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# In this Issue

An Introduction to the European General Data Protection Regulation ("GDPR") and its Potential Impact to Malaysian Organisations. .......... 5

New Kid on the Block – Introducing the Amendments to the Arbitration Act 2005 (As Revised in 2011) – An Overview .......... 12

Data Exclusivity in Malaysia .......... 18

Current Trends in Financial Services and the Malaysian Regulatory Environment .... 22

Notices of Abandonment in Marine Insurance – Keeping to the Timeline .......... 26

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# Managing Partner's Message

This is the maiden publication of our bi-annual newsletter. In this newsletter, we share some of the latest legal updates we think you will find interesting, and hopefully, relevant to most of your businesses.

One of our articles relate to data privacy and exclusivity, specifically the impact European General Data Protection Regulation have on Malaysian organisations and another one relates to data exclusivity under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**").

We also share our thoughts on the current trends in financial services such as QR code based payment channels and the legal framework that supports businesses to go digital.

Elsewhere in this newsletter, we set out a brief case commentary on the intricacies of marine insurance law claims and we discussed revisions to our Arbitration Act designed to make Malaysia as a choice arbitration hub for businesses.

We hope you will enjoy reading our newsletter. We are also keen to hear your feedback on this new initiative – please email CLOinfo@christopherleeong.com and tell us what you think.

With Best Wishes,

Lee Hock Chye
Managing Partner

# An Introduction to the European General Data Protection Regulation and its Potential Impact to Malaysian Organisations

For organisations based in Europe, and organisations physically located outside of Europe but which conduct business with EU residents, the 25th of May 2018 signals the privacy "D-Day" as this is the day that the GDPR, otherwise known as the European General Data Protection Regulation, comes into force.

## What is the GDPR, and Why Is It a Concern?

The GDPR, is Europe's new overarching framework for data protection, which replaces the previous data protection regime under Directive 95/46/EC. The GDPR is an extensive legislation, containing a total of 99 Articles which set out, amongst others, brand new and/or increased rights of individuals vis-à-vis their personal data, and heightens the obligations of organisations to protect the personal information of data subjects.

These rights and obligations are wide-ranging, and achieving compliance has and will continue to be an onerous and costly exercise.

Briefly, the GDPR introduces a multitude of new rights for individuals, ranging from the *"right to be forgotten"* (i.e. the right to require an organisation possessing an individual's personal data to erase said individual's personal data from its database and systems), to the right to request for the personal data held by one organisation to be securely transmitted to another organisation (formally known as the *"right to data portability"*) at the point of switching services. Organisations are also subject to new compliance requirements, such as the requirement to report the occurrence of a data breach to supervisory authorities within 72 hours from becoming aware of the data breach. Another major change brought about by the GDPR is the greatly increased obligations on

**Deepak Pillai (Partner)**

Head, Technology, Media & Telecommunications
Data Privacy
T +603 2273 1919
E deepak.pillai@christopherleeong.com

**Michelle Wu (Associate)**

Technology, Media & Telecommunications
Data Privacy
T +603 2273 1919
E michelle.wu@christopherleeong.com

data processors [1] as the GDPR places direct obligations on data processors for the first time, such as the right of data subjects to enforce their rights under the GDPR directly against data processors.

However, the greatest factor causing organisations to sit up and consider GDPR compliance as a priority are the increased maximum fines for non-compliance. The maximum fine is an incredible €20million (or roughly 24 million USD), or 4% of the total worldwide annual turnover of the preceding financial year for an organisation, whichever is higher. The sheer sum that can be imposed in fines for non-compliance with the GDPR is surprising in itself, but the biggest change brought about by the GDPR as compared to the previous regime pursuant to the Directive 95/46/EC, and the principal cause of concern to Malaysian organisations, is the increased territorial scope of the GDPR. In certain circumstances, the GDPR would cause Malaysian organisations to fall within its ambit, irrespective of the fact that they have no presence within Europe whatsoever.

Under **Article 3** of the GDPR, the GDPR applies to organisations that process personal data in any of the following scenarios:

1. Where an organisation is established in the EU, and is engaged in the processing of personal data (irrespective whether the processing is done in the capacity of an organisation as a controller[2] or a processor [3]) in the context of that establishment's activity, even if the processing itself takes place outside the EU;

2. Where an organisation is not established in the EU but the organisation processes personal data of EU data subjects (irrespective whether the processing is done in the capacity as a controller or a processor), and the data relates to goods or services offered to EU data subjects or the monitoring of behaviour in the EU; or

Why has the EU gone to such lengths to protect the privacy of individuals?
And the bigger question – how did it all begin?

[1] A "**Processor**" or "**Data Processor**" is defined in Article 4 of the GDPR as meaning a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

[2] A "**Controller**" or "**Data Controller**" is defined in Article 4 of the GDPR as meaning the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.

[3] See footnote 1.

3. Where an organisation is not established in the EU, but the organisation is a controller that is established in a place where Member State law applies by virtue of public international law.

Based on **Article 3(2)**, it would seem that the applicability of the GDPR has been extended to organisations established outside the EU, with no physical presence in the EU whatsoever, so long as such organisation processes personal data of EU residents. In other words, an organisation established in Malaysia with no branches, offices, or personnel based in or operating in the EU may be subject to the GDPR and the onerous compliance requirements attached to it, and subject to potentially massive scale penalties for a failure to comply.

This article will briefly examine Article 3, to consider how and to what extent the GDPR applies to Malaysian organisations. Before this, there is an important question to consider: Why has the EU gone to such lengths to protect the privacy of individuals? And the bigger question – how did it all begin?

## History of Data Protection

There are historical explanations dating back to World War II, which consolidates the belief that privacy merits special protection under law. In the 1930s, the Nazi regime required citizens to identify themselves by information such as religious affiliation and race in a National Census. Ultimately, the data from this National Census was used to identify and persecute Jews, and people saw the destructive power that information could have in the wrong hands, and how, if left unchecked, information gathered for one purpose could be re-used for purposes that dehumanised individuals and ultimately led to the genocide of millions of Europeans.

The horrors of World War II left a deep mark on German citizens, and ultimately led to Germany's adoption of the world's first data protection act in the 1970s. In 1980, in an effort to create a comprehensive data protection system throughout Europe, the Organization for Economic Cooperation and Development (OECD) issued recommendations, or principles, for the protection of personal data. Thereafter, these recommendations were adopted by the European Union, bulked up and took the form of Directive 95/46/EC which was issued in 1995.

Since then, many countries have rolled out data protection laws, including Malaysia's own Personal Data Protection Act 2010 ("**PDPA**"), which by and large are based on the data protection principles in Directive 95/46/EC.

