out criminal investigations and charges. One potential issue with this approach is if the authorities take a long time to investigate and decide not to bring any action. Can the victim still pursue its own legal action?

It is important to know the limitation period before making any such decision as it could make or break any intended recovery action.

Limitation Period In Malaysia

In general, a party may not bring a claim after a period of six years has elapsed from the time the cause of action accrued. This is provided under S.6(1)(a) Limitation Act 1953 which states:

> *"6 (1) Save as hereinafter provided the following actions shall not be brought after the expiration of **six years** from the date on which the cause of action accrued, that is to say-*
> *(a) actions founded on a contract or on tort..."*

For a claim based on tort, the cause of action accrues on the date when the victim suffered the damage caused by the defendant's tort. In the case of assets misappropriation, the damage is suffered when assets are diverted from the organisation. Therefore, under the general rule of limitation period, a claim to recover misappropriated asset must be commenced within 6 years from the time it was removed from the organisation, failing which the victim will be barred from pursuing an action through the civil justice system. Notwithstanding section 6 of the Limitation Act 1953, the law recognises some exceptions to the general limitation period. Of particular relevance to asset recovery claims is when they involve fraud and breach of trust.

Fraud

The law recognises that the default limitation period may cause injustice in cases involving fraud or fraudulent concealment. Thus, section 29 Limitation Act 1953 provides for the postponement of limitation period when a claim is based upon fraud or concealed by fraud:

> *"29(1) Where, in the case of any action for which a period of limitation is prescribed by this Act, either-*
> *(a) the action is based upon the **fraud** of the defendant or his agent or of any person through whom he claims or his agent; or*
> *(b) the right of action is **concealed by the fraud** of any such person as aforesaid;...*
>
> *the period of limitation shall not begin to run until the plaintiff has **discovered the fraud ... or could with reasonable diligence have discovered it..."***

Fraud is defined as 'actual fraud' involving dishonesty of some sort for which the defendant is a party or privy to.[31] Where a person acts with the intention to deceive another and such deception caused an advantage to himself or injury, loss or detriment to another, such person is acting fraudulently.[32] As is often the case, asset misappropriation involves the dishonest actions of rogue employees or officers to divert the company's assets for their own personal gain. In such cases, section 29(1) of the Limitation Act would operate to postpone the commencement of the limitation period until the time when the victim discovers the asset misappropriation, or until the time when the victim could have discovered it with reasonable diligence.

In order to prove that the victim may discover the fraud with reasonable diligence, he must have been put on inquiry of the fraud and such inquiry would have led to the discovery of the real facts.[33] Therefore, constructive discovery of the fraud may occur, for example, when a whistle-blower comes forward with credible evidence of the fraud, or when the authorities alert the victim of a criminal case.

The exception under section 29 Limitation Act 1953 is particularly helpful to victims of corporate fraud. The investigation process for corporate fraud is time-consuming. In complex cases where assets are located or have been removed to foreign jurisdictions, the process could take even longer as it is dependent on foreign authorities. By the time the investigations have been completed and the victim is ready to commence a civil recovery action, 6 years may have elapsed from when the misappropriation took place.

The postponement of the limitation period under section 29 mitigates this issue by giving sufficient time for a full investigation to take place, the identification and location of misappropriated assets, the collection of evidence and the proper preparation of the civil claim.

Breach Of Trust

Where a beneficiary of trust brings an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy to, or an action to recover trust property from the trustee, no limitation period shall apply. This is provided for under section 22(1) Limitation Act 1953:

> *"22 (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action-*
> *(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
> *(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use."*

31 PJTV Denson (M) Sdn Bhd v Roxy (M) Sdn Bhd [1980] 2 MLJ 136

32 Seet Soon Guan v PP [1955] MLJ 3

33 Sturgis v Morse (1857) 4 Beav 541

By virtue of their position, company officers (i.e. directors or senior management personnel) are trustees of the corporation's assets. When company officers participate in or execute the misappropriation of assets dishonestly, their actions constitute fraud, particularly a fraudulent breach of trust and their fiduciary duties.

