



TAY & HELEN WONG

LAW PRACTICE • AMALAN GUAMAN

LAW UPDATE 2/2006

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ARBITRATION

ENFORCEMENT OF FOREIGN ARBITRAL AWARD

An arbitration was conducted in Singapore which resulted in an award made. The successful plaintiff sought to summarily enforce the award in Malaysia. The defendant resisted such enforcement on the ground that the Malaysian High Court lacked jurisdiction to permit enforcement since there was no Gazette Notification declaring that Singapore is a party to the New York Convention.

This issue was before the Court of Appeal in *Sri Lanka Cricket v World Sport Nimbus Pte Ltd*. In Malaysia, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("the Act") allows a "Convention Award" to be enforceable in Malaysia by action or in the same manner as the award of an arbitration is enforceable by virtue of section 27 of the Arbitration Act 1952ⁱ. "Convention Award" under the Act means an award, on a dispute between parties that is commercial in nature, made in pursuance of an arbitration agreement in the country which is a party to the New York Convention or in pursuance of an arbitration agreement to which the New York Convention applies. Singapore is supposedly a party to the New York Convention, hence it was the plaintiff's case that the award in question being made in Singapore was a Convention Award within the Act which allowed it to be summarily enforceable.

The defendant however argued that under section 2(2) of the Act, there must be Gazette Notification declaring that Singapore is a party to the New York Convention before the arbitration award obtained in Singapore can be summarily enforced pursuant to the Act. Since there

has been no such Gazette Notification, the award obtained in Singapore was not summarily enforceable under the Act.

The Court of Appeal upheld the defendant's argument. This landmark decision highlighted the lacunae (gap) in Malaysia legislations on the implementation or adoption of the New York Convention. It would appear that no Gazette Notification has been issued pursuant to section 2(2) of the Act to include any country as a Convention party.

The Court remarked that to give the Act efficacy, the government ought to issue a Gazette Notification (pursuant to section 2(2) of the Act) declaring one or more countries (in this case, Singapore) as a party or parties to the Convention. Until and unless the government does that, the successful party of an arbitration award made in a foreign country which is a party to the New York Convention will remain unable to summarily enforce the award in Malaysia.

Nevertheless, in the instant case, the plaintiff was not entirely without remedy. It would just have to go through the longer way of registering the award as a judgment in the Singapore High Court and then seek registration of that judgment in Malaysia pursuant to the Reciprocal Enforcement of Judgments Act 1958.

ⁱ [2006] 3 AMR 750, [2006] 3 MLJ 117.

ⁱⁱ S. 27 reads: "An award or an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and, where leave is so given, judgment may be entered in terms of the award".

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BANKING LAW

BANKERS: IT'S YOUR DUTY TO STRICTLY FOLLOW CUSTOMER'S MANDATE & NOT TO UNILATERALLY CHANGE AGREED TERMS

In the recent decision of *Abdul Rahim bin Abdul Hamid & 4 Ors v Perdana Merchant Bankers Bhd & 6 Ors*ⁱ, the Federal Court held that a borrower, despite having received a loan from a bank, is not liable to repay the bank such monies disbursed to them due to the bank's negligence in varying a term in the facility agreement without informing the customer of the variation and the bank's breach of agreement in not following the customer's mandate in executing an order to transfer money.

The facts of this case in brief revolved on a loan facility of RM20 million granted by the first to sixth respondent ("the Banks") to the fifth appellant ("the Borrower") to finance its project for purchasing a cold storage with tube ice factory and machinery to process pineapples from a company in Germany. After a series of negotiations, the Banks and the Borrower agreed on a working draft for the purpose of the said loan facility. One of the clauses under the working draft (to which much importance was attached by the Federal Court)ⁱⁱ provided that the RM20 million would be disbursed in two draw downs amounting to RM10 million each. However, the said clause was not incorporated into the facility agreement subsequently entered into by parties. Instead, the facility agreement provided that the RM20 million would be disbursed in only one single full draw down. Pursuant to the "varied" clause which the Banks heavily relied on, they disbursed the whole of the said loan facility in one draw down to the Borrower.

