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KILLING GIANTS: SLAYING ANTI-COMPETITIVE PRACTICES

by Annabel Kok Keng Yen

The COVID-19 pandemic has posed no shortage of challenges to us across multiple different industries throughout the past year. One thing that did not change, however, is the level of regulation that the Malaysian Competition Commission ("**MyCC**") imposes on major corporations when it comes to any actions which may be considered anti-competitive.

This article elucidates how the MyCC slays anti-competitive practices with cases demonstrating how MyCC imposes hefty fines on various major market players, such as AirAsia Berhad ("**AirAsia**"), Malaysian Airline System Berhad ("**MAS**") and Grab due to breach of competition laws.

What Constitute Competition Offences?

The Competition Act 2010 (the "**Act**") expressly prohibits two types of anti-competitive practices: (i) anti-competitive agreements and other conduct;[1] and (ii) abuse of dominant position.[2]

(i) **Section 4 of the Act: Anti-competitive agreements and other conduct**

According to the MyCC, an agreement is "anti-competitive" if it has the object or

1 Competition Act 2010, Section 4.

2 Competition Act 2010, Section 10.

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effect of significantly preventing, restricting or distorting competition in any market for goods or services in Malaysia or in any part of Malaysia.[3] An "agreement" includes any form of contract, arrangement or understanding between enterprises, whether legally enforceable or not, and includes decisions by associations (such as trade and industry associations) and concerted practices.[4] As such, finding a "loophole" around this definition would likely be an arduous task.

According to the MyCC, an agreement is "anti-competitive" if it has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services in Malaysia or in any part of Malaysia

There are 2 types of anti-competitive agreements: (a) horizontal agreements (agreements between enterprises, each of which operate at the same level in the production or distribution chain,[5] also known as cartels)[6]; and (b) vertical agreements (agreements between enterprises, each of which operate at different levels in the production or distribution chain,[7] such as agreements between wholesalers and retailers).

A horizontal agreement with the object to (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions; (b) share market or sources of supply; (c) limit or control: (i) production; (ii) market outlets or market access; (iii) technical or technological development; or (iv) investment; or (d) perform an act of bid-rigging, is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

Here are some practical examples of anti-competitive agreements:

(i) a seller imposing a fixed price or a minimum price at which the product must be resold (Resale Price Maintenance or "RPM"); and

(ii) a buyer or seller asking for an exclusive agreement with a seller or buyer who controls a certain geographic area.[8]

(a) **Methods of escaping liability under Section 4**

Fortunately, an enterprise who is party to an anti-competitive agreement may relieve itself of liability based on the following reasons: (a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement; (b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition; (c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and (d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.[9]

An enterprise may also apply for an exemption from MyCC which effectively exempts

3 *Competition Act 2010, Section 4(1); MyCC, "Guidelines on Chapter 1 Prohibition: Anti-competitive Agreements", Paragraph 1.2 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MYCC-4-Guidelines-Booklet-BOOK1-10-FA-copy_chapter-1-prohibition001_1.pdf> .*

4 *Competition Act 2010, Section 2*

5 *Competition Act 2010, Section 2.*

6 *MyCC, "Guidelines on Leniency Regime" at Paragraph 1.1 and 1.2 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MyCC_Guildline-on-Leniency-Regime.pdf>.*

7 *Competition Act 2010, Section 2.*

8 *MyCC, "Guidelines on Chapter 1 Prohibition: Anti-competitive Agreements", Paragraph 2.4 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MYCC-4-Guidelines-Booklet-BOOK1-10-FA-copy_chapter-1-prohibition001_1.pdf>.*

9 *Competition Act 2010, Section 5*

one agreement from the prohibition under Section 4. This may be in the form of an "individual exemption" for a single agreement[10] or a "block exemption" for a particular category of agreements.[11] However, MyCC may impose a time limit to the exemption, together with conditions or obligations which the enterprise must follow to keep the exemption.[12]

(b) **Section 10 of the Act: Abuse of dominant position**

An enterprise is in a "dominant position" if it possesses such significant power in a market to adjust prices or output or trading terms, without effective constraint from competitors or potential competitors.[13] MyCC assesses whether an enterprise is "dominant" by determining the: (i) relevant product market; and (ii) the relevant geographic market in which the enterprise operates in.[14]

Here are some examples of how an enterprise may be abusing their dominant position:

(i) directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition on a supplier or customer;

(ii) limiting or controlling production, market access, technical or technological development or investment, to the prejudice of consumers; or

(iii) refusing to supply to a particular group of enterprises.[15]

Powers of "MyCC" in the Event of An Infringement Under the Act

If MyCC determines that there has been an infringement of the Act, it: (a) must require that the infringement to be stopped immediately; (b) may specify steps which are required to be taken by the infringing enterprise to stop the infringement; (c) may impose a financial penalty (not exceeding 10% of the enterprise's worldwide turnover over the period of the infringement)[16] ; and (d) may give any other direction as it deems appropriate.[17] MyCC will prepare and publish the reasons for each decision it makes.[18]

AirAsia and MAS

On 31 March 2014, MyCC decided that AirAsia, AirAsia X and MAS (the "**Parties**") were liable for a fine of RM10 million for having made an anti-competitive horizontal agreement (contravening Section 4 of the Act) called the "Collaboration Agreement" to share and segment the aviation market, which MyCC deemed to have the object of significantly preventing, restricting or distorting competition in the market.[19] The Collaboration Agreement resulted in the outcome of Firefly (a wholly-owned subsidiary of MAS) to withdraw from several Sabah and Sarawak routes, leaving AirAsia to be the sole low cost carrier for those routes.[20] The Parties did not dispute the findings of MyCC.[21]

10 *Competition Act 2010, Section 6.*

11 *Competition Act 2010, Section 8.*

12 *Competition Act 2010, Section 6(4) and Section 8(5).*

13 *Competition Act 2010, Section 2.*

14 *MyCC, "Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position, Paragraph 2.1 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MYCC%204%20Guidelines%20Booklet%20BOOK2-6%20FA%20copy.pdf>.*

15 *MyCC, "Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position, Paragraph 1.3 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MYCC%204%20Guidelines%20Booklet%20BOOK2-6%20FA%20copy.pdf> .*

16 *Competition Act 2010, Section 40(3).*

17 *Competition Act 2010, Section 40(1).*

18 *https://www.mycc.gov.my/case*

19 *MyCC, "Decision of Competition Commission: Infringement of Section 4(2)(b) of the Competition Act 2010 by Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn. Bhd." (31 March 2014) at Paragraph 45, <https://www.mycc.gov.my/sites/default/files/pdf/decision/MAS%20AIRASIA.pdf>.*

20 *MyCC, "Decision of Competition Commission: Infringement of Section 4(2)(b) of the Competition Act 2010 by Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn. Bhd." (31 March 2014) at Paragraph 9, <https://www.mycc.gov.my/sites/default/files/pdf/decision/MAS%20AIRASIA.pdf>.*

21 *MyCC, "Decision of Competition Commission: Infringement of Section 4(2)(b) of the Competition Act 2010 by Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn. Bhd." (31 March 2014) at Paragraph 25, <https://www.mycc.gov.my/sites/default/files/pdf/decision/MAS%20AIRASIA.pdf>.*

The Parties appealed against MyCC's decision to the Competition Appeal Tribunal (CAT) to impose the financial penalty,[22] which was successful as the CAT opined that MyCC had failed to show that the objective of the Collaboration Agreement was to share the aviation market. However, on a judicial review application by MyCC to the High Court, the High Court nullified the CAT's decision on the ground that the decision was tainted with error of law and unreasonableness (the decision was on a technical point of how the law was to be interpreted), holding that the Parties were still liable to pay the fine of RM10 million.[23]

Following an appeal to the Court of Appeal (CA), the CA had, on 27 April 2021, set aside the RM10 million fines each imposed on AirAsia and MAS by the MyCC over a short-lived collaboration between the two in 2012. Justice Datuk Hanipah of the CA ruled that MyCC should have abided by the decision imposed by the CAT and not filed the judicial review to challenge the CAT's decision.