Where the company's assets are misappropriated in breach of trust and the persons who received the assets had knowledge of the breach of trust, the law treats such persons as constructive trustees of the misappropriated assets. Pursuant to section 22(1) Limitation Act 1953, no limitation period shall apply in relation to an asset recovery claim by the victim company, being beneficiary under the constructive trust, against the constructive trustees.

Limitation In England & Wales

The position in England and Wales is similar to Malaysia's. The general limitation period for claims founded in contract and tort is 6 years from the date on which the cause of action accrued[34]. Where fraud or a deliberate breach of duty is alleged or where there is concealment of facts, limitation may be extended by 6 years from the date of discovery of fraud or breach, or with reasonable diligence, could have discovered it.

Section 32(1) Limitation Act 1980 (UK) (which is in *pari materia* with section 29(1) of the Malaysian Limitation Act 1960) provides:

> *"32 (1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—*
> *(a) the action is based upon the fraud of the defendant; or*
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; ...*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."*

English case laws have held that section 32(1) would apply where there is active concealment of facts by the plaintiff, with the effect that time for the purposes of limitation period will not start to run until the concealment has been discovered.[35]

34 *ss. 2 and 5, Limitation Act 1980 (UK)*

35 *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd [1996] AC 102*

Therefore, for the purpose of an asset recovery claim involving fraud, breach of duty or concealment, time for limitation period will not start to run until actual discovery of the fraud or when the victim could with reasonable diligence discovered it.

Conclusion

The period of limitation is an important issue, which has the potential to make or break a case. If a party finds itself unfortunate to have been a victim of asset misappropriation, it is essential to consider the issue of limitation at the outset before deciding on the way forward, even if it was only for the purpose of establishing timelines for any potential claim. This would assist greatly in mapping out the overall asset recovery strategy to be undertaken.

In cases of asset misappropriation involving fraud or breach of trust, Malaysian law provides exceptions to the general limitation period of 6 years from when the damage is suffered, i.e. when the assets are misappropriated from the victim. The Malaysian position is consistent with the laws in other foreign jurisdictions which make similar exceptions for cases involving fraud, breach of duties and/or latent damage.

Where a party commences asset recovery claim as a victim of fraud or the beneficiary of misappropriated trust properties, it is essential to plead fraud or breach of trust in order to avail itself to the extended limitation period. A failure to do so may prove fatal, especially in cases where the limitation period would have otherwise expired and thus the victim will be barred from pursuing any legal claim to recover the misappropriated assets.

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ALLIED HEALTH PROFESSIONALS

ARE YOU REGISTERED?

by Edwin Raj Gnanamuthu

The Ministry of Health Malaysia had recently appointed 1 July 2020 as the date on which the Allied Health Professions Act 2016 (Act 774) ("**AHPA**") comes into operation. The Allied Health Professions Regulations (Fees) 2020 was also gazetted and came into force on the same day as the AHPA.

The aim of the AHPA is to regulate the practice of allied health practitioners in Malaysia for the safety and wellbeing of the public through the establishment of the Malaysian Allied Health Professions Council ("**MAHPC**").

While health care professionals and hospitals are regulated in Malaysia, there were other professionals within the health care industry which are left unregulated before the introduction of the AHPA. Among them are the Allied Health Professionals. The AHPA defines the profession of allied health as "any profession which has a direct or an indirect effect on patient care, or on the health of an individual or the population". Under the AHPA, 23 Allied Health Professions as prescribed under the list in the 2nd Schedule are now being regulated. They are as follows:

1. Audiologist
2. Dietitian
3. Entomologist (Public Health)
4. Physiotherapist
5. Medical Physicist
6. Nutritionist
7. Clinical Psychologist
8. Clinical Scientist (Biochemist)
9. Clinical Scientist (Biomedical)
10. Clinical Scientist (Embryologist)
11. Clinical Scientist (Medical Geneticist)
12. Clinical Scientist (Microbiologist)
13. Occupational Therapist
14. Speech-Language Therapist
15. Radiation Therapist
16. Diagnostic Radiographer
17. Medical Laboratory Technologist
18. Dental Technologist
19. Environmental Health Officer
20. Health Education Officer
21. Food Service Officer (Healthcare)
22. Forensic Science Officer
23. Medical Social Officer

