Empower

A MONTHLY NEWSLETTER BY **HHQ & HLP** JULY 2022 | VOL. 7

MyCC's Green Light for M&A Soon? *- page 3*

- **Stamp Duty Exemption under i-MILIKI announced by the Prime Minister on 15th July 2022.** *- page 9*
- **A Recent Federal Court's Decision on the Issue of Sovereign Immunity in an Employment Dispute** *- page 11*
- **Case summary: U Television Sdn Bhd & Anor v Comintel Sdn Bhd [2017] 5 MLJ 292** *- page 15*
- **Inside Out** *- page 17*

ADVOCATES & SOLICITORS

Note from the Editorial Team

Dear Readers,

We hope everyone has been keeping well and safe. It is with great joy and pleasure, we wish to present to you, our new and improved 7th edition of Empower for the year 2022.

Our first article is our feature article for this month and it discusses the proposed amendments to the Competition Act 2010 of Malaysia. The proposed amendments may be of particular interest to many of our readers as it considers the introduction of a merger control regime that will provide the Malaysian Competition Commission with the power to review and investigate merger transactions that are likely to cause market concentration. For those who intend to undertake mergers and/or acquisitions.

The second article sets out and explains the effect and scope of a very recent and important announcement made by our Prime Minister on the exemption of stamp duty for first time home buyers through the Keluarga Malaysia Home Ownership Initiative (i-MILIKI). To have a better understanding on what the exemptions are and how they apply, do take a look at our article!

Our third article considers and explains the effect of a recent Federal Court decision on the issue of the restrictive doctrine of sovereign immunity in an employment dispute. The case involves a claim for unfair dismissal brought by a former security guard against the US Government and the article conveys the relevant issues that required the Federal Court's determination and how those issues were decided upon.

The fourth article in this newsletter is also a case summary of a Federal Court decision. In this case, the Federal Court was required to decide on whether in cases of a technical nature, expert evidence is required for the determination of the dispute between the parties by the trial court. The article sets out the key takeaways from this Federal Court decision and considers the reasoning behind the Federal Court's decision.

Finally, don't forget to take a look at our "Inside Out" section for all of our latest updates, events, promotions and activities.

We hope that you enjoy reading this month's edition!

Empower is a monthly newsletter jointly published by Halim Hong & Quek and Harold & Lam Partnership.

It is distributed for free and can be read on HHQ's or HLP's website at **https://hhq.com.my/** or **https://hlplawyers.com/**

All articles in this publication are intended to provide a summary or review of the subject matter and are not intended to be nor should it be relied upon as a substitution for legal or any professional advice.

Contact Us

KUALA LUMPUR OFFICE
OFFICE SUITE 19-21-1, LEVEL 21,
WISMA UOA CENTRE,
19, JALAN PINANG,
50450 KUALA LUMPUR.
T: +603 2710 3818
F: +603 2710 3820 (Corporate & Real Estate)
+603 2710 3821 (Dispute Resolution)
E: hhqkl@hhq.com.my

PENANG OFFICE
1-01-02, JALAN AHMAD NOR,
PUSAT PERDAGANGAN NOVA,
11600 PULAU PINANG.
T: +604 640 6818
T: +604 640 6817
F: +604 640 6819
E: hhqpenang@hhq.com.my

JOHOR OFFICE
A-2-23 & A-3-23, BLOCK A,
PUSAT KOMERSIAL BAYU TASIK,
PERSIARAN SOUTHKEY 1,
80150 JOHOR BAHRU,
JOHOR
T: +607 338 4648
T: +607 338 4725
T: +607 338 4728
F: +607 338 4685
E: hhq@hhqjb.com.my

HAROLD & LAM PARTNERSHIP
ADVOCATES AND SOLICITORS

KUALA LUMPUR OFFICE
SUITE 32-5, 32ND FLOOR,
OVAL TOWER DAMANSARA,
NO. 685, JALAN DAMANSARA,
60000 KUALA LUMPUR
T: +603 7732 8862
F: +603 7732 8812
E: hlp@hlplawyers.com

FREE Publication
Printing Permit: PP19508/08/2019(035103)

MyCC's Green Light for M&As soon?

Written by
MAPLE CHIENG HEA FONG

BACKGROUND

Competition law contains three (3) pillars being: (1) prohibition of anti-competitive agreements; (2) prohibition on the abuse of dominant position and (3) merger control regime.

The Competition Act 2010 of Malaysia ("**Act**") prohibits anti-competitive agreements and the abuse of dominant position in the market has been in force since 1 January 2012. However, as it currently stands, Malaysia is the only country in Southeast Asia that does not have merger control provisions.

On 25 April 2022, the Malaysia Competition Commission ("**MyCC**") launched an online public consultation on the proposed amendments to the Act to seek comments and feedback from the public to submit their written input to MyCC by 27 May 2022. The proposed amendments to the Act includes, amongst others, the introduction of a merger control regime that will provide MyCC with the power to review and investigate mergers transactions that are likely to cause market concentration ("**Proposed Amendments**").