Looking back, it needs to be recognised that Directive 95/46/EC was adopted at a time when the internet was in its infancy and the world had yet to be exposed to the advent of social media networks such as Facebook, SnapChat and Instagram. Beginning 2011, EU authorities felt that the Directive was not adequate to cope with new privacy challenges arising from developments in technology, and the changing ways that personal data is used in the digital era. After a four-year preparation and review process, with more than 4,000 amendments, the GDPR was born. The Regulation was published in the Official Journal of the European Union on 4 May 2016 with a scheduled coming into force date of 25 May 2018, which afforded organisations a two-year buffer period to pursue compliance.

## Rights and Obligations under the GDPR

To address the new and ever-changing methods that personal data is used, the GDPR not only strengthens already existing privacy rights of individuals, but also introduces new privacy rights as well. These include:[4]

- **Right to be forgotten (Article 17)** – as explained earlier in this article, this refers to the right of an individual to require an organisation with personal data of an individual to erase the said individual's personal data from the organisation's systems and databases without undue delay in the event that one of the qualifying circumstances in Article 17 applies, e.g. the

[4] Please refer to Chapters III and IV of the GDPR for a full list of the rights of data subjects and obligations of organisations.

personal data is no longer necessary in relation to the purpose for which it was collected or processed, the individual has withdrawn his consent to the processing of his personal data, or the personal data was processed unlawfully etc.

- **Obligation to notify personal data breaches to supervisory authority (Article 33)** –where an organisation experiences a personal data breach, it is required by the GDPR to notify the relevant supervisory authority of the breach without undue delay, and in any event no later than 72 hours after becoming aware of the breach. On this development, the reader may wish to note that non-EU jurisdictions such as Singapore, Australia and Canada have also similarly passed or are in the process of passing similar legislation which requires data breaches to be reported to supervising regulators.

- **Obligation to conduct data protection impact assessments (Article 35)** – This refers to processing which is likely to result in a high risk to the rights and freedoms of individuals, in particular processing which is done using new technologies. In such situations, before a controller is permitted to commence processing, the controller is required to carry out a data protection impact assessment to determine the impact of the envisaged processing operation on the protection of personal data. The organisation is required to seek the advice of the organisation's data protection officer where conducting the data protection impact assessment. In the event that a data protection impact assessment indicates that processing would result in a high risk to rights and freedoms of individuals in the absence of measures taken to mitigate such risks, the controller will be required to consult the supervisory authority prior to commencing the processing (Article 36).

- **Obligation to appoint data protection officer (Article 37)** – Both controllers and processors who are subject to the GDPR are required to appoint a data protection officer if the controller or processor in question is either (i) a public authority, or (ii) carries out certain types of processing activities identified in the GDPR, e.g. where the core activities of the organisation involve processing operations which require regular and systematic monitoring of data subjects on a large scale, or where special categories of personal data or personal data relating to criminal convictions and offences are processed on a large scale.

## Will the GDPR apply to Malaysian Organisations?

The wording of Article 3(1) suggests that Malaysian organisations with any EU presence whatsoever, i.e. irrespective of whether the organisation has full service offices in the EU, or conversely where the organisation only has an EU branch or representative office with one or two sales personnel, such EU offices will be subject to the GDPR.

The position is less clear under Article 3(2). Article 3(2) extends the ambit of the GDPR to organisations established outside of the EU, where an organisation processes personal data of EU data subjects who are physically situated in the EU, in certain scenarios, namely where (i) data of EU residents is processed and the data relates to **goods or services offered** to EU data subjects; or (ii) the **behaviour of data subjects in EU is monitored.**

### 1. Offering of goods or services

Recital 23 of the GDPR clarifies that in determining whether goods or services are offered to data subjects in the EU, authorities will consider whether the organisation *"envisages"* offering goods or services to data subjects in the EU. The GDPR provides examples of the factors which will be taken into account when making this determination.

Mere accessibility of an organisation's website from the EU, or the use of a language which is generally used in the country that the organisation is established would not be sufficient to conclude that an organisation has envisaged offering goods or services to residents in the EU. On the other hand, using a language or currency generally used in the EU, providing users in the EU with the possibility of ordering goods and services in that language, and the

mentioning customers or users who are in the EU, would suggest such an intention.

**2. Monitoring behaviour of data subjects in the EU**

Recital 24 of the GDPR provides that in determining whether a processing activity can be considered as monitoring the behaviour of data subjects, authorities will consider whether individuals are tracked on the internet, or subject to data processing techniques such as profiling, to analyse or predict personal preferences of the individual, his / her behaviours and attitudes, or to take decisions concerning the individual.

Needless to say, other than for organisations that fall squarely within the examples provided in the GDPR, the formulations currently provided in the GDPR are not specific enough or clear enough to aid organisations in coming to a decision as to whether they fall within the ambit of the GDPR and unfortunately leave much to interpretation.

Examples of scenarios that organisations find themselves in that do not fall squarely within the examples provided in the GDPR:-

- An organisation with its HQ in Malaysia and various different countries (including an EU office) utilise a database which is located in Malaysia. Some of the records in the database are from the EU office and contains the personal data of EU residents. Would the presence of EU data in the shared database subject all non-EU offices to the GDPR as well?

- Many organisations offer goods or services to the world at large, without having envisaged or intended for the offer to be specific to customers from the EU. Would the ability of EU residents to accept offers made to the world at large subject the organisation offering goods or services to the GDPR?

- An individual outside the EU instructs his/her local Bank to transfer money to an individual resident in the EU. The Bank is required by banking laws to maintain the information (including the name and account number of the EU resident) relating to the transfer. Would the Bank as a consequence of retaining the EU resident's personal data be subject to the GDPR?

- An individual in the EU wishes to trade in securities on the Malaysian stock exchange. As required by securities laws, he/she opens a central depository system (CDS) account together with an account with a securities trading firm in Malaysia. As the details of the EU resident are on the system of the securities trading firm, would the said securities trading firm be required to comply with the GDPR?

There are no clear answers to the above and the best that can be achieved currently is to rely on interpretation in accordance with Article 3(2). Nonetheless, going forward, we expect these questions to become clearer as more guidance is issued by the EU in terms of the tests to be utilised to determine whether a non-EU organisation falls within or outside the ambit of the GDPR.

## Next Steps

Malaysian organisations with offices or personnel located in the EU will be subject to the GDPR, and should seek the assistance of EU counsel to conduct a review of their data processing activities to ensure that (i) said offices located in the EU fully comply with the GDPR, and (ii) consider how the Malaysian arm of the organisation may be impacted by extension, e.g. where the Malaysian and EU offices share one or more databases which contains the personal data of EU residents.

Malaysian organisations with no presence in the EU but with any sort of exposure to the EU should conduct an audit or review of the data processing activities of the organisation, and consider the factors identified in the Recitals to the GDPR above to assess the risk of EU authorities finding that the organisation is offering goods or services to data subjects in the EU or monitoring the behaviour of EU residents.

