Newsletter

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FRONT PAGE FOCUS

Restructuring & Insolvency

Re Scomi Group Bhd: Judicial Management Not Available for Public Listed Companies?

In this article, Douglas Goh Peng Fong discusses whether a public listed company can apply for a judicial management order under Subdivision 2 of Division 8 *(Corporate Rescue Mechanism)* of Part III of the Companies Act 2016 ("CA").

Introduction

On 23 May 2022, the Court of Appeal ("COA") in the case of **Re Scomi Group Bhd** affirmed the decision of the High Court[1] that a public listed company cannot avail itself of the judicial management corporate rescue mechanism under the CA.

Judicial management is a type of corporate rescue mechanism that allows a financially distressed company or its directors or its creditors to apply for a judicial management order ("JM Order") to place the management of the company in the hands of a judicial manager.

The JM Order provides financially distressed companies an automatic moratorium from legal proceedings for six months[2] (which can be extended for another six months) until the disposal of the judicial management application.

Background

Scomi Group Berhad ("Scomi") is a public company listed on the Main Market of Bursa Malaysia Securities Berhad ("Bursa Malaysia"). Scomi has been classified as a

Contents

Restructuring & Insolvency...............2

Re Scomi Group Bhd: Judicial Management Not Available for Public Listed Companies?............2

Employment & Administrative Law..7

Trade Secret in Employment Perspective................................7

Financial Services..........................14

Revised Foreign Exchange Policy Notices with effect from 1 June 2022.......................................14

Intellectual Property......................18

Opposition Proceedings under the Patents (Amendment) Act 2022..18

Shipping & Maritime.....................21

Sheriff's Expenses — The Requirement to Obtain Prior Sanction of the Court or the Sheriff..21

Tax & Revenue.............................25

Lam Ah Company Sdn Bhd v Ketua Pengarah Kastam Dan Eksais Civil Appeal No. P-01(A)-558-09/2021..25

financially distressed Practice Note (PN 17) company since December 2019[3] after its shareholders' equity spread went below 25% of its issued share capital and its equity dropped below RM40 million based on its financial results for the quarter ended 30 June 2019[4].

On 14 April 2021, Scomi filed an application with the High Court pursuant to sections 404 and 405 of the CA to seek a JM Order to be placed under judicial management of a judicial manager. Scomi's application was opposed by its creditors, namely, See Song & Sons Sdn Bhd, Malayan Banking Berhad as well as SBI Spectrum Sdn Bhd (which acted as an intervener in the proceeding) ("Creditors").

The Creditors had argued that section 403(b) of the CA is clear in that the judicial management procedure was not applicable to Scomi as it was a company which was subject to the **Capital Markets and Services Act 2007** ("CMSA") and that where the secured creditors had objected to the application, the court shall dismiss the said application in accordance with section 409(b) of the CA.

The High Court had to decide on the following:

- whether Scomi, as a public listed company can apply for a JM Order by virtue of section 403(b) of the CA ("First Issue"); and

- whether the secured creditor(s) of Scomi who object the JM Order would disentitle Scomi from continuing with the application ("Second Issue").

First Issue

Pursuant to section 403 of the CA, judicial management shall not apply to:

> "*(a) a company which is a licensed institution or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia; and*
>
> *(b) a company which is subject to the Capital Markets and Services Act 2007".*

In respect of section 403(b) of the CA, Scomi argued that the High Court should apply a purposive approach in interpreting the same to only preclude companies that are licensed and regulated under the CMSA, and not all public listed companies.

The Creditors argued to the contrary that section 403(b) of the CA is clear in that judicial management was not applicable to Scomi as it was a company which was subject to the CMSA (by virtue of Scomi being a public listed company which is required to comply with various provisions of the CMSA).

In addition, one of the Creditors, See Song & Sons Sdn Bhd, referred the High Court to the Companies Commission of Malaysia's ("CCM") Consultative Document on the proposed Companies (Amendment) Bill 2020[5], which states that:

> "*the benefit of judicial management is not available to companies which are regulated under [the CMSA] including listed companies. The proposed amendment would assist all companies facing financial difficulties including listed companies an avenue to rehabilitate their situations through judicial management.*"

The Creditors argued that judicial management is not available to companies under the CMSA including listed companies like Scomi.

In determining the First Issue, the High Court examined the provisions under the CMSA. The High Court cited provisions in the CMSA which govern "*listed corporations*" and the duties imposed on them under the CMSA, such as section 317A which is on the prohibited conduct of a director or officer of a listed corporation and section 320A on false or misleading financial statements of a listed corporation. Other provisions of the CMSA cited by the High Court, such as those relating to offences for market trading, market rigging and insider trading, are all applicable to listed corporations. A "*listed corporation*" is defined under the CMSA to mean "*a corporation whose securities or any class of its securities have gained admission to be quoted on a stock market of a stock exchange*".

Thus, upon reading the CMSA as a whole, the High Court concluded that "*<u>any body corporate</u> formed or incorporated or existing within or outside of Malaysia which will include any foreign company which is not a corporation sole, co-operative society or trade union <u>whose shares are quoted on a stock market, will be governed by the CMSA</u>*" [emphasis ours]. This includes Scomi, a public company that is listed on Bursa Malaysia.

The High Court did not agree with Scomi's contention that section 403(b) of the CA is general in nature or adopts a broad brush categorisation as opposed to section 403(a) of the **Companies Act 2016** which, in the words of Scomi's counsel, "*seeks to carve out entities that are licensed and regulated by Bank Negara from judicial management*". The High Court stated that the words in section 403(b) of the **Companies Act 2016** are clear to its meaning. Accordingly, a purposive approach cannot be adopted to interpret section 403(b) of the CA to only apply to companies that are "*licensed and regulated under the CMSA*".