1) WHAT IS "MERGER" OR "ANTICIPATED MERGER"?

There are four circumstances in which a "**merger**" is said to have occurred:

a) two or more previously independent enterprises combine into one single enterprise and cease to exist as separate legal entities;

b) the acquisition of direct or indirect control of the whole or part of one or more enterprises;

c) the acquisition of assets of one enterprise by another enterprise results in the acquiring enterprise replacing or substantially replacing the enterprise whose assets are being acquired, in the business or the part concerned of the business, in which the acquired enterprise was engaged immediately before the acquisition; or

d) the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity.

An enterprise shall be deemed as having control of another enterprise where such enterprise has conferred the possibility of exercising decisive influence on the other enterprise by reason of rights, contracts or any other means either separately or in combination.

"**Anticipated merger**" refers to any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, that is in progress or contemplation and that, if consummated, will result in the occurrence of a "merger" referred to in the above.

continued from page 3

2) WHAT IS NOT "MERGER"?

The four circumstances listed below in which a commercial or economic activity in the market does NOT amount to a "merger":

a) the control is acquired by a person acting in his capacity as receiver or liquidator or an underwriter;

b) all of the enterprises involved in the merger are, directly or indirectly, under the control of the same enterprise;

c) the control is acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy; or

d) the control is acquired by an enterprise whose normal activities include the carrying out of transactions and dealings in securities for its own account or for the account of others in the circumstances specified below:

   i) the securities are acquired are on a temporary basis (calculated 12 months from the date on which control of the other enterprise); and

   ii) the acquiring enterprise must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target enterprise or must exercise these rights only to prepare the total or partial disposal of the enterprise, its assets or securities.

3) WHAT IS "MERGER CONTROL"?

The definition of "merger control" is not provided for by MyCC in the Proposed Amendments.

Merger control can be understood as to refer to the procedure of reviewing mergers and acquisitions under antitrust/competition law[1].

MyCC has proposed that any merger control regime based on competition law must establish a substantive standard for determining whether a particular merger should be amended or prohibited, and when a government decides to implement a merger control system as part of its competition law framework, it must first select which substantive criterion it will apply to evaluate whether a merger should be allowed or prohibited based on competition law principles.

MyCC has proposed to adopt the "substantial lessening of competition" test (also known as "**SLC**") as the substantive standard for assessing the anti-competitive effects of mergers in Malaysia. MyCC however has not provided guidance on SLC in the Proposed Amendments.

In short, any merger or anticipated mergers transacted within and outside of Malaysia has an effect on competition in any market in Malaysia is subject to the merger control regime, and any mergers that result or an anticipated merger, if consummated, may result in a SLC within any market for goods or services is prohibited ("**Prohibition**").

[1] https://en.wikipedia.org/wiki/Merger_control

continued from page 4

4) WHY "MERGER CONTROL"?

The basis for the introduction of the merger control regime by MyCC in Malaysia are as follows:

a) lacuna of the Act - which results in MyCC unable to intervene in any merger transactions that result in a SLC of the merger transactions, and consequently the enterprises may exploit the merger transactions to legalise their cartel, which may undermine the competition process;

b) addressing the issues for the increasing cost of living – mergers that result in a SLC in the market may lead to economic sabotage, which consequently has derailed the efforts to assist marginalised groups and distort Malaysia's economic growth in the long term; and

c) creation of monopolies and concentrated market – unmonitored merger transactions may lead to the creation of monopolies that result in a concentrated market, which may pose a high barrier to entry for new players in a market and impede the innovative incentive for enterprises.

5) WHAT SHOULD THE PARTIES TO THE MERGERS AND ACQUISITIONS ("M&As") DO?

Parties' obligations would therefore depend on whether it is a mandatory notification or voluntary notification requirement based on the threshold prescribed by MyCC:

a) Mandatory notification

If the anticipated mergers exceed the threshold to be prescribed by MyCC through an order published in the Gazette ("**Threshold**"), parties to notify MyCC before the consummation of the anticipated mergers. The Threshold has not been announced by MyCC in the Proposed Amendments. Further, MyCC also has the power to review the sufficiency of the Threshold and amend the Threshold, through an order published in the Gazette.

After notification to MyCC, parties are to provide additional information/document required by MyCC according to the timelines set by MyCC (if applicable), and parties shall not consummate the anticipated merger that was notified before receiving the approval from MyCC/gun jumping.

MyCC is required to issue its decision on the anticipated merger that was notified to it within 120 working days from the date when MyCC accepts the notification is complete.

If MyCC has not made any decision with regards to the anticipated merger that was notified upon the expiry of the 120 working days merger review period, the anticipated merger shall be deemed to be approved and the parties to the anticipated merger may proceed to consummate the merger.

