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Editor
Jonathan Cotton

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EDITOR'S PREFACE

Building on the previous five editions under the editorship of my partner Richard Clark, I am delighted to have taken on the role of editor from him. *The Dispute Resolution Review* has grown to now cover 54 countries and territories. It is an excellent resource for those, both in-house and in private practice, whose working lives include involvement in disputes in jurisdictions around the world.

The Dispute Resolution Review was first published in 2009 at a time when the global financial crisis was in full swing. Against that background, a feature of some of the prefaces in previous editions has been the effects that the turbulent economic times were having on the world of dispute resolution. Although at the time of writing the worst of the recession that gripped many of the world's economies has passed, challenges and risks remain in many parts of the world.

The significance of recession for disputes lawyers around the world has been mixed. Tougher times tend to generate more and longer-running disputes as businesses scrap for every penny or cent. Business conduct that was entrenched is uncovered and gives rise to major disputes and governmental investigation. As a result of this, dispute resolution lawyers have been busy over the last few years and that seems to be continuing as we now head towards the seventh anniversary of the credit crunch that heralded the global financial crisis. Cases are finally reaching court or settlement in many jurisdictions that have their roots in that crisis or subsequent 'scandals' such as *LIBOR*.

The other effect of tougher times and increased disputes is, rightly, a renewed focus from clients and courts on the speed and cost of resolving those disputes, with the aim of doing things more quickly and for less, particularly in smaller cases. The Jackson Reforms in my home jurisdiction, the United Kingdom, are an example of a system seeking to bring greater rigour and discipline to the process of litigation, with a view to controlling costs. Whether such reforms here and in other countries have the desired effect will have to be assessed in future editions of this valuable publication.

Jonathan Cotton
Slaughter and May
London
February 2014

Chapter 34

MALAYSIA

Tiang Joo Su and Yin Faye Lim[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Malaysia is a member of the Commonwealth of Nations. According to its 2010 population and housing census, estimates for 2013 indicate it has 27.4 million Malaysian citizens. A budget of 264.2 billion ringgit has been allocated as part of its 2014 budget to implement programmes and projects as Malaysia is a fast-developing country. Its dispute resolution framework has grown tremendously beyond the early litigation structure that had adopted the common law system of England. The first Courts of Judicature Act, which established the three settlements of Penang, Malacca and Singapore (the Malay Peninsula) in 1807 to administer the principles of common law and equity then in force in England 'as far as local circumstances will admit' is now applicable to the whole of Malaysia. Although Section 3 of the Civil Law Act 1956 provides *inter alia* for the courts in Peninsular Malaysia to apply the common law of England and the rules of equity as administered in England on 7 April 1956 if no Malaysian provision exists; Malaysia now has a vast body of law, both statutory and common law, of its own.

Unlike England, Malaysia is a federation with a written constitution wherein its Federal Constitution is supreme.[2] Parliament and state legislature is constrained by the Constitution and cannot enact laws that are *ultra vires* the Constitution.

The legal profession in Malaysia is a fused one where practitioners are known as advocates and solicitors. Although the practitioners can do both solicitors' work and litigation, in practice the practitioners who practise regularly in the superior courts tend to concentrate only on litigation and dispute resolution.

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1 Tiang Joo Su is a senior partner and Yin Faye Lim is a legal assistant at Cheah Teh & Su, Advocates & Solicitors.

2 *Ah Thian v. Government of Malaysia* [1976] 2 Malayan Law Journal 112.

II THE YEAR IN REVIEW

There have been several recent interesting decisions in Malaysia, which have been incorporated into the relevant sections of this chapter. The Personal Data Protection Act 2010 (PDPA), which came into force on 15 November 2013, the Mediation Act 2012 and the Rules of Court 2012, which came into force on 1 August 2012, will be discussed.

i Rules of Court 2012

At one time, the rules of civil procedure were enforced rigorously; so strictly that, for example, if the margins on either side of the cause papers were less than one inch wide, the applicant could find his or her matter being struck off. The infamous 'one inch rule' was the bane of a number of litigants.

Things came to a head in the case of *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd*[3] where the Federal Court addressed an appeal that was summarily struck off at the Court of Appeal despite the appellant having complied with the practice direction issued by the Court of Appeal itself.

The author had the honour and privilege of leading the argument before a specially empanelled bench comprising five Federal Court judges. The issue of procedural impropriety overshadowing substantive justice was dealt with. In this landmark case, a majority decision was made that justice should override technical irregularities. Among the statements made were the following:

> *A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law… A fair-minded judge should look at all the circumstances of the case before penalising the party who infringes any particular rule of procedure.*[4]

After this decision, the Rules of Court were amended and with effect from 16 May 2002, it was expressly provided that '[i]n administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.' This rule is highlighted in Order 1A of the combined Rules of Court 2012, which came into force on 1 August 2012.

Although there are momentary lapses,[5] by and large the courts in Malaysia do abide by the rule that technicalities should not stand in the way of administering justice.

The new consolidated and simplified combined Rules of Court 2012, applicable to both the High Courts and the subordinate courts, reflect efforts made to simplify the procedures to facilitate the pursuit of justice. Examples include the reduction of modes of commencement of action from four to two (i.e., by way of writ or originating summons and with all interlocutory applications in the High Courts and subordinate

3 [2002] 1 Malayan Law Journal 385.

4 per Mohtar Abdullah, Federal Court Justice.