The High Court held that section 403(b) of the CA applies to all companies whose shares are quoted on a stock market of a stock exchange as is the case with Scomi, and that Scomi as a listed company under the CMSA cannot avail itself of the judicial management corporate rescue mechanism under the CA. Thus, public listed companies are precluded from applying for a JM Order under section 403(b) of the CA.

Second Issue

Pursuant to section 409 of the CA, the High Court shall dismiss an application for a JM order if it is satisfied that:

> *"(a) a receiver or receiver and manager referred to in subparagraph 408(1)(b)(ii) has been or will be appointed;* ***or*** *[emphasis ours]*
>
> *(b) the making of the order is opposed by a secured creditor."*

The High Court felt that it was pertinent to note that the word "or" which appears in section 409 of the CA was inserted by way of the **Companies (Amendment) Act 2019**[6] which came into force on 15 January 2020.

The usage of the words "*secured creditor*" in section 409(b) of the CA showed that Parliament had in its wisdom specifically and expressly included the term "secured creditor" to the said sub-section and thus confined the right to object to a judicial management application to only two categories of creditors which are (i) "a receiver or receiver and manager referred to in sub-para. 408(1)(b)(ii) (who) has been or will be appointed''; and (ii) "a secured creditor".

Malayan Banking Berhad and See Song & Sons Sdn Bhd were secured creditors of Scomi who had a right to veto the judicial management application by Scomi and as they had done so, Scomi was not entitled to obtain a JM Order pursuant to section 403(b) and section 409(b) of the CA.

The COA's judgment

Scomi went on to appeal against the decision of the High Court. On 23 May 2022, the COA dismissed Scomi's appeal with costs[7]. At the time of writing, the written grounds of judgment of the COA have yet to be issued.

Conclusion

This case has provided the High Court with the opportunity to consider if a public listed company can apply for a JM Order under the CA. Following the COA's decision, public listed companies are precluded from applying for a JM Order.

Notwithstanding this, it is worth highlighting that the CCM has, in its Consultative Document on the proposed Companies (Amendment) Bill 2020, proposed amendments to section 403(b) of the CA to extend the application of the judicial management framework to more categories of companies including public listed companies.

If the proposed amendments are passed, the decision that judicial management is not available for public listed companies will no longer be relevant as the proposed amendments to section 403(b) of the CA will not preclude public listed companies like Scomi (which are neither registered nor licensed under the CMSA) to apply for judicial management under the CA. The proposed amendments to section 403(b) are specific in that judicial management would not apply to, amongst others, a company "*which is registered or approved under Part II, licensed under Part III, or recognised under Part VIII of the Capital Markets and Services Act 2007*"[8].

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Endnotes:

[1] [2021] MLJU 2173.
[2] Section 406(1), **Companies Act 2016.**
[3] See Scomi's announcement published on the website of Bursa Malaysia https://www.bursamalaysia.com/market_information/announcements/company_announcement/announcement_details?ann_id=3007221.
[4] See https://www.theedgemarkets.com/article/scomi-sinks-record-low-half-sen-potential-delisting.
[5] See Companies Commission of Malaysia's Consultative Document on the proposed Companies (Amendment) Bill 2020 https://www.ssm.com.my/Pages/Legal_Framework/Document/Consultative%20Document%20%26Companies%20(Amendment)%20Bill%202020%20(280720).pdf.
[6] See the **Companies (Amendment) Act 2019** https://www.ssm.com.my/Pages/Legal_Framework/Document/Companies%20(Amendment)%20Act%202019.pdf.
[7] See Scomi's announcement published on the website of Bursa Malaysia https://www.bursamalaysia.com/market_information/announcements/company_announcement/announcement_details?ann_id=3260867.
[8] See Companies Commission of Malaysia's Consultative Document on the proposed Companies (Amendment) Bill 2020 https://www.ssm.com.my/Pages/Legal_Framework/Document/Consultative%20Document%20%26Companies%20(Amendment)%20Bill%202020%20(280720).pdf.

Employment & Administrative Law

Trade Secret in Employment Perspective

In this article, Nur Najehah Jalaldin examines a company's right to protection of trade secrets in Malaysia and the options available to it if its trade secrets are being divulged by its employees.

Introduction

Have you ever taken a sip of your favourite beverage and wondered how it was made? Take Coca-Cola for example – it is a unique and refreshing beverage which has become so well-known, yet little is known about how exactly it was made. It is precisely for that reason that the Coca-Cola Company is now a successful billion-dollar company.

However, it is not just the recipe that the Coca-Cola Company keeps secret, there is other information it keeps confidential that has helped maintain its edge over its competitors thus far. Such information, be it the recipe for its beverages, its sales strategies, list of suppliers and clients, or certain processes within the company, is commonly known as trade secrets.

So, how does the Coca-Cola Company protect its trade secrets? Can other companies do the same and to what extent can they do so?

What are trade secrets?

The World Intellectual Property Organization defines trade secrets as any confidential business information (for example, commercial information, such as sales methods, distribution methods, consumer profiles, advertising strategies, list of suppliers and clients and technical information such as information concerning manufacturing processes.) of significant commercial value to businesses and which provide an enterprise a competitive edge.

Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights defines a trade secret as information that:

- must not be accessible to the public;
- must offer real and/or potential benefits to the company in question; and

- is subject to reasonable measures by its rightful owner to ensure the confidentiality of the information itself.

In Malaysia, there is no statutory definition of "*trade secret*". The Malaysian courts have thus far relied on case law definitions in English cases and applied common law definitions in dealing with cases involving trade secrets and confidential information in employment disputes; one such dispute arose in the case of **Faccenda Chicken Ltd v Fowler**[1].