The 120 working days of merger assessment may be stopped or suspended by MyCC when:

i) MyCC requests further information from the enterprises;

ii) The enterprise seeks an extension of time to file for their written representation;

iii) The enterprise wants to make an oral representation; or

iv) The enterprise submits a commitment offer, i.e. a commitment that was given by the enterprise to MyCC to remedy, mitigate or prevent SLC caused by the merger or anticipated merger.

continued from page 5

MyCC would not take more than 40 working days to review and approve an application but the process may stretch for another working 80 days for in depth assessment to determine if an anticipated merger, if consummated, will cause SLC effect in the market (if necessary).

The application can be:

i) approved without condition - where enterprises can consummate their mergers;

ii) approved with conditions - where the transaction was approved with a commitment that addresses SLC concerns; or

iii) rejected - where enterprises will be prohibited from consummating the anticipated merger due to SLC concerns.

Parties who are displeased with the merger-related decisions issued by MyCC can appeal to the Competition Appeal Tribunal ("**CAT**"), which will be provided with exclusive jurisdiction to review/hear appeals relating to the merger-related decisions issued by MyCC. The right of appeal against the decisions of CAT at the High Court will be limited to the following:

i) on a point of law arising from a decision of the CAT; or

ii) from any decision of CAT as to the amount of a financial penalty.

The High Court, upon hearing the appeal, may:

i) confirm, modify or reverse the decision of the CAT; and

ii) make such other order as the High Court thinks fit.

b) Voluntary notification

If the mergers or anticipated mergers do not exceed the Threshold, parties to voluntarily notify MyCC whether before or after the mergers or anticipated mergers have been consummated. Parties will not be subject to 120-working days merger assessment period by MyCC.

6) WHAT IF PARTIES TO THE M&As FAIL TO NOTIFY MYCC FOR AN ANTICIPATED MERGER THAT EXCEEDS THE THRESHOLD OR THE PARTIES TO THE M&As HAVE NOTIFIED MYCC BUT PROCEED TO CLOSE/CONSUMMATE THE ANTICIPATED MERGER THAT EXCEEDS THE THRESHOLD WITHOUT OBTAINING THE APPROVAL FROM MYCC? ANY RELIEF OF LIABILITY?

An anticipated merger shall be deemed to have been consummated if the anticipated merger results in the occurrence of a merger referred to in item (1) above. As a result, failure to adhere to the requirement not to consummate the anticipated merger/gun jumping would result in a merger violation and the anticipated merger that has been consummated shall be rendered void.

MyCC has the power to impose a financial penalty of up to ten per cent (10%) of the value of the merger transaction or anticipated merger transaction on the enterprise that has committed a merger violation. Further, MyCC has the power to prescribe the manner of calculating the value of a merger transaction or anticipated merger transaction for the purposes of imposing the financial penalty by an order published in the Gazette.

Enterprises are provided with an avenue to relieve their liability from the Prohibition on the basis that the economic efficiencies of the merger or anticipated merger outweigh any adverse effect from SLC effect caused by the merger or anticipated merger, and any enterprises claiming the benefit bear such burden to establish the existence of economic efficiencies.

continued from page 6

7) ANY EXCLUSION FROM THE MERGER CONTROL REGIME STATED ABOVE?

The Act currently excludes the commercial activities regulated under the following legislations:

a) Communications and Multimedia Act 1998, which is subject to the scrutiny of the Malaysia Communications and Multimedia Commission ("**MCMC**");

b) Energy Commission Act 2001, which is subject to the scrutiny of the Energy Commission of Malaysia ("**Energy Commission**");

c) Petroleum Development Act 1974 and the Petroleum Regulations 1974 in so far as the commercial activities regulated under these regulations are directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia, which is subject to the scrutiny of Petroliam National Berhad (PETRONAS); and

d) Aviation Commission Act 2015, which is subject to the scrutiny of Malaysian Aviation Commission (MAVCOM).

One recent example would be MyCC announced on 2 July 2022 that MyCC was aware of repeated calls for MyCC to intervene in the proposed merger between Digi Bhd (Digi) and Celcom Axiata Bhd (Celcom) ("**Proposed Merger**"). However, since the Act does not apply to, amongst others, telecommunications and multimedia sector (which is subject to the scrutiny of the MCMC), MyCC would therefore leave such matters relating to the Proposed Merger to the wisdom of MCMC.

The Proposed Amendments further expand the exclusion from the Act the following legislations/mergers:

a) Postal Services Act 2012, which is subject to the scrutiny of MCMC;

b) Gas Supply Act 1993, which is subject to the scrutiny of the Energy Commission;

c) mergers between enterprises licensed or approved or registered or prescribed by the Finance Minister or the Central Bank of Malaysia (BNM) under the following legislations:

    i) Financial Services Act 2013;

    ii) Islamic Financial Services Act 2013;

    iii) Money Services Business Act 2011; and

    iv) Development Financial Institutions Act 2002;

d) mergers between enterprises licensed or approved or registered by the Finance Minister or the Securities Commission of Malaysia (SC) under the following legislations:

    i) Capital Markets and Services Act 2007; and

    ii) Securities Industries (Central Depository) Act 1991;

e) mergers between enterprises licensed or approved or registered by the Labuan Financial Services Authority (Labuan FSA) under the following legislations:

    i) Labuan Financial Services and Securities Act 2010; and

    ii) Labuan Islamic Financial Services and Securities Act 2010;

continued from page 7

f) mergers between enterprises licensed by the National Water Services Commission ("**SPAN**") under the Water Services Act 2006;

g) mergers to the extent they are engaged in order to comply with a legislative requirement; and

h) mergers carried out by an enterprise entrusted by the Federal or State Government, as the case may be, with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the Prohibition would obstruct the performance of the task assigned to the enterprise.