Based on this assessment, the organisation should consider whether it will be necessary to consult local and/or EU counsel to provide advice on the next steps to be taken. As at the time of writing, it is unlikely that Malaysian organisations with no EU presence whatsoever will be high on the list of priorities of EU enforcement authorities.

For those Malaysian organisations with no presence in the EU, another point to consider is the likelihood of an enforcement action being brought against them, given the lack of any enforcement mechanism that can be relied upon by EU supervisory authorities. The GDPR attempts to address this conundrum by requiring organisations under Article 3(2) to appoint a representative in the EU, which would enable supervisory authorities to enforce an action for liability against that representative. However, it remains unclear how actions will be taken against organisations that fail to appoint a representative, as well as the types of actions or sanctions that may be carried out against non-EU organisations.

## Conclusion

Regardless of the approach decided upon by Malaysian organisations, all Malaysian organisations should have at the forefront of their minds that their journey to data protection compliance is far from over, and with the coming into force of the GDPR, there are very likely more challenges to come in terms of achieving and maintaining compliance with data protection laws.

Just as Directive 95/46/EC has been the basis for data protection legislative activity the world over for the past twenty years, the GDPR will be the new benchmark for data protection legislation going forward.

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# New Kid On The Block

# Introducing the Amendments to The Arbitration Act 2005 (As Revised in 2011): An Overview

## This article's main aim is to highlight some of the important features that were made to the Arbitration Act 2005 (as revised in 2011) (hereafter referred to as "**the Arbitration Act**").

A high level reading of the amendments that were done to the Arbitration Act posits to bring the Arbitration Act to be in line with the 2006 amendments made to the United Nations Commission on International Trade Law Model on International Commercial Arbitration or more commonly known as the UNCITRAL Model Law, upon which the Arbitration Act is modelled after. Better late than never, these amendments have been welcomed by the arbitral bodies in Malaysia. The following article will highlight some of the key amendments made to the Arbitration Act vide the Arbitration (Amendment) (No.2) Bill (2018). The said Bill was passed on 3 April 2018 and has since received the royal assent on 27 April 2018. It was published in the Gazette on 4 May 2018.

### Interim Applications in an Arbitration Proceeding

Section 19(1) has been substantially changed to empower the arbitral tribunal to grant interim measures at the request of any of the parties to the arbitral proceedings. Prior to the amendments, Section 19 (1) of the Arbitration Act was rather restrictive and only allowed the arbitral tribunal to grant the following interim measures:-

(i) security for costs;

(ii) discovery of documents and interrogatories;

(iii) giving of evidence by affidavit; and

(iv) the preservation, interim custody or sale of any property which is subject matter to the dispute.

However, with the amendments to Section 19, the powers of the arbitral tribunal to grant interim

**Rubini Murugesan, MMIArb (Partner)**

Commercial Litigation
Construction & Projects
Employment & Benefits
T +603 2273 1919
E rubini.murugesan@christopherleeong.com

**Nereen Kaur Veriah, FCIArb, FMIArb (Senior Associate)**

Construction & Projects
Litigation and Alternative Dispute Resolution

T +603 2273 1919
E nereen.kaur@christopherleeong.com

measures are no longer restricted and these amendments have in fact armed the arbitral tribunal to grant a wider array of interim measures. Section 19(2) defines '*interim measure*' to mean any temporary measure whether in the form of an award or in any other form which is given at any time prior to the final award being rendered for the purposes of:-

(a) maintaining or restoring status quo pending the determination of the dispute between the parties;

(b) allowing a party to take an action that would prevent or refrain the other party from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;

(c) providing a means of preserving assets to satisfy any subsequent award; and

(d) providing security for the costs of the dispute.

The old section 19 (3) has been deleted and in its place, sections 19A to 19J have been added. At a glance, these new sections reflect the current version of the UNCITRAL Model Law as amended in 2006 and sets out the framework within which the arbitral tribunal can exercise its powers and discretion to grant these interim measures. The next part of this article will look at some of these new Sections.

## Section 19A

Section 19A sets out the conditions that the party seeking for an interim measure under Section 19(2) (a) to (c)[5] needs to satisfy before the arbitral tribunal would grant this party the interim measure that is being sought for. The conditions set out therein are similar to the conditions that one needs to satisfy to get an injunctive relief, namely, the requesting party has to satisfy the arbitral tribunal that:-

(a) harm, not adequately reparable by an award of damages is likely to result if the interim measure sought for is not granted; and

(b) such harm substantially outweighs the harm that is likely to result to the party against whom the interim measure is directed against; and

(c) the party requesting for the interim measure has a reasonable possibility to succeed on the merits of the claim.

It goes without saying that the aforesaid conditions should not in any way act as an impediment to the arbitrator or be of any influence on the arbitrator when he or she subsequently determines the final award in relation to the dispute between the parties.

## Section 19B and Section 19C

Section 19B is interesting as it enables a party to seek for a preliminary order in respect of an interim measure on an *ex parte* basis.

On the one hand, the rationale in allowing a party to an arbitration proceeding to make such an application *ex-parte* is so as to prevent the purpose of the interim measure from being frustrated by the other party.

However, one must not forget that in an arbitration setting, a party to an arbitration proceeding ought not to have any one-party communication with the arbitrator as this may form a basis for the final award given by the arbitrator being challenged on the grounds of breach of natural justice.

To obviate this, Section 19C has set out a specific regime that the arbitral tribunal needs to comply with in respect of an application for a preliminary order whether sought by way of an *ex-parte* application or otherwise. Amongst others, the provision requires the arbitral tribunal to give immediate notice to the other party of the preliminary order made and to disclose all communication (including any oral communication made) in relation to the preliminary order. Further to this, the arbitral tribunal has to give an opportunity to the other party against whom the preliminary order is made to present their case and the arbitral tribunal is required to decide *immediately* on any objection made against the preliminary order. What is meant by *immediately* remains to be seen and is open to

[5] As has been set out in paragraph 2 above.

interpretation as in most circumstances, the arbitral tribunal would need time to consider the arguments presented to it before the tribunal is in a position to decide on the objections that have been raised.

Section 19C(3) mandates that the preliminary order is to expire after 21 days from the date on which such order is issued. However, subsection (4) provides that notwithstanding its expiration, the arbitral tribunal is empowered to issue an interim measure akin to the preliminary order or as modified, but this can only be done after the other party against whom the preliminary order was issued has been given an opportunity to present their case. However, a preliminary order is not considered as an award and it cannot be enforced at the High Court. Hence there seems to be no penalty or relief provided for in the event that there is a breach of a preliminary order.

However, when it comes to an interim measure, the arbitral tribunal seems to have more powers. An interim measure can be modified, suspended or terminated once granted, upon the application of any party or in some circumstances, on the arbitral tribunal's own initiative[6].