The Borrower contended that this draw down, in one full swoop, went against the spirit of the working draft and was a

breach in itself. The Banks on the other hand contended that the facility agreement resulted from a culmination of all negotiations between parties which seemingly took into account the working draft and despite there being a variation in it, the Borrower signed the same. By virtue of his execution, the Borrower ought to be bound by the terms in the facility agreement.

In arriving at its decision, the Federal Court extensively reassessed the entire evidence and facts of the case and stated that despite the settled principle that a trial court is in a more advantageous position to make findings of fact and assess the credibility of witnessⁱⁱⁱ, a distinction has to be made between a finding on a specific fact which relies on the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's finding of fact and form an independent opinion than in the case of the former.

The Federal Court ruled that the Borrower was not liable to pay to the Banks the said loan and any interest and charges thereon on among others, the following grounds:-

(1) There was an elementary obligation on the part of the Banks to inform the Borrower as their customer of the substantial change that they had inserted in the facility agreement, namely the variation of the clause on disbursement of RM20 million loan to one draw down instead of two draw downs as per the working draft. The Banks had in this case executed the facility agreement by shutting its eyes to the obvious fact that they had varied the facility agreement, without the consent of the Borrower. Taking into account the entire background, the Court found that it was not wrong for the Borrower to assume that the facility agreement was in compliance with the working draft and proceeded to sign the facility agreement without exercising care to scrutinize it. Thus, the failure of the Banks

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to inform the Borrower on the variations made or the departure from the agreed terms in the working draft constituted a fundamental breach of duty of care on the part of the Banks.

(2) If a bank executes an order knowing it to be dishonestly given, or shuts its eyes to an obvious fact of dishonesty, or acted recklessly in failing to disclose material facts, the bank will plainly be liable. Here, it is not open for the Banks to question the workability of the original mandate as contained in the working draft and in this manner, seek to justify the unilateral variation in the facility agreement. The Banks are obliged to strictly follow the customer's mandate save in extreme cases.

(3) There was also non-compliance with the drawing notice in that the loan was released without getting the three relevant certificates certifying the completion of the machinery as required under the drawing notice. Such non-compliance is a breach of the fundamental term of the financial arrangement.

BANKING LAW / COURT PROCEDURE

A COSTLY LESSON TO BANK

It must be one of the costlier lessons to one of the local banks when the court awarded compensation totalling almost RM3 million for its acts in wrongfully freezing the accounts of its customer for seven banking days, dishonouring 14 of its cheques presented and printing words "Frozen Accounts" and "Refer to Drawer" on such cheques after having been served with garnishee orders to show cause.

A garnishee order is usually obtained by a judgment creditor to attach the debts owed by a third party (which is called garnishee) to a judgment debtor so as to

In the end, the Court not only totally disallowed the Banks from claiming back the loan disbursed to the Borrower but also awarded damages to be assessed and be paid to the Borrower.

ⁱ [2006] 3 AMR 629

ⁱⁱ Indeed, the Federal Court seemed to have made a finding that the facility agreement was to merely formalise what was agreed upon by the parties in the working draft

ⁱⁱⁱ Hence, an appellate court generally would not interfere with a decision which is based on such findings of fact unless there is a clear justification for doing so.

satisfy the judgment debt. Legally, a bank upon receipt of a garnishee order to show cause is obliged to stop any dealing with the moniesⁱ in the account concerned according to the terms of the order. Such monies will be attached with a view to be paid to the judgment creditor if the garnishee order to show cause is subsequently made absolute by the court.