In a recent article by the Edge[24], it was reported that MyCC is currently in the process of applying for leave to appeal to the Federal Court in respect of MyCC's right to challenge the CAT's decision. The Chief Executive Officer ("**CEO**") of MyCC, Iskandar Ismail stated that the interpretation by the Federal Court is significant to MyCC as it would impact the role of MyCC as the competition authority in Malaysia."

Grab

On 31 October 2019, MyCC issued a proposed decision to impose a fine on Grab Inc., GrabCar Sdn. Bhd. And MyTeksi Sdn. Bhd. ("**Grab**") for collectively abusing their dominant position (contravening Section 10 of the Act) by imposing a number of restrictive clauses on its drivers which prevented the drivers from promoting and providing advertising services for Grab's competitors in the e-hailing and transit media advertising market. MyCC stated that Grab had obtained a dominant position in the Malaysian e-hailing market following its merger with Uber in late March 2018.[25]

Grab had applied to obtain permission to bring a judicial review application to the High Court, but this application was dismissed by the High Court on 9 March 2020 because (i) MyCC's decision was not yet final as it was still a proposed decision; and (ii) even if MyCC had imposed a final decision, Grab still had to exhaust the next available remedy which was to appeal to the CAT.[26]

However, on 19 April 2021, a three-member Court of Appeal bench granted leave to Grab Holdings Inc and its subsidiaries, GrabCar Sdn Bhd and MyTeksi Sdn Bhd to hear the merits of their judicial review application against the proposed RM86.77 million fine by imposed the MyCC.

The Leniency Regime - A Way Out?

If an enterprise has been caught for carrying out anti-competitive practices, MyCC has

22 *Malaysian Airline System Berhad & Anor v Competition Commission [2016] MLJU 903 <https://www.mycc.gov.my/sites/default/files/pdf/decision/CAT%27s%20Written%20Decision%20for%20MAS%20and%20AirAsia%27s%20Case.pdf>.*

23 *Competition Commission v Competition Appeal Tribunal & Ors [2018] MLJU 2167.*

24 *Hafiz Yatim, The Edge 'Business & Investment Weekly' (The Week of May 24 - May 30, 2021).*

25 *MyCC, "MyCC Proposes to fine Grab RM86 million for abusive practices" (3 October 2019) at page 1 <https://www.mycc.gov.my/sites/default/files/pdf/decision/Proposed%20Decision%20against%20GRAB%20%28Eng%29.pdf>.*

26 *MyTeksi Sdn Bhd & Ors v Suruhanjaya Persaingan [2020] MLJU 750 at Paragraphs 24-26, 30 & 31.*

the discretion to reduce any penalties which would have otherwise been imposed on the enterprise by up to 100%. This may be available if the enterprise has: (a) admitted its involvement in an infringement of any prohibition under Section 4(2) (*i.e.* making an anti-competitive agreement as discussed above); and (b) provided information or other form of co-operation to MyCC which significantly assisted, or is likely to significantly assist, in the identification or investigation of any finding of an infringement of any prohibition by any other enterprises.[27]

If an enterprise admits to its offending behaviour and assists MyCC in further investigations during the early stages of the investigation process, then the more likely the enterprise will get a higher reduction in penalties imposed on it.[28] However, MyCC has confirmed that it is unlikely to allow a 100% reduction in a penalty if the relevant enterprise was the one who initiated the cartel or took any steps to coerce other enterprises to take part in the cartel activity.[29]

Conclusion

It was recently reported that MyCC is currently investigating more than 3,000 companies for potential breach of section 4 of the CA due to alleged bid-rigging activities involving various project cartels worth RM5.8 billion.[30] Further, the Malaysia Anti-Corruption Commission ("MACC") has also recently announced that it has managed to cripple a 'project tender cartel' believed to have monopolised a total of 354 tenders involving projects from several ministries and government agencies nationwide worth RM3.8 billion since 2014.[31]

As such, businesses are reminded to regularly monitor and review their business practices and strategies and cooperate with the MyCC at all times to ensure compliance with competition laws.

27 *Competition Act 2010, Section 41(1).*

28 *Competition Act 2010, Section 41(2).*

29 *MyCC, "Guidelines on Leniency Regime" at Paragraph 2.7 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MyCC_Guildline-on-Leniency-Regime.pdf>.*

30 *MalayMail, 'Over 3,000 companies under investigation for rigging tenders worth RM5.8b, MyCC reveals' (30 April 2021) <https://www.malaymail.com/news/malaysia/2021/04/30/over-3000-companies-under-investigation-for-rigging-tenders-worth-rm5.6b-my/1970547>.*

31 *The Edge Markets, ''Project tender cartel' crippled, seven arrested – MACC' (5 April 2021) <https://www.theedgemarkets.com/article/project-tender-cartel-crippled-seven-arrested-—-macc>.*

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BOILERPLATE CLAUSES: WHY THEY MATTER

by Lim Khey Ken

Boilerplate clauses are general clauses that appear in most contracts, regardless of the subject matter. These clauses can sometimes be overlooked by parties in the course of negotiations because they are often found towards the end of the contracts and use standardized language. However, boilerplate clauses have significant practical and commercial implications and parties should ensure that they are worded concisely and as clear as possible. For instance:

(a) Where there are payment obligations, are such payments to be made within a certain number of days or business days?
(b) Would either party be allowed to assign its rights or obligations to a third party?
(c) Would the agreement be conclusive as between parties or can a party later argue that prior oral agreements form part of the agreement as well?

In this article, I will go through some of the more common boilerplate clauses and the importance of such clauses, with specific reference to their relevance in light of the Covid-19 pandemic (where applicable).

A. Waiver

A waiver clause basically states that if a party fails or delays in exercising its rights under an agreement, this will not constitute a waiver of such rights. This clause is important because if a party commits a breach of its obligations under a contract and the non-defaulting party does nothing or delays in exercising its rights in relation to the breach, the non-defaulting party may lose the rights to take action in this regard.

In the current Covid-19 climate, a party to a contract may have defaulted on certain payment obligations or service provisions. The non-defaulting party may, instead of exercising its rights to terminate or such other available rights under the contract, decide to give the defaulting party further time to comply with their payment or service obligations. The presence of a waiver clause in a contract will secure the non-defaulting party's rights in the event the non-defaulting party decides to take action against the defaulting party for such breach of contract later on.

This is affirmed in the Federal Court case of *Kumpulan Darul Ehsan Bhd* v *Mastika Lagenda Sdn Bhd* [1]. In this case, Mastika Lagenda Sdn Bhd ("**MLSB**"), as purchaser, entered into a share sale agreement with Tenaga Nasional Berhad ("**TNB**") in relation to TNB's shares in a company ("**SSA 1**"). Subsequently, MLSB, as purchaser, also entered into a share sale agreement with Kumpulan Darul Ehsan Bhd ("**KDEB**") in relation to KDEB's shares in the same company ("**SSA 2**").