In **Faccenda**, a distinction was drawn between trade secrets and "*mere*" confidential information. It was held that in order to determine whether a particular item of information was a trade secret it was necessary to consider all the circumstances of the case including:

- the nature of the employment;
- the nature of the information;
- whether the employer impressed on the employee the confidentiality of the information; and
- whether the relevant information can easily be isolated from other information which the employee is free to use or disclose.

Is there a specific law protecting trade secrets?

In Malaysia, trade secrets and confidential information are protected by the common law tort of breach of confidential information and/or by contract. The three elements to be established to succeed in an action for breach of confidence are:

- the information sought to be protected has the necessary quality of confidence;
- the information was communicated in circumstances importing an obligation of confidence; and
- there must be unauthorised use of that information to the detriment of the party communicating it.

While there is no specific legislation that protects "*trade secrets*" per se, there are certain provisions that protect business information in different statutes. The **Capital Market and Services Act 2007** ("CMSA") refers to the protection of company information in a specific circumstance, that is, insider trading; the **Companies Act 2016**

("CA 2016") imposes a duty on directors as well as employees not to misuse company information during their tenure or employment in the company.

CMSA 2007

The CMSA is a statute that regulates capital markets in Malaysia. The CMSA creates an offence of insider trading, which requires employees to maintain the secrecy of defined non-public information that would tend to have a material effect on the price or value of securities of the employer company.

Pursuant to section 188, any person who has access to price sensitive information that is not generally available is prohibited from utilising such information in connection with the sale or purchase of securities of the company or from directly or indirectly disclosing it to any other person for the purpose mentioned earlier. Any individual found guilty of an offence may be subject to imprisonment for a term not exceeding 10 years and fine not less than RM1 million.

CA 2016

A duty of loyalty or fidelity on an employee originates from the common law and is embodied in statutory provisions, particularly the CA 2016. The CA 2016, in setting out directors' duties under section 218(1) of the CA 2016, states that:

> "*A director or officer of a company shall not, without the consent or ratification of a general meeting-*
>
> *…(b) use any information acquired by virtue of his position as a director or officer of the company … to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company.*"

The above extract states a director or officer of a corporation is not permitted to use corporate information for personal advantage or benefit or to divulge such information to third parties unless such use or disclosure was approved in a general meeting.

According to the CA 2016, the term "*director*" includes the chief executive officer, chief operational officer and any other individual who has primary responsibility for the management of the organisation. Any "*director*" found to have contravened section 218 shall, upon conviction, be subject to imprisonment for a term not exceeding five years or a fine not exceeding RM3 million or both.

Does an employer have any option besides what is referenced above to prevent employees from stealing its trade secrets?

Yes, companies or employers typically enter an employment contract and they can include a clause or provision in the employment contract that prohibits the misuse or disclosure of the company's information.

In **Ecooils Sdn Bhd v Raghunath Ramaiah Kandikeri**[2] , the manager of the company's Engineering and Project Services department was found to have breached his terms of employment by misusing and disclosing to third parties confidential information of the company, ie, its trade secrets. In determining whether the employee breached the duty of confidentiality, the Court had to consider whether the confidentiality clause in his contract of appointment imposed a duty of fidelity and confidence.

The High Court ruled in this case that the confidentiality clause in the employee's contract of appointment imposed an express obligation of faithfulness on him. According to the Court, "*this specific obligation of faithfulness imposed by the letter of appointment is over and beyond his implied duty to act toward his employer in good faith*".

The question then arises as to whether this duty of fidelity only subsists during the term of the employment or after such employment has ended. The Court in the case of **Schmidt Scientific Sdn Bhd v Ong Han Suan**[3] considered this point and held that such a duty subsists even after the term of employment has ended.

This was further affirmed in the case of **Dynacast (Melaka) Sdn Bhd v Vision Cast Sdn Bhd**[4] ("**Dynacast**") when the Federal Court upheld the decision in **Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling**[5]**,** which ruled that the protection of confidential information did not have a time limit and that whether the confidentiality could be for a specific period or perpetual would depend on the terms of the agreed contractual obligation. As such, non-disclosure agreements or confidentiality clauses may be drafted in a way that an employee is perpetually bound by his obligations of confidentiality even after his employment ceases.

In essence, what amounts to trade secrets would be dependent on the specific facts and circumstances of each case; once that information is classified as a trade secret by the Court, an employee owes his employer a duty of fidelity and good faith to maintain the confidentiality of such information while he is employed. Such a duty extends beyond the cessation of the employment relationship, as former employees are prohibited from using confidential information obtained during employment for their own or someone else's use without the consent of the former employer.

Would such confidentiality clauses be void for being in restraint of trade?

Section 28 of the **Contracts Act 1950** sets out that any clause which is in restraint of trade shall be void. There are, however, three exceptions to the general rule of restraint of trade under that section, namely:

- where a party who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein;

- where partners may upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits that are reasonable, having regard to the nature of the business; and

- where partners may agree that someone or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

In addition, section 28 does not prohibit an employer from requiring his employee to provide his services on an exclusive basis during the employment contract.

The High Court in **Polygram Records Sdn Bhd v The Search**[6] held that section 28 is only applicable in cases where a person is restrained from carrying on his/her trade or profession in the traditional sense of the doctrine, that is, in the post-contract period and not while the contract is still in effect.

While the employee's right to practise his skills and expertise after termination of contract or resignation is guaranteed, the law also confers reasonable protection to the employer's legitimate business interest in the form of any trade secrets or confidential information which the employee may have access to during their tenure of employment.

Such obligation may be express or implied and they are bound not to disclose or exploit such information even if the employment contract is silent on this matter. The prohibition is strict such that the protection is conferred with no time limits as discussed above in the Federal Court case of **Dynacast**.