5 *Tetuan Teh Kim Teh, Salina & Co (Satu Firma) v. Tan Kau Tiah @ Tan Ching Hai & Anor* [2013] 4 Malayan Law Journal 313.

courts standardised to one single mode of application). In general, the language and forms used have been simplified.

ii Section 114A of the Evidence Act

Section 114A of the Evidence Act, which only came into force on 31 July 2012, effectively creates a presumption that any registered user of network services is presumed to be the publisher of a publication sent from a computer that is linked to that network service, unless the contrary is proved. The presumption of publication within this Section is far-reaching and all-encompassing. Although the presumption is rebuttable, it covers a host of potential defendants. The Malaysian Bar had in a press release dated 13 August 2012 called for the repeal of Section 114A.

III COURT PROCEDURE

i Overview of court procedure

The subordinate courts in Malaysia comprise the magistrates' courts and the sessions courts, and the superior courts are the High Court in Malaya, the Court of Appeal and the Federal Court (apex court). However, a special court exists to adjudicate disputes involving rulers in Malaysia in any proceeding involving them in their capacity as Royal Highnesses.

In civil matters, a court's original jurisdiction is governed by monetary limits. As of 1 March 2013, the monetary jurisdiction of the magistrates' courts was increased from 25,000 to 100,000 ringgit and that of the sessions courts from 250,000 to 1 million ringgit. The sessions courts are now empowered to grant equitable relief in the form of injunctions, declaratory orders and rescission subjects to the limit of their monetary jurisdiction, except for motor vehicle accidents and landlord and tenant disputes including distress proceedings where attachment of moveable property for the recovery of unpaid rent can be initiated on an *ex parte* basis, where it has unlimited jurisdiction. The High Courts have unlimited jurisdiction to hear all matters irrespective of the amount or value of subject matter.

Appeals in Malaysia are provided for by statute and not as of right. In this regard, except for specific non-appealable matters, the Court of Appeal has jurisdiction to hear an appeal from any judgment or order of the High Court as long as the value of the subject matter is more than 250,000 ringgit. Leave must be obtained from the Court of Appeal where the value of the claim is less than 250,000 ringgit; the judgment or order is made by consent of the parties; the judgment or order relates to costs only; and where any written law currently in force established that the judgment or order of the High Court is expressly declared to be final. An appeal to the Court of Appeal is by way of a rehearing and the Court of Appeal has all the powers and duties of the High Court.

The Federal Court generally requires an application for leave to be made within one month from the decision of the Court of Appeal. Leave to appeal against any judgment or order of the Court of Appeal in respect of any civil cause decided by the High Court in the exercise of its original jurisdiction will be granted if the Federal Court is satisfied that it involves a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal

Court would be to public advantage. If a statute provides for a right of appeal from the High Court to the Court of Appeal and thereafter to the Federal Court, it has been held that such a provision provides for an automatic right of appeal to the Federal Court.[6]

ii Procedures and time frames

Statistics and implementation of timelines for disposal of matters[7]

The Right Honourable Chief Justice of Malaysia Tun Arifin bin Zakaria's in his Lordship's speech given during the opening of the Legal Year 2013, presented impressive statistics on the performances of the courts in Malaysia.

High Courts and subordinate courts

In 2012, the High Courts disposed of more than 120,000 civil cases and 6,000 criminal cases; the sessions courts disposed of more than 130,000 civil cases and 27,000 criminal cases; and the magistrates' courts disposed of 250,000 civil cases and more than 134,000 criminal cases (not inclusive of traffic and departmental summons).

The timeline imposed in 2011 for judicial officers to dispose of matters is nine months in both the High Courts and sessions courts, and six months in the magistrates' courts. In 2012, 90.1 per cent of the High Courts' cases were disposed of within nine months, 85.8 per cent of the cases were disposed of within the timeline in the sessions courts while 81.6 per cent of the cases were disposed of in the Magistrates' Courts.

His Lordship, the Right Honourable Chief Justice, said that a remarkable performance was achieved with 95.3 per cent of the cases registered from January 2011 to March 2012 being disposed off in the new commercial courts (NCCs) and 90.1 per cent of the cases registered in the new civil courts (NCvCs) from January 2011 to March 2012 being disposed within the timeline of nine months.

Although there is still a backlog of cases pending disposal in the High Court in Malaya, the efforts by the judiciary to implement new courts and systems has made a marked difference.

Court of Appeal

In 2012, the percentage of disposal of cases compared with the registration of cases in the Court of Appeal was 154 per cent. This rapid disposal is attributed to the implementation of initiatives with effect from January 2011, focused on disposing three categories of appeals: interlocutory appeals; criminal appeals involving capital punishment; and appeals involving government servants. In respect of interlocutory appeals, the targeted timeline for hearing the interlocutory appeals is six months from the date of registration.

The establishment of NCCs, NCvCs and other specialised courts in the High Court in Malaya led to a domino effect with the Court of Appeal also setting up specialised panels to hear these appeals. The timeline for disposal of these appeals is six

6 *Syed Hussain Bin Syed Junid and Nine Others v. Pentadbir Tanah Negeri Perlis* and another appeal [2013] 6 Malayan Law Journal 626.

7 Speech by Tun Arifin bin Zakaria, Chief Justice of Malaysia, at the Opening of the Legal Year 2013 (Palace of Justice, Putrajaya, 12 Jan 2013).

months. This measure resulted in 408 NCC appeals registered in 2011 being disposed of and nine cases pending disposal, and 365 NCvC appeals registered in 2011 disposed of and four pending disposal. The timeline for leave applications in the Court of Appeal is four months and as at 31 December 2012, all leave applications were disposed of within the timeline.

Federal Court

Based on the performance review of 2012, the Federal Court is said to have recorded an increase in the registration of cases compared to the previous year and this is largely attributed to the higher disposal of cases by the Court of Appeal. However, the Federal Court succeeded in disposing of a total of 759 cases out of 1,375 pending in 2012.