The Federal Court affirmed the decision of the Court of Appeal that the presence of a waiver clause defeats arguments of laches and unreasonable delay in the exercise of rights.

Clause 9 of SSA 2 provides, amongst others, that MLSB may elect to terminate SSA 2 if SSA 1 was not completed and that KDEB shall refund the purchase price to MLSB upon termination of SSA 2. MLSB had paid the purchase price under SSA 2. However, SSA 1 was later terminated. MLSB exercised the option to terminate SSA 2 and demanded the refund of the purchase price about 4 years after the termination of SSA 1. The purchase price was not refunded and MLSB then brought an action at the High Court for recovery of the purchase price, interest and costs.

The High Court dismissed the action on the ground that the termination of SSA 1 after 4 years was caught under the doctrine of laches and there was unreasonable delay. On appeal, the Court of Appeal allowed the appeal and held that equity should not be invoked as the parties had agreed in SSA 2 that any delay in exercising the rights therein should not constitute a waiver. On appeal to the Federal Court, the Federal Court affirmed the decision of the Court of Appeal that the presence of a waiver clause defeats arguments of laches and unreasonable delay in the exercise of rights.

B. Notices

A notices clause is a clause which sets out how parties are to communicate with each other upon the occurrence of certain specified events under the contract. There are two important aspects to a notices clause:

(i) To specify the valid methods of giving notices – e.g. by way of post, fax, electronic mail; and

(ii) To determine when such notices are deemed to have been delivered. This second aspect is particularly important as parties can specify that once either party complies with the necessary formalities regarding the notice, such notice shall be deemed to have been delivered to the other party.

The obligation to give notice commonly appears in termination clauses or clauses where a party is entitled to exercise a certain right, such as the right to purchase or

1 [2017] 4 MLJ 561

renew a contract. For instance, if a party defaults in its obligations under the agreement which gives the non-defaulting party the right to terminate such agreement by giving a written notice, the non-defaulting party has to properly consider what constitutes an effective notice. Does the agreement provide for the giving of notice by electronic mail or only by way of post? If electronic mail is provided for, when will the written notice of termination be deemed to be delivered – at the time of transmission or on the next following day?

C. Force Majeure

A force majeure clause is a clause which excludes parties from liability for non-performance of their contractual obligations or which allows parties to suspend their contractual obligations in the event of the occurrence of certain events beyond their reasonable control, which may include war, acts of god, civil commotion and epidemics.

A pertinent example would be the current Covid-19 pandemic and the movement control order ("**MCO**") implemented by the Government of Malaysia which may have resulted in the inability of parties to perform their obligations under a contract. Whether the Covid-19 pandemic constitutes a force majeure event will depend entirely on the scope of the force majeure clause in the contract. Words such as 'pandemic', 'epidemic', 'outbreak' and 'government action' in a force majeure clause will likely cover the Covid-19 pandemic and the MCO. Parties who are about to enter into contracts during the Covid-19 pandemic are therefore advised to ensure such wordings are included in the force majeure clauses of such contracts.

It has to be noted that the burden of proving the force majeure event lies on the party wishing to rely on it and courts will also look at whether mitigating steps have been taken before allowing a defaulting party to invoke the force majeure clause[2].

D. Interpretation

An interpretation clause sets out how certain matters in agreements are to be interpreted, including:

(i) Where the agreement includes a reference to "days", does it refer to calendar days or business days;

(ii) Where a period of time is specified from a given day, whether it is to be calculated inclusive or exclusive of that day; and

(iii) Where the agreement refers to a legislation, whether such reference includes any future amendments to the legislation.

2 See Intan Payong Sdn Bhd v Goh Saw Chan Sdn Bhd [2005] 1 MLJ 311; Crest Worldwide Resources Sdn Bhd v Fu Sum Hou Dan Satu Lagi [2019] MLJU 512.

When parties evaluate their position in contracts that have been entered into prior to or during the Covid-19 pandemic, particular attention has to be given to the timeframes within which they have to comply with their obligations. For instance, if a party has to make payment or carry out a certain obligation within fourteen (14) days from a specific date, the agreement should set out clearly whether reference to "days" refers to calendar days or business days to avoid any disputes from arising in the future in this regard.

E. Entire Agreement

An entire agreement clause essentially states whether prior negotiations or representations between parties leading up to the contract will form part of the contract, or whether the terms of the contract will supersede any such prior negotiations and representations. The entire agreement clause is relevant where there has been a history of negotiations and exchange of documents between parties which have led to the formation of the actual contract.

While a seller may be keen to include an entire agreement clause to exclude liability for any pre-contract representations or negotiations, a purchaser may wish to include the same to capture these representations and negotiations. Hence, it is important that parties to a contract determine whether such pre-contract negotiations (if any) should form part of the contract as this is important to provide certainty to the parties and avoid potential disputes in the future.

Entire agreement clauses have been upheld by the courts in many instances. The High Court in *Berjaya Times Square Sdn Bhd v Twingems Sdn Bhd & Anor and another action*[3] and the Court of Appeal in *Bank Perusahaan Kecil & Sederhana Malaysia Bhd v Iskandar Zulkarnain Zainal Abidin*[4] had respectively denied the defence of misrepresentation on the basis that there was an entire agreement clause in the contracts.

F. Prevalence

A prevalence clause sets out which provisions or which document will prevail in the event of any conflict or inconsistency between the provisions of an agreement or two or more documents forming part of the same agreement. This is particularly important in scenarios where more than one document is incorporated into the same agreement. For example, construction contracts typically consist of various documents incorporated as one, including the letter of award, conditions of contract and contract drawings. In such a case, it is pertinent to set out the priority in which the documents will be interpreted in the event there is a conflict or inconsistency.

3 [2012] 9 MLJ 510

4 [2013] MLJU 1648

Conclusion

What has been stated above are just some common examples and is not an exhaustive list of boilerplate clauses that can be found in a contract. In practice, the types and number of boilerplate clauses to be inserted will depend on the nature, complexity and the subject matter of a contract.

These boilerplate clauses should be drafted with sufficient clarity as such clauses could have a significant impact on the parties to a contract. In times of dispute, parties will turn to these boilerplate clauses in determining their respective rights. In fact, these boilerplate clauses, depending on how they are drafted, may favour one party over the other. It is therefore advisable that parties to a contract engage legal professionals to review or draft such boilerplate clauses to safeguard their interests.

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ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY

by Kenny Lam Kian Yip

As Francois Chollet – Artificial Intelligence ('**AI**') researcher at Google and creator of the machine-learning software library Keras – once said, intelligence is tied to a system's ability to adapt and improvise in a new environment, to generalise its knowledge and apply it to unfamiliar scenarios.

"Intelligence is the efficiency with which you acquire new skills at tasks you didn't previously prepare for."

"Intelligence is not skill itself, it's not what you can do, it's how well and how efficiently you can learn new things."

This definition is the base for modern AI systems including virtual assistants which can be said as demonstrating 'narrow AI'; *i.e.* the ability to generalise their training when carrying out a limited set of tasks, such as speech recognition or computer vision.

Typically, AI systems demonstrate at least some of the following behaviours associated with human intelligence: planning, learning, reasoning, problem solving, knowledge representation, perception, motion, manipulation and, to a certain extent, social intelligence and creativity.

Problems

In the context of intellectual property law, especially copyright laws, AI can present novel and interesting questions, in light of its capacity to create ideas and works in a similar fashion as human beings do.