Further, the Federal Court in **Dynacast** warned of the harmful effects of the potential abuse of the doctrine of confidential information by employers if there is no clear case before its invocation. The Federal Court quoted Scott J in **Balston Ltd v Headline Filters Ltd**[7]:

> *"The use of confidential information restrictions in order to fetter the ability of these employees to use their skills and experience after determination of their employment to compete with their ex-employer is, in my view, potentially harmful. It would be capable of imposing a new form of servitude or serfdom, to use Cumming-Bruce LJS words, on technologically qualified employees. It would render them unable in practice to leave their employment for want of an ability to use their skills and experience after leaving. Employers who want to impose fetters of this sort on their employees ought in my view to be expected to do so by express covenant. The reasonableness of the covenant can then be subjected to the rigorous attention to which all employee covenants in restraint of trade are subject. In the absence of an express covenant, the ability of an ex-employee to compete can be restricted by means of an implied term against use of disclosure of trade secrets. But the case must, in my view, be a clear one. An employee does not have the chance to reject an implied term. It is formulated and imposed on him subsequently to his initial entry into employment. To fetter his freedom to compete by means of an implied term can only be justified, in my view, by a very clear case. The present is, to my mind, a long way from that."*

The former employer in the **Dynacast** claimed that confidentiality clauses had been breached by the former employee respondent. The Federal Court dismissed the claim on account of vague and insufficient pleadings as well as evidential inadequacies and held that the employer should have specified the particulars of the alleged misappropriation of the confidential information.

Based on the Federal Court decision in **Dynacast**, it is fair to conclude when handling confidentiality obligations, companies and/or employers must consider the following factors:

- although a clause that restraints an employee from disclosing or exposing confidential information or trade secrets of the company upon termination of his employment contract has been held to be enforceable as a matter of principle, the scope of an employee's confidentiality obligations are heavily dependent on the terms of the agreed contractual obligations;

- In a claim for breach of confidentiality, employers must be able to identify and specify the confidential information allegedly misappropriated or misuse; and

- if a former employee establishes a competing business, the former employer must assess whether the former employee abused confidential information and the sufficiency of evidence to that effect.

What can you do if an ex-employee is discovered to have breached the confidentiality clause/ agreement?

There are various remedies available following a breach of confidentiality. An injunction is typically used to prevent former employees from exploiting trade secrets acquired in the course of their former employment.

In reference to **Dynacast**, Hamid Sultan JCA in the Court of Appeal case **Ganesh Raja a/l Nagaiah v NR Rubber Industries Sdn Bhd**[8] stated that the courts, whether considering a claim in contract or in equity relating to confidential information, will place emphasis on the nature of information whereby such information will only be protected if it could properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret *eo nomine*[9].

Conclusion

The best tool to effectively protect trade secrets is a robust employment contract where the nature of the trade secrets and confidential information is clearly spelt out. That will reduce the risk of disputes as to whether the information misused by the employee is in fact confidential or not. The common law right to confidentiality and the various statutory provisions referenced above are often insufficient to provide quick and effective relief for the employer by way of injunctive relief to immediately restrict the access to and use of confidential information. This is important as once the information is made available publicly, the confidentiality is lost forever.

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Please contact us for further information regarding employment and administrative law matters.

Endnotes:

[1] [1987] Ch. 117.
[2] [2014] 7 MLJ 309.
[3] [1997] 5 MLJ 632.
[4] [2016] 6 CLJ 176.
[5] [2008] 8 CLJ 386.
[6] [1994] 3 MLJ 127.
[7] [1987] FSR 330.
[8] [2017] 2 MLJ 396.
[9] *Eo nomine* means an item is "*identified by name*".

Financial Services

Revised Foreign Exchange Policy Notices with effect from 1 June 2022

In this article, Cheryl Liew Xin Yi summarises some of the key amendments under the FEP Notices[1].

Introduction

On 1 June 2022, the Central Bank of Malaysia, Bank Negara Malaysia ("BNM"), issued a revised set of Foreign Exchange Policy Notices ("FEP Notices") which came into effect on the same date. The new FEP Notices supersede the previous Foreign Exchange Notices that were issued and have been in effect since 15 April 2021 ("Previous Notices").

Key Amendments under FEP Notices

FEP Notice 1: Dealings in Currency, Gold and Other Precious Metals

- The restrictions and conditions imposed under the Previous Notices on a non-resident buying or selling foreign currency ("FC") against ringgit on spot basis for its own account with an appointed overseas office ("AOO") of the licensed onshore bank's banking group are no longer applicable.

- The restrictions and conditions imposed under the Previous Notices on a non-resident buying or selling FC against ringgit on forward basis for its own account with a licensed onshore bank ("LOB") or an AOO have been consolidated/merged into paragraph 6(1)(b) of Part B of FEP Notice 1 and subject to similar restrictions and conditions.

- Consolidation of paragraphs 8 and 9 of Part B of FEP Notice 1 whereby a non-resident entity is allowed to buy and sell foreign currency against ringgit on behalf of an entity within its group (the "Principal") with a LOB or an AOO provided that (i) the Principal is not a non-resident financial institution; (ii) the Principal complies with paragraphs 1 and 2 of Part A of FEP Notice 1 where it is a resident; (iii) the Principal complies with paragraphs 6 and 7 of Part B of FEP Notice 1 where it is a non-resident.

FEP Notice 2: Borrowing, Lending and Guarantee

- One of the material amendments introduced by the FEP Notices is paragraph 21 of Part G of FEP Notice 2 relating to giving and obtaining of financial guarantee. The revised paragraph 21 of Part G of FEP Notice 2 clarifies that a non-bank resident guarantor is also allowed to give a financial guarantee in any amount to secure borrowing in FC by a non-resident from a non-resident financial institution ("NRFI").