The arbitral tribunal can also order appropriate security to be provided by the party seeking for the interim measure. The party seeking for the interim measure also has to appraise the arbitral tribunal of all circumstances that are likely or relevant for the determination of the interim measure that is being sought for. In the event, the arbitral tribunal finds later that the interim measure ought not to have been granted at all, then the party applying for the interim measure will be made liable for any costs and damages caused by that interim measure given.
Although the above position also applies to a preliminary order, however, unlike the preliminary order, an interim measure is deemed to be binding and it can be enforced at the High Court.

Further, just like in an application to set aside the enforcement of a final arbitration award, the recognition and enforcement of an interim measure can only be set aside on the very same limited grounds that are relied upon to set aside the recognition and enforcement of a final arbitration award[7]. In short, the High Court is not at liberty to review the substance or merit of the interim measure granted.

All in all, the amendments made to Section 19 and the inclusion of the new subsections 19A to 19J sees the arbitral tribunal being empowered to grant a wide array of interim measures compared to the restricted interim measures that were allowed prior to the amendments.

The High Court too has been given wider powers to grant interim measures in relation to arbitration proceedings regardless of whether the seat of arbitration is in Malaysia or not. However, the High Court's power in this regard is not all encompassing. In the event that the arbitral tribunal has made a ruling on a matter which is relevant to the interim measure application that is being made, then such finding of fact is to be treated as conclusive and the High Court is not entitled to depart from such finding of fact.

## Interest

Another interesting amendment made to the Arbitration Act is in respect of the arbitral tribunal's powers to award interest. However, before moving into this recent amendment, it is worthwhile to bear in mind the preceding decision of the Federal Court in *Far East Holdings Bhd v Kampong Aur Oil Palm Sdn Bhd*[8]. In this case, one of the issues raised for the determination of the Federal Court was whether a presiding arbitrator has the jurisdiction to grant *pre-award interest.*

In considering this issue, the Federal Court referred to the then worded Section 33(6) of the Arbitration Act which read as follows:-

> *"Unless otherwise provided in the arbitration agreement, the arbitral tribunal may:-*

[6] See amended Section 19D

[7] See Sections 37 and 39 of the Arbitration Act

[8] [2018] 1 CLJ 693

*(a) award interest on the any sum of the money ordered to be paid by the award from the date of the award to the date of realisation; and*

*(b) determine the rate of interest.*"

and took the position that the above provision does not contemplate for the arbitral tribunal to grant pre-award interest.

The Federal Court was of the view that unless the arbitration agreement between the disputing parties clearly provides for this, the arbitral tribunal does not have the jurisdiction to grant pre-award interest. The Federal Court did however take the view that the arbitral tribunal could grant post-award interest <u>but even then</u>, such a relief should be <u>expressly pleaded by the party seeking for it</u>. Devoid of this, it was decided that even post-award interest ought not to be granted as well.

The recent amendments saw a revamp of Section 33(6). The old subsection(6) has been removed in its entirety and substituted with the following:-

"*(6) Subject to subsection (8), unless otherwise agreed by the parties, the arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate, for any period ending not later than the date of payment on the whole or any part of–*

*(a) any sum which is awarded by the arbitral tribunal in the arbitral proceedings;*

*(b) any sum which is in issue in the arbitral proceedings but is paid before the date of the award; or*

*(c) costs awarded or ordered by the arbitral tribunal in the arbitral proceedings.*"

Further to this, two new subsections i.e. (7) and (8) [9] have been added to fortify the position of the arbitral tribunal to award interest regardless of whether it has been pleaded or not. It is now mandatory that should any award made by the arbitral tribunal direct a sum to be paid, such sum is to carry interest from the date of the award at the rate of a judgment debt unless otherwise stated in the award.

It is more than obvious that the sum total of the above amendments have effectively reversed the decision of the Federal Court in *Far East Holdings Bhd v Kampong Aur Oil Palm Sdn Bhd (supra)*. The powers of the arbitral tribunal to award interest is no longer curtailed. In fact, it is the converse as the arbitral tribunal is now empowered to award interest at any rate, from any date and to be paid in any manner as contemplated appropriate by the tribunal.

## Section 42 and 43 repealed

Finally, the recent amendments to the Arbitration Act also saw the repealing of Sections 42 and 43. In a nutshell, the old sections 42 and 43 were made part of the Arbitration Act to enable either party to refer a question of law arising from the award to the High Court. In this regard, any order made by the High Court in respect of this question of law was to be treated as a judgment of the High Court, which was appealable.

However, with arbitration gaining more traction in Malaysia, coupled with the numerous initiatives taken by bodies like AIAC (formerly known as the KLRCA) to promote Malaysia as an arbitration hub, there were calls from these bodies to look into the significance of both these sections.

It would appear that the rationale for the lobby for the removal of Section 42 was that the section seemingly undermined the credibility of the arbitration proceedings.

[9] "(7) Nothing in subsection (6) shall affect any other power of an arbitral tribunal to award interest.

(8) Where an award directs a sum to be paid, that sum shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt."

By removing section 42, effectively what this means now is that the Court's power to look into a final award issued by an arbitral tribunal is only confined to the circumstances set out in Sections 37 and Sections 39 (i.e. both sections set out the grounds in which the High Court can set aside or refuse the recognition of an award respectively). Thus, the Court no longer has the jurisdiction to set aside the final award on the basis of a question of law that may arise out of the final arbitration award.

With the repealing of Sections 42 and 43, Malaysia seems to have taken a giant leap of faith. By comparison, other jurisdiction such as Singapore, Australia and the United Kingdom have not totally done away with the equivalent of Section 42. Instead what they have done is put in place procedural and substantive restrictions which serves as a threshold requirement that would have to be satisfied first before a question of law is referred to the courts. In most of these jurisdictions, an appeal on a question of law arising out of an award can only be made with the leave of court or with the agreement of the parties to the arbitration proceedings.

These restrictions act as a sieve to ensure that the effectiveness of an arbitral proceeding is not undermined whilst preserving the right of courts to re-visit an arbitration award should any issue of law be raised.

## Conclusion

The consequences and effectiveness of the amendments that have been made to the Arbitration Act remains to be seen. What is evident from the amendments made to the Arbitration Act is that these amendments are aimed to give the arbitral tribunal greater control and power over the proceedings before them. In turn, the burden will be upon the parties (and their lawyers) to ensure that care is given when presenting the arguments before the arbitral tribunal since no longer is there recourse to the courts under Section 42 and Section 43 of the Arbitration Act. It is hoped that with these amendments, it will make Malaysia more attractive and help it to become one of the leading arbitration hubs not only in this region but internationally as well.