Establishment and Functions of MAHPC

The MAHPC is established pursuant to Section 3 of the AHPA. The functions of the MAHPC are provided under Section 4 of the AHPA, as follows:

a) to register and issue certificates to registered practitioners;
b) to determine the appropriate qualifications of Allied Health Professions;
c) to determine the necessary prerequisite requirements of Allied Health Professions;
d) to regulate the ethics and professional conduct of registered practitioners;
e) to supervise matters relating to Allied Health Professions which includes training, competency and professional development; and
f) to do such other things as may be required or permitted to do under this Act.

The MAHPC is also vested with the power to exercise disciplinary authority over the registered practitioners.

Registration

Registration of Allied Health Professionals is regulated under Part IV of the AHPA. The AHPA requires all persons which falls within the 23 prescribed Allied Health Profession to be registered as an allied health practitioner within 12 months from the coming into effect of the Act. Such persons may not practise unless registration has been made with the MAHPC. Under Section 16 of the AHPA, to qualify for registration:

a) he must be a Malaysian citizen;
b) he holds any qualification as may be recognized by the MAHPC;
c) he fulfils other prerequisite requirements as may be determined by the MAHPC; and
d) he has not been convicted of an offence involving fraud, dishonesty or moral turpitude or an offence punishable with imprisonment, whether in itself only or in addition to or in lieu of a fine, for more than two years

A registered practitioner may also apply to be registered as an expert under section 21 of the AHPA.

Practising Certificate

Apart from the registration requirement, a practitioner must also apply to the MAHPC for a practising certificate before he or she can practise. This requirement is stipulated under Section 22 and the renewal of the practising certificate is provided for under Section 23. A practising certificate is valid for two years.

For foreign practitioners who have been practising as Allied Health Professionnals outside of Malaysia, they may apply for a temporary practising certificate if they wish to practise in Malaysia. This is provided for under Section 24AHPA. The temporary practising certificate is valid for one year from the date the certificate is issued and may be revoked if the holder fails to abide by certain conditions and restrictions.

A registered practitioner who practises without a practising certificate or a foreign practitioner who practises without a temporary practising certificate commits an offence and may be held liable upon conviction for either a fine not exceeding RM50,000 or imprisonment for a term not exceeding two years or both.

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Advertisement

The AHPA also regulates the advertising activities of the allied health profession. The prohibitions are stated in Section 32 AHPA which includes, making any false claim in any advertisement, misleading representations to induce or influence any person to enter into a contract for the purchase of such services, contravene any written law regulating advertisement for medical and health matters or acting in contrary to any guidelines on advertisement issued by the MAHPC.

Any contravention of the advertising prohibitions could attract either a fine not exceeding RM10,000 or imprisonment for a term not exceeding six months or both. In the case of a continuing offence, the registered practitioner may be liable for a fine not exceeding RM500 per day.

Conclusion

The ambit of the AHPA is expected to expand in the future to include other practitioners that will be considered party of the allied health professions and the Act provides for such an avenue in Sections 10 and 12. The introduction of the AHPA has generated positive feedback from the other facets of medical practitioners, such as doctors, dentists, pharmacists, who welcome the Act as the allied health professions will finally be regulated by a regulatory body with regulatory powers. It is hoped that the long-awaited Act will be helpful in improving and raising the standards of the medical profession and the health industry as a whole.

If you are an Allied Health Professional listed under the second Schedule to the AHPA, do take note that you have to **register** and **apply** for a practising certificate before you can practise. You would also have to ensure that your advertising activities conform with Section 32 AHPA.