- Under the revised paragraph 21 of Part G of FEP Notice 2:

  (i) a non-bank resident guarantor is not allowed to give financial guarantee to secure borrowing in FC obtained by a non-resident borrower from a NRFI if the underlying borrowing is or will be utilised by the resident guarantor. Such financial guarantee will be deemed as a borrowing in FC by the resident guarantor, and the resident guarantor will need to comply with Part A or B of FEP Notice 2;

  (ii) a non-bank resident guarantor is not allowed to give financial guarantee to secure borrowing obtained by a non-resident borrower where the resident guarantor has entered a formal or informal arrangement to make repayment of the borrowing in foreign currency other than under a call-upon by the lender in the event of default. Such repayment will be deemed as an investment in foreign currency asset, and the resident guarantor will need to comply with Part A or B of FEP Notice 3.

- It is further explained and clarified in FEP Notice 2 and the "*Frequently Asked Questions (FAQs)*" relating to FEP Notice 2 that the "call-upon" of financial guarantee shall be initiated by the lender in its prerogative in writing to the resident guarantor. It is stated that a resident guarantor may not initiate a "*call-upon*" of a financial guarantee. In the event a resident guarantor intends to voluntarily liquidate a financial guarantee to support the borrower, the prior approval from BNM is required to be obtained by the resident guarantor in accordance with FEP Notice 3.

- It is also stated in FEP Notice 2 and the "*Frequently Asked Questions (FAQs)*" relating to FEP Notice 2 that an "*event of default*" prior to a call-upon of a financial guarantee by the lender shall be treated by the lender in accordance with the requirements under International Financial Reporting Standard 9 (IFRS 9) or any equivalent accounting standards adopted by the lender.

FEP Notice 4: Payment and Receipt

- Under the revised paragraph 4(d) of Part C of FEP Notice 4, a resident is free to pay or receive FC to or from another resident for settlement of a miscellaneous expense incurred outside Malaysia between a resident individual residing in Malaysia and a resident individual residing outside Malaysia.

- "*Miscellaneous expense*" is defined or explained in FEP Notice 4 as trade of goods or services or primary income or secondary income[2], and includes fee, commission, royalty or income, wage, salary, dividend, profit and interest that is of reasonable amount and infrequent in nature, including but not limited to holiday expenses abroad, medical expenses abroad and advance or reimbursement for purchase of goods and services abroad on behalf of a resident individual residing in Malaysia.

- The revised paragraph 14 of Part F of FEP Notice 4 allows a resident individual to open and maintain a foreign currency account with a LOB or a NRFI, jointly with a non-resident individual. Under the Previous Notice 4, this was only permitted where the non-resident individual is an immediate family member.

- The revised paragraph 18 of Part F of FEP Notice 4 allows a non-resident to open and maintain a foreign currency account with a LOB, jointly with a resident individual. Under the Previous Notice 4, this was only permitted where the resident individual is an immediate family member.

FEP Notice 7: Export of Goods

- Amendments to the reporting and notification requirements have been introduced by FEP Notice 7. Under the revised FEP Notice 7:

  (a) a resident exporter that meets the requirement as stipulated in Part C of Notice 7, that is annual gross export of goods exceeding RM250 million equivalent in the preceding year, shall submit a report on Export of Goods to BNM only as and when required by BNM. It is further explained in the "*Frequently Asked Questions (FAQs)*" relating to FEP Notice 7 that if a resident exporter is required to submit export of goods report, such requirement will be communicated to the exporter via a letter from BNM;

  (b) a resident exporter that did not receive any of its proceeds from export of goods as referred to under paragraph 1(c) of Part A of this Notice 7 within 24 months from the date of shipment, shall notify BNM on the outstanding export of goods proceeds within 21 days after the end of each calendar year via https://bnm.my/fep.

The FEP Notices which come into operation on 1 June 2022 are available at https://www.bnm.gov.my/fep.

Conclusion

BNM continues to maintain a liberal foreign exchange policy, which is part of its broad prudential toolkits to maintain monetary and financial stability[2].

BNM is committed in ensuring that the foreign exchange policy continues to support the competitiveness of the Malaysian economy by facilitating a more conducive environment for domestic and cross-border real economic activities[3].

The recent changes/amendments in the FEP Notices provide further clarifications and elaborations to some of the earlier foreign exchange policy requirements and conditions imposed by BNM, further liberalising certain exchange controls/restrictions to promote economic growth in Malaysia.

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FINANCIAL SERVICES PRACTICE GROUP

Please contact us for further information regarding financial services matters.

Endnotes:

[1] Please note that the list of amendments set out in this article is not exhaustive.
[2] As defined in the *Balance of Payments and International Investment Position Manual (Sixth Edition)* issued by the International Monetary Fund and as amended or revised from time to time.
[3] Bank Negara Malaysia "*Overview*" available at https://www.bnm.gov.my/fep.
[4] Bank Negara Malaysia "*Overview*" available at https://www.bnm.gov.my/fep.

Intellectual Property

Opposition Proceedings under the Patents (Amendment) Act 2022

In this article, Pravind Chandra looks at the new section 55A of the Patents (Amendment) Act 2022.

Introduction

The **Patents (Amendment) Act 2022** ("the Amendment Act") came into force in Malaysia on 18 March 2022[1]. Together with the Patents (Amendment) Regulations 2022, this Amendment Act brought a wave of changes through the existing **Patents Act 1983** ("PA1983") and the Patents Regulations 1986 ("PR1986").

The Amendment Act introduces into the PA1983 a new section 55A which provides for an interested party to be able to commence opposition proceedings to challenge the validity of a granted patent. The introduction of section 55A now places the Intellectual Property Corporation of Malaysia ("MYIPO") on par with its peers such as the Intellectual Property Office of Singapore ("IPOS") and the European Patent Office ("EPO") in terms of providing an avenue to challenge and revoke a granted patent.

However, it must be noted that the new section 55A, as well as several other amendments, will only come into force at a date later than 18 March 2022. As of 31 May 2022, there has been no official announcement on when section 55A would take effect.