In *Top-A Plastic Sdn Bhd & Ors v Bumiputra Commerce Bank Berhad*ⁱⁱ, the bank was held to have made several mistakes. Firstly, the garnishee orders in the said case were 'limited'ⁱⁱⁱ in nature in that the sum sought to be attached was ascertainable and stated in the orders. The bank however froze all the balances in the customer's accounts. By right, the bank ought to have transferred from the customer's accounts to a suspense account a sum sufficient to satisfy the judgment debt and all other related costs and expenses as stipulated in the orders. The balance

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remaining in the customer's account would still be at his disposal.

Secondly, the bank froze the amount of RM98,888.06 banked in after the service of the garnishee orders. The said amount ought not to be subject to the garnishee orders as a garnishee order only affects debts in existence at the date of the service thereof and the moneys subsequently paid in could not be subject of the orders.

Thirdly, the bank did not inform the customer at all about the freezing of its accounts until eight days later. A prudent banker would have notified its customer immediately upon service of the garnishee order. The customer should have been informed that if he wished, he could open a new account for future transactions. Alternatively, the bank should have set aside the total amount required to satisfy the garnishee order in full into a suspense account and to allow the customer to continue operate the existing accounts. The bank in this case had done neither. The bank only notified the customer eight days later that it had attached a sum of RM40,000 (which was set aside to answer both garnishee orders) and that the customer was allowed to operate the balance sum in its accounts, by which time damage had been done.

CONTRACT

GAMBLING DEBTS ABSOLUTELY UNRECOVERABLE

In *Jupiters Limited (trading as Conrad International Treasury Casino) v Lim Kin Tong*ⁱ, the defendant had issued a couple of cheques to pay off his gaming debts incurred in a licensed casino in Queensland, Australia. When the cheques were dishonoured, the casino sued the

Fourthly, the bank had wrongly dishonoured 14 cheques presented for payment which were stamped with the words "Frozen Accounts" and "Refer to Drawer", both of which were held to be highly defamatory. These words carried the connotation that the customer has been wound up or liquidated.

The court awarded special damages for a sum of RM1.4 million as prayed and proven by the plaintiff; general damages for a sum of RM1 million and in the light of the bank's unprofessional conduct in clear disregard of a customer's interest and failure to apologize to the plaintiff, exemplary damages for a sum of RM500,000.

ⁱ The balance in the account concerned represents debt due from the bank to the customer.

ⁱⁱ [2006] 3 CLJ 460

ⁱⁱⁱ The other type of garnishee order is of 'unlimited' nature in which the garnishee bank is to attach all debts owing or accruing from the garnishee bank to the judgment debtor to answer the judgment debt and the garnishee bank may and should refuse to pay any cheque drawn by its customer, the judgment debtor.

defendant for payment of the outstanding gaming debt.

The High Court in Malaysia however prohibited the casino from bringing any action or suit to claim the debt in Malaysia. This is in view of our Civil Law Act, s 26(2) which "*prohibits ... the bringing of any suit for recovering any sum of money or valuable thing alleged to be won upon any wager.*" The laws of Queensland, Australia was held to be irrelevant to such claims in Malaysia.

In addition, the court found that gaming and gambling is injurious to the public welfare of our local society and should be avoided. In short, "...local Courts

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should not, as a matter of principle and public policy, act as gambling debt collectors for foreign casinos..."

The court also refused to accept the casino's argument that the claim was brought on the dishonoured cheques which gave rise to a presumption under the Bills of Exchange Act 1949 that cheques were given for value and in good faith. By virtue of such presumption, there is no necessity to examine the underlying transaction (relating to gaming activity that was disapproved). It was therefore submitted that the fact that the cheques were related to gaming activities was irrelevant. The court rejected such argument.

The case was dismissed but the court awarded no costs to the defendant since he "...had engaged in activity that his religion frowns upon and which it would be against public policy to assist him by way of awarding him costs."ⁱⁱ

ⁱ [2006] 4 AMR 20

ⁱⁱ A phrase borrowed from the earlier case of *The Ritz Hotel Casino Ltd v Dato' Seri Osu Hj Sukam* which was widely publicized in local newspapers.

