Rahmat Lim & Partners
IN ASSOCIATION WITH ALLEN & GLEDHILL LLP (SINGAPORE)

Jurisprudentia

A summary of developments in the law

At a glance

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IN ASSOCIATION WITH ALLEN & GLEDHILL LLP (SINGAPORE)

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Capital Markets

Lodge and Launch Framework: Shorter time to market for wholesale products

In its press release issued on 15 June 2015, the Securities Commission Malaysia ("**SC**") heralded the Lodge and Launch Framework as a "*major reform in the SC funds and product approval regime which will significantly reduce time-to-market for wholesale products*". The Lodge and Launch Framework, which came into effect on 15 June 2015, goes hand-in-hand with the SC's Guidelines on Unlisted Capital Markets Products under the Lodge and Launch Framework ("**LOLA Guidelines**") (revised 15 June 2015). The LOLA Guidelines set out the requirements that must be observed for the purposes of making available certain unlisted capital market products ("**Products**") exclusively to sophisticated investors in Malaysia, or persons outside Malaysia. For the purposes of the LOLA Guidelines, unlisted capital market products do not include shares and real estate investment trusts. Under the Lodge and Launch Framework, the previous manual submission requirement has been replaced by a requirement to lodge documents via an online lodgement system operated by the SC through its website.

Following the implementation of the LOLA Guidelines, the SC's approval or authorisation under section 212 of the Capital Markets and Services Act 2007 ("**CMSA**") for the issuance of the relevant Product will no longer be required. Once the requisite information and documents have been lodged with the SC, the issuer may immediately proceed to "launch" the Product, meaning that it may make available, offer for subscription or purchase, or issue an invitation to subscribe for or purchase, the Product. In the case of ringgit-denominated *sukuk*, the *Shariah* pronouncement by the issuer's *Shariah* adviser must be submitted to the SC at least 10 business days prior to the proposed lodgement date. Only after the endorsement of the SC's *Shariah* Advisory Council is received may the issuer proceed with the lodgement.

To facilitate this new framework, Schedule 5 of the CMSA has been amended pursuant to the Capital Markets and Services (Amendment of Schedules 5, 6, 7 and 8) Order 2015, to expressly exempt such Products from the requirement to obtain the prior approval or authorisation of the SC. Such exemption will apply if the making available of, offering for subscription or purchase of, or issuance of an invitation to subscribe for or purchase such Products complies with the LOLA Guidelines, including requirements relating to lodgement of documents and information, payment of fees and timelines.

Superseded Guidelines

The LOLA Guidelines supersede the SC's Guidelines on Wholesale Funds, Guidelines on the Offering of Structured Products, Guidelines on Private Debt Securities, Guidelines on *Sukuk*, and Guidelines on the Offering of Asset-Backed Securities (collectively, the "**Superseded Guidelines**").

The SC concurrently, on 15 June 2015, issued its new Guidelines on Issuance of Private Debt Securities and *Sukuk* to Retail Investors ("**Retail PDS/*Sukuk* Guidelines**"), which took effect on the same day. Sections of the Superseded Guidelines pertaining to retail offerings have now been superseded and replaced with the Retail PDS/*Sukuk* Guidelines. In other words, the offering or issuance of capital market products listed on Bursa Malaysia and unlisted capital market products issued to retail investors in Malaysia are now regulated under the Retail PDS/*Sukuk* Guidelines.

What are the key changes under the LOLA Guidelines?

The key changes under the LOLA Guidelines in relation to private debt securities ("**PDS**"), *sukuk* and asset backed securities ("**ABS**") include the following:

- **Greater certainty on time to market:** As the offering or issuance of PDS, *sukuk* or ABS will no longer be dependent on the SC's approval or authorisation (which, under the Superseded Guidelines, could take between 14 business days to 28 business days from the date of the SC's receipt of complete documentation), there is now more certainty as to the timeline for commencing the offering process and the issuance of such securities.

- **No requirement for *Shariah* pronouncement:** In relation to foreign currency-denominated *sukuk*, there is no longer a requirement to submit the *Shariah* pronouncement by the issuer's *Shariah* adviser. This requirement has, however, been maintained for ringgit-denominated *sukuk*.