Initiating opposition proceedings

Section 55A of the Amendment Act allows any interested person to commence opposition proceedings at MYIPO. It should be noted that the interested person includes the Federal Government and any State Government. One main prerequisite to do so is that the patent in dispute must not be the subject of Court proceedings or any other proceedings under the PA1983 read together with the Amendment Act.

The deadline to commence these proceedings is "*within the prescribed period from the date of publication of the grant of the patent*". However, the prescribed period has not been defined in the Amendment Act or any regulation yet.

An interested person who has commenced opposition proceedings may not, at any time during those proceedings, initiate any Court proceedings to invalidate the patent in question, unless both parties agree to the commencement of Court proceedings, or if the interested person is defending an infringement lawsuit.

Grounds for opposition

The three grounds on which a party may mount a challenge under section 55A of the Amendment Act pursuant to section 56(2) of the PA1983 are summarised as follows:

- The invention in the patent does not fall within the meaning of "*invention*" as defined in section 12 of the PA1983, or is contrary to public order or morality, or is not patentable because it is not novel, it lacks an inventive step, or is not industrially applicable; or

- that the description or the claim does not comply with the requirements of the PA 1983 or PR1986; or

- any drawings which are necessary for the understanding of the claimed invention have not been furnished by the patent owner.

Decision of the Registrar

Upon assessing the notice of opposition and any supporting documents submitted by the interested person or by the patent owner, the Registrar of MYIPO shall then make one of the following determinations:

- to maintain the patent in question; or

- to maintain the patent with amendments; or

- to invalidate the patent.

In the event the Registrar decides to maintain the granted patent or maintain the patent with amendments, the interested person can not then make an application under section 56 of the PA1983 to invalidate the patent unless the person is a defendant in an infringement lawsuit. However, it should be noted that the interested person would still be able to file an appeal to the Court, pursuant to section 88 of the PA1983.

Conclusion

The amendments under the Amendment Act to the PA1983 have long been overdue. Malaysia's patent laws are now on similar footing with the laws in neighbouring countries. Malaysia's commitments to the Regional Comprehensive Economic Partnership ("RCEP") Agreement have no doubt been a catalyst and driving force for the

need to update the PA1983 via the Amendment Act. One aspect of that commitment to the RCEP Agreement is having robust and up-to-date patent laws which allow parties to test and challenge the validity of a granted patent.

Once it comes into force, the new section 55A of the Amendment Act would provide a faster and less costly channel for a party to invalidate a granted patent. As things stand, a party would have to file an invalidation suit at Court to have a patent revoked. This new provision now enables parties to challenge the validity of a granted patent on substantive matters at the MYIPO level, thus minimising costs and indirectly reducing the burden on the Court.

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Endnotes:

[1] PU(B) 168/2022 — in exercise of the powers conferred by subsection 1(2) of the **Patents (Amendment) Act 2022** [Act A1649], the Minister appoints 18 March 2022 as the date on which the Act comes into operation except section 14, paragraph 26*(a)*, sections 45 and 47, paragraph 48*(a)*, section 55 and paragraph 57*(b)*.

Shipping & Maritime

Sheriff's Expenses — The Requirement to Obtain Prior Sanction of the Court or the Sheriff

A case note by Rajasingam Gothandapani and Lynnette Tan Hui Ling.

Introduction

It is trite that in the distribution of proceeds of a judicial sale of a vessel, the Sheriff's expenses would take priority over the claims of other parties having an interest in the vessel. It is, however, an established rule of practice that before an item of expenditure may be cast as a Sheriff's expense, and so rank as first charge on the proceeds in the hands of the Court, there are two pre-requirements to be satisfied: (1) it must arise from the preservation and good management of the vessel; and (2) it must also receive the prior sanction of the Court or the Sheriff.

This rule of practice is recognised in authorities such as **The "Eastern Lotus" Ex "Spring Flower"; Urzad Morski W Szczecinie v Moscow Narodny Bank Ltd**[1] and **The 'Euroexpress'**[2]. The same position has recently been affirmed by the High Court in **The Hongkong and Shanghai Banking Corporation Limited v The Owners and/or Demise Charterers and/or other Parties Interested in the Vessel "SEA CORAL" of the Port of Cook Islands**[3] ("**Sea Coral**").

Facts

In **Sea Coral**, the plaintiff, The Hongkong and Shanghai Banking Corporation Limited ("HSBC") had provided a trade facility to the defendant (The Owners and/or Demise Charterers and/or other Parties Interested in the Vessel "SEA CORAL" of the Port of Cook Islands ("Owners")).

The trade facility was secured by a general pledge, where the Owners pledged their interest over six original Bills of Lading representing the cargo carried on board four vessels, including Sea Coral.

The Owners subsequently defaulted on the trade facility and HSBC sought to exercise the general pledge only to discover that the Owners had released the cargo to another party without the production of the original Bills of Lading that were still in HSBC's possession. HSBC commenced an *in rem* writ action against the Owners for mis-delivery of cargo and proceeded to arrest Sea Coral. The Owners did not enter appearance.

HSBC successfully applied to have Sea Coral appraised and judicially sold. The proceeds from the judicial sale were paid into Court. Thereafter, several parties claiming interest in the proceeds of the judicial sale of Sea Coral applied to intervene in the proceedings. Whilst the proceedings were underway, the 4th Intervener filed an application seeking an order that the expenses incurred by the 4th Intervener as anchorage fee for Sea Coral when it was anchored at a designated area licensed to the 4th Intervener post arrest, be ranked as Sheriff's expenses.

The 4th Intervener's application was grounded on a Ship-To-Ship Anchorage Service Agreement ("the Agreement") entered between the 4th Intervener and Ocean Tankers Pte Ltd, a company that had common directors and shareholders as the owners of Sea Coral. Under the Agreement, Ocean Tankers Pte Ltd had agreed to pay a monthly sum of USD140,000.00 for several services to be provided by the 4th Intervener, which included Ship-To-Ship Transfer services.