CONCLUSION

It was reported that MyCC will soon be given the power to regulate M&As once the parliament approves the Proposed Amendments, which is expected to be tabled by end of year 2022. It was further reported that the market will be given a one-year grace period to be familiar with the new merger control regime[2].

Companies which intend to undertake M&As to take note of and familiarise themselves with the Proposed Amendments (which includes, but not limited to, the content highlighted above) and the final amendments to the Act (when available)[3], and to actively engage with the relevant regulators early to ensure that the targeted timeline for their M&As is met[4] when the final amendments to the Act come into force.

In relation to the documentation for M&A when the final amendments to the Act come into force, parties are to take note for the pre-merger notification to MyCC and clearance/approval from MyCC to be made as a condition precedent to the completion/closing of such M&As should they exceed the Threshold since that parties to such M&As are not allowed to consummate/close the deals until the clearance/approval from MyCC is obtained.

[4]

This article dated 13 July 2022 is contributed by Maple Chieng for general information only and is not a substitute for legal advice.

Maple Chieng Hea Fong
Partner
Halim Hong & Quek
Advocates & Solicitors
maple.chieng@hhq.com.my

[2] https://www.theedgemarkets.com/article/firms-seeking-mas-may-need-obtain-myccs-nod-2024

[3] In particular, on the Threshold and the guidance on SLC which have not been announced.

[4] https://www.freemalaysiatoday.com/category/business/local-business/2022/06/30/proposed-new-rule-on-ma-raises-delay-concern/

STAMP DUTY EXEMPTION UNDER i-MILIKI ANNOUNCED BY THE PRIME MINISTER ON 15TH JULY 2022

Written by
CLARA CHU YEN YONG

Image source: Jabatan Penerangan Malaysia

On 15 July 2022, Prime Minister Datuk Seri Ismail Sabri Yaakob announced a stamp duty exemption for first-time home buyer through the Keluarga Malaysia Home Ownership Initiative (i-MILIKI) to assist more people in purchasing their first home in Malaysia.

What is Keluarga Malaysia Home Ownership Initiative (i-MILIKI)?

It is a stamp duty exemption incentive applicable to the instruments of transfer (Memorandum of Transfer) and loan agreements for the purchase of property by a first-time home buyer.

What are the requirements to be eligible for this stamp duty exemption under i-MILIKI:-

1) First-time home buyers; and

2) Sale and Purchase Agreement dated between 1 June 2022 to 31 December 2023.

NB: Further details on this exemption will have to wait until the official gazette is published.

What are the stamp duty exemptions under i-MILIKI?

1) For properties valued RM500,000.00 and below, **full (100%) stamp duty** payable on the instruments of transfer and loan agreements are waived.

2) For properties valued above RM500,000.00 to RM1,000,000.00, **half (50%) of the stamp duty** payable on the instruments of transfer and loan agreements are waived.

continued from page 9

Current Stamp Duty Calculation Formula:

	Purchase Price or Adjudicated Value	Scale of Adjudicated
Calculation Formula of Stamp Duty for instrument of transfer (Memorandum of Transfer)	First RM100,000	1%
	RM100,001 to RM500,000	2%
	RM500,001 to RM1,000,000	3%
	Above RM1,000,000	4%
Calculation Formula of Ad Valorem Stamp Duty for Loan Agreements	0.5% of the loan amount	

Stamp Duty Calculation Formula Exemptions under i-MILIKI:

Property Category	Example	Stamp Duty payable on the instrument of transfer (WITHOUT EXEMPTION)	Exemption entitlement	Stamp Duty payable on the instrument of transfer (WITH EXEMPTION under I-MILIKI)
Properties valued RM500,000.00 and below	Property value: RM500,000.00	RM9,000.00	Full exemption	**NIL**
	Property value: RM400,000.00	RM7,000.00	Full exemption	**NIL**
For properties valued above RM500,000.00 to RM1,000,000.00	Property value: RM1,000,000.00	RM24,000.00	50% exemption	RM24,000.00 x 50% = **RM12,000.00**
	Property value: RM600,000.00	RM12,000.00	50% exemption	RM12,000.00 x 50% = **RM6,000**