- **More flexibility in the appointment of foreign *Shariah* advisers:** In relation to foreign currency-denominated *sukuk*, an issuer is now allowed to appoint one or more foreign *Shariah* advisers (without such foreign *Shariah* advisers being registered with the SC) provided that it appoints at least one *Shariah* adviser that is either registered with the SC or is a licensed Islamic bank or a licensed bank or a licensed investment bank approved to carry on Islamic banking business. Under the Superseded Guidelines, all foreign *Shariah* advisers had to be registered with the SC.

- **Tighter time frame:** The issuance of PDS, *sukuk* or ABS must now be implemented within 60 business days from the date of lodgement, which is a tighter time frame than previously provided. Under the Superseded Guidelines, a one-off issuance of PDS, *sukuk* or ABS could be implemented within one year from the date of the SC's approval or authorisation, and in the case of a PDS, *sukuk* or ABS programme, the first issuance could be implemented within two years from the date of the SC's approval or authorisation. Under the LOLA Guidelines therefore, the issuer must already be certain at the time of lodgement with the SC, that it intends to proceed with the launch.

- **One-off payment of fees:** Instead of the two-stage fee payment structure under the Superseded Guidelines for an issue of PDS, *sukuk* or ABS (i.e. a fee prescribed by the SC depending on the size of the issuance payable at the time of submission to the SC, and a fee of RM1,000 for the deposit of the information memorandum and trust deed with the SC payable after the SC's approval or authorisation had been obtained), all requisite fees are now payable at the point of lodgement.

- **Increase in certain fees:** The Capital Markets and Services (Fees) (Amendment) Regulations 2015 came into effect on 15 June 2015. Changes from the previous fee structure include an increase in fee for the lodgement of ringgit-denominated non-tradable and non-transferable debentures and *sukuk,* as well as an increase in fee for revisions to the terms and conditions of debentures and *sukuk*.

- **Responsible party:** The LOLA Guidelines introduce a new concept of "responsible party" ("**RP**"). RPs are persons accountable or responsible, whether solely or jointly with other persons in the lifecycle of an unlisted capital markets product (e.g. the issuer, trustee, lawyers and reporting

accountants). An RP has a duty to, among other things, notify the lodgement party (normally, the principal adviser or lead arranger) of any false and misleading statement contained in documents lodged with the SC. The lodgement party must identify all the RPs and such information must be lodged with the SC.

- **Post-issuance notice:** Under the LOLA Guidelines, the issuer is now required to submit a post-issuance notice to the SC within seven business days of an issuance. In the case of PDS, *sukuk* or ABS issued under a programme, submission of the post-issuance notice is required for each issuance under the programme. Previously, the Superseded Guidelines required an issuer to submit documents and information to the SC in relation to the issuance after the SC's approval or authorisation had been obtained, but before the first issuance of the PDS, *sukuk* or ABS (whether it was a one-off issuance or under a programme). In the case of commercial papers (i.e. where the tenure of the paper is not more than one year), this new requirement may be more burdensome on the issuer and its advisers.

Conclusion

The implementation of the LOLA Guidelines marks a gradual shift towards a more mature Malaysian capital market, emphasising self-regulation on the part of the issuer and its advisers, while the SC takes on a broader supervisory role. The LOLA Guidelines also seek to expedite time to market, provide more certainty in the timeline to issuance, and promote greater efficiency in the offering and issuance process for the Products. In addition, the SC has provided clarification in the LOLA Guidelines on various *Shariah* concepts used in connection with *sukuk* issuances but which were not previously found in the Superseded Guidelines (for example, the principle of *musawamah* which is a common feature used in perpetual *sukuk*).

As we welcome this new framework, additional changes from a practical perspective are needed in order for it to work effectively. One example is the existing Stamp Duty (Exemption) (No. 23) Order 2000 ("**2000 Exemption Order**") which stipulates that debentures must first be approved by the SC before instruments in connection with the debenture can be exempted from stamp duty. As the SC's approval or authorisation is no longer required under the CMSA and the LOLA Guidelines, there is an urgent need for a new Order to be gazetted to replace the 2000 Exemption Order.

Reference materials

The following materials are available from the SC website www.sc.com.my:

- Press release titled "SC Introduces Major Reform in Approval Regime with Lodge and Launch Framework" (15 June 2015)
- Guidelines on Unlisted Capital Markets Products under the Lodge and Launch Framework
- Summary of Updates to the Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework
- FAQ on the requirements of the Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework

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Revision to Main Market Listing Requirements: Provision of financial assistance to joint arrangements

With effect from 27 January 2015, the provision in the Bursa Malaysia Securities Berhad Main Market Listing Requirements ("**MMLR**") which regulates the provision of financial assistance by a listed issuer or its unlisted subsidiaries, has been revised to provide clarification in relation to the provision of financial assistance to joint arrangements.