For patients or clients under the care of registered allied health professionals, should there be any reason to make a complain you may now lodge a complain against any of the professionals as they are being regulated by the MAHPC.

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UNWRITTEN RULE OF EMPLOYMENT

LOYALTY TOWARDS THE COMPANY

by Louis Liaw

The relationship between an employer and an employee is one of a master and a servant.[36] While the description sounds archaic, one may be surprised to find that it is still how courts describe the relationship of employment today[37]. But are the courts wrong? After all employment is indeed a person being hired to fulfill the instructions, whatever it may be, of another person in exchange for payment[38].

Consequently, with this master-servant relationship, comes a duty on the servant to obey the wills of his master and a duty to be loyal to his master. A servant that goes against the orders of the master, or who betrays his master for his interest or interest of another person, will breach the fundamental element of the relationship thereby allowing it to be terminated.

Albeit an 1886 decision, the decision of the Court of Appeal of the United Kingdom in **Pearce v. Foster & Others [1886] 17 QBD 536**, remains relevant and has been adopted by the Courts today[39]:

> *"The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him...".*

In Malaysia, the case of **Zainudin Bin Kassim v. Johan Ceramic Berhad [2008] 2 LNS 1447** cited an academic opinion with approval:

> *"The right to control employees is a distinguishing feature of a contract of employment. The right to control implies the right to ask the employee what work to do. It is a dominant characteristic in the relationship of employer and employee, which marks off the employee from an independent character. As such, the employee must subject himself to the said control and behave accordingly. (See Misconduct in Employment by B.R.Ghaiye at p. 42)".*

36 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, Pearce v. Foster & Others [1886] 17 QBD 536*

37 *Kamaazura Bt Abu Bakar v KYP Education Sdn. Bhd. (Industrial Court Case No.: 12/4-665/18)*

38 *Ngeow Voon Kean v Sungei Wang Plaza Sdn Bhd [2006] 3 CLJ 837*

39 *Kamaazura Bt Abu Bakar v KYP Education Sdn. Bhd. (Industrial Court Case No.: 12/4-665/18)*

These duties of obedience and loyalty subsist in all employment contracts, even if they are not explicitly spelled out. Perhaps it is because they are not explicitly laid out in the employment contract that some employees, knowingly or unknowingly, embark on activities that breach these duties.

Likewise, some employers may also have the misconception that they have no recourse when employees act in a manner that harms the company as these duties are not laid down in the employment contract.

For the employees, this piece will not only provide examples of activites that breach these duties, but also serve as a reminder to them to avoid such activities. For the employers, this article seeks to unravel the misconception mentioned above.

These duties of obedience and loyalty subsist in all employment contracts, even if it is not explicitly spelled out.

What Is The Duty Of Fidelity?

In the case of **Zaharen Hj Zakaria v. Redmax Sdn Bhd & Other Appeals [2016] 7 CLJ 380** the Court of Appeal held the following:

> *"[44] Under the law, an employee of a company has a duty of fidelity to be observed at all times during his employment with the company. What is this duty of fidelity? Every employment contract contains an implied term that an employee will serve his employer with good faith and fidelity (the duty of fidelity). The duty of fidelity is owed by all employees and is to be distinguished from a fiduciary duty. A fiduciary duty requires an employee to act in the interests of his employer, whereas the duty of fidelity requires an employee to have regard to his employer's interests. Inherent in that duty to have regard to his employer's interests must be a duty not to act in a manner that would be to disregard his employer's interests. Such acts must include acts that are inherently detrimental to his company's interests."*

In summary, the duty of fidelity requires the employee to have regard to the employer's interest and avoid engaging in activities that are detrimental to that. However, what activities are "activities that are detrimental to the interest of the company"?

It is impossible to foresee all the scenarios in which the duty of fidelity can be breached. Moreover, certain actions may be a breach in one scenario, but not in another; each case must be treated with regards to its specific factual matrix, particularly with regards to the specific employment terms entered between the parties.