Property Category	Example	Stamp Duty payable on the loan agreement (WITHOUT EXEMPTION)	Exemption entitlement	Stamp Duty payable on the loan agreement (WITH EXEMPTION under I-MILIKI)
Properties valued RM500,000.00 and below	Loan amount RM500,000.00	RM2,500.00	Full exemption	**NIL**
	Loan amount RM400,000.00	RM2,000.00	Full exemption	**NIL**
For properties valued above RM500,000.00 to RM1,000,000.00	Loan amount RM1,000,000.00	RM5,000.00	50% exemption	RM5,000.00 x 50% = **RM2,500.00**
	Loan amount RM600,000.00	RM3,000.00	50% exemption	RM3,000.00 x 50% = **RM1,500.00**

Side note:

Similarly, and for the benefit of first-time home buyers, the government has also introduced the Stamp Duty (Exemption) Order 2021, which exempts from stamp duty all instruments of transfer and loan agreements executed in relation to the purchase of a residential property valued up to RM500,000 (based on market value) by an individual between 1 January 2019 and 31 December 2025.

Please refer to [Stamp Duty (Exemption) Order 2021 [P.U.(A) 53] and Stamp Duty (Exemption) (No. 2) Order 2021 [P.U.(A) 54]] for further information regarding the stamp duty exemption.

Clara Chu Yen Yong
Associate
Halim Hong & Quek
Advocates & Solicitors
clara.chu@hhq.com.my

A RECENT FEDERAL COURT'S DECISION ON THE ISSUE OF RESTRICTIVE DOCTRINE OF SOVEREIGN IMMUNITY IN AN EMPLOYMENT DISPUTE

Written by
TEOH YEN YEE

THE UNITED STATES OF AMERICA v. MENTERI SUMBER MANUSIA & ORS AND ANOTHER APPEAL [2022] 5 MLRA 134

INTRODUCTION

1) In the recent Federal Court decision in ***The United States Of America V. Menteri Sumber Manusia & Ors And Another Appeal [2022] 5 MLRA 134***, a claim for unfair dismissal brought by a former security guard against the US Government was sent back to the Industrial Court to decide on its merits.

2) The Federal Court held that under the restrictive doctrine of sovereign immunity, immunity would not be granted if a sovereign state performs certain private acts or transactions which are commercial in nature. As the reference to the Industrial Court for unfair dismissal had nothing to do with functions related to the exercise of sovereignty of the state, the appropriate and only forum to determine the issue of immunity was the Industrial Court.

BACKGROUND FACTS

3) The Appellant in this case is the United States of America, a sovereign state which has established a diplomatic mission, the Embassy of the United States of America in Kuala Lumpur ("**Embassy**"). On 29.9.1998, the 2nd Respondent, a Malaysian, was employed as a security guard at the Embassy ("**Security Guard**").

4) The dispute arose when the Security Guard's employment was terminated on 4.4.2008 through a phone call from an official of the Embassy, without giving any reasons.

5) As the Security Guard had served the Embassy for more than 10 years, he felt aggrieved for being dismissed without notice and any reasons given. He then filed a representation under Section 20(1) of the Industrial Relations Act 1967 ("**IRA**") against the Embassy for dismissal without just cause and excuse, and seeking for reinstatement.

6) At that time, the reference to the Industrial Court for determination was not automatic. Upon attempt for conciliation, the Director General of Industrial ("**DGIR**") referred the matter to the Industrial Court for adjudication on whether the dismissal was for just cause or excuse as the DGIR found that:

    a) there were serious questions of facts and laws that require adjudication;

    b) the issue concerning the claim for immunity by the Embassy is an issue of law that should be decided by the Industrial Court; and

    c) The claim brought by the Security Guard was not frivolous and vexatious.

continued from page 11

7) This reference vested threshold jurisdiction upon the Industrial Court to hear a claim under Section 20 of the IRA ("**Reference**").

8) However, the Embassy filed an ex parte application to the High Court for leave to commence judicial review proceedings to quash the Reference.

9) The High Court granted leave to the Embassy and subsequently quashed the Reference by the DGIR. The High Court also granted a declaration that the Appellant and its Embassy are immune from the jurisdiction of the Industrial Court in respect of the said claim.

10) Aggrieved with the High Court's Order, both the Minister of Human Resources and the Security Guard appealed to the Court of Appeal. The Court of Appeal allowed both appeals and set aside the High Court's Order.

11) The Appellant then filed 2 applications for leave to appeal to the Federal Court and they were granted on 30.9.2021.

ISSUES FOR THE DETERMINATION BY THE FEDERAL COURT

12) There were 8 leave questions allowed by the Federal Court which were subsequently condensed into the following 3:

    a) Question 1: Whether under common law, the restrictive doctrine of sovereign immunity applied to a claim pursued under Section 20 of the IRA by a staff of a diplomatic mission who was dismissed on the ground of misconduct in the course of the diplomatic mission's internal disciplinary management of its staff ("**Section 20 Claim**") with the result that the Industrial Court will have no jurisdiction over the said claim?

    b) Question 2: Whether the common law restrictive doctrine of sovereign immunity applies to a Section 20 Claim of a staff of a diplomatic mission employed in a security capacity whose duties pertain to the protection of its diplomatic staff and the maintenance of the inviolability of its diplomatic mission's premises with the result that the Industrial Court will have no jurisdiction over the said claim? and

    c) Question 3: Whether the Court of Appeal had erred in setting aside the Decision and Orders of the High Court, which was properly exercising its plenary judicial powers, its statutory judicial review powers and in accordance with the law laid down by the apex Supreme Court in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 1 MLRA 372, to decide whether the Appellant and her Embassy were immune from the jurisdiction of the Industrial Court in respect of the Employee's Section 20 Claim?