After Sea Coral's arrest, the Sheriff's agent had requested for a quote of anchorage fee from the 4th Intervener. The 4th Intervener quoted a monthly sum of USD140,000.00 citing the Agreement. In response, the Sheriff's agent informed the 4th Intervener that the Agreement was neither applicable to nor binding on the Sheriff, and consequently the 4th Intervener was requested to negotiate a fresh agreement with the Sheriff to secure anchorage fee. Subsequently, the 4th Intervener filed its application in Court seeking an order to rank the anchorage fee of Sea Coral as Sheriff's expenses.

4th Intervener's submission

In support of its application, the 4th Intervener submitted that as Sea Coral was still anchored at the designated area it had incurred daily anchorage fee. The 4th Intervener further contended that HSBC and all other claimants had benefitted from the provision of safe shelter to Sea Coral by the 4th Intervener.

Thus, relying on the authority of **Kleinwort, Benson Ltd v Sherkate Sahami Sakht (The "Myrto" — No. 1)**[4], the 4th Intervener contended that the anchorage fee was a necessity and was an expense ordinarily incurred in the preservation and good management of the vessel.

The 4th Intervener further contended that it had acted appropriately in accordance with the legal principles set out in **The "Eastern Lotus"**[5] and **The 'Euroexpress'**[6] by informing the Sheriff's Agent of the anchorage fee that was being charged to the vessel.

HSBC's submission

HSBC submitted that it was settled law and sound practice of the Admiralty Court that the 4th Intervener should have obtained the prior approval, consent and/or agreement of the Sheriff to treat anchorage fee as Sheriff's expenses, as per the authorities of **The**

"Eastern Lotus" Ex "Spring Flower"; Urzad Morski W Szczecinie v Moscow Narodny Bank Ltd[7] and **The 'Euroexpress'**[8]. It was pointed out to the Court that the 4th Intervener had failed to do so. The 4th Intervener had also not taken steps to have the vessel relocated outside the designated area after the arrest.

The Court was informed that the 4th Intervener had not entered into a fresh agreement with the Sheriff to incur anchorage fee for the vessel commencing from the time of her arrest. The Court also noted that the Agreement relied upon by the 4th Intervener had expired 11 days after Sea Coral was arrested by the Sheriff.

Both the 1st and 3rd Interveners echoed HSBC's submission in opposing the 4th Intervener's application.

Decision of the High Court

The High Court agreed with HSBC (1st and 3rd Interveners) that whilst anchorage fees may be treated as Sheriff's expenses as it relates to the preservation and good management of the vessel, it must, however, receive the prior sanction of the High Court and/or the Sheriff before it can be treated as Sheriff's expenses (**The "Eastern Lotus" Ex "Spring Flower"; Urzad Morski W Szczecinie v Moscow Narodny Bank Ltd**[9] and **The 'Euroexpress'**[10]).

The High Court found that the 4th Intervener had not satisfied the requirement that prior consent, approval or agreement from the Sheriff must be obtained for the 4th Intervener to incur anchorage fee and for this head of expenses to be treated as Sheriff's expenses.

Prior to the 4th Intervener's filing the application to rank anchorage fee as Sheriff's expenses, the 4th Intervener had not alerted the Sheriff or the Sheriff's Agent that the vessel had been incurring, and was continuing to incur, the anchorage fee whilst she remained under arrest at the designated area and that the 4th Intervener wished to treat this expense as Sheriff's expenses.

The High Court ruled that an application to the Sheriff or to the Court for an order to have the anchorage fee be treated as Sheriff's expenses ought to have been made at the earliest opportunity.

The High Court dismissed the 4th Intervener's application with costs.

High Court's recent decision

The requirement that there must be prior consent from the Sheriff for an expense to be ranked as Sheriff's expenses was recently reaffirmed by the High Court in **The Hongkong and Shanghai Banking Corporation Limited v The Owners and/or Demise Charterers**

and/or other Parties Interested in the Vessel "OCEAN WINNER" of the Port of Singapore[11].

In dismissing the 4th Intervener's application for leave to rank lay-up fee as Sheriff's expenses, the High Court referred to **The 'Euroexpress'**[12] and opined that it was a rule of admiralty practice to obtain prior sanction of the Court or Sheriff before an expenditure can be cast as Sheriff's expenses and further that it was not sufficient for a party to merely prove that the expenditure was incurred for the preservation and good management of the vessel.

The Court further held that an agreement concluded between the 4th Intervener and a third party prior to the arrest of the vessel did not entitle any claims arising under that agreement to be ranked as Sheriff's expenses. Such agreements do not bind the Court, the Sheriff or the Sheriff's agent.

Expenses incurred in consultation with or with the knowledge of the Sheriff are not regarded as expenses approved by the Sheriff. Merely informing the Court that the 4th Intervener had a claim for lay-up fee did not automatically bind the Court or its Sheriff.

The 4th Intervener's application was dismissed with costs.

Conclusion

A party wishing to rank an expense incurred by it in connection with the preservation and good management of a vessel under arrest as Sheriff's expenses is obliged to seek prior sanction and/or approval of the Court or its Sheriff to enjoy a higher priority in the distribution of proceeds of a judicial sale of the vessel.

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Please contact us for further information regarding shipping & maritime matters.

Endnotes:

1 [1980] 1 MLJ 137.
2 [1988] 3 MLJ 367.
3 Kuala Lumpur High Court Admiralty In Rem No.: WA-27NCC-39-05/2020.
4 [1984] Lexis Citation 1462.
5 [1980] 1 MLJ 137.
6 [1988] 3 MLJ 367.
7 [1980] 1 MLJ 137.
8 [1988] 3 MLJ 367.
9 [1980] 1 MLJ 137.
10 [1988] 3 MLJ 367.
11 Kuala Lumpur High Court Admiralty In Rem No.: WA-27NCC-52-06/2020.
12 [1988] 3 MLJ 367.