# Data Exclusivity in Malaysia

## What is Data Exclusivity? Data exclusivity is the protection of clinical test data submitted to a regulatory or government agency to obtain marketing approval of the products and for the prevention of generic / other manufacturers from relying on the data in their own applications. It is necessary to understand how the marketing of drug products is regulated.

In Malaysia, a manufacturer of a drug product has to submit the laboratory test data to the Director of Pharmaceutical Services to apply for a product registration before marketing the drug product to the public. Data Exclusivity treats such undisclosed, unpublished and non-public domain test data as protected and thus exclusive from third party access as laid down in the Directive of Data Exclusivity.

### The Directive on Data Exclusivity

Malaysia is a signatory to the Agreement on Trade Related Aspects of Intellectual Property Rights (“**TRIPS Agreement**”) signed under the auspices of the World Trade Organisation (“**WTO**”). According to article 39.9 of the TRIPS Agreement, Member States when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. There is an obligation on the Member State to protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use. The Director of Pharmaceutical Services under the Ministry of Health (“**MOH**”) had issued the Directive on Data Exclusivity (“**Directive**”) under regulation 29 of the Control of Drugs and Cosmetics Regulations 1984.

**Sri Sarguna Raj (Partner)**

Intellectual Property
Sports
Gaming
T +603 2273 1919
E sri.sarguna.raj@christopherleeong.com

**Tan Xin Ying (Associate)**

Intellectual Property
T +603 2273 1919
E xin.ying.tan@christopherleeong.com

The Directive came into force on 1st March 2011. The Directive provides protection of undisclosed, unpublished and non-public domain pharmaceutical test data, the origination of which involves considerable effort, submitted to as required to the Director of Pharmaceutical Services for the purpose of scientific assessment in consideration of the quality, safety and efficacy of any new drug product containing a New Chemical Entity ("**NCE**") or approval for a second indication of a registered drug product.

## Application for Data Exclusivity Protection

Any person may apply for Data Exclusivity. Such application shall be made to the Director of Pharmaceutical Services via a Letter of Intent in conjunction with the application for the registration of a new drug containing a NCE or approval for Second indication of a registered drug product.

An application for Data Exclusivity shall only be considered if the application in Malaysia for:

(i) New drug product containing a NCE is made within eighteen (18) months from the date the product is first registered or granted marketing authorisation and granted Data Exclusivity / Test Data Protection in the country of origin or in any country, recognised and deemed appropriate by the Director of Pharmaceutical Services.

(ii) Second indication of a registered drug product is made within twelve (12) months from the date the second indication is approved and granted Data Exclusivity / Test Data Protection in the country of origin or in any country, recognised and deemed appropriate by the Director of Pharmaceutical Services.

Before the Data Exclusivity is granted, the applicant of a new drug product containing a NCE shall provide to the Director of Pharmaceutical Services the undisclosed, unpublished and non-public domain pharmaceutical test datas, the origination of which involves a considerable effort.

While for the application for a Second indication of a registered drug product, the applicant shall provide to the Director of Pharmaceutical Services, the reports of new clinical investigations other than bioavailability studies, conducted in relation to the second indication and the origination of which has involved considerable effort.

The time period of the Data Exclusivity is determined by the Director of Pharmaceutical Services on a case to case basis, and in any event, shall not be more than five years for a new drug product containing a NCE and three years for a second indication of a registered drug product.

## The Calculation of the period of Data Exclusivity

For a new drug product containing a NCE, the period of Data Exclusivity shall be calculated from the date the product is first registered or granted marketing authorisation. Besides, the drug product must also be granted Data Exclusivity / Test Data Protection in the country of origin or in any country recognised and deemed appropriate by the Director of Pharmaceutical Services.

For a Second indication of a registered drug product, the period of Data Exclusivity shall be calculated from the date the Second indication is first approved and granted Data Exclusivity / Test Data Protection in the country of origin or in any country recognised and deemed appropriate by the Director of Pharmaceutical Services.

## Consideration of other applications upon the grant of Data Exclusivity

For a registered new drug product containing a NCE, registration of any other drug product where the active moiety is in all respect the same as the active moiety in the registered drug product which has been granted Data Exclusivity in Malaysia can be considered if:-

(i) The applicant provides undisclosed, unpublished and non-public domain pharmaceutical test data, the origination of which involved a considerable effort to demonstrate the Quality, Safety and Efficacy of the drug product submitted for registration; OR

(ii) The applicant has obtained consent in writing for right of reference or use of the test data from a person authorised by the owner of the registered new drug product containing a NCE.

## Exceptions to Data Exclusivity

Data Exclusivity does not apply in three of the following situations:

(i) where compulsory licenses have been issued;

(ii) the implementation of any other measures consistent with the need to protect public health and ensure access to medicines for all; or

(iii) where it prevents the Government from taking any necessary action to protect public health, national security, non-commercial public use, national emergency, public health crisis or other extremely urgent circumstances declared by the government.

## Implication of Data Exclusivity

As of 10 November 2017, a total of 54 Data Exclusivity registration have been granted for New Drug in Malaysia as can be seen in the register published by the National Pharmaceutical Regulatory Agency:

http://npra.moh.gov.my/en/images/reg-info/DataEx/2017/DETable2017.pdf

The cost and time for research and development of a new drug is undoubtedly high. While it is important to protect innovator companies against unfair commercial competition, data exclusivity can be a tool for innovator companies to monopolise the market to keep the price of drug product high. This has a negative impact on the public access to medicines.

Although generic drug manufacturers are prevented from using the clinical trial data for a specific period of time, such as a period of five years, generic drug manufacturer can conduct its own clinical trials freely during the period. Otherwise the generic pharmaceutical manufacturer will have to wait till the expiry of the data exclusivity period before entering the market. This is ineffective as it results in duplication of conducting trial and delay in manufacturing the drug while trial is being conducted.

## Conclusion

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**"), formerly known as the Trans-Pacific Partnership ("**TPP**") is a new free trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam after the withdrawal of the United State from the TPP. The signing of the CPTPP took place on 8th March 2018, however it is still uncertain when the CPTPP would come into force in Malaysia.

It is important to highlight the CPTPP because Chapter 18 of the CPTPP stipulates some provisions on data exclusivity. Currently, Malaysian regulations on undisclosed pharmaceutical data is in compliance with the CPTPP. Malaysia would however have to amend its legislation to further extend the protection for new pharmaceutical product that is or contains a biologic to at least eight years; and extend the protection for data for agricultural chemical products to at least ten years. This would undoubtedly provide innovator companies a stronger shield against generic manufacturers. Only time can tell whether such strong protection for the innovator companies would be favourable to the general Malaysian public.

# Current Trends in Financial Services and the Malaysian Regulatory Environment

## South East Asia is poised for significant (some pundits might say explosive) growth in data-driven financial solutions, particularly in the areas of alternative payment solutions, microfinancing and insurance. This article aims to give readers an overview of these developments and the regulatory environment in Malaysia.