Whilst acknowledging that there was no "pending litigation", the learned judge found that there was in fact "threatened litigation" even though at the time the warranty was given, Rotol had yet to make any formal demand.

CONTRACT / CORPORATE LAW

THREATENED LITIGATION

In *Van Der Horst Engineering Ptd Ltd v Rotol Singapore Ltd*, the defendant ("Rotol") had warranted to a prospective subscriber pursuant to a Subscription and Option Agreement ("SOA") that there was **"...no litigation against or by the Company or any of its subsidiaries is in progress, pending or threatened, which individually has or collectively have a material adverse effect on the financial position of the Company or the Group taken as a whole"** (emphasis added).

However, just a mere four days thereafter, Rotol's subsidiary had issued a statutory demand to one of its debtors claiming for some outstanding payment, the dispute of which had already arisen earlier and was clearly known to Rotol before the SOA was signed.

The Court held that as long as at the material time, there was some sign or indication, without there being any actual utterance, written or verbal, of any intention to sue, there would be in existence, a threat of litigation. In short, it would suffice if the facts and circumstances were such that it was reasonable to conclude that litigation might ensue

Separately, Rotol had received a letter of demand from one of its creditors some seven months prior to the signing of the SOA. Although there were attempts to settle the matter, the fact remained that at the time the SOA was signed, the dispute had yet to be resolved and the creditor in question was still threatening suit. Again, Rotol was found to be in breach of the above warranty.

In addition, by failing to disclose this claim in its financial statements under the heading of *"contingent liabilities not provided*

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for in the financial statements”, Rotol was held to have breached another warranty where it had represented that “the Accounts give a true and fair view of the financial position of the Company and the Group for the period ended on and as at the Accounts Date”.

The fact that the claim was not for a liquidated amount and could not be determined with reasonable certainty did not excuse Rotol from disclosure.

Whether or not our Malaysian Courts would be persuaded to adopt the

CONTRACT / CORPORATE LAW

PRACTISING DECEPTION ON AUTHORITIES NULLIFIES CONTRACT

It does not pay to practise deception on regulatory authorities. The court will look behind the transaction to ascertain its real nature, so that a transaction which on the face of it is lawful is in fact entered into for an unlawful purpose or to achieve an unlawful end will be struck down.

That was basically the message sent out by the Court of Appeal in its decision in *Hasmah binti Abdul Rahman v Kenny Chua Kien Lam*ⁱ. In that case, the respondent entered into an agreement to sell some shares of a company to the appellant who did not pay for those shares. It was not disputed that the respondent and the appellant executed several statutory declarations containing assertions which, as the court found, would have given the impression to the listing approving

EMPLOYMENT LAW

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above interpretation of “threatened litigation” remains to be seen but suffice it to say that such warranties should not be given lightly but only after due care and consideration.

ⁱ [2006] SGHC 53

authorities that the sale transaction was genuine and which must have been intended to mislead Securities Commission and Kuala Lumpur Stock Exchange (KLSE) to approve the floating of the company on the Second Board of KLSE. The court held on the facts that the purported sale of those shares was indeed a deception practised on the relevant approving authorities. The transaction was tainted with illegality and unenforceable. In line with the underlying maxim denoting the consequence of any illegal transaction of “the loss lies where it falls”, the respondent’s claim against the appellant for the return of the shares was struck out.

ⁱ [2006] 2 CLJ 1029; [2006] 4 AMR 336.

LIMIT OF BACKWAGES IN AWARD FOR WRONGFUL DISMISSAL

In *JT International Tobacco Sdn Bhd v Lau Thow Sin*ⁱ, the learned High Court judge, whilst reiterating that the quantum of backwages in an award in respect of the

remedies for wrongful dismissal from employment without just cause or excuse is very much at the discretion of the Industrial Court, held that the Practice Note No 1 of 1987 which was formulated to limit the award of backwages to a maximum of 24 months should not be disregarded unless it can be proved that the delay in disposing a case is mainly contributed by the company. In that case, the company was not solely nor mainly responsible for the delays which were due to several other factors. The award of backwages of 63 months was quashed and the matter was remitted to the Industrial Court for reassessment.