Position prior to revision

Prior to the revision of Paragraph 8.23 of the MMLR on 27 January 2015, a listed issuer or its unlisted subsidiaries could only provide financial assistance to or in favour of the following:

(i) directors or employees of the listed issuer or its subsidiaries;

(ii) persons to whom the provision of financial assistance:

(a) was necessary to facilitate the ordinary course of business of the listed issuer or its subsidiaries; or

(b) was pursuant to the ordinary course of business of the listed issuer or its subsidiaries,

such as the provision of advances to its sub-contractors or advances to clients in the ordinary course of a moneylending business; or

(iii) the subsidiaries or associated companies of the listed issuer or its immediate holding company which is listed.

The wording of the previous Paragraph 8.23 begged the question, however, of whether a listed issuer was permitted to provide financial assistance to "joint arrangements" of the listed issuer or its unlisted subsidiaries.

The term "joint arrangement" is not defined in the Companies Act 1965. The term is, however, obliquely defined in the MMLR as having the same meaning as used in the accounting standards approved by the Malaysian Accounting Standards Board ("**MASB**") in Malaysia. According to the MASB approved accounting standards, a "joint arrangement" is an arrangement in respect of which two or more parties have "joint control". It is possible, however, for a joint arrangement to be a "joint arrangement" for purposes of the approved accounting standards and yet still fall within the definition of a "subsidiary" for the purposes of the MMLR and the Companies Act 1965 e.g. a "joint arrangement" that is 60% held by the listed issuer.

From a black letter reading of the previous Paragraph 8.23, the provision of financial assistance to "joint arrangements" of a listed issuer or its unlisted subsidiaries was not permitted unless it was necessary to facilitate, or was pursuant to, the ordinary course of business of the listed issuer or its subsidiaries.

Effect of revision

The revision to Paragraph 8.23 of the MMLR has closed this gap as Paragraph 8.23 now expressly provides that a listed issuer or its unlisted subsidiaries may provide financial assistance to joint arrangements. Where a listed issuer proposes to provide financial assistance to a joint arrangement, and the aggregate amount provided or to be provided at any time to joint arrangements compared to the net tangible assets of the group

is 5% or more, the listed issuer must first issue a circular to its shareholders and seek their approval in general meeting. This approval requirement is similar to that imposed under the MMLR in relation to the provision of financial assistance to associated companies.

Reference material

The Main Market Listing Requirements is available from the Bursa Malaysia Securities Berhad website www.bursamalaysia.com by clicking **here**.

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Dispute Resolution

Federal Court imposes CIDB levy on offshore works for EPCC contract in Malaysia

Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corporation and Kellogg Brown and Root, Inc. & Ors [2015] 9 CLJ 273

In the case of *Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corporation and Kellogg Brown and Root, Inc. & Ors*, the Federal Court had to consider whether a levy prescribed under the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ("**Act**") and the Construction Industry (Collection of Levy) Regulations 1996 ("**1996 Regulations**") extended to certain "offshore works" and "non-construction works" (e.g. engineering, procurement, supervision, management and other ancillary services).

Background

Pursuant to section 34(1) of the Act, every contractor is required to declare and submit to the Lembaga Pembangunan Industri Pembinaan Malaysia (the Construction Industry Development Board or "**CIDB**") in the manner prescribed in the Act, certain information relating to any contract awarded to that contractor in relation to any construction works. Section 34(2) provides that for every contract having a contract sum above RM500,000 the contractor is liable to pay to the CIDB a levy at the rate of a quarter per cent. of the contract sum.

Regulation 6 of the 1996 Regulations provides that upon receipt of a submission, the CIDB has to determine the contract sum for the relevant construction works for the purpose of determining the amount of levy payable by the registered contractor. The CIDB may take into consideration certain factors when determining the contract sum, for example, the consideration in respect of any construction works contained in the contract or in the letter of acceptance, letter of award or any document that constitutes acceptance in relation to construction works.

Definition of "construction works"

The Act defines "construction works" to mean "*the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of –*

(a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;

(b) any road, harbour works, railway, cableway, canal or aerodrome;

(c) any drainage, irrigation or river control works;

(d) any electrical, mechanical, water, gas, petrochemical or telecommunication works; or

(e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation works".