In this regard, Google has just started funding an artificial intelligence program that will write local news articles under the **Google's Digital News Initiative**. In 2016, a group of museums and researchers in the Netherlands showed to the world a portrait known as The Next Rembrandt, which is a new artwork generated by a computer that had analyzed thousands of works by the 17th-century Dutch artist, Rembrandt Harmenszoon van Rijn.

A short novel written by a Japanese computer program in 2016 reached the second round of a national literary prize. And the Google-owned artificial intelligence company, Deep Mind has created a software that can generate music by listening to recordings.

Some of the key questions to be asked are these:

1. Who are the owners of the works created by computers and AI that are recognized by the law?
2. Whether copyright protection exists in these AI-generated works?
3. How should AI generated works be protected in law?

International Approach

There are indications that the laws of many countries have not recognized computer / AI-generated works to be eligible for copyright protection. In the United States, *Feist Publications v Rural Telephone Service Company, Inc.*[1] held that copyright law only protects *"the fruits of intellectual labor"* that *"are founded in the creative powers of the mind."* Similarly, in the Australian case of *Acohs Pty Ltd v Ucorp Pty Ltd* [2], the court declared that a work generated with the intervention of a computer could not be eligible for copyright protection because it was not produced by a human and does not have an author that is a human being.

In Europe, the Court of Justice of the European Union (CJEU) has also declared in *Infopaq* decision (C-5/08 *Infopaq International A/S v Danske Dagbaldes Forening*) that copyright protection only applies to original works, and that originality must reflect the "*author's own intellectual creation.*" This is usually understood as meaning that an original work must reflect the author's personality, which could mean that a human author is necessary for a copyright work to exist.

The second option, that of giving authorship to the programmer or creator of the AI program / technology, is evident in a few countries such as the Hong Kong (SAR), India, Ireland, New Zealand and the UK. This approach is summarized in the UK under section 9(3) of the Copyright, Designs and Patents Act (CDPA), which states:

"In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken."

Furthermore, section 178 of the CDPA defines a computer-generated work as one that *"is generated by computer in circumstances such that there is no human author of the work"*. The idea behind such a provision is to create a workable exception to the human authorship requirement under conventional copyright laws and to accord copyright

1 *499 U.S. 340 (1991)*

2 *(2012) 287 ALR 403*

protection to the 'original creator' or the 'author' of the works.

In this sense, one may argue that AI authors are mere agents of their programmers, and any copyright that may exist in the works created by these AI programs would ultimately be attributable to the AI programmers.

AI authors are mere agents of their programmers, and any copyright that may exist in the works created by these AI programs would ultimately be attributable to the AI programmers.

The Malaysian Context

There is a dearth of authority and regulation in Malaysia in dealing with the IP issues in relation to AI. However, the Malaysian jurisprudence in respect of copyright laws is not dissimilar to international jurisprudence.

Under section 7(3) of the Copyrights Act 1987 (the "**Act**"), a literary, musical or artistic work shall not be eligible for copyright unless—

a) sufficient effort has been expended to make the work original in character; and
b) the work has been written down, recorded or otherwise reduced to material form.

Under section 9(1) of the Act, Copyright shall subsist, subject to the provisions of this Act, in every published edition of any one or more literary, artistic or musical work in the case of which either—

a) the first publication of the edition took place in Malaysia; or
b) the publisher of the edition was a **qualified person** at the date of the first publication thereof.

Under section 3 of the Act, "qualified person" is defined as:

a) in relation to an individual, means a person who is a citizen of, or a permanent resident in, Malaysia; and
b) in relation to a body corporate, means a body corporate established in Malaysia and constituted or vested with legal personality under the laws of Malaysia.

Unlike CDPA from the UK, the Act from Malaysia did not cater for copyright protection to AI-generated works to its creator / programmer. However, all is not lost as the common law tort of deceit and other associated causes of action such as unlawful interference with trade; passing off; and/or tort of conversion may still be available to injured parties in the context of copyright infringement involving AI-generated works.

Be that as it may, clarity is needed in Malaysian regulations in the event AI technologies start to gain a foothold in the Malaysian society.

What Does the Future Hold?

Nobody knows what would happen in the future. As AI technologies develop, new questions of science and law would arise and changes are the only constant in an ever-evolving world. There is no certainty as to the nature and character of AI-technologies, and there may be one day that the concept of AI itself would undergo changes to the extent that individuality is achieved with a capacity of intelligence that surpasses human beings. How would the law deal with such event then?

The simple answer is, nobody knows. However, we do know that AI-technologies are here to stay, and that amendment of laws is needed urgently to deal with new problems that come together with the advancement of AI-technologies.

Thus, the author is of the view that frequent dialogues and discussions should be held between lawyers, members of the legislature, and captains of the AI industry to formulate laws and regulations to deal with AI-generated works in order to ensure that the development of the law is always in tandem with the development of AI-technologies.

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WHEN THE TAXMAN COMES KNOCKING TWICE

by Khoo Jia Hui

Due to the COVID-19 pandemic, property owners who are short of cash may be seeking to liquidate their assets to ease cash flow. With the recent introduction of the waiver of Real Property Gains Tax ("**RPGT**") by the Government under the PENJANA initiative,[1] it serves as an attractive point for property owners to dispose their properties. As a result, it has been reported that the waiver of RPGT had resulted in more secondary market transactions and created new demand for sub-sale properties.[2]

It is a general understanding that the disposal of real property will attract RPGT. In the past, property owners from all walks of life, have been acquiring and disposing real property, diligently subjecting themselves to the RPGT regime, and thereafter, feeling "safe" that they have complied with the applicable tax law on disposal of real property. However, is that the case?

It is a general understanding that the disposal of real property will attract RPGT. However, is that the case?

In recent years, the Inland Revenue Board ("**IRB**") has been actively raising Notices of Assessments to taxpayers, whether individuals or large corporations, claiming that the disposal of real property is actually subjected to income tax, instead of RPGT.

CAN THE INLAND REVENUE BOARD REASSESS AN ASSESSMENT PREVIOUSLY MADE?

Unfortunately, yes.

This question was one of the issues raised before the Special Commissioner of Income Tax ("**SCIT**") and the High Court in the case of *MR Properties Sdn Bhd v KPHDN*.[3]

In *MR Properties*, the taxpayer is a property developer who had acquired property for the purpose of converting an agricultural land to a golf course. Approvals to develop the land as a golf course was granted subject to several conditions. Despite having put some work onto the land, the taxpayer faced financial difficulties and subsequently sold the land. The taxpayer submitted their returns and subjected themselves to RPGT.

1 *Real Property Gains Tax (Exemption) Order 2020.*

2 *'RPGT exemption sees more secondary market transactions', link at: https://themalaysianreserve.com/2021/01/18/rpgt-exemption-sees-more-secondary-market-transactions/, accessed as at 31 January 2021.*

3 *MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (1996) MSTC 2728, [2005] 7 MLJ 260.*

By a Notice of Assessment dated 2nd May 1992, the IRB raised an assessment to RPGT, to which the taxpayer paid RM1,080,768.48. However, on 9th August 1993, the IRB through a second Notice of Assessment raised assessment for income tax amounting to RM4,220,064.26.

The taxpayer raised the following arguments in resisting the Notice of Assessment: -

a) Where an assessment under RPGT has been made and paid by the taxpayer, the second Notice of Assessment under the Income Tax Act 1967 ("**Income Tax Act**") amounted to double taxation;

b) That Section 20 of the Real Property Gains Tax Act 1976 ("**RPGT Act**"), which states that an assessment under RPGT shall become final and conclusive, precludes an assessment under the Income Tax Act.