During the commencement of the legal year of 2012, the specific time frame for disposal of civil cases in the Federal Court is six months from the date of registration. On a related note, reforms were made with effect from January 2012 for the quorum sitting in the Federal Court to increase from three to five judges. Also, press summaries of the Federal Court's judgment are issued for transparency and for the public to have a better comprehension of the decisions of the Federal Court. The full authoritative judgments are uploaded on the judicial website of Malaysia after delivery of the judgment.

However, despite these impressive statistics and the undoubted benefits of the fast resolution of cases, a significant number of counsel feel that the speed within which cases have been disposed of comes at the expense of the time allowed to them for oral presentation, despite the time allotted for the preparation having been considerably shortened.

In this regard, those law firms and counsel without the resources to cope with such fast-paced litigation will have to readjust their practices by taking on fewer cases or moving on to other areas of practice.

It would not be surprising if the desire for the speedy and efficient resolution of cases results in cases being disposed of by having them struck off for want of compliance with procedural technicalities. This is linked to how the cases are being managed.

Case management system and e-court system

Order 34 of the Rules of Court 2012 provides for pretrial case management. This grants the court power to give directions; ensuring all interlocutory applications are exhausted to achieve a quick and cost-efficient disposal of the claim. It is important that practitioners try their utmost to adhere to directions given as the rule also provides the court with the power to enter a judgment in default or to strike off a claim for failure to comply with its directions.

With the view to ensuring a timely disposal of a suit, an *ex parte* application with a certificate of urgency filed has to be heard within the next day unless the judge is of the view that it is not an urgent application and may even order the cause papers to be served upon any other party. In any event, the matter needs to be heard within two weeks of the filing of the certificate of urgency.[8]

8 Circular by the Chief Judge of Malaya No. 4 / 2012.

Further efforts to promote efficiency were introduced by implementing the e-court system in March 2011. This system includes:

a a video conferencing system;

b a case management system (CMS) that can be accessed by court staff, officers and judges. A part of the CMS is the queue management system (QMS), which arranges the attendance of the lawyers with priority being given to those who have recorded their presence on a first come first served basis;

c e-filing, which is governed by Order 63A of the Rules of Court 2012. It plays an important role in eliminating incidents of missing files and documents and facilitates the easy retrieval of court documents online;

d a community and advocate portal system where SMS messages are sent out to notify lawyers and judges of any change in the trial schedule; and

e case recording and transcribing (CRT) is where a transcriber machine will video and record the proceedings. Such machines are now installed in all the 506 courtrooms throughout the country.

iii Class actions

Class action is commonly known as representative action in Malaysia. The procedural requirements for representative actions can be found within Order 15, Rule 12 of the Rules of Court 2012. The provisions here adopted the prerequisites laid down in the English decision of *Duke of Bedford v. Ellis*[9] wherein the plaintiff must satisfy all the three criteria for the initiation of a representative action, which are: common interest, common grievance and that the relief sought must be beneficial to all.[10] Consent is not needed for a plaintiff suing in a representative capacity. The law only requires that the representor has the same interest in the proceedings as the persons in the group that he or she represents.

Further, there are provisions that govern the joinder of a member of a class who is not represented by the representor by making an application pursuant to Order 15, Rule 6 of the Rules of Court 2012 to be added as a co-plaintiff.

Procedurally, initiating representative actions in Malaysia is flexible. The representor commencing the action must ensure there is proper endorsement made on the writ in accordance with Order 6, Rule 2(b) of the Rules of Court, 2012. However, Malaysian courts have not strictly enforced this technical requirement and in practice the inability to comply strictly with endorsing the writ is not an impediment to commencing a representative action.[11]

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9 [1901] Appeal Cases 1.

10 (On their behalf and for the 213 sub-purchasers of plots of land known as PN 35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) *Vellasamy a/l Pennusamy & Ors v. Gurbachan Singh a/l Bagawan Singh & Ors* [2010] 5 Malayan Law Journal 437; *Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors* [1988] 2 Malayan Law Journal 624.

11 *EH Riyid v. Eh Tek* [1976] 1 Malayan Law Journal 262; *Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors* [1990] 1 Malayan Law Journal; *Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2006] 1 Current Law Journal 805.

In situations where a class of parties alleges infringement of rights by a public authority, it must do so by way of judicial review as it is against public policy and an abuse of the courts' process to allow it to proceed by way of an ordinary action. This principle laid down by the House of Lords in the *locus classicus* authority of *O'Reilly v. Mackman*[12] is followed in Malaysia.

However, there is a notable exception that is in the enforcement of native customary rights – the right, handed down from one generation to the next, to forage, hunt, fish and cultivate the land for their livelihood. The recent decisions from the Court of Appeal[13] have been consistent in applying the principle laid down by the Federal Court,[14] which is where there is a mixture of public and private law and the private law element in native customary rights-related claims is so great that it affects the livelihood of natives, the private law element is held to be dominant over the public law element. In the latter circumstance, the court will hold that commencement of an action by way of ordinary action is appropriate so that there is no need to first secure leave to initiate judicial review proceedings within the stringent three-month time frame.

The main reason litigants shy away from representative action is the cost. People who consent to be named as plaintiffs in a representative action bear the risk of costs being awarded against them. Although there are no official statistics on the amount of representative actions, a recent example from 25 October 2013 witnessed the Court of Appeal striking out a civil suit brought by 711 water consumers (residents of the Shah Alam district) against the Selangor government and two others over not receiving free water under a state government scheme.

Class action and derivative action

A significant development in class action is the codification and enlargement of the scope of the common law derivative action commonly known as the Rule against *Foss v. Harbottle*. The statutory provisions are contained in sections 181A to 181E of the Companies Act 1965. Unlike the common law restriction, the statutory enactment allows for the court to grant leave for the initiation, intervention and defence of an action against a third-party wrongdoer who is not in control of the company.