Further, it is expressly provided that "construction works" include:

"(A) any works which ***form an important and integral part of*** *or* ***are preparatory to*** *or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; or*

(B) procurement of construction materials, equipment or workers, necessarily required for any work described in paragraphs (a) to (e)." (emphasis added)

A contractor who contravenes section 34(1) of the Act will be guilty of an offence punishable with a fine not exceeding RM50,000 or four times the amount of the levy payable, whichever is higher.

Facts of the case

In the present case, the respondent, a consortium of five contractors comprising two foreign entities and three Malaysian entities, was a registered contractor under the Act and had been established solely to undertake the construction of a national gas plant in Bintulu, Sarawak ("**Project**") for Malaysia LNG Tiga Sdn Bhd ("**Owner**"). Concurrently on 21 January 2000:

- the respondent and the Owner entered into an engineering, procurement, construction and commissioning contract ("**EPCC Contract**"); and
- the members of the respondent entered into a consortium agreement,

in relation to the Project.

The respondent duly lodged a notification with the CIDB in relation to the EPCC Contract and related letter of award. By a notification of imposition of levy dated 6 December 2000 issued pursuant to regulation 7 of the 1996 Regulations, the CIDB imposed a levy of RM13,129,934.05 on the respondent.

The respondent disputed the levy sum and argued that the correct levy was RM2,802,130.21, on the basis that the sums attributed to certain "offshore works" and "non-construction works" should have been disregarded. Subsequently, the respondent paid the CIDB the amount of RM2,802,130.21 and the CIDB filed an action at the High Court for the balance of RM10,327,803.84.

The High Court judge ruled in favour of the respondent and found that the appellant had misconstrued the Act causing it to levy an incorrect amount under the 1996 Regulations. The CIDB filed an appeal against the decision of the High Court with the Court of Appeal but lost the appeal.

The CIDB successfully obtained leave to appeal to the Federal Court, which held that the CIDB had not construed the Act wrongly, nor had it imposed an incorrect levy on the respondent.

In coming to its decision, the Federal Court took the view that the EPCC Contract was a lump sum contract, and found no justification for splitting the contract into different parts, according to the work done by the individual member contractors.

The Federal Court rejected the argument put forward by the respondent's counsel that the statutory definition of "construction works" did not include "offshore works" or "non-construction works". The respondent's counsel had relied on the principle of *noscitur a sociis* which is generally applied to ascertain the meaning of a word and consequently the intention of the legislature by reference to the context. In this case, the respondent's counsel argued that the statutory definition of "construction works" focussed on the physical work performed on-site and was therefore restricted to the construction works component of the EPCC Contract and excluded non-construction works such as engineering, procurement, supervision, management and other ancillary services. The Federal Court was satisfied that the term "construction works" included "*all 'integral and preparatory' work… [because] surely no construction works may be carried out satisfactorily without the requisite design, drawings, supervision or planning preceding it*". Accordingly, the Federal Court held that the EPCC Contract was a comprehensive contract and included both construction and non-construction components.

Additionally, the Federal Court stated that in the circumstances of the case, as the commercial transaction was undertaken through the respondent (as the registered contractor), a tax presence was created within Malaysia which enabled the levy to be imposed.

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General

Remedial constructive trust: The Malaysian position

Renowned trust jurist, David J. Hayton once said, "[*l*]*ike an elephant, a trust is difficult to describe but easy to recognise*". For the longest time, trust lawyers and judges in common law jurisdictions have continued to disagree on the true conceptual basis for constructive trusts, i.e. whether a constructive trust arises institutionally ("**institutional constructive trust**"), or as a remedy to reverse a wrongdoing ("**remedial constructive trust**").

It was not until recently that the apex court in Malaysia had the opportunity to consider the theoretical basis of constructive trust under Malaysian law, in *RHB Bank Bhd v Travelsight (M) Sdn. Bhd.* [2015] 1 CLJ 309.

The institutional/remedial dichotomy

An institutional constructive trust is said to arise by operation of law, and on such basis, exists as from the date of the circumstances that give rise to it, upon which the function of the court is merely to declare its existence. Remedial constructive trust on the other hand is characterised as a judicial remedy granted by court. It operates retrospectively by imposition of an enforceable equitable obligation to remedy a wrong.