The SCIT, and the High Court agreeing, rejected the taxpayer's argument. They held that under the scheme of taxation in Malaysia, there is no possibility of overlap between tax payable under the Income Tax Act and the RPGT Act.[4] What the IRB had in fact, done was amending an assessment that was previously made and collected under the RPGT Act and imposed another tax under a different Act, the Income Tax Act.[5]

They were also of the view that Section 20 of the RPGT Act merely states that an assessment under RPGT shall become final and conclusive only "... for the purposes of this Act (emphasis added) as regards the amount of the tax assessed under it or the tax relief for allowable losses" and does not say that the assessment shall become final and conclusive for all other purposes of the same Act, neither does it expressly exclude any of the provisions in the Income Tax Act.[6]

The SCIT further referred to Section 2 of the RPGT Act, which defines a chargeable gain to be "gain other than gain or profit chargeable with or exempted from income tax under the income tax law".[7] The SCIT explained that once a gain is found to be income in nature under the Income Tax Act, an assessment issued under the RPGT Act shall cease to have any effect as it is no longer a chargeable gain.[8]

What about the principle of Estoppel? Can't we argue that the IRB is estopped from raising an assessment against one that has been made and taxes paid for?

Estoppel *in pais* (estoppel by words or conduct) is a rule of evidence where one party is precluded from denying an assumption which he adopted against another by the assertion of a right based on it.[9]

In *Teruntum Theatre Sdn Bhd*, the taxpayer submitted that the RPGT assessment made by the IRB against them has been finalised as a certificate of clearance had been issued

4 *MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 7 MLJ 260, at 265.*

5 *MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (1996) MSTC 2728, at 2738.*

6 *Ibid, at 2739.*

7 *Real Property Gains Tax Act 1976, Section 2.*

8 *MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (1996) MSTC 2728, at 2741.*

9 *Halsbury's Laws of Malaysia – Contract (Volume 4), [120.542]*

after the sum assessed was paid. As such, the IRB is estopped from proceeding with the assessment for income tax.[10]

The Court of Appeal rejected the taxpayer's submission on estoppel. Justice Zaleha Zahari JCA, in delivering her decision held as follows, "The Director General cannot raise an estoppel against himself from discharging his statutory duty to raise a correct assessment under the appropriate law if the basis of treating the gain as a capital gain was not within the meaning ascribed to it by the RPGT and no real property gains tax is payable".[11] Her Lordship further added that it is the duty of the IRB and the taxpayer to obey the law – that is to raise and pay the correct assessment.[12]

INCOME TAX AND REAL PROPERTY GAINS TAX PROPERLY DISTINGUISHED

What is the main reason behind the IRB's act in reassessing one's disposal of property from RPGT to income tax thereby causing nightmares to taxpayers?

Besides the very stark reason that the collection of taxes under the Income Tax Act is much higher than under the RPGT Act, thereby generating more revenue for the government, the liability to pay RPGT is distinguished from the liability to pay income tax as RPGT relates to "the disposal of any real property",[13] whereas income tax relates to "income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia".[14]

Furthermore, Section 2 of the RPGT Act specifically defines "chargeable gains" as "gains other than gain or profit chargeable with or exempted from income tax under the income tax law".[15] As such, income tax shall have the first right of tax if it falls under one of the categories of income listed in Section 4(a) of the Income Tax Act.

Therefore, if the IRB is of the opinion that the taxpayer is in the business of buying and selling properties and generates income from this activity, the IRB has the right to reassess the gains derived from the disposal of property as income and raise a Notice of Assessment to the taxpayer under the Income Tax Act. Even though the IRB has the right to do so, it does not necessarily mean that the IRB's opinion is correct. The onus lies on the taxpayer to prove that the sale of the property is capital in nature.[16]

FACTORS TO CONSIDER WHETHER A SALE OF PROPERTY TRANSACTION IS SUBJECT TO INCOME TAX OR REAL PROPERTY GAINS TAX

In discerning whether a property transaction is liable to RPGT or income tax, the Courts have looked at whether the transaction as a whole is an adventure in the nature of trade.[17]

10 Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 4 MLJ 685

11 Ibid, at [18].

12 Ibid, at [18].

13 Real Property Gains Tax Act 1976, Section 2.

14 `Income Tax Act 1967, Section 3.

15 Real Property Gains Tax Act 1976, Section 2.

16 Alf Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 3 CLJ 936, at [10].

17 Rutledge v Commissioners of Inland Revenue (1929) 14 TC 490.

In doing so, the Courts will consider the badges of trade.[18] These factors are to be looked at collectively,[19] in order to decide whether the disposal of a property is an adventure in the nature of trade.

(i) Profit Seeking Motive

Note that the concept of badges of trade is not limited only to real property transactions. It is also commonly used to determine whether an activity of a taxpayer that is being carried out is an adventure in the nature of trade or not.

Rutledge v Commissioner of Inland Revenue is an interesting case where Mr. Rutledge, a Scottish in the money-lending business had, in a one-off transaction, purchased very cheaply one million rolls of toilet paper when he was in Berlin. Within a short period of time, he sold the whole consignment to one person in the United Kingdom.[20] The Court concluded that the particular adventure of Mr. Rutledge was "in the nature of trade" as it is hard to conclude that the purchase of one million rolls of toilet paper is for his private use.[21]

In Malaysia, the Courts and SCIT referred to several factors to determine as to whether a particular transaction is a profit seeking motive.

If the taxpayer's principal object of business stated in their memorandum & articles of association was to carry on "the business of property developers and building contractors",[22] *prima facie*, it would be indicative that a sale of property by the taxpayer is profit seeking.

Another consideration in determining whether a real property transaction is subject to income tax is by referring to the classification of the real property in question in the accounting books of the taxpayer. In *Perak Construction*,[23] the High Court overturned the SCIT's decision and stated that the real property transaction was not an adventure in the nature of trade. This was because the land in question was capitalized in their accounts prior to the disposal of the land, and not as stock in trade. The High Court further found that the taxpayer was not a trader in land,[24] as opposed to a property developer.

What about property investors who purchased multiple units of properties with the view to sell them at a later date at a profit?

In *Hui Thong Co Sdn Bhd*, the taxpayer was a family company carrying on business as insurance and general agents.[25] The company invested in several pieces of land for the purpose of obtaining rental income. No steps were taken to erect buildings on the land nor were building plans for the development of the land submitted. Five years later,

18 *Marson v Morton [1986] 1 WLR 1343.*

19 *Alf Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 3 CLJ 936.*

20 *Rutledge v The Commissioners of Inland Revenue (1928-29) 14 TC 490.*

21 *Ibid, at 497.*

22 *Alf Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 3 CLJ 936.*

23 *Perak Construction Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2002] 1 MLJ 363.*

24 *Ibid, at 369.*

25 *DGIR v Hui Thong Co Sdn Bhd [1981] 2 MLJ 33.*

the lands were sold at a profit. The SCIT and Court of Appeal dismissed the claim by the Director General of Inland Revenue ("**DGIR**") that the sale was an adventure in the nature of trade as it was merely a realization of investment made.[26]

(ii) Acquisition Method

How the taxpayer initially acquired the subject matter is also considered by the Courts in determining whether the transaction is income in nature.