This statutory derivative action was introduced in Malaysia following a suggestion by the Malaysian High Level Finance Committee on Corporate Governance and the

12 [1982] 2 All England Reports 1124.

13 *Director of Lands and Surveys Sarawak v. Tr Subing Anak Jamit Alias Langan* (Suing for and on behalf of himself and 25 other families of the longhouse (bilek) of Rh Subing Ulu Krian Sarawak) [2013] 6 Malayan Law Journal 387; and *Litus Jau & Jau Ajang v. Boustead Pelita Tinjar Sdn. Bhd., Superintendant of Lands and Surveys Miri Division and State Government of Sarawak* Civil Appeal No.: Q-01-305-07/2012.

14 *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 Current Law Journal 865.

Malaysian Corporate Law Reform Committee in its final report to overcome the setbacks of the common law derivative action.[15]

To date, the highest authority for Malaysia's statutory derivative action is the Court of Appeal case of *Celcom (M) Bhd v. Mohd Suhaib Ishak*[16] (*Celcom*). Unfortunately, the court held that the test for leave under Section 181A–181E is that leave must not be given lightly and a low threshold of merely determining if it existed a *prima facie* case is the wrong basis for granting leave. The author, in a pending suit involving a highway concession worth about 1.7 billion ringgit in the Court of Appeal, had submitted that that the case of *Celcom* was decided per incuriam as it relied on two Australian authorities[17] wherein the statutory provisions under consideration are more stringent than those in Malaysia.

The author had argued that it was clearly set out in *Swansson v. RA Properties Pty Ltd & Anor,*[18] where Palmer J said:

> *At the outset, it is important to note that s.237(2)(c) requires the Court to be satisfied, not that the proposed derivative action may be, appears to be, or is likely to be, in the best interests of the company but, rather, that it is in its best interests. In this respect, s.237(2) differs significantly from its counterpart in the Canadian legislation, which requires the Court to be satisfied that the proposed derivative action 'appears to be' in the interests of the company.*
>
> *The requirement of s.237(2)(c) that the applicant satisfy the Court that the proposed action is in the best interests of the company is a far higher threshold for an applicant to cross.*

Section 181B(4)(b) of the Malaysian Companies Act uses the words 'it appears *prima facie* to be in the best interest of the company'. Thus, the test should be that only a low threshold should suffice and the authorities in Canada, Singapore and Hong Kong applying the low threshold test and whose statutory provisions are similar should be more persuasive and followed.[19]

A decision on this point is expected in the first quarter of 2014.

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15 Dr Yeow-Choy Choong and Sujata Balan (Dec 2008) 'Class Actions in Malaysia: An Update on the Country Report'.

16 [2011] 3 Malayan Law Journal 636.

17 *Swansson v. RA Properties Pty Ltd & Anor* [2002] New South Wales Supreme Court 583 and *Charlton v. Baber* [2003] New South Wales Supreme Court 745.

18 [2002] New South Wales Supreme Court 583.

19 550934 *British Columbia Ltd & L.L.T. Holdings Inc. v. A.R. Thomson Group* [2012] British Columbia Supreme Court 1332; *Ang Thiam Swee v. Low Hian Chor* [2013] Singapore Court of Appeal 11; *Bellman & Others v. Western Approaches Ltd* (1981) 130 Dominion Law Report (3d) 193; *Primex Investments Ltd v. Northwest Sports Enterprises Ltd* [1995] Canadian Legal Information Institute 717 (BS SC) at paras. 36-41; and Re F & S Express Ltd [2005] 4 Hong Kong Law Reports & Digest 743.

iv Representation in proceedings

Order 5, Rule 6 of the Rules of Court 2012 permits any person to begin and carry on proceedings in the High Court in person (whether or not he or she sues as a trustee or personal representative or in any other representative capacity) to begin and carry on proceedings in the High Court in person.

v Service out of the jurisdiction

Order 11 of the Rules of Court, 2012 allows for service of a claim made through a writ or another originating process to be effected out of the jurisdiction subject to leave being granted. This application for leave must be supported by an affidavit setting out that the applicant has a good cause of action and showing in what place or country the defendant is or probably may be found. Upon leave being obtained by the applicant, service of the notice of writ or originating summons will depend on whether there is a civil procedure convention in the other country. Countries with such a convention can be assisted by the judicial authorities, the government and the Malaysian consular authority in the country. An easier route would be service by the applicant himself or his or her agent. In practice, an advocate will instruct a solicitor of the country concerned to effect service and secure an affidavit of service from the solicitor instructed.

vi Enforcement of foreign judgments

The method of enforcement is by way of registration of foreign judgments, governed by Order 67 of the Rules of Court 2012, which empowers judges in chambers and registrars with the jurisdiction to decide upon the Reciprocal Enforcement of Judgment Act 1958 (REJA).

Under the REJA, the enforcement of a foreign judgment in Malaysia is premised upon the principle of reciprocity. The foreign judgment must be capable of enforcement by execution in that foreign country and must be one that remains unsatisfied. There are four conditions that must be fulfilled:

a the country must have an agreement for reciprocal enforcement of judgment with Malaysia;

b there must be a final judgment in a superior court in that country and for a definite sum of money;

c enforcement must be done within six years from the time of judgment; and

d judgment must not be on the matters expressly excluded from the REJA 1958.

The judge may order security for costs. Parties have the option to apply to set aside the registration of foreign judgments. If the four conditions above cannot be satisfied, the applicant can nevertheless sue on the judgment and seek to establish that the respondent is estopped from challenging it.

vii Assistance to foreign courts

Order 65 of the Rules of Court 2012 regulates the service of foreign legal processes within Malaysia. Where there is a civil procedure convention in the foreign country providing for service in Malaysia of process of the tribunals in that country, assistance

in effecting service can be sought by way of a letter of request from a consul or another authority of that country.