13) Questions 1 and 2 essentially relate to the nature, scope and applicability of the restrictive doctrine of a sovereign immunity in the context of the dismissal of the security guard by the employer which is a sovereign state.

14) Question 3 concerns whether the judicial review proceedings in the High Court is a proper forum to decide the issue of restrictive doctrine of sovereign immunity.

continued from page 12

THE APPELLANT'S CONTENTIONS

15) The Appellant contended that the Industrial Court is not the proper forum to decide the question of sovereign immunity as the employee was employed in a security capacity and his duties was also to maintain the inviolability of the Embassy's premises. It is not merely auxiliary but was integral to the core sphere of sovereign activity.

THE RESPONDENTS' CONTENTIONS

16) The Minister of Human Resources contended that the scheme of IRA expressly conferred upon the Industrial Court an adjudicatory function to decide on questions of fact or law. Whether restrictive doctrine of immunity applies is a question of law and would depend on a few factors, principally on the nature of the employment. So, the proper forum to decide on the nature of the job scope of the Security Guard would be in the Industrial Court.

17) Whereas for the Security Guard, he contended that the distinction between the employees whose job scope include implementing foreign and defence policies of the state or that in the private sector is wholly dependent on the facts and circumstances of each case. So, the proper forum to decide on the nature of the job scope would be in the Industrial Court, after considering both oral and documentary evidence.

DECISION BY THE FEDERAL COURT

18) For convenience, the Federal Court first dealt with Question 3.

19) The pre-amended Section 20 (3) of the IRA conferred upon the DGIR a wide and unfettered discretion to refer or not to refer the dispute to the Industrial Court. If the representation raises serious questions of fact or law (or even mixed questions of law or fact) calling for adjudication, it ought to be referred to the Industrial Court since it is the only proper forum to adjudge such questions.

20) The Federal Court recognized that the question as to whether the dismissal of the Security Guard at the Embassy was a decision of the Appellant made in its governmental function as a sovereign state and not a private or commercial matter. As such, it is entitled to sovereign immunity and is in itself a serious and difficult question of law.

21) As the Security Guard averred in his affidavit that his job scope were mere routine and menial in nature, did not involve diplomatic functions or governmental decision of the Appellant. He also did not have access to the confidential information or documents relating to the Embassy.

22) In the case of restrictive doctrine of sovereign immunity, it is not all acts of the sovereign foreign state that is immune from legal action but only those acts that are primarily governmental or diplomatic in nature and character, or for example touching on the legislative or international transaction of a foreign government, or the policy of its executive. However, all these can only be decided upon all the relevant facts being ascertained. An inquiry has to be made to ascertain whether the action of the sovereign state is within or outside that activity.

23) The relevant evidence can only be more appropriately given at the Industrial Court where the parties may be cross-examined by each other on the true nature of the employment and the act of dismissal. The designation of the job as a security guard at the Embassy alone is not sufficient and that the Appellant ought to lead evidence as to whether the job performance had anything to do with functions related to the exercise of sovereignty of the Appellant.

continued from page 13

24) In the present case, the Industrial Court had not even commenced any hearing yet let alone made any decision on the preliminary issue regarding the applicability of restrictive doctrine of sovereign immunity. If a party is aggrieved, the proper recourse is to apply for judicial review against the Industrial Court after the Industrial Court has made a determination on that question.

25) Based on these reasons, the Federal Court answered Question 3 in the negative. As for Questions 1 and 2, it was deemed unnecessary to be answered by the Federal Court in the circumstances.

KEY TAKEAWAYS FROM THE CASE

26) Based on our reading and understanding of this decision by the Federal Court, the Industrial Court is conferred upon a wide threshold jurisdiction to hear and determine employment related disputes, be it questions of law or fact. Even for the issue of sovereign immunity, the appropriate and only forum to determine these issues would be at the Industrial Court as a matter of first instance upon a reference by the Minister of Human Resource.

27) Post-amendment to the IRA, as employees now have direct access to the Industrial Court, any parties who are aggrieved by the reference or would like to raise questions of law in the reference, would have to wait for the Industrial Court to hear and give an award before taking up any judicial review proceedings.