Examples

Here are some examples of actions that have been regarded by the Courts as a breach of this duty. They include, amongst others,

i) Working for the benefit of another company other than the employer and obtaining profit from the company without consent or knowledge of the employer[40];
ii) Diverting potential or existing customers of the employer to another company, without consent or knowledge of the employer[41];
iii) Using confidential information and trade secret of the employer for the benefit of another company, without consent or knowledge of the employer[42]; and
iv) Planning team-moves and soliciting employees during employment with the employer to join a competitor or set-up a competing business[43].

In these circumstances, clearly, the interest of the employer has not only been disregarded, but positively harmed by such actions of the employee. Such actions of an employee would therefore, constitute a breach of his/her duty of fidelity.

Recourse Available To The Company

When faced with this situation, there are essentially two recourses available to the company, both of which can be undertaken simultaneously. They are:

1. Dismissing the infidel employee; and
2. Taking a civil suit against the infidel employee

Dismissing the infidel employees

Case laws have shown that actions that breach the duty of fidelity amount to misconduct and insubordination, thereby warranting disciplinary actions and even dismissal[44]. However, before terminating the infidel employee, companies are advised to still adhere to good labour practice and natural justice by issuing show-cause letters and conducting domestic inquiries first. This is not only morally fair,but it will also either discourage complaints at the industrial court later and strengthen the company's case if brought to court for the same.

That being said, if the company has in its possession incontrovertible or overwhelming evidence of such breach, be it documentary evidence or witnesses, then the company can in fact summarily dismiss the infidel employee, i.e. dismissing him/her without notice. This is because serious misconducts such as diversion of business to another company or breach of confidence can, depending on the context, amount to a breach going to the root of the employment contract.

In any event, companies are advised to conduct its investigation and gather solid evidence of such breaches in silence first before making any moves. This is to avoid pre-mature and/or wrongful termination of these employees which could lead to a claim of unfair dismissal. Apart from this, it will also avoid alerting the infidel employee from destroying credible evidence.

Taking a civil suit against the infidel employee

Other than terminating the infidel employee, another action that can be taken by the employer is to sue the employees in the civil courts. The causes of action that are available to an employer includes: breach of the employment contract, (specifically breach of an implied term of the contract (that is the duty of fidelity)), unlawful interference with trade, and/or breach of confidence, depending on the facts of the matter.

These civil suits will aim to obtain damages from the infidel employee, to have the employee account for profits earned through these unlawful dealings[45], as well as to injunct the employee from continuing such action. If another company is also knowingly involved in the unlawful dealings, the other company can also be jointly sued to enhance the chances of recuperating the losses suffered by the betrayed company.

In the case of **Worldwide Rota Dies Sdn Bhd v. Ronald Ong Cheow Joon [2010] 1 LNS 444**, the Court held that the defendant of the case had committed the tort of unlawful interference with the plaintiff's trade when the defendant encouraged and/or influenced the plaintiff's employees to leave the employment of the plaintiff, when the defendant failed to keep all information obtained in the course of his employment with the plaintiff confidential, when the defendant divulged the plaintiff's confidential information to the plaintiff's competitor, and when the defendant made misrepresentations to the plaintiff's customers with the sole aim of damaging the plaintiff's reputation.

The Court also held that the defendant was in breach of his duty of fidelity (albeit in the case said duty was listed in the employment contract) as well as in breach of confidence when he committed the abovementioned activities. Consequently, the court awarded an injunction that the defendant whether

40 *Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals [2018] 4 MLJ 461*

41 *The Continuity Company (M) Sdn Bhd V. Chin Chee Hong & Ors (No 2) [2016] 1 LNS 1056*

42 *Schmidt Scientific Sdn Bhd v. Ong Han Suan & Ors [1998] 1 CLJ 685*

43 *Thomson Ecology Ltd and another v APEM Ltd and others [2013] EWHC 2875 (Ch), Shepherd Investments Ltd and another v Walters and another [2006] EWHC 836 (Ch), [2007] IRLR 110, [2007] 2 BCLC 202*

44 *Aetna Universal Insurance Sdn Bhd v. Ooi Meng Sua [2001] 3 CLJ 1, Lee Lok Kan V. Foodteller Sdn Bhd [2018] 2 LNS 3074*

45 *Reading v A-G [1951] AC 507*

by himself, his agent and/or servant, be restrained from doing any further acts which could damage the reputation of the plaintiff and from encouraging the plaintiff's employees to leave the employment of the plaintiff. The Court also awarded damages of upwards of RM2 million.