Further, Section 16 of the Courts of Judicature Act 1964 enables the taking of evidence for use in civil and criminal proceedings with Order 66 of the Rules of Court 2012 setting out the procedure applicable in the examination of witnesses and for attendance and production of documents in relation to a matter pending before a court or tribunal in a place outside the jurisdiction.

viii Access to court files

In relation to extracting a copy of any case management track system or notes of proceedings (whether in open court or in chambers), judicial officers cannot restrict the public from obtaining any of these documents recorded by the judiciary as they qualify as public documents[20] as long as payment for copies to be made is provided.

In a civil action, Order 60, Rule 4 of the Rules of Court 2012 allows for the right to inspect documents filed with the High Court Registry subject to payment of a prescribed fee. Parties to the proceedings are at liberty to obtain any document in relation to ongoing proceedings but a member of the public is restricted to a copy of the originating process and any judgment or order made by the High Court. Any other document can only be obtained with the leave of the Registrar. There is an administrative rule that provides that only 30 minutes is allowed for a person to conduct a file search per payment.

In criminal actions, the advocate and solicitor must write to the judge handling the action and request the documents. Only upon express consent obtained from the judge can a file search be made.

ix Litigation funding

Although litigation funding is encouraged by organisations such as the Securities Commission of Malaysia for investors to be more involved in protecting their rights, litigation funding is not at all developed in Malaysia and hence there is great potential for it.

In Malaysia, Section 112 of the Legal Profession Act 1976 (LPA) prohibits a pure contingency fee arrangement and can subject the advocate and solicitor involved to disciplinary proceedings. Although the Bar Council of Malaysia is in general agreement with a proposal made by the author while serving the *ad hoc* committee to review the LPA to adopt the conditional fee arrangements modelled on the South African Contingency Fees Act 1997, provisions for these have not yet been introduced into the LPA.

In January 2011, the Malaysian Bar approved and adopted the proposed Rules on Contingency Fees, which are, however, confined to personal injury cases. This has met with protests by various members of the Bar who are of the opinion that they should be allowed across the board except for the practice areas of criminal and family law. Whether these rules can overcome the statutory provisions in Section 112 of the LPA

20 See Sections 35 and 74 of the Evidence Act for the relevance of entries in public records made in the performance of duty.

is still a moot point and the ideal solution would be to remove the restriction through a suitable legislative amendment. Once done, it will facilitate access to the pursuit of justice by parties who are subject to monetary constraints.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

An advocate and solicitor is not allowed to accept a brief if a potential conflict may arise. Rules in the Legal Profession (Practice and Etiquette) Rules 1978 together with rulings made by the bodies governing the legal profession provide for it. Further, an express provision was stipulated by Parliament that an advocate and solicitor acting for a developer is not to act for the purchaser in that developer's housing development. Besides facing legal action for acting in a conflict of interest, an advocate and solicitor in Malaysia can also be subject to disciplinary proceedings.

Chinese walls (i.e., for advocates and solicitors to set up barricades within the firm to restrict access to information) are permissible in Malaysia. Although research shows that there are no reported Malaysian judgments wherein firms have successfully erected Chinese walls, the principle of their use as established in the landmark case of *Prince Jefri Bolkiah v. KPMG*[21] has been referred to and applied by the Malaysian courts.[22]

ii Money laundering, proceeds of crime and funds related to terrorism

Section 14 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLA) imposes on a reporting institution the obligation to:

> *promptly report to the competent authority any transaction: exceeding such amount as the competent authority may specify; and where the identity of the persons involved, the transaction itself or any other circumstances concerning that transaction which gives any officer or employee of the reporting institution reason to suspect that the transaction involves proceeds of an unlawful activity.*

Pursuant to Articles 15, 16 and 17, Part 1, First Schedule of the AMLA, advocates and solicitors are included as reporting institutions. Hence, lawyers are entrusted with the same obligations as that of financial institutions to report to the competent authority any transaction that falls within Section 14 of the AMLA.

Further, Section 47(1) of the AMLA empowers a High Court judge, on an application being made to the judge for an investigation into a money laundering offence or a terrorism financing offence, to order an advocate and solicitor to disclose information available to him or her in respect of any transaction or dealing relating to any property that is liable to seizure under the AMLA.

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21 [1999] 2 Appeal Cases 222.

22 *Kayla Beverly Hills (M) Sdn Bhd & anor v. Quantum Far East Ltd & Ors*; (Uma Devi d/o R Balakrishnan, Third Party) [2003] 6 Malayan Law Journal 703.

iii Data protection

The Personal Data Protection Act (PDPA), although passed by Parliament in April 2010, only came into force on 15 November 2013. It is largely based upon seven data protection 'principles' that cover subjects including notice, retention and access. Under the PDPA, explicit consent for personal data processing is required, rather than implied or assumed. The law also affords an option for data owners to withdraw consent to data processing at any time. Data owners also possess the right to prevent the processing of their personal data if that processing is 'causing or is likely to cause substantial damage or substantial distress'.[23]

Consumers can at any time, bring complaints on data abuses to PDP Commissioners. The penalty for breaching PDPA is severe: a maximum fine of 500,000 ringgit or imprisonment of up to three years, or both.

Businesses and practitioners advising clients must take cognisance that data users are only given three months as from 15 November 2013 to ensure compliance. Thus, businesses using personal user data should take immediate active steps to register themselves with the PDP Commissioner vide the Personal Data Protection Department of Malaysia. Four new pieces of subsidiary legislation including the class of data users and registration of data users were also enacted to assist data users on the compliance of the PDPA.

A notable exception to the applicability of the PDPA is that it is not applicable to the federal and state governments and that it does not apply to any personal data processed outside Malaysia unless it is intended to be further processed in Malaysia.