If the property was inherited, it is less likely that the property being disposed of was revenue in nature. In *YMF v KPHDN*, even though the taxpayer had entered into a joint venture agreement with the Developer for development purposes – an indicator for commercial adventure, the fact that the property was inherited by the taxpayer from his late father suggests that the disposal of property should be subject to RPGT as it was not an adventure in the nature of trade.[27]

(iii) Subject of Realisation

If the subject matter was acquired by the taxpayer for personal use, it is more likely that the subject matter was not income in nature.

In *Lower Perak Co-Operative Housing Society*, the taxpayer is a co-operative housing society with the object to assist its members to own houses by buying land and building houses thereon to be sold to its members.[28] As the primary purpose of the purchase of the land was to build houses for its members, which is a domestic purpose, the Supreme Court overturned the SCIT's findings that the land was a stock-in-trade of the taxpayer.[29]

(iv) Modification of the Asset

Whether work was done on the land in question is also a factor in determining whether the disposal of the land is subject to income tax or RPGT.

In *Taylor v Good*,[30] the taxpayer purchased the property for possible use as a residence with his family. However, due to circumstances that arose, the taxpayer's intention did not materialise. In a subsequent sale of the property to a developer, the Inspector of Taxes argued that the fact that the taxpayer had applied for and obtained approval to develop the property into flats, it is indicative that the taxpayer's subsequent disposal of the property to a property developer is a trade.

The Court of Appeal ultimately held that the disposal of the property by the taxpayer is not income in nature as the application and approval to develop the property into flats by the taxpayer are merely steps taken by the taxpayer to enhance the value of

26 DGIR v Hui Thong Co Sdn Bhd [1982] 2 MLJ 33, at 34.

27 YMF v Ketua Pengarah Hasil Dalam Negeri (2001) MSTC 3257.

28 Lower Perak Co-Operative Housing Society Bhd v KPHDN [1994] 2 MLJ 713.

29 Ibid, at 734.

30 Taylor v Good (1974) 1 All ER 1137.

the property in the eyes of a developer.[31] Besides obtaining the approval to develop the property, the taxpayer and his wife had only taken steps to clean the rooms in the property, fitted curtains so that it seemed that the property is occupied and cut the grass and hedges around the property.[32] No additional work was done on the land that qualified the disposal into a trade.

(v) Period of Ownership

The longer the property is held, the less likely it is income in nature.

In *Hui Thong Co Sdn Bhd*, the Court pointed out that the land was held by the company for more than 5 years before the land was sold. Even though the company had the freedom to sell the land at any time prior to that, it did not do so.

Contrast this with the modus operandi of a property developer, who buys a plot of land, build houses on it and sells each unit at a profit – the period of holding the land is considerably shorter than that of a property investor, which is indicative of a trade.

(vi) The Way Sale is Secured

The way the sale of the property is secured is also an indicator of whether the transaction is an income or a realisation of an investment. If a broker is appointed to secure the sale, it is likely to indicate a trading activity.[35]

In *C I Sdn Bhd*, the taxpayer is a company in the primary business of cultivation of palm oil and letting of property and investment operations.[36] A plantation land belonging to the taxpayer was sold to a property developer for development purposes. It was further agreed that the taxpayer would purchase 50 units of the houses as compensation for its workers who were displaced as a result of the sale of the plantation land. However, only 30 units of the houses were taken up by their workers. The remaining 20 units were sold by the taxpayer.

The SCIT found that the sale of the 20 units was not an adventure in the nature of trade as the intention of the taxpayer at that time was to provide houses for its displaced workers, which is not in the normal course of its business. When the 20 units were not taken up by its workers, the circumstances had changed, and the transaction became an investment. It did not show a change of intention of the taxpayer.[37]

(vii) Number of Transactions

Naturally, the greater the number of transactions, the more likely it is income in nature. However, single transactions too can amount to trading activity – see *Rutledge v Commissioner of Inland Revenue*.

31 *Taylor v Good (1974) 1 All ER 1137, at 1143.*

32 *Ibid, at 1140.*

33 *DGIR v Hui Thong Co Sdn Bhd [1981] 2 MLJ 33 at 34.*

34 *Ibid.*

35 *Teruntum Theatre Sdn Bhd.v Ketua Pengarah Hasil Dalam Negeri [2006] 4 MLJ 685, at [42]*

36 *C I Sdn Bhd v KPHDN (2008) MSTC 3746.*

37 *Ibid, at 3752.*

(viii) Existence of Similar Trading Transactions

In *Mount Elizabeth (Pte) Ltd*, the taxpayer is a property developer who built 59 units of high-rise apartment. Within 2 years, 51 units were sold, and 8 units were retained. 6 of the retained units were sold 7 years later.[38] The issue was whether the sale of the 6 retained units was income in nature or merely a realisation of investment.

The Tax Board of Review held (and the Court agreeing) that the disposal of the 6 units were income in nature as the land was developed by the taxpayer.[39] Further, there was no indication by the taxpayer that the 8 units were retained for investment purposes as they were units that were "selected at random" by the taxpayer, not units that were specifically selected by the taxpayer for investment.[40]

(ix) Method of Financing

If a loan was taken out for the purchase of the property, the property owner will have the financial pressure to quickly realise its gains – which is a likely indicator of trading. In *Lynch v Edmondson*, loans were taken out by the taxpayer to finance the construction of the property. The Court held that the sale proceeds from the flat is indicative that it is a trade.[41]

(x) Circumstances responsible for disposal of property

Elements of compulsion resulting in the disposal of property could also indicate that the gain derived is not income in nature.

In *Lower Perak Co-Operative Housing Society Bhd*, there were elements of compulsion in the sale as the taxpayer was forced to sell the land to a developer, which vitiates the intention of the taxpayer to trade, thus it was decided that it was not income in nature.[42] In *Penang Realty*, the High Court held that compensation derived from compulsory acquisition of land by the government is not trade in nature.[43]

What about Joint Venture Agreements?

A joint venture project involves landowners who agree to enter into a joint venture agreement ("**JV Agreement**") with a property developer to develop the land owned by the landowner. By surrendering the development rights of the land to the property developer, the landowner receives benefit from the property developer, usually in the form of receiving a certain number of units from the development or receiving a certain percentage from the sale of the units.

38 *Mount Elizabeth (Pte) Ltd v the Comptroller of Income Tax [1987] 2 MLJ 130.*

39 *Ibid, at 137.*

40 *Ibid, at 140.*

41 *Lynch v Edmondson (HMIT) (1998) Sp C 164.*

42 *Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713.*

43 *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal [2006] 3 MLJ 597.*

Would the entry into a JV Agreement by a landowner result in the landowner being subjected to income tax for participating in a trading activity? This depends on whether the landowner was actively involved in the development of the property.

In *YMF*, the taxpayer was an individual who inherited land from the estate of his late father. He entered into a JV Agreement with a developer for the sale of his land, and in return, he was entitled to receive a portion of the units to be sold. The taxpayer sold half of his share of the units and kept the balance for investment purposes. The IRB argued that the taxpayer's profit from the disposal of his share of the units were profits from his trading activities and thus should be subjected to income tax.

The SCIT decided that the taxpayer was not liable to be assessed under income tax as there was no indication to suggest that the JV Agreement was a joint venture business within the meaning of the Income Tax Act.