Teoh Yen Yee
Senior Associate
Harold & Lam Partnership
Advocates & Solicitors
yenyee@hlplawyers.com

CASE SUMMARY: U Television Sdn Bhd & Anor v Comintel Sdn Bhd [2017] 5 MLJ 292

Written by
SATSHANI N. RADHAKRISNAN

INTRODUCTION

1) This is a decision by the Federal Court concerning expert evidence. The Federal Court was required to decide on whether in cases of a technical nature, expert evidence is required for the determination of the dispute between the parties by the trial court.

2) The question of law which the Federal Court had to determine – "Whether in a case where the plaintiff had the burden of establishing facts which by their nature required expert evidence to establish them, it was open to the court to rule that the plaintiff had discharged its burden without calling for expert evidence.".

3) The above question was answered in the negative by the Federal Court. This will be explained below.

BACKGROUND FACTS

4) The 1st Appellant was a licensed television broadcaster while the Respondent was a provider of software and hardware solutions for the broadcast and telecommunication industries.

5) By way of a Letter of Award, the 1st Appellant engaged the Respondent to provide a solution to the various technical problems it faced in its broadcast transmissions. Payment for the work done was guaranteed by the 2nd Appellant.

6) In accordance with the Letter of Award, the Respondent was required to pass a "Proof of Concept Site Acceptance Test" to determine whether its proposed solutions resolved the 1st Appellant's technical problems. In this regard, it was initially agreed by the parties that the test protocol to be used would the POC SAT version 3.8(a). This version was however aborted mid-way because the 1st Appellant felt that it was unsuitable.

7) The 1st Appellant then applied the re-formatted version 3.8(b) which, during the initial testing, failed to solve the 1st Appellant's problems. Based on the evidence adduced, the test based on the 3.8(a) version was never fully performed. The Respondent refused to accept the test results using this version as it was not a mutually agreed upon test protocol. The Respondent took the position that versions 3.8(a) and 3.8(b) were substantially different from each other but the Appellants contended that they were similar.

8) The Respondent then terminated the Letter of Award on the ground that the 1st Appellant repudiated the contract by failing to make payments when due and for preventing or interfering with the Respondent's work in carrying out the contract. The Respondent then made a call on the guarantee and thereafter sued the Appellants for damages for breach of contract. The 1st Appellant counterclaimed for a refund of all the monies it had paid the Respondent under the contract and also sought damages for breach of contract.

9) The High Court allowed the Respondent's claim and dismissed the Appellants' counterclaim. In arriving at its decision, the High Court relied primarily on the evidence of PW2 and PW3 whom it considered to have the expertise and know how on the technical aspects of the case. In reliance on their evidence, the High Court found that versions 3.8(a) and 3.8(b) were different.

continued from page 15

10) The Court of Appeal thereafter dismissed the Appellants' appeal and affirmed the High Court's decision.

11) The Appellants then applied for leave to appeal to the Federal Court which was given based on the question of law set out in paragraph 2 above. In the appeal proper, the Appellants took the position that the trial court was wrong in deciding the case without the benefit of expert evidence despite the dispute involving technical issues. The Respondent however contended that expert evidence was not required as the dispute centred on whether a mutually agreed upon test protocol version had been used.

THE DECISION BY THE FEDERAL COURT

12) In deciding the appeal, the Federal Court had to consider whether the approach adopted by the High Court and the Court of Appeal on the discharge of the burden of proof by a party seeking judgment in respect of matters of a technical nature was correct especially considering that both courts opined that there was a need for technical evidence for parties to prove their respective case.

13) In connection thereto, the Federal Court found that expert evidence was required. The Federal Court held that the Respondent's witnesses, PW2 and PW3 were witnesses of facts and could not be characterised as experts as they did not satisfy the test under Section 45 of the Evidence Act 1950. In this regard, the Federal Court opined that for a witness to be an expert, he had to be truly independent and skilled in the area he was giving evidence.

14) In connection thereto, PW2 was the Respondent's Senior Manager and PW3 was the Respondent's CEO. PW2 was personally involved in the technical aspects of the project and coordinated and oversaw the implementation of the project and participated in discussions with the 1st Appellant on the test protocol. The Federal Court was therefore of the view that they had an interest in the case which would disqualify them as truly independent witnesses.

15) Given the fact that the High Court had established that there was a need for technical evidence, it was therefore the judgment of the Federal Court that it was incumbent for the Respondent to have led evidence through experts. In this respect, as the Respondent did not lead evidence through experts, it had failed to discharge its burden of proof under Sections 101 and 102 of the Evidence Act 1950.

16) The appeal was accordingly allowed by the Federal Court with costs with the question of law set out in paragraph 2 above being answered in the negative.

KEY TAKEAWAYS

17) This decision by the Federal Court establishes that in cases involving technical issues, expert evidence is required. A party seeking judgment in such cases should lead evidence through experts in order to satisfy their burden of proof under Sections 101 and 102 of the Evidence Act 1950. This is especially so when the trial court recognises that there is a need for expert evidence to determine the technical issues.

18) Based on this case, it is also clear that in order for a witness to be characterised as an expert witness, the test laid down under Section 45 of the Evidence Act 1950 must be satisfied. A person who is a representative of one of the parties to the dispute and who has been involved in the project which is the subject matter of the dispute cannot qualify as an expert as he has an interest in the case and would not be independent. Such persons would be witnesses of facts and not expert witnesses.