In the space of alternative payment solutions, South East Asia has become an important battleground since last year with the entry of QR code-based payment channel giants such as Tencent's WeChat Pay and Alibaba's AliPay, ride-hailing service provider Grab's GrabPay and low-cost air carrier AirAsia's BigPay.

On the moneylending front, non-traditional lenders including service providers who used to operate outside the realm of financial services are entering the Malaysian market. An example is Grab Financial, which is a joint venture between ride-hailing service provider Grab and Japanese consumer financing provider Credit Saison. The insurance industry is also disrupted by insurtech service providers such as Jirnexu and PolicyStreet who change the way insurance products are provided to the masses.

### The Digital Model

The existing legal framework in Malaysia supports the digital business model of these fintech and insurtech players. The Electronic Commerce Act 2006 provides legal recognition to technology-neutral electronic messages in commercial transactions, thereby enabling electronic commercial transactions. The Consumer Protection Act 1999 provides protection to consumers in general and the Consumer Protection (Electronic Trade Transactions) Regulations 2012 protects consumers by mandating important information that must be displayed on the websites of merchants or service providers

**Yau Yee Ming (Partner)**

General Corporate Commercial
T +601 7362 3459
E yee.ming.yau@christopherleeong.com

### Alternative Payment Solutions

The regulatory framework adopted in Malaysia regarding digital payments is one which emphasizes their safety and soundness in order to enhance users' confidence in their usage. In general, digital payment services in Malaysia are regulated by the Financial Services Act 2013 ("**FSA**"). Electronic money (e-money), charge cards, debit cards and credit cards are known as "designated payment instruments" ("**DPIs**"). The issuance of DPIs requires approval from Bank Negara Malaysia ("**BNM**"). In particular, the QR code-based payment channels fall under the category of e-money, which is a payment instrument that contains monetary value that is paid in advance by the user to the e-money issuer and the user of e-money can then make payments for purchases of goods and services to merchants who accept the e-money as payment.

E-money schemes are categorised into small schemes and large schemes. Small schemes are those with purse limit of up to RM200 or outstanding e-money liabilities for 6 consecutive months of less than RM1 million, whereas large schemes have purse limit of between RM201 to RM1,500 or any amount approved by BNM, or outstanding e-money liabilities for 6 consecutive months of more than RM1 million. E-money scheme providers are required to comply with minimum capital funds of RM100,000 for small

schemes, and RM5,000,000 or 8% of its electronic money liabilities, whichever is higher, for large schemes. All e-money transactions must be in Ringgit Malaysia and no cross-border transactions are allowed, unless otherwise approved by BNM. The e-money regime also imposes customer due diligence requirements for anti-money laundering purposes.

Besides getting BNM's approval for issuance of DPIs, service providers must also register with BNM if they engage in merchant acquiring services, ie entering into contracts with merchants for the purposes of accepting payment instruments for payment of goods and services.

## Moneylending and Insurance

In Malaysia, the business of moneylending has traditionally been the fort of banks and financial institutions on one part, and smaller non-bank and non-financial institution moneylenders on the other. The former group faces heavier and more stringent regulations under the FSA and is regulated by the central bank, Bank Negara Malaysia, whereas the latter group is regulated under the Moneylenders Act 1950 by the Ministry of Domestic Trade, Co-Operatives and Consumerism. Newer business models such as the peer-to-peer (P2P) financing platforms are subject to a different set of requirements.

Through P2P lending, individuals can now lend money in small amounts to business owners through an online digital platform. P2P market operators are required to be registered with the Securities Commission of Malaysia ("**SC**") and must have a minimum capital of RM5 million, and the borrowers are required to raise at least 80% of their target financing amount and they are prohibited from retaining any amount which exceeds the initial target amount. The borrowers are also prohibited from being hosted concurrently on multiple P2P platforms. Nonetheless, borrowers hosted on P2P platforms may be permitted to list on an equity crowdfunding platform at the same time subject to disclosure requirements as may be specified by the platform operators. Individuals who wish to become lenders on P2P platforms are limited to the investment amount of a maximum of RM50,000 at any period of time. There is no restriction on investment amount for angel investors and sophisticated investors.

On the other hand, the insurance market in Malaysia is occupied by gigantic to small and medium insurance companies focusing on life insurance or general insurance, regulated under the FSA. The entry barriers to the insurance business are significantly higher compared to the business of moneylending, due to strict prudential and capital adequacy requirements that are imposed on insurance providers.
The disruption to both the moneylending and insurance markets come in the form of collaboration where online service providers enter into arrangements with incumbent banks, financial institutions, moneylenders and insurers to offer the latter group's financing and insurance solutions to the former's customers, which may involve utilising the former's data analytics to identify credit default and various risks to determine the right interest rates, lending terms or insurance premiums.

## Data Analytics

Customers' data and analytics can largely be derived from non-financial related businesses (eg, ride-hailing, e-tailing and loyalty or reward programs) and from the internet (eg information from social media sites relating to consumer behaviour and buying preferences) to identify potential customers and to determine their credit and risk profiles. These data analytics are often the kind that incumbent lenders and insurers have either tended to overlook or otherwise do not have readily available data points to collect. Therefore, these data are not just valuable to non-financial service providers who venture into microfinancing and insurance services, but they are also of great value to the incumbents. With these data analytics, lenders and insurers will be able to assess better the credit worthiness and associated risks of their existing or prospective customers. It is not a surprise that ride-hailing companies and alternative payment solution providers are collaborating or will likely collaborate with financial institutions, moneylenders and insurance companies to offer financial and insurance products to their customers.

This use of data analytics across platforms or services is one that the service providers, lenders and insurers must handle with care, particularly in terms of consumers' privacy and personal data protection. The recent privacy scandal involving users' data globally on social media platforms is raising alarm. The business model of social media platform companies and the third-party application developers who operate on these platforms is to provide free services to users in exchange for data access, mining and analytics in relation to the users' behaviour and activities. In response to the ever-increasing importance of better personal data protection, the European Union has earlier this year developed a new General Data Protection Regulation which focuses on ensuring that users know, understand and consent to the collection and use of their data, in a clear and concise manner.

In Malaysia, the principal legislation that deal with personal data is the Personal Data Protection Act 2010 ("**PDPA**"). It applies to any person who collects, records, holds, stores or carries out any operation on personal data (in other words, processes personal data), or who has control over personal data, in respect of commercial transactions. The PDPA applies to data users and data processors who are established in Malaysia and otherwise. A person who is not established in Malaysia is caught by the PDPA if he uses equipment in Malaysia for processing personal data otherwise than for the purposes of transit through Malaysia. In this case, the foreign person is required to nominate its representative in Malaysia for the purposes of the PDPA.