This decision is diametrically different from the stand taken by another

High Court judge in the case of *Telekom Malaysia Bhd v Ramli Akim* which was featured in our Issue 2/2005. It is submitted that the latest decision is a preferred one for it restores at least some certainty to the award and assessment of backwages.

ⁱ [2006] 4 MLJ 251

EMPLOYMENT LAW

BONA FIDE TRANSFER OF LECTURER TO LIBRARIAN POST---NO CONSTRUCTIVE DISMISSAL

In the Industrial Court case of *Kolej Damansara Utama v Lina Binwani*, the Claimant was employed by the college as a lecturer in its Secretarial School. Sometime in 1999, the college closed down its Secretarial School due to a reduction in the student intake. Instead of retrenching the Claimant, the college chose to re-deploy her to other divisions that the college thought was suitable in the circumstances at the material time. However, the college was unable to place the Claimant at other divisions as a lecturer because of the new guideline from the Ministry of Education which barred lecturers without any basic degree like the Claimant from teaching. Hence, the college offered to transfer the Claimant to the library as an assistant librarian.

The Claimant refused the offer claiming that the transfer would entail loss of benefits to her and alleged that the move was tantamount to constructive dismissal. The Claimant argued that she had no qualification or experience in relation to running a library. The Claimant did not report for duty or proceed with the new job.

The Court held that the college had found a proper solution to the closure of the Secretarial School by redeploying the Claimant instead of retrenching her. The Court was of the view that the Claimant should have taken the transfer positively instead of rejecting the offer off hand. The Court also held that the employer has the prerogative as how to manage or transfer its staff in order to maximise its profit provided the prerogative act is done *bona fide*. In the circumstances of the instant case, the College had acted *bona fide* in transferring the Claimant to the library.

ⁱ [2006] 2 ILR 835

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section 38(1), Electricity Supply Act 1990, which reads:

PUBLIC UTILITIES

RIGHTS & POWERS OF TNB IN POWER SUPPLY

In *Yee Ngeok Moy and Others v Tenaga Nasional Bhd*ⁱ, the tenant, under the tenancy agreements with the owners of the premises, had agreed to settle all bills and charges of electricity used by the tenant. When the tenant subsequently failed to pay some arrears of charges, Tenaga Nasional Berhad (“TNB”) had demanded payment from the owners instead. The owners however refused to pay up as they claimed that the electricity was never used by them at all. TNB then disconnected the electricity supply to the premises.

The Court found that TNB clearly had knowledge that it was the tenant, and not the owners, who was using the electricity, and held that it would be arbitrarily unfair and oppressive for TNB to make the owners pay for the electricity supply not used by them. The Court also held that there was no prohibition in law for TNB, as supplier of electricity, to bring a legal action against the tenant to recover the outstanding charges. TNB was thus ordered to re-connect the supply to the premises.

In the same breath, one should be aware of TNB’s seemingly wide powers to disconnect its supply as decided in *Karupasmy a/l Silliah dan lain-lain lwn Tenaga Nasional Bhd*ⁱⁱ. The Court relied on

“...jika mana-mana orang yang diambil kerja oleh pemegang lesen mendapat keterangan di mana-mana premis yang pada pendapatnya membuktikan bahawa sesuatu kesalahan telah dilakukan di bawah s37(1), 3793) atau 37(4), pemegang lesen ...boleh, dengan, memberi notis tidak kurang daripada dua puluh empat jam...menyebabkan bekalan tenaga dipotong daripada premis tersebut.”
(emphasis added)

and held that TNB may exercise its disconnection power even before the purported offence (eg. tampering of meter) is proven in Court. The Act does not require any proof of offence as a pre-condition for the supply to be disconnected by TNB. Indeed, the Court held that this was a power specifically given by the Parliament to protect TNB, as the supplier of electricity, from having to bear continuous and prolonged losses arising from prohibited activities.