The protection afforded also extends to the fact that there will be no transfer of data outside Malaysia unless a data user obtains consent from the Commissioner, or the country or jurisdiction that the data is to be transferred to is within a list published in the Gazette as specified by the minister charged with the responsibility for the protection of personal data upon the recommendation of the Commissioner. The aforementioned list has yet to be released.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Privilege is in conflict with the idea that all relevant information should be before a judicial officer to achieve a fair and just result. Relevant documents are statutorily privileged from being produced in *inter alia* the following situations:

a judges are not to be compelled to answer any questions as to their professional conduct or anything that came to their knowledge in court as a judge;

b a married person is not to be compelled to disclose marital communication unless the person who made it or his or her representative consents to the disclosure, except in suits between married persons;

c no person shall be permitted to produce any unpublished official records relating to affairs of the state, or to give any evidence derived therefrom, except with the

23 Section 42 PDPA 2010.

permission of the officer concerned, who in turn is subject to the control of a Minister or Chief Minister;

d a public officer cannot be compelled to disclose communications made to him or her in official confidence when the disclosure is contrary to the public interest; and

e legal professional privilege.

The law on legal professional privilege is contained in Sections 126–129 of the Evidence Act. Section 126 of the Evidence Act specifically bars an advocate and solicitor, in the course and for the purpose of his or her employment by or on behalf of his or her client, from disclosing any communication made to him or her by his or her client, whereas Section 127 of the Evidence Act extends it to cover the clerks or servants of the advocates.

There are two distinct limbs of legal professional privilege in Malaysia: legal advice privilege and litigation privilege. The distinction between these two limbs of privilege, is that[24] legal advice privilege governs communications between a lawyer and a client for the purpose of giving or receiving legal advice, in both the litigation and the non-litigation context, whereas litigation privilege governs communications between a client or his lawyer and third parties for the purposes of litigation.

Since the privilege is that of the client, only the client may waive it expressly under this Section, or impliedly under Section 128 of the Evidence Act 1950. Express consent was considered in the High Court[25] where the Court held that express consent must necessarily mean consent in writing, given to the solicitors by each holder of the privilege before such privileged communications can be released.[26] The fact that the holder of the privilege did not object to it, or remained silent, did not constitute a waiver of the privilege.[27] There must be an intentional and deliberate act done to waive legal privilege.[28]

Section 129 of the Evidence Act, which provides for litigation privilege, is a question of fact. The question is: 'At the time the client sought legal advice or consulted his lawyer, did he have the prospect of litigation in mind?' However, when there is more than one purpose for seeking legal advice with litigation in mind, the dominant purpose for the advice sought and obtained must be in anticipation or contemplation of litigation.[29]

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24 *Skandinaviska Enskilda Banken AB (Publ) Singapore Branch v. Asia Pacific Breweries (Singapore) Pre Ltd* [2007] 2 Singapore Law Reports (R) 367; and *Three Rivers District Council and others v. Governor and Company of the Bank of England* (No 6) [2005] 1 Appeal Cases 610 at paragraphs 50-51 (per Lord Roger) and paragraph 65 (per Lord Carswell).

25 *Dato Au Ba Chi & Anor v. Koh Keng Kheng & Anor* [1989] 3 Malayan Law Journal 445.

26 Ibid. at p. 447.

27 Ibid. at p. 445.

28 *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 Malayan Law Journal 14 at pg. 22.

29 *Waugh v. British Railways Board* [1980] Appeal Cases 521, HL adopted the Australian High Court in *Esso Australia Resources v. Federal Commisioner Taxation* (1999) 201 Commonwealth Law Reports 49.

Application of legal professional privilege to in-house lawyers and foreign lawyers

If the dominant purpose for the advice sought and obtained from an in-house lawyer or foreign lawyer is in anticipation or contemplation of litigation, it is likely that legal professional privilege will be available. However, it would be prudent to work together with a practising advocate and solicitor to support and maintain this line of argument. Except for this, it is unlikely that the legal professional privilege shield would be available for these lawyers.

The Legal Profession (Amendment) Act 2012 that amends the existing LPA was passed on 13 June 2012 but has yet to come into force. The amendment is to allow foreign law firms and foreign lawyers to practise in Peninsular Malaysia and requires them to comply with the same rules and regulations applicable to Malaysian lawyers relating to professional conduct and ethics.[30] They are also subject to the disciplinary control of the Disciplinary Board. Thus, the law on legal professional privilege will be equally applicable to them.

Breach of legal professional privilege

A breach of legal professional privilege can bring severe consequences. While there are no reported cases in Malaysia where any aggrieved party or the Bar Council on its own volition commenced disciplinary proceedings against a practising advocate and solicitor for breach of professional privilege, it is clear that such a breach would amount to misconduct that warrants action under Section 94 of LPA.

'Misconduct' is defined in the LPA is defined as conduct or the omission to act amounting to grave impropriety. Any advocate and solicitor who is guilty of any misconduct can be liable to any of the following consequences:

a suspension (i.e., suspending an advocate and solicitor for a definite period, not more than five years);

b being struck off (i.e., no longer having the status of advocate and solicitor);

c a fine (a specific sum to be paid to the Discipline Fund by the advocate and solicitor concerned);

d being reprimanded;

e being censured; or

f an order for restitution (i.e., an order requiring an advocate and solicitor to refund any monies due and owing to the complainant, and stipulating the time period within which such refund should be made).