The PDPA adopts a principles-based approach. Personal data processing by a data user must comply with the Personal Data Protection Principles, which include the general principle that data users must obtain the consent of data subjects before processing their personal data, and the processing must not be excessive in relation to a lawful purpose. Other principles include giving notice and choice to data subjects, non-disclosure of personal data without consent, ensuring security of personal data, not retaining personal data for longer than necessary, ensuring the integrity of personal data and giving access to data subjects to their personal data

## Final Note

The financial services space will see more innovation coming its way. With new products and business models, more likely than not new regulations will be put in place. While regulators play catch up, business startups and ventures will stand to benefit and gain competitive edge by engaging legal professionals early, to enable businesses to put in place an operating model that can better adapt to the evolving regulatory landscapes.

# Notices of Abandonment in Marine Insurance – Keeping to the Timeline

The aim of this article is to discuss the recent judgment of the English Court of Appeal in The MV Renos [2018] EWCA Civ 230. This article will set out the implications of the judgment and the guidance that it provides in giving notices of abandonment in marine insurance claims.

## What is Constructive Total Losses?

A 'constructive total loss' ('CTL') is a concept peculiar to marine insurance law. It has its origins in judgments pronounced in the early 19th century. However the concept was only codified in the English Marine Insurance Act of 1906.

A CTL is one of the three different types losses that may be suffered by an insured in marine insurance – the other two being partial and total losses.

Generally, a total loss occurs when the insured ship or goods (otherwise known as the 'subject-matter') is destroyed. Or if damaged, it is so damaged as to cease to be a thing of the kind insured. Any loss that is not recognised as a total loss is treated as a partial loss.

A CTL occurs when the insured is deprived of the subject-matter and it is unlikely that the insured can recover the subject-matter. A key feature of a CTL is when the costs of recovering the subject-matter or of rectifying the damage suffered by it exceeds the actual value of the subject-matter.

## Issuing a Notice of Abandonment

Where a constructive total loss has occurred, the insured may either treat the loss as a partial loss or as a total loss. In that regard, where the insured elects to abandon the subject matter, he is required to issue a Notice of Abandonment to the insurer. The Notice of Abandonment serves as a formal notice by the insured to treat the loss in relation to the vessel as an actual total loss.

**Clive Navin Selvapandian (Partner)**

Shipping & International Trade
Commercial Litigation
T +603 2273 1919
E clive.selvapandian@christopherleeong.com

**John Rolan Fernandez (Associate)**

Shipping & International Trade
Commercial Litigation
T +603 2273 1919
E john.rolan@christopherleeong.com

The Marine Insurance Act 1906, albeit being an English statute is applicable in Malaysia by virtue of Section 5 of the Civil Law Act 1957 which imports English maritime law into Malaysia. On that basis, the following case is relevant to marine insurance cases within the jurisdiction of the Malaysian courts.

It is imperative to point out that Section 62(6) of the Marine Insurance Act 1906 has the effect to the extent that when a Notice of Abandonment is accepted by the insurer, it becomes irrevocable. Specifically, Section 62(6) of the Marine Insurance Act 1906 provides as follows:-

> *Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.*

That being said, it is crucial for the determination of the costs of repairing the subject matter to be made quickly and correctly.

## The MV Renos Case

In the recent English Court of Appeal case involving the vessel MV Renos, the Court of Appeal was required to interpret and determine the following:-

(i) the meaning of "*reasonable diligence*" concerning the timeliness of the issuance of a Notice of Abandonment by an insured/owner to the insurer for a constructive total loss of a vessel; and

(ii) on the assumption that the Notice of Abandonment was issued in a timely manner, can the insured/owner seek to recover costs for repairs incurred prior to the issuance of the Notice of Abandonment?

## The Facts in the MV Renos

In August 2012, a fire engulfed the engine room of the MV Renos ("**the Vessel**"), causing her to suffer extensive damage. Some months after, surveyors of the insured and the insurer assessed the damage caused by the fire to be in excess of USD 8 million. Thereafter, multiple assessments were conducted on the damage caused by the fire and the further assessments from surveyors ranged from USD 4 million to USD 9 million.

As highlighted above, for the vessel to be treated as a constructive total loss, the repair costs for the damage to the Vessel would have to be in the region of USD 8 million or more.

The wreckage of Costa Concordia in the Superbacino dock in Genoa, Italy

Approximately five months after the incident at the Red Sea and no more than two months after receipt of the conflicting assessments, the insured/owner issued a Notice of Abandonment to the insurer. However, the insurer rejected the Notice of Abandonment on the basis that it was not issued promptly by the insure/owner.

Before going into the judgment, it is worthwhile to note that a contract of marine insurance is a contract based upon the utmost good faith (*uberrimae fidei*) and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party (see Section 17 of the Marine Insurance Act 1906). Accordingly, in determining legal issues within the Marine Insurance Act 1906, the courts will take into account the concept of utmost good faith.

## The Judgment of the High Court

The judgment of the High Court was handed down by Justice Robin Knowles sitting in the Commercial Court who decided in favour of the owners of the Vessel in that:=

(i) the owners had not lost the right to abandon the Vessel and claim a constructive total loss pursuant to Section 62(3) of the Marine Insurance Act 1906; and

(ii) costs incurred prior to the date of the Notice of Abandonment and the Special Compensation Protection and Indemnity Clause costs could be counted as "*costs of repairs*" for the purposes of the constructive total loss calculation.

Justice Robin Knowles has extensive commercial experience, having been involved in rewriting the Commercial Court Guide as part of the Woolf Reforms and is also the Chairman of the International Committee of the Judicial College of England & Wales. Essentially, Justice Robin Knowles made the finding of fact that the owners of the Vessel had not received sufficient reliable information in relation to the losses suffered prior to the issuance of the Notice of Abandonment. His Lordship went on to hold that the owners of the Vessel acted reasonably and within a reasonable time in trying to obtain sufficient reliable information.

## Legal Issues before the Court of Appeal

Unsatisfied with the High Court's decision, the insurer appealed to the Court of Appeal on the basis that Justice Robin Knowles erred in his decision favouring the owners of the Vessel. The Court of Appeal decision was delivered by Lord Justice Nicholas Hamblen who was previously a Queen's Counsel specialising in shipping, insurance and reinsurance, international sale of goods, commodities, conflicts of laws and arbitration.

Section 62(3) of the Marine Insurance Act 1906 provides for the requirement on the insured to issue a Notice of Abandonment with "*reasonable diligence*" after the receipt of "*reliable information*". The section goes on to provide that in a situation where the information received is of a doubtful character, the insured is entitled to a reasonable time to make inquiry. Specifically, Section 62(3) of the Marine Insurance Act 1906 provides as follows:-

> *Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.*

## Was there reliable information?

The issue before the Court of Appeal was whether the assessments conducted by the surveyors on the damage to the Vessel could amount to reliable information. It was not disputed that the insured received conflicting assessments from multiple surveyors on the estimated cost of repairs of the Vessel ranging between USD 4 million and USD 9 million. On that basis, the Court of Appeal found that it was not realistic to take each assessment in isolation, especially so when the conflicting assessments were issued by experienced sources. Accordingly, the Court of Appeal went on to conclude that the insured had in fact no reliable information before them, even at the time the Notice of Abandonment was issued.