The taxpayer's conduct in attending meetings with the Developer, making constructive suggestions and offering to help market the units did not amount to an adventure in the nature of trade as he was merely protecting his interest on the property.[44] Besides that, the SCIT relied on the following points in the JV Agreement to conclude that the joint venture business was not income in nature:- [45]

(a) The taxpayer is neither a shareholder nor a director of the Developer;

(b) The taxpayer is not entitled to the profits or be liable to the losses of the development, instead, he was indemnified against all losses, damages and costs arising from the project;

(c) The taxpayer was to be kept informed of the monthly meetings and be provided with a quarterly progress report on the status of the project;

(d) The costs and expenses incurred in constructing the project are fully borne by the Developer; and

(e) The taxpayer is entitled to claim liquidated damages from the Developer should the Developer fail to complete the construction of the project within the time specified.

The decision in *YMF* is consistent with the Public Ruling issued by the IRB in 2009, which confirms that if the landowner is not actively participating in the development activities of the project, the landowner is not undertaking a business.[46] Conversely, if the landowner actively participates in the development of the property, he shall be deemed to be undertaking the business of a property development.[47]

44 YMF v Ketua Pengarah Hasil Dalam Negeri (2001) MSTC 3257, at 3264.

45 Ibid, at 3267.

46 Inland Revenue Board of Malaysia, Public Ruling No. 1/2009 (22 May 2009), [15.3].

47 Ibid.

Conclusion

Based on the above cases, it is evident that the IRB has the right to replace a particular assessment that was previously made, if in law, the gains should be assessed otherwise. The principle of estoppel does not apply to the IRB even though a previous assessment had been made and paid for.[48]

Nevertheless, as highlighted in the cases discussed above, the purchase of multiple properties at one time with the expectation that the value would rise over the years does not necessarily mean that it is an adventure by the taxpayer in the nature of trade.[49] It ultimately depends on various factors of the matter at hand.

Taxpayers must be aware that it is their prerogative to structure a particular transaction to the best of their tax advantage as long as it is within the requirements of law or accepted business practices.[50] Even though the Courts have held that income tax has the first right of tax, if a transaction does not fall under the categories of income as listed in Section 4 of the Income Tax Act, the IRB has no right to assess the transaction under the Income Tax Act.

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48Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [1998] 4 MLJ 195.

49 Leeming v Jones (JM Inspector of Taxes) (1928-1931) 15 TC 333.

50'Discerning the judicial trend in recent tax avoidance cases', link at: https://www.mondaq.com/tax-authorities/500890/discerning-the-judicial-trend-in-recent-tax-avoidance-cases, accessed as at 29 January 2021.

LAW REFORM: THE MANDATORY REGISTER OF BENEFICIAL OWNERSHIP OF COMPANIES

by Hayden Tan Chee Khoon

In July 2020, the Companies Commission of Malaysia ('**SSM**') published its proposed Companies (Amendment) Bill 2020 (**the** '**Proposed 2020 Bill**'). Notably, SSM observed that existing company law may be inadequate in preventing criminals from hiding behind corporate entities, see SSM's Consultative Document on the Proposed Companies (Amendment) Bill 2020 at pg.12, para 26:

> *'In the MER 2015, Malaysia has been rated as partially compliant in terms of taking measures to prevent the misuse of legal persons for money laundering and terrorist financing. Typically, legal persons such as companies and limited liability partnerships are vulnerable to be used in a money laundering and terrorist financing activities by irresponsible persons behind the entity (beneficial owners).'* (emphasis added)

This observation is especially true in light of the 1MDB scandal, described as 'the largest kleptocracy case' in the US history,[1] which was made possible via 'a systematic course of action carried out by means of complex financial structures'.[2]

This article highlights the amendments proposed by SSM to enhance the transparency of a company's beneficial ownership and the effect of non-compliance on the enforcement of beneficial rights.

The Proposed 2020 Bill

The proposed amendments were tailored to achieve the following policy considerations:

a) 'Defining the concept of "beneficial owner" for companies and foreign companies';

b) 'Introducing a new register, "register of beneficial owners" to record all information relating to beneficial owners';

c) 'Empowering companies to obtain beneficial ownership information from members or any person whom to believe is a beneficial owner or has knowledge of a person who is a beneficial owner';

1 *R Ramesh, '1MDB: The inside story of the world's biggest financial scandal' The Guardian (28.7.2016).*

2 *M Peel and J Vasagar, 'Malaysia: The 1MDB Money Trail' Financial Times (16.2.2016).*

d) '**Imposing an obligation to the beneficial owner to notify and provide information relating to his status as "beneficial owner"**';

e) 'Clarifying the mandatory obligation to submit beneficial ownership information to the Registrar together with annual return';

f) 'Requiring particulars on beneficial ownership information as part of the annual return to be lodged'

(the '**Policies**')

Under the present Companies Act 2016 (the '**2016 Act**'), 'beneficial owner' is defined under s.2 as 'the ultimate owner of the shares'. Clause 56B(1) of the Proposed 2020 Bill will further clarify the definition of 'beneficial owner' as referring to *'a **natural person** who ultimately owns or controls a company and includes an individual who exercises **ultimate effective control** over a company'*. This is a much-needed clarification when the present definition is at best elusive for it provides no clear legal standards for the determination of the '*ultimate owner*'.

The conviction to enhance the transparency of a company's beneficial ownership is most pronounced in the following clauses of the Proposed 2020 Bill, which would impose continuing obligations on companies to obtain beneficial ownership information as well as on beneficial owners to provide such information, failure of which attracts penal consequences:

*'**Register of beneficial owners***

*56C(1) Every company **shall** keep a register of beneficial owners **and record in the register**:*

*a) the name, number of identity card issued under the National Registration Act 1959 [Act 78], if any, passport number or other identification number, nationality, the date of birth and the usual place of residence **of every person who is a beneficial owner;***

b) the date of the person becoming or ceasing to be a beneficial owner; and

c) such other information as the Registrar may require.'

(2) to (3) ...

*(4) The company and every officer who contravene subsection (1) **commit an offence** and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and, in the case of continuing offence, to a further fine not exceeding five hundred ringgit for each day during which the offence continues after conviction.'* (emphasis ours)

*'**Duty of a beneficial owner to provide information***

*56E(1) A person who knows or **ought reasonably to know** that the person is a beneficial owner in relation to a company **shall** within such reasonable time–'*

a) notify the company, that the person is a beneficial owner in relation to the company; and

b) provide such other information as may be prescribed

(2) A person who is a beneficial owner in relation to a company who knows, or ought reasonably to know that a relevant change has occurred in the prescribed particulars of the register of beneficial owner shall notify the company of the relevant change—

a) stating the date that the change occurred; and

b) providing the particulars of the change.

(3) ...

*(4) Any person who fails to comply with subsection (1) or (2) **commits an offence.**'*
(emphasis ours)

Clause 4 of the Proposed 2020 Bill would also require companies to include beneficial ownership information when lodging their annual return. If the Proposed 2020 Bill is passed into law, the failure to do so in the annual return will attract penal consequence under s.68(9) of the 2016 Act.