In practical terms, cases involving a breach of professional privilege will first and foremost be dealt with by the Advocates and Solicitors Disciplinary Board after a written complaint and only on appeal to the courts in Malaysia. It is to be noted that in a case where a judge or magistrate finds that an advocate handling any matter before them has acted in a highly unethical manner (this can include a breach of legal professional privilege), the proper procedure to be taken is for them to refer the matter to the Disciplinary Board.[31] In one

30 Lee Shih (Praxis Chronicle of the Malaysian Bar, 2013), 'Enter the Foreign Law Firms'.

31 *Insas Bhd & Anor v. Ayer Molek Rubber Co Bhd & ors* [1995] 2 Malayan Law Journal 833I.

case, solicitors have been sued (although unsuccessfully) for damages resulting from what is alleged to have been a breach of contract and breach of professional privilege.[32]

An advocate and solicitor may have to bear the consequences for a breach of the legal professional privilege by his or her clerks or servants even though the breach was not committed by the advocate and solicitor himself. It follows that the advocate and solicitor must exercise direct and immediate control as principal and must provide proper supervision. It is possible that if an interpreter or a clerk is to have the same obligation as an advocate and solicitor with regard to professional privilege, interpreters or clerks may also be jointly or severally liable in a suit for the tort or breach of an implied term of confidentiality under a contract.

ii Production of documents

Discovery will be ordered as long as the evidence sought is relevant and available. Unlike some other jurisdictions, illegally obtained evidence is generally admissible as long as it is relevant.

In this connection, Order 24 of the Rules of Court 2012 abolished the previous automatic obligation of parties in a writ action to make discovery of the documents that 'are or have been in their possession, custody or power in relation to matters in question in the action'. Order 24, Rule 3 of the Rules of Court 2012 provides that discovery will only be made if an order of court is obtained by a party.

An action against a third party for discovery is possible in Malaysia. The former Supreme Court[33] adopted and applied the principle in the landmark English case of *Norwich Pharmcal Co v. Customs and Excise Commissioners* [1974] Appeal Cases 133, which allows a separate action to compel discovery of documents.

In relation to documents stored electronically, the term 'document' as defined in Section 2 of the Evidence Act includes any matter expressed or in any way represented upon any material, including any matter embodied in a disc, tape, film, soundtrack or other device. Thus, electronically stored documents are caught under the discovery process too.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The two main alternatives in Malaysia are arbitration and mediation.

The third option is adjudication, introduced by the Construction Industry Payment and Adjudication Act 2012, which has yet to be brought into force. The process of compulsory adjudication legislated here is to cater for those involved in the construction industry based upon the fundamental principle that timely payments are the lifeline of the industry.

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32 *Ernest Cheong Yong Yin v. Kamariyah Hamdan & Ors* [2010] Malayan Law Journal Unreported 1155.

33 *First Malaysia Finance Bhd v. Dato Mohd Fathi bin Haji Ahmad* [1993] 2 Malayan Law Journal 497.

ii Arbitration

Not all disputes (albeit agreed upon by the parties before the dispute arises) must proceed to arbitration.The author successfully argued in the Court of Appeal based on persuasive case law from several Commonwealth countries, that although there is an express contractual clause in the memorandum and articles of association of the company that states the parties must seek recourse in arbitration proceedings in the event of a dispute, the proper venue to seek a minority oppression suit under Section 181 of the Companies Act 1965 must be the High Court because the private arbitrator has no power to order a winding up of the company or to order relief to third-party creditors and debtors in the event of the company being wound up. It is hoped that written grounds of judgment for this point will be made available in early 2014.

Arbitration in Malaysia as an alternative mode of dispute resolution is well developed. Since 1985, Malaysia is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Thus, arbitral awards under the Kuala Lumpur Regional Centre for Arbitration (KLRCA) Rules will be enforceable in the 146 countries that are signatories to the New York Convention.

The KLRCA under the tireless and able stewardship of Professor Datuk Sundra Rajoo is often the first port of call for those seeking alternatives to litigation. It also recently added Asian Domain Name Dispute Resolution and Sensitive Names Dispute Resolution to the services provided.[34]

The Arbitration Act 2005 is primarily based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law. In this connection, the KLRCA was the first international arbitration centre to have adopted the 2010 version of the UNCITRAL rules with modifications. KLRCA enjoys statutory immunity in carrying out its functions.

As recently as 24 October 2013, the KLRCA Arbitration Rules, KLRCA i-Arbitration Rules (also known as the Islamic Rules, which allow arbitration arising from any contract containing shariah issues) and the KLRCA Fast Track Rules were revised to enhance the incorporation of international trends and best practices. These revisions added new provisions for the appointment of emergency arbitrators, power for arbitrators to grant pre-award interest, strengthened confidentiality requirements and a revised schedule of fees and administrative costs.

iii Mediation

Mediation is a purely voluntary process. The Mediation Act 2012, which came into force on 1 August 2012 makes it clear that mediation under the Act will not prevent the commencement of any civil action in court or arbitration nor will it act as a stay of, or extension of, any proceedings if the proceedings have been commenced.

However, Practice Direction No. 5 of 2010 issued by the Chief Registrar of the Federal Court of Malaysia allows the presiding judge the prerogative to direct that parties facilitate settlement of the matter by way of mediation (court-annexed mediation). There

34 Kuala Lumpur Regional Centre for Arbitration, www.klrca.org.my.

are two categories of mediation available upon commencing a suit, judge-led mediation and mediation by a non-judge mediator, which are to be agreed upon by parties. The presiding judge of the action would not be the judge mediator unless all the parties consent to it. In the event of a successful mediation, parties will sign a draft copy of the order setting out the terms of the settlement. If unsuccessful, the case will revert back to the presiding judge and any documents referred to shall not be admissible (see *Alex Nandasari De Silva v. Sarath Wickrama Surendre* [2013] 5 AMR 363 HC). If parties opt for a non-judge mediator, the parties are free to choose and agree upon the mediator from a panel of certified mediators furnished by the Malaysian Mediation Centre of the Bar Council (MMC), the KLRCA or any qualified mediator.