To fortify the decision that there was no reliable information before the owners of the Vessel, the Court of Appeal added that there is unlikely to be

many cases which involve such a stark and critical difference in expert opinion.

## Was there reasonable diligence?

On the issue of "*reasonable diligence*", the Court of Appeal adopted a fact based approach and held that in the present case, there was no particular urgency requiring the insured to issue a Notice of Abandonment as the Vessel was not in immediate danger.

Accordingly, the Court of Appeal held that when the Notice of Abandonment was issued, the insured had acted with reasonable diligence considering the contrasting assessments received coupled with the fact that the extent of the damage to the Vessel justified a complex and time-consuming assessment exercise.

It is mandatory to showcase the existence of "*reasonable diligence*" as the requirement for the same is entrenched in Section 62(3) of the Marine Insurance Act 1906.

## Can Costs Incurred prior to the Notice of Abandonment be included in the Calculation of Constructive Total Loss

A supplementary issue decided upon by the Court of Appeal was on the recovery of costs before the issuance of a Notice of Abandonment.

Section 60(2)(ii) of the Marine Insurance Act 1906 envisages such costs to be future costs by virtue of the usage of the words "*the expense of future salvage operations and of any future general average contributions*".

Specifically, Section 60(2)(ii) of the Marine Insurance Act 1906 provides as follows:-

> *In particular, there is a constructive total loss – In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.*
>
> *In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or*

A literal reading of the said section would suggest that costs incurred prior to the Notice of Abandonment cannot be claimed as part of a constructive total loss. Notwithstanding this, the Court of Appeal adopted a liberal approach that such words were of inclusions of future costs rather that the exclusion of prior costs.

Accordingly, costs incurred prior to the issuance of the Notice of Abandonment may be quantified and accounted for in determining whether or not there has been a constructive total loss especially so since these costs were essential towards assisting the insured in forming a judgment as to whether there are justifiable grounds to abandon the Vessel.

In fact, Lord Justice Nicholas Hamblen in agreement with Justice Robin Knowles held that Special Compensation Protection and Indemnity Clause costs may also be included as part of the calculation of constructive total loss notwithstanding the contents of the Special Compensation Protection and Indemnity Clause which prevents owners from making a claim against insurers in relation to such payments. Specifically, the relevant clause between the owners and the salvors provided as such:-

> *"SCOPIC (Special Compensation Protection and Indemnity Clause) remuneration shall be that of the Shipowner alone and no claim whether direct, indirect, by way of indemnity or recourse or otherwise relating to SCOPIC remuneration... shall be made...under the vessel's Hull and Machinery Policy by the owners of the vessel."*

Unfortunately, Lord Justice Nicholas Hamblen does not provide detailed grounds on why such such expenses may be included as part of the calculation of constructive total loss.

## Implications of the Decision of the Court of Appeal

Practically, it is more likely than not that prior to the issuance of the Notice of Abandonment by the owner, discussions will be held between the owner and the insurer on the extent of the damage caused to the subject matter. Considering that the High Court and the Court of Appeal noted that the discussions between the insurer and the owner of the Vessel in relation to the extent the repair and fee estimates somewhat contributed to the delay in the owner's submission of the Notice of Abandonment, it would seem that there is a potential risk that discussions held between the insurer and the owner prior to the issuance of the Notice of Abandonment may have the effect of extending the period in which the Notice of Abandonment must be issued.

Accordingly, insurers ought to approach the discussions with owners with caution so as to avoid the same from being used adversely against them. It would seem that if such discussions were to take place, they ought to be held expediently.

In light of the Court of Appeal's view that Special Compensation Protection and Indemnity Clause expenses may also be included as part of the calculation of constructive total loss, it may now be prudent for insurers to insert a clause to the extent that these expenses are to be excluded from the calculation of constructive total loss.

## Conclusion

It is important to note that when delivering the judgment, the Court of Appeal cautioned that there ought to be no objective test and a fact-based approach much suited in such situations. However, it is clear from the judgment that:-

(i) where the situation is not urgent and there is no immediate danger to the vessel, owners are required to act with reasonable diligence upon receipt of reliable information and are entitled to reasonable time to make inquiry before issuing the Notice of Abandonment; and

(ii) whether the information available is reliable is subjective and the insured should be prudent to act promptly upon receipt of the reliable information.

The portion of the judgment allowing costs incurred prior to the issuance of the Notice of Abandonment to be quantified and accounted for in determining whether or not there has been a constructive total loss may not be well received by insurers. This is so because whilst no claim under the marine insurance policy could be made for these costs, these costs may be taken into account in determining a constructive total loss.

Nevertheless, the portion of the judgment which suggests that a fact-based approach is to be adopted in such cases is welcomed and will ensure that is a rigid application of this case can be avoided for future cases. Suffice to say, the adoption of a subjective test here should provide sufficient leeway in the future for courts to manoeuvre out of a similar interpretation where the facts of the case justify a departure against the same.

Notwithstanding this, as pointed out by the Court of Appeal, owners must be cautious in situations involving a lack of reliable information as to the losses suffered as Section 62(3) of the Marine Insurance Act 1906 makes it clear that the election on making a claim of a constructive total loss cannot indefinitely delayed.

# Our Regional Contacts

RAJAH & TANN | *Singapore*

**Rajah & Tann Singapore LLP**
T +65 6535 3600
F +65 6225 9630
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*

**R&T Sok & Heng Law Office**
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海
SHANGHAI REPRESENTATIVE OFFICE | *China*

**Rajah & Tann Singapore LLP**
**Shanghai Representative Office**
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

**Assegaf Hamzah & Partners**

**Jakarta Office**
T +62 21 2555 7800
F +62 21 2555 7899

**Surabaya Office**
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*

**Rajah & Tann (Laos) Sole Co., Ltd.**
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

**Christopher & Lee Ong**
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN NK LEGAL | *Myanmar*

**Rajah & Tann NK Legal Myanmar Company Limited**
T +95 9 7304 0763 / +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL
GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

**Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)**
T +632 894 0377 to 79 / +632 894 4931 to 32 / +632 552 1977
F +632 552 1978
www.cagatlaw.com

RAJAH & TANN | *Thailand*

**R&T Asia (Thailand) Limited**
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

**Rajah & Tann LCT Lawyers**

**Ho Chi Minh City Office**
T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

**Hanoi Office**
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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