The Effect of Non-compliance on the Enforcement of Beneficial Rights

At present, it is not uncommon for the Court to recognise beneficial ownership of company shares. Beneficial owners of shares may move the Court to order the transfer of shares to the beneficial owners, as was ordered by the Court in *Jemix*;[3] and may even file an oppression suit, as was granted by the Court recently in *Dato' Gue See Sew*.[4]

In *Jemix*, the plaintiffs claimed beneficial ownership over all the shares of the 1st defendant company, which were held in the names of the other defendants. The Court inferred the existence of trust over the shares of the 1st defendant company based on surrounding circumstances.[5] Whilst not uncommon, the lack of trust documents in *Jemix* is suspicious in light of the following features of the case:

a) the plaintiffs are multinational companies based in Japan and Singapore, which are ordinarily expected to be sufficiently prudent to document such trust; and

3 *Jemix Co Ltd & anor v Jemix Heat Treatment (M) Sdn Bhd & 3 ors (Civil Suit no.: WA-22IP-7-03/2016)*

4 *Dato' Gue See Sew & 2 ors v Heng Tang Hai & 2 ors (Originating Summons No.: WA-24NCC-292-05/2019)*

5 *see para 34(1) of the grounds of judgment dated 22.1.2019 for Jemix Co Ltd & anor v Jemix Heat Treatment (M) Sdn Bhd & 3 ors (Civil Suit no.: WA-22IP-7-03/2016).*

b) the trust over the shares in the 1st defendant company is valuable. Monetarily, the 1st defendant company had total assets of over RM5.2 million as at 2015. Strategically, the plaintiffs claimed that the 1st defendant company was a foothold for the plaintiffs to penetrate the Malaysian market.

Notwithstanding, the Court held that:

'36(1)-(5)...

*(6) no trust deed or formal document had been executed by the Plaintiffs because **as a matter of Japanese business culture, the Plaintiffs trusted their employees** to hold shares in the 2nd Plaintiff and 15' Defendant on trust for the 1st and 2nd Plaintiffs respectively.' (emphasis added)*

Arguably, this is a very lenient and forgiving approach. However, when the Proposed 2020 Bill is passed into law, will beneficial owners be granted such latitude, if their beneficial interests are not disclosed in the register of beneficial ownership? Such non-disclosure would certainly raise issues of illegality and unlawfulness. The question is whether such illegality will render the beneficial owners impotent to enforce their beneficial rights.

In this regard, a passage from Lord Bingham's judgment in *Saunders v Edwards* [6] is instructive:

*'Firstly, illegality. Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand, it **is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits**. On the other hand, **it is unacceptable that the court should, on the first indication of unlawfulness** affecting any aspect of a transaction, **draw up its skirts and refuse all assistance to the plaintiff**, no matter how serious his loss or how disproportionate his loss to the unlawfulness of his conduct.'* (emphasis added)

It is therefore relevant to consider the severity of the illegality and to determine the object which the law prohibits. In regard to the object of the Proposed 2020 Bill, a good starting point will be the SSM's Consultative Document on the Proposed Companies (Amendment) Bill 2020, which outlines, amongst others, the following public policies that the Proposed 2020 Bill is designed to serve:

*'94. To ensure the beneficial ownership information is up to date, accurate and can be obtained in a timely manner, **mandatory** reporting of beneficial ownership information is crucial for companies to record such information in a register.*

6 *Saunders & anor v Edwards & anor [1987] 2 All ER 651 at 666*

95. *With the introduction of the new section 56C of the CA 2016, register of beneficial owners shall be the platform for companies to record and maintain* ***all information relating to beneficial*** *owners and individuals that are directly related to members or shares of a company and shall also include those who control the company through criteria set under section 56B. The same policy shall apply to foreign companies to ensure no information gap for all companies incorporated or registered in Malaysia under the CA 2016…*

…

111. *Nevertheless, the main objective of this amendment is to provide clarity of the current policy to have an* ***annual mandatory submission of beneficial ownership*** *information to the Registrar. Based on this proposal, the current subsection 576(2) is amended to include beneficial ownership information as part of the information to be submitted together with the annual return.'* (emphasis added)

A register of beneficial ownership which discloses the persons who have ultimate '***effective control***' will greatly facilitate the enforcement of laws such as the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, see for example s.52 thereof:

'Special Provisions relating to seizure of a business

52(1) Where an enforcement agency has reason to believe that any business—

a) is being carried on by or on behalf of any person against whom prosecution for an offence under subsection 4(1) or a terrorism financing offence is intended to be commenced;

b) is being carried on by or on behalf of a relative or an associate of such person;

c) is a business in which such person, or a relative or associate of his, has an interest which amounts to or carries a right to not less than thirty per centum of the entire business; or

d) is a business over which such person or his relative or associate has management or ***effective control****, either individually or together,*

the enforcement agency may seize the business…' (emphasis added)

Based on the above, it is likely that when the Proposed 2020 Bill is passed into law, the Court will not lend aid to a beneficial owner who had breached their obligation to disclose beneficial ownership – because the Court will then be countenancing the illegality which undermines the public policies for transparent corporate ownership and to halt the use of corporate structure as a tool or instrument of crime.

As put by Lord Bingham, *'it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits'.* Our Federal Court had also taken a stern approach in this respect, see *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 at [35]:

> *'[35] Clearly, therefore,* ***courts are bound at all stages to take notice of illegality****, ... and to refuse to enforce the contract. In that regard, we endorse the following statement of law by the Court of Appeal ... in China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal [2014] 5 MLJ 1:*
>
> *At the outset we must say* ***that the trial courts must be vigilant not to provide any relief on contracts which is void on the grounds of public policy, or illegality*** *...'*

it is likely that when the Proposed 2020 Bill is passed into law, the Court will not lend aid to a beneficial owner who had breached their obligation to disclose beneficial ownership – because the Court will then be countenancing the illegality which undermines the public policies for transparent corporate ownership and to halt the use of corporate structure as a tool or instrument of crime.

There is another fundamental reason why the Court would withhold their aid to beneficial owners who had breached their obligation to disclose. Beneficial ownership stems from equity, which expects a person to act equitably and to not breach the law – beyond that, one is expected to act morally.[7]

As such, the implication for failing to obey the law will be particularly severe against litigants who try to move a court in equity, see *Teng Meow Chong v Chia Ngim Fong & Anor* [1991] 3 MLJ 452 at 455:

> *'Even if that section is not applicable, there is still a difficulty in the way of the plaintiff.* ***Equity cannot assist a party who has been in breach*** *and still continues to be in breach of the law. In seeking the assistance of the court to grant him an injunction he must come with clean hands: he who comes into equity must come with clean hands.'*

In *Teng Meow Chong*, the Court refused to provide the plaintiff reliefs because the plaintiff had breached s.17 of the Business Registration Act by failing to register a change in the ownership and person responsible for the management of the business with the Registry of Businesses. The Court held:

> *'I now turn to the last issue. The first defendant on 8 February 1990 terminated the registration of the business of 747 Departmental Store, and that was the business which was carried on by the plaintiff. The plaintiff was aware of this, and once again had not taken steps to seek to register the business under that or other name. Here*

7 *Rennie v Hamilton [2005] BCL 814 at [8].*

again he had the benefit of legal advice. If the ex parte injunction were continued, ***it would enable the plaintiff to continue to carry on a business without complying with the requirements of the Act; it would be tantamount to giving approval to a continuing breach or contravention of the Act on the part of the plaintiff. That clearly the court cannot do****.*

I therefore refused the motion to continue the ex parte injunction granted to the plaintiff. ***If there had been compliance with the Act by the plaintiff, the answer might well have been different.****'* (emphasis added)

Accordingly, it is likely that the Court will not countenance a breach of the registration requirement, and will withhold aid the beneficial owners who so breach – for equity follows the law.

Conclusion

Should the Proposed 2020 Bill be passed into law, beneficial owners ought to ensure that their beneficial ownership are disclosed to the companies to be recorded in the register of beneficial ownership – or risk the inability to enforce their beneficial rights, on top of the penal consequences that would follow.

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