Tax & Revenue

Lam Ah Company Sdn Bhd v Ketua Pengarah Kastam Dan Eksais Civil Appeal No. P-01(A)-558-09/2021

In this article, Analise Cheong reviews the recent Court of Appeal decision in the case of Lam Ah Company Sdn Bhd v Ketua Pengarah Kastam Dan Eksais Civil Appeal No. P-01(A)-558-09/2021.

Brief facts

On 30 April and 4 May 2020, the Director General of Customs and Excise (“Customs”) issued Bills of Demand (“the Disputed Notices”) assessing Lam Ah Company Sdn Bhd (“the Taxpayer”) to goods and services tax (“the Disputed GST”).

Thereafter, Customs also issued Notifications of Action to Blacklist Directors/Shareholders of the Company[1] dated 26 June 2020 (“Blacklisting and Travel Ban Notices”) to blacklist and prevent all the directors of the Taxpayer from leaving Malaysia until the Disputed GST was paid.

As the Bills of Demand were raised after the repeal of the Goods and Services Tax Act 2014 (“GST Act”) from 1 September 2018, the Taxpayer filed an Application for Judicial Review (“JR Application”) before the High Court. However, on a protective basis, the Taxpayer also filed an appeal to the Customs Appeal Tribunal (“Customs Tribunal”).

At the High Court, Customs raised a preliminary issue arguing that the High Court has no jurisdiction to hear the JR Application in the light of the appeal filed by the Taxpayer before the Customs Tribunal. Customs sought to apply section 141N of the **Customs Act 1967** (“CA”), which provides that:

> *“(1) Where an appeal is lodged with the Tribunal and the appeal is within the jurisdiction of the Tribunal, the issues in dispute in such appeal, whether as shown in the initial appeal or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties in any court unless-*
>
> *(a) the proceedings before the court were commenced before the appeal was lodged with the Tribunal; or*
>
> *(b) the appeal before the Tribunal is withdrawn, abandoned or struck out.*
>
> *(2) Where paragraph (1)(a) applies, the issues in dispute in the appeal to which those proceedings relate, whether as shown in the initial appeal or as emerging in the course of the hearing, shall not be the subject of proceedings between the*

same parties before the Tribunal unless the appeal before the court is withdrawn, abandoned or struck out."

Decision of the High Court

The High Court found in favour of Customs on the jurisdiction issue and held that the case ought to have been heard by the Customs Tribunal as section 141N of the CA prevents the High Court from hearing the case ("the High Court's Decision").

Appeal to the Court of Appeal ("the Appeal")

Dissatisfied with the High Court's Decision, the Taxpayer lodged an appeal to the Court of Appeal.

The Taxpayer argued that the Customs Tribunal's jurisdiction over GST matters was limited to such matters as were provided under section 141M(1) of the CA read with section 5 of the **Goods and Services Tax (Repeal) Act 2018** ("Repeal Act"). Pursuant to section 5(3) of the Repeal Act, the Customs Tribunal's jurisdiction over GST matters extended only to GST appeals that were pending before the Goods and Services Tax Appeal Tribunal immediately before 1 September 2018 (that is the date when the GST Act was repealed), among others.

In this regard, Section 141M(1) of the CA provides that,

> "*The [Customs] Tribunal shall have jurisdiction to determine any appeals made under … section 126 of the repealed Goods and Services Tax Act 2014 as provided under section 5 of the Goods and Services Tax (Repeal) Act 2018 [Act 805].*"

Section 5(3) of the Repeal Act provides that,

> "*Any appeal before the Goods and Services Tax Appeal Tribunal which is pending immediately before the appointed date shall, on or after the appointed date, continue to be heard and decided by the Customs Appeal Tribunal.*"

The Taxpayer argued that if the Customs Tribunal has no jurisdiction over the instant case to begin with, then section 141N of the CA ought not apply.

Decision of the Court of Appeal

The Court of Appeal agreed with the Taxpayer's submissions and allowed the Appeal ("Court of Appeal's Decision").

The Court of Appeal held that the instant case does not fall within the ambit of section 141M(1) of the CA read with section 5 of the Repeal Act, as section 5(3) of the Repeal

Act only vests the Customs Tribunal with jurisdiction to hear GST appeals filed at the Goods and Services Tax Appeal Tribunal that were ***immediately pending*** [emphasis ours] before the appointed date (that is, immediately pending before 1 September 2018).

However, the Disputed Notices and Blacklisting and Travel Ban Notices in this case were raised more than one and a half years after 1 September 2018. As such, no appeal was or could have been filed by the Taxpayer before the Goods and Services Tax Appeal Tribunal, which was already abolished by then.

The Court held that as the Customs Tribunal has no jurisdiction to hear this case to begin with, section 141M of the CA which was relied upon by Customs does not apply. Accordingly, the Court of Appeal directed that the case be remitted to the High Court to be determined on its merits in the JR Application.

No appeal was filed by Customs against the Court of Appeal's Decision.

Conclusion

This case clarifies and confirms that the Customs Tribunal, a statutory tribunal, has no jurisdiction over GST cases other than as provided under section 5 of the Repeal Act. Cases such as the instant case, where Customs had issued bills of demand after the repeal of the GST Act, cannot be heard by the Customs Tribunal and the proper forum is the High Court.

Irene Yong and Yeoh Yu Xian from our Tax & Revenue Practice Group acted for the Taxpayer in this case.

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Endnotes:

[1] Section 49, **Goods and Services Tax Act 2014** (Act 762).

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