Conclusion

In conclusion, by entering into employment relationship, an employee owes his/her employer a duty to be loyal to the employer and to always have regard to the employer's interest. This is notwithstanding the employment contract not having any clause to that effect. When an employee disregards the employer's interest in his/her actions, he/she shall be liable to the losses caused to the employer which could very well lead to the termination of his/her employment.

Hence to avoid these unfortunate situations, employers are advised to hire good human resource managers as well as good legal advisors to put in place a robust system of operation that can deter these misconducts.

Nevertheless, while there is recourse available to the employer, prevention is always better than cure. In reality, these situations normally occur due to a weakness in the operations of the company, ranging from a lack of check and balance, over-consolidation of power and authority in one individual, a lack of audit, over-trusting of certain staff and so on.

Hence, to avoid these unfortunate situations, employers are advised to hire good human resource managers as well as good legal advisors to put in place a robust system of operation that can deter these misconducts. Furthermore, this could also be a result of inadequate remuneration to the employees, as ultimately the employees find that the profit gained from participating in these dealings outweighs the risk of termination and a lawsuit. Therefore, companies are reminded to reward their employees fairly so that their employees do not see it attractive to betray the trust of their employer.

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CHANGING TRENDS IN ARBITRATION
IN MALAYSIA

by Abang Iwawan

Arbitration is a form of dispute resolution, which represents an alternative to the traditional method of resolving disputes through court. Due to its private and consensual process, arbitration allows more flexibility compared to court litigation – for example, parties have the liberty to appoint their arbitrator of choice to suit the nature of their dispute. Given its many benefits, arbitration is often the preferred choice in commercial contracts, especially those involving international parties.

Amid the pro-arbitration regimes being introduced in Malaysia, such as the amendments to the Arbitration Act 2005 to reflect the UNCITRAL Model Law, arbitration has increasingly become the preferred method of dispute resolution in the country. In this short article, we will provide an overview of the latest developments in the arbitration landscape in Malaysia, particularly in relation to judicial intervention, as well as other developments such as 3rd party funding, virtual hearing and confidentiality.

Judicial Intervention

Setting Aside Of Arbitral Awards

In mid-2018, Parliament promulgated amendments to the Malaysian Arbitration Act to amongst others, repeal Section 42 which allows a losing party to a domestic arbitration to set aside the award on the grounds of errors of law. The amendments made reflects the policy of the New York Convention and the UNCITRAL Model Law – often described as 'pro-enforcement bias'. As the law now stands, arbitral awards can only be challenged in Malaysia under Section 37 of the Arbitration Act, on grounds of breach of natural justice or public policy.

Nevertheless, the court's reluctance to exercise its power to set aside an arbitral award under Section 37 has been highlighted in the recent Federal Court decision in *Jan De Nul v Tan Sri Vincent Tan,* where it was held that –

- Even if the court finds that a breach of the rules of natural justice has been established, or that an arbitral award is in conflict with public policy, it does not necessarily mean that the award must be set aside as a matter of course.

- The court must always be reminded that constant interference with arbitral awards would defeat the spirit of the Malaysian Arbitration Act, which "for all intent and purposes is to promote one-stop adjudication in line with the international practice" and that courts must "recognise the arbitral process by encouraging finality".

The recent High Court decisions in *Wolfgang Leonhard Schulz* as well as *Tune Talk v Padda Gurtaj* illustrate the Court's approach in enforcing arbitral awards; that courts would ordinarily grant recognition and enforcement, as long as the formal requirements is complied with, and any failure to comply with common law principles or legislative procedures, would not be fatal to the enforcement proceedings.