ⁱ [2006] 3 MLJ 59

ⁱⁱ [2006] 3 MLJ 347

LIMITATION

ACCRUAL OF CAUSE ACTION WITH REGARD TO FRIENDLY LOAN

In a friendly loan transaction (i.e. loans given without express provision for repayment or repayable on demand. Usually loans made between family members and friends) , if the repayment period is not spelt out, when does the cause of action accrue ? Does it accrue on the date the loan was given? Does it accrue only when demand for repayment has been made ? Or does it accrue only after such a demand and after a reasonable time to repay has elapsed? This

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was the question before the Singapore High Court in *Hong Guet Eng v Wu Wai Hong (liquidator of Xiang Man Lou Food Court Pte Ltd)*ⁱ.

Malaysia	UK
<p>6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say -</p> <p>(a) actions founded on a contract or on tort</p>	<p>(5)An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.</p> <p>6 (1) Subject to subsection (3) below, section 5 of this Act shall not bar the right of action on a contract of loan to which this section applies.</p> <p>(2) This section applies to any contract of loan which—</p> <p>(a) does not provide for repayment of the debt on or before a fixed or determinable date; and</p> <p>(b) does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter;</p> <p>except where in connection with taking the loan the debtor enters into any collateral obligation to pay the amount of the debt or any part of it (as, for example, by delivering a promissory note as security for the debt) on terms which would exclude the application of this section to the contract of loan if they applied directly to repayment of the debt.</p> <p>(3) Where a demand in writing for repayment of the debt under a contract of loan to which this section applies is made by or on behalf of the creditor (or, where there are joint creditors, by or on behalf of any one of them) section 5 of this Act shall thereupon apply as if the cause of action to recover the debt had accrued on the date on which the demand was made.</p>
Singapore	
<p>6(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:</p> <p>(a) actions founded on contract or on tort</p>	

The High Court of Singapore held that the accrual of the cause of action for such friendly loans begin to run from the date of the loan itself.

The High Court rejected the counsel's submissions that the relevant law had been amended in England and following the said amendment, the plaintiff's claim would not be time barred. According to the UK law, time begins to run when a formal demand is made for the repayment of the friendly loan. The Singapore High Court, although agreeing that the Limitation Act should be reformed by Parliament, held that it was bound by the provisions of the Singapore Limitation Act. Any attempts by the court to follow the UK position would be amending the statutory law by way

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of *judicial fiat* which is arbitrary and unconstitutional. The court was bound to observe and apply the law as it presently existed. Although the task of the court was to ensure a just and fair result was arrived at, it has a duty to do so in accordance with the prevailing law.

Hence, it is most likely that the Malaysian Courts will take the same position as the Singapore Court based on the similar wording of the s.6 of the Limitation Act as evident above.

ⁱ [2006] 2 SLR 458

MISC.

EPILOGUE

Right on the heel of the High Court decision in *MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*ⁱ featured in our Issue 1/2006, the Court of Appeal in *Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*ⁱⁱ similarly held that the Inland Revenue Department ("IRD") was not precluded from discharging the assessment (for capital gains tax) under the Real Property Gains Tax Act 1976 and proceeding with an assessment (for income tax) under the Income Tax Act 1967 in respect of a sale transaction entered into by the taxpayer which constituted an adventure in the nature of trade and not a realization of

capital assets. Therefore, it can be safely concluded that the law is settled that the IRD may always revise and discharge assessment made under a wrong taxing statute and raise assessment under the correct taxing statute despite payment of the taxes assessed erroneously and issuance of certificate of clearance, so long as the taxpayer has not been subjected to double taxation and the taxes paid erroneously transferred to the taxpayer's account towards payment of the correct tax.

ⁱ [2005] 6 MLJ 518

ⁱⁱ [2006] 3 AMR 758

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