Satshani N. Radhakrishnan
Partner
Harold & Lam Partnership
Advocates & Solicitors
satshani@hlplawyers.com

ANNOUNCEMENT

WELCOME ON BOARD!

We are pleased to announce that Mr. Desmond Liew Zhi Hong joins Halim Hong & Quek as a Tax Partner of Corporate & Commercial Team.

Desmond is a Tax Partner at HHQ. He has more than 8 years of Malaysian taxation experience, including 4 years as a tax consultant at one of the Big 4 audit firms. He works on all aspects of tax and revenue law, in particular, regularly representing taxpayers in tax disputes, handling tax audits and investigations, regularly advises on tax issues arising from corporate transactions, M&A, corporate restructuring, cross border transactions, regulatory compliance, employment, TMT, IP, real estate as well as land matters. He has been recognized as one of the key tax lawyers in Malaysia by Legal 500 Asia Pacific 2022.

RELOCATION OF HHQ PENANG OFFICE

We are excited to announce that our HHQ Penang Office is moving to a new location. Our new establishment will be on full force starting on 1st August 2022 at below address:

No. 1-01-02, Jalan Ahmad Nor, Pusat Perdagangan Nova,
11600 Jelutong, Pulau Pinang.

Phone: 04-6406818
Fax: 04-640 6819
Email: hhqpenang@hhq.com.my

HLP MOOT COMPETITION

We would like to extend our sincere congratulations to our interns for their successful participation in the "HLP Moot Competition" held recently on 21.7.2022. The moot question concerned the application of Section 23 of the Contracts Act 1950, an area of law which is still unsettled and open-ended in Malaysia. The participants were assessed based on a number of categories such as research and preparation, responding to questions, persuasiveness, courtroom conduct and overall impression of the mooter.

Well done to Tong Xi Xian, Hannah Chong Mun Kei, Issac Guek Yee Yun, Alaina Lim Li Fern, Jaden Ngooi Yew Shiuan and Clement Ling Jia Hao. We hope that through this mooting competition, they are able to enhance their advocacy, legal research and writing skills as well as to work closely with and learn from their peers.

HHQ SPORTS CLUB COMMITTEE 2022/2023

On 15 July 2022, Mr Tan Keen Ling and Mr Chau Yen Shen, on behalf of HHQ Sports Club Committee 2022/2023 had given an announcement to all the employees of HHQ and the representatives of HLP. It was a fruitful session as the session had introduced the club annual operating plan, the committee members and highlighted the upcoming activities and games. With the aim to instill the spirit of teamwork and sportsmanship in all members, HHQ Sports Club will organise different sports on a weekly basis and all members are encouraged to join. A tea ceremony was held in conjunction with the session, to celebrate the milestones achieved and we look forward for many more milestones ahead.

Empower is a monthly newsletter jointly published by Halim Hong & Quek and Harold & Lam Partnership.

It is distributed for free and can be read on HHQ's or HLP's website at **https://hhq.com.my/** or **https://hlplawyers.com/**

All articles in this publication are intended to provide a summary or review of the subject matter and are not intended to be nor should it be relied upon as a substitution for legal or any professional advice.

EDITORIAL TEAM

Chong Lee Hui

Ankit Sanghvi

Serene Hiew Mun Yi

Amy Hiew Kar Yi

Tan Poh Yee

Hee Sue Ann

Chan Jia Ying

Contact Us

KUALA LUMPUR OFFICE
OFFICE SUITE 19-21-1, LEVEL 21,
WISMA UOA CENTRE,
19, JALAN PINANG,
50450 KUALA LUMPUR
T: +603 2710 3818
F: +603 2710 3820 (Corporate & Real Estate)
+603 2710 3821 (Dispute Resolution)
E: hhqkl@hhq.com.my

PENANG OFFICE
No.1-01-02, Jalan Ahmad Nor,
Pusat Perdagangan Nova,
11600 Jelutong, Pulau Pinang.
T: +604 640 6818
T: +604 640 6817
F: +604 640 6819
E: hhqpenang@hhq.com.my

JOHOR OFFICE
A-2-23 & A-3-23, BLOCK A,
PUSAT KOMERSIAL BAYU TASIK,
PERSIARAN SOUTHKEY 1,
80150 JOHOR BAHRU,
JOHOR
T: +607 338 4648
T: +607 338 4725
T: +607 338 4728
F: +607 338 4685
E: hhq@hhqjb.com.my

KUALA LUMPUR OFFICE
SUITE 32-5, 32ND FLOOR,
OVAL TOWER DAMANSARA,
NO. 685, JALAN DAMANSARA,
60000 KUALA LUMPUR
T: +603 7732 8862
F: +603 7732 8812
E: hlp@hlplawyers.com

FREE Publication
Printing Permit: PP19508/08/2019(035103)