Enforcement Of Arbitral Awards

Malaysia has, since 1985, been a signatory (referred to as 'a contracting state') to the New York Convention.[46] Accordingly, any arbitration award made in Malaysia can be recognised and enforced in any of the contracting states, and likewise, an arbitration award made in any of the contracting states can be recognised and enforced in Malaysia – so long as the legal requirements for an enforcement are satisfied.

There are a plethora of cases demonstrating the pro-enforcement approach taken by Malaysian courts. In *Sinantrans Asia's* case, the Court of Appeal clarified that in the context of foreign arbitral awards, the Malaysian courts merely acts as an enforcement court, and that any challenge with regards to the merits of the awards ought to be raised in the supervisory courts (i.e. the seat of arbitration).

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The recent cases discussed in this section highlights the non-interventionist approach taken by the Malaysian judiciary, so as to uphold the finality and sanctity of arbitral awards.

3rd Party Funding

3rd Party Funding is in a nutshell, the funding of a legal claim by a third-party investor, in return for a share of the proceeds, if the case is successful. This form of investment effectively means that cases hindered by a claimant's lack of funds can now be pursued. This is especially important in arbitration which is always generally deemed as "expensive".

46 As of date, there are 164 contracting states.

However, under the common law doctrines of maintenance and champerty, 3rd parties are prohibited from funding a party's litigation. The rationale behind such a prohibition is to prevent abuses of the legal system by those who are financially empowered to launch strategic legal attacks for the purpose of gaining profit. That being said, there has been a paradigm shift in the laws against 3rd party funding in a number of jurisdictions including Australia, the UK, Canada and the US. The modern approach is to consider whether the arrangements are contrary to public policy – for example, in the UK, for an arrangement to amount to maintenance or champerty, there has to be an element of impropriety, such as disproportionate profit or excessive control by the 3rd party.

Closer to our shores, in line with the consistent efforts to strengthen its position as the region's international dispute resolution hub, Singapore has, by amending the Civil Law Act, allowed 3rd party funding contracts for international arbitration seated in Singapore. Similarly, Hong Kong has also legalised 3rd party funding in Arbitration.

Whilst attempts have been made to keep pace with the developments in Hong Kong and Singapore, as the law stands, 3rd party funding is illegal in Malaysia. Nevertheless, amid the virus induced recession that has caused market volatility, many companies around the world face serious revenue reduction and liquidity risk, and companies in Malaysia are no exception. The impact of COVID-19 thus may lead to a rise in interest and potential usage of third party funding.

Virtual Hearing

Beyond the economical and public health implications, as countries across the globe imposes "lockdowns", the pandemic has evidently posed a formidable challenge to the functioning of society, including the administration of justice. Whilst the use of virtual hearing is not uncommon in international arbitrations, the pandemic has necessitated and accelerated the shift from hearings in person to virtual hearings.

As a response to the pandemic, arbitral institutions and bodies have produced guidance on virtual hearings. For example, the *'ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID 19 Pandemic'* issued by the International Chamber of Commerce sets out how ICC Arbitration Rules can be interpreted to permit virtual hearings, and the *"Guidance Note on Remote Dispute Resolution Proceedings"* issued by the Chartered Institute of Arbitrators UK provides a guidance on how to conduct virtual hearings. As it stands however, there are no similar guidance in Malaysia issued by the Parliament, or the Asian International Arbitration Centre.

A fundamental question is however, whether arbitral tribunals can order the arbitration proceedings to be heard virtually in the event a party objects which gives rise to the risk of having the arbitral award subsequently set aside; as helpful as the guidance issued by the various arbitral institutions and bodies may be, they do not address this situation. In the Singaporean case *China Machine v Jaguar Energy,* in rejecting the setting aside application, the Court of Appeal clarified that the overarching inquiry is whether the proceedings were conducted in a manner which was fair. In this regard –

- It may be reasonable for a tribunal to direct a virtual hearing against the wishes of a party if, for example, it considers that the objecting party has adequate equipment and preparation time.