It is accepted generally that there are three different schools of thoughts regarding the conceptual basis for constructive trust. First, there is the conservative view that a constructive trust arises only institutionally by way of operation of law. Secondly, there is the liberal view that a constructive trust is invariably imposed as a remedy when justice so requires. Thirdly, there is also a centrist approach that treats constructive trust as both institutional and remedial, depending on the circumstances of the case.

In *Westdeutsche Landesbank v Islington* [1996] AC 669, Lord Browne-Wilkinson recognised that "*hitherto English law has for the most part only recognised an institutional constructive trust*" and the decision whether to adopt remedial constructive trust would have to be decided in some future case when the point was directly in issue. Nevertheless, English courts remained by and large resistant to the concept of remedial constructive trust after *Westdeutsche*. By contrast, American jurisprudence has taken the position that constructive trust can only exist as a remedy.

The Malaysian position

In Malaysia, the courts have historically recognised institutional constructive trust. The concept of a remedial constructive trust, however, is more recent and was recognised in 2012 by the Court of Appeal in *Zaharah A. Kadir v Ramunia Bauxite Pte Ltd & Anor* [2012] 1 MLJ 192 ("***Ramunia Bauxite***"), and in 2015 by the Federal Court in *RHB Bank Bhd v Travelsight (M) Sdn. Bhd.* [2015] 1 CLJ 309 ("***RHB Bank Bhd***").

Ramunia Bauxite

In *Ramunia Bauxite*, the Court of Appeal was asked to determine the nature of the interest of an original proprietor who had sold several lots of land ("**Lands**") conditionally to a mining company. The original proprietor, Abdul Kadir, had sold the Lands to a company, Ramunia, to enable the latter to carry out mining of bauxite and aluminium ores on the Lands. Abdul Kadir alleged that Ramunia had agreed to transfer the Lands back to him upon completion of the mining operations.

In delivering the judgment of the majority, Abdul Malik Ishak JCA held that the Lands were held on trust for Abdul Kadir by Ramunia. His Lordship found that based on the underlying sale and purchase agreement, it had not been the intention of the parties for there to be an outright transfer of the beneficial interest in the Lands to Ramunia. It appears that the species of "trust" recognised by the Abdul Malik Ishak JCA was an "implied trust" based on the intention of the parties as discerned from the terms of the underlying sale and purchase agreement.

His Lordship then went further and stated in *obiter* that a remedial constructive trust could likewise have been imposed in the circumstances of the case, as the registered legal owner of the Lands (i.e. Ramunia) had acted unconscionably and with disregard for the interests of the unregistered beneficial owner, i.e. Abdul Kadir. His Lordship did not however, elaborate on how the concept of a remedial constructive trust could apply in a situation where it was already clear that beneficial interest in the subject property was vested in the person in whose favour the remedial constructive trust was sought to be imposed.

RHB Bank Bhd

The issue in *RHB Bank Bhd* related to the rights of RHB Bank Bhd ("**RHB**") as an assignee and Travelsight (M) Sdn. Bhd. ("**Travelsight**") as assignor of a certain property sold by a developer, Atlas Corporation Sdn. Bhd. ("**Atlas**") to Travelsight in 1997 ("**Property**").

Travelsight had entered into an agreement on 2 April 1997 with Atlas to purchase the Property. The purchase had been partly financed by RHB on the security of an assignment of the Property to RHB.

Travelsight subsequently filed an action against Atlas for a declaration that Atlas had breached the terms of the underlying sale and purchase agreement and that the agreement had therefore been rescinded. By an order dated 15 November 2002 ("**Declaratory Order**"), the court declared that the underlying sale and purchase agreement had been rescinded and ordered Atlas to refund the purchase price paid by Travelsight. Atlas failed to comply with the Declaratory Order. In the meantime, Travelsight continued to make repayments to RHB until full settlement of the loan facility together with interest.

Atlas was subsequently wound up, and the liquidators of Atlas refused to refund the purchase price on the basis that (i) Travelsight was an unsecured creditor who ranked *pari passu* with other unsecured creditors, and (ii) the liquidators were free to deal with the Property as an unencumbered asset.

RHB informed Travelsight that it would not execute a deed of release and reassignment of the security on the grounds that the rights of Travelsight to the Property had been lost upon rescission of the agreement. Travelsight subsequently commenced an action against RHB to compel RHB to execute the deed of release and reassignment, in default of which, Travelsight claimed a refund by RHB of all sums paid in settlement of the loan facility. Atlas and the liquidators intervened in the action.