Since 2011, a number of court-annexed mediation centres were set up. The statistics for successful mediation include 28.3 per cent of the 571 cases in Kuala Lumpur registered in 2012.[35] The Right Honourable Chief Justice, in full support of mediation, said that judges and judicial officers will contine to be given practical training in mediation and the judiciary is seriously considering the establishment of a mediation division in the Chief Registrar's Office. His Lordship had also proposed that all accident cases be subject to compulsory mediation.[36]

The Financial Mediation Bureau, led by the Central Bank of Malaysia, plays an important role in resolving out-of-court disputes. The mediation panels are made up of experts in their own field.

On a related note, professional bodies such as the Malaysian Medical Association (MMA) and the Medico-Legal Society of Malaysia (MLSM) are looking into setting up a mediation bureau due to the increasing number of medical disputes in the country.

iv Other forms of alternative dispute resolution

In matters pertaining to compensation for compulsory land acquisition, the High Court judge sits with two assessors, one a government-employed assessor and the other from the private sector.

We were recently reminded by the Court of Appeal by way of a decision handed down on 3 July 2013 that a person's right to land is a fundamental right guaranteed by the Federal Constitution.[37] By reason thereto, the Court of Appeal held that any compulsory acquisition of land undertaken in violation of the provisions of the Land Acquisition Act 1960 (LAA) constitutes a manifest breach of Article 13(1) of the Federal Constitution.

Malaysia is a fast-developing nation. In its march to become a developed nation by 2020, land is often acquired in the name of development. Under the LAA, land can be compulsorily acquired for public use provided that adequate compensation is paid.

35 Speech by Tun Arifin bin Zakaria, Chief Justice of Malaysia, at the Opening of the Legal Year 2013 (Palace of Justice, Putrajaya, 12 Jan 2013).

36 Speech by Tun Arifin bin Zakaria, Chief Justice of Malaysia, at the Opening of the Legal Year 2013 (Palace of Justice, Putrajaya, 12 Jan 2013).

37 *Ng Chin Siu & Sons Rubber Estate Sdn. Bhd.v Pentadbir Tanah Hilir Perak and Anor*, Civil Appeal No. A-01-794-2010.

Land reference cases to the High Court are mainly to do with adequacy of compensation. However, Section 49 of the LAA effectively takes away the right of appeal from a person dissatisfied with a decision of the court of first instance as invariably any appeal is in effect a dispute as to the quantum of compensation awarded. Section 49 of the LAA provides that:

> *(1) Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court:*
>
> *Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.*

This section, when read with Section 40D(2) of the LAA, effectively takes away the power of the judge to make his or her own independent decision in awarding compensation. This is because the judge is bound by the findings of two assessors who sit with him or her in all land reference matters, effective from 1 March 1998. In the case of *Jitender Singh a/l Pagar Singh & Ors v. Pentadbir Tanah Wilayah Persekutuan*,[38] the High Court stated:

> *By reason of subsection (2) of section 40D, my judicial discretion is limited: I am legally compelled to concur either with the decision of Encik Phuah or with the decision of Encik Basri. I am not at liberty to arrive at any other decision – even if I were to disagree with their opinions.*

This begs the question of whether the judge is just a mere rubber stamp in land reference matters. Further, the adequacy of compensation not being judicially determined seems to be in direct contravention of Article 13 of the Federal Constitution wherein it is explicitly provided that 'no law shall provide for the compulsory acquisition or use of property without adequate compensation'.

The author was part of the legal team who recently obtained leave in the Federal Court on 7 October 2013 to challenge the constitutionality of *inter alia* the aforesaid impugned provisions. The substantive hearing is scheduled for March 2014. It will be interesting to see the forthcoming Federal Court's decision on the matter.

VII OUTLOOK & CONCLUSIONS

Turning to the courts to resolve disputes is a basic and fundamental right, not only to ensure one's rights are protected, but also to ensure the proper interpretation of law and the constitutionality of Parliament's enactments. Malaysia is a country to watch as its diverse ethnicity and culture mean it will continue to produce compelling and novel decisions.

38 [2008] Malayan Law Journal Unreported 15.

Appendix 1

ABOUT THE AUTHORS

TIANG JOO SU

Cheah Teh & Su, Advocates & Solicitors

Tiang Joo Su was admitted as a barrister to the Bar of England and Wales in 1983 and as an advocate and solicitor of the High Court in Malaya on the 24 August 1984. Senior lead partner of dispute resolution group and regularly appears as lead counsel in trials and appellate courts in high-value matters. Practice areas include land acquisition, contentious administration of estates, trust, intellectual property, corporate and shareholders' disputes. Besides pre-emptive strikes, he is particularly conversant in land reference and real estate matters. He is experienced in arbitration and cross-border disputes involving ICC Rules. He speaks regularly at law seminars and has conducted many training courses on matters involving dispute resolution.

Tiang Joo Su is a notary public, Commissioner for Oaths, Registered Trademarks Agent, former board member of the Advocates & Solicitors Disciplinary Board (2007–2011), former Deputy Chairman of the Law Reform and Special Areas Committee of the Bar Council Malaysia and current Vice President of the Malaysian Chapter of the Honourable Society of Gray's Inn.

YIN FAYE LIM

Cheah Teh & Su, Advocates & Solicitors

Yin Faye Lim was admitted as a barrister to the Bar of England and Wales in 2012. Thereafter, she returned to Malaysia and read in the chambers of Mr Tiang Joo Su. She was admitted and enrolled as an advocate and solicitor of the High Court in Malaya on the 22 November 2013. She is an active member of the Kuala Lumpur Bar Young Lawyers Committee (2013/2014).

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