- In any event, a failure to raise potential difficulties with participating in a virtual hearing at the material time may prevent that party from subsequently relying on such difficulties in a setting-aside application.

Whilst no similar case has been tested within our shores, the Malaysian judiciary has been rather progressive in embracing technology. In early 2020, the Malaysian courts have adopted the use of artificial intelligence in sentencing criminal offences.

Confidentiality

In *Siemens v Jacob*, the Federal Court held that in so far as an application to register and enforce and arbitral award is concerned, parties only need to disclose the dispositive section of an arbitral award, and no longer need to exhibit the entire award. The Federal Court went on to say that to require the disclosure of the entire arbitral award would undermine the confidentiality of arbitration, and that in any event, the courts need not assess the merits of the tribunal's award when enforcing awards. The decision in *Siemens v Jacob* signifies the judiciary's pro-arbitration approach and enhances the rule of confidentiality of arbitration in Malaysia.

Whilst no similar case has been tested within our shores, the Malaysian judiciary has been rather progressive in embracing technology.

Conclusion

The latest developments in the arbitration landscape in Malaysia demonstrates clear signs of a positive outlook, and strengthens Malaysia's position as an attractive dispute resolution hub in the region. The court's reluctance to intervene in arbitration effectively means that parties to an arbitration only have one bite of the cherry, making it an efficient dispute resolution mechanism. In this regard, parties contemplating arbitration should mindful to be well prepared given the limited recourse to review or challenge an arbitral award.

That being said, the arbitration landscape in Malaysia is not free of challenges. Upon the demise of the director of AIAC in March 2020, as of 1 August 2020, the AIAC does not have a director. As a result, cases requiring formal registration or appointment of an arbitrator by the Director are halted. In addition, the Bar Council is also presently considering a proposal to reconsider reinstating the widely debated section 42 of the Arbitration Act 2005 – which some perceive as a step backwards in the progressiveness of the international arbitration landscape in Malaysia.

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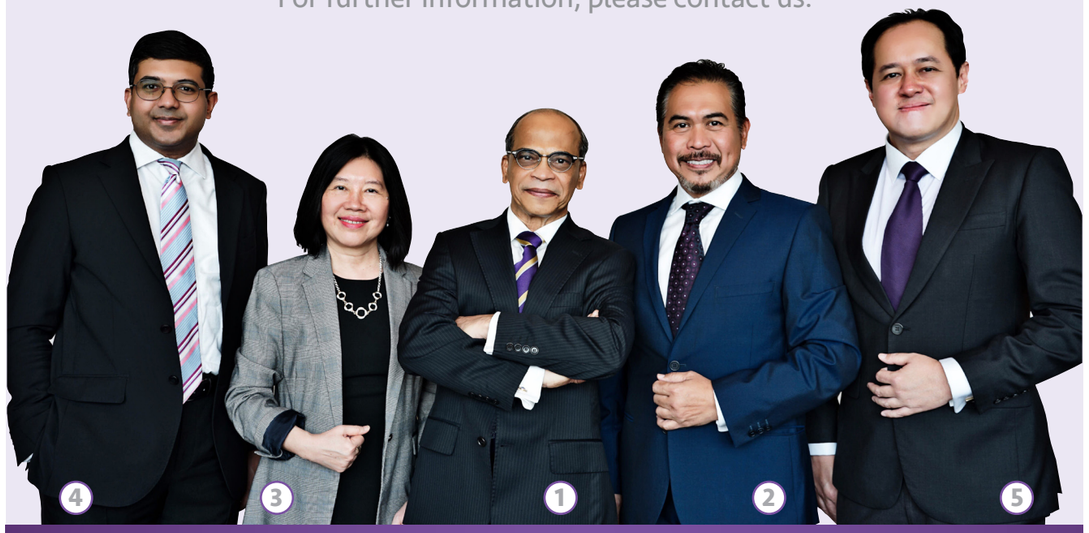

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