The Federal Court held that the underlying sale and purchase agreement had never been rescinded because Atlas had not refunded the purchase price of the Property to Travelsight. Accordingly, Travelsight continued to retain its interest in the Property. In these circumstances, the Federal Court held that a remedial constructive trust arose when Atlas and the liquidators dealt with the Property in a manner that was inconsistent with the rights of Travelsight as the purchaser, and RHB as the assignee of the Property (Atlas and the liquidators had sold the Property despite having knowledge of Travelsight's and RHB's interests).

The Federal Court also held that since both Travelsight and RHB had agreed to relinquish the Property, what would be restituted was a refund of the purchase price. Accordingly, Travelsight and RHB had a proprietary right only to the refund of the purchase price under a constructive trust. Accordingly, the court directed the liquidators to pay the refund to Travelsight, as the loan facility provided by RHB to Travelsight was already settled in full.

The Federal Court did not explain how a separate remedial constructive trust could be said to have arisen in respect of the Property when beneficial interest in the Property was already vested in Travelsight. However, it is possible to rationalise the Federal Court's stance by taking the position that until the sale of the Property by the liquidators, the beneficial interest in the Property vested in Travelsight under an implied trust, whereas upon sale of the Property, a remedial constructive trust arose in relation to the proceeds of sale.

Observations

The Federal Court's general recognition of the doctrine of remedial constructive trust in *RHB Bank Bhd* follows the trend in other common law jurisdictions, such as Australia, New Zealand and Canada, Singapore and Hong Kong.

As may be observed from *RHB Bank Bhd*, acceptance of the doctrine of remedial constructive trust would have some practical ramifications in insolvency cases in Malaysia. Using the concept of remedial constructive trust, an innocent party who has been unconscionably deprived of his property by an insolvent wrongdoer no longer has to stand *pari passu* with other unsecured creditors of the wrongdoer, and may claim priority over certain assets of the wrongdoer.

Furthermore, in both *Ramunia Bauxite* and *RHB Bank Bhd*, the courts did not have to resort to the doctrine of remedial constructive trust to provide a remedy to the innocent parties. In both cases, the courts implied a trust from the contractual relationship between the parties as the parties had intended for beneficial ownership of the property in question to either remain with, or be divested to, the innocent party. Both cases illustrate how, like the proverbial elephant, in any given set of facts it is easier to recognise a trust than it is to accurately describe the true nature and essence of the trust imposed by the court.

Conclusion

It is often argued that the remedial constructive trust theory creates uncertainty in the law, and is therefore undesirable in commercial litigation. This is because there has been no principled guidance as to when a judge ought to exercise his discretion to grant a constructive trust as a remedy, save that it should be exercised when justice so requires.

Nevertheless, the recognition of the concept of remedial constructive trust by the Malaysian Court of Appeal and Federal Court represents a progressive development in Malaysian law as it adds another weapon to the arsenal of remedies available to the court in its equitable jurisdiction, to protect the proprietary rights of an innocent person.

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The Trans-Pacific Partnership Agreement: Impact on trade in goods, intellectual property and dispute settlement

On 5 October 2015, Malaysia and 11 other countries - Australia, Brunei Darussalam, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam successfully concluded negotiations for the Trans-Pacific Partnership Agreement ("**TPPA**").

The Trans-Pacific Partnership ("**TPP**") will form the biggest free trade zone in the world. The TPP countries encompass a population of 800 million people with a combined gross domestic product of around USD 30 trillion amounting to 40% of the world's economy. It is expected that the TPPA will promote economic growth, enhance innovation, productivity and competitiveness and generally raise living standards in the region.

The TPPA includes 30 chapters covering trade and trade-related issues such as trade in goods, customs and trade facilitation, technical barriers to trade, trade remedies, investment, services, electronic commerce, government procurement, intellectual property, labour, environment and dispute settlement.

Trade in goods

Under the TPPA, the parties have agreed to eliminate and reduce tariffs and non-tariff barriers on industrial and agricultural goods. The TPPA will provide preferential access for goods and services from Malaysia into four "new" markets: the United States of America, Canada, Mexico and Peru. Exports of Malaysian goods into these markets is expected to increase upon the entry into force of the TPPA as import duties for 77% to 95% of products will be eliminated in these markets. Conversely, Malaysia will eliminate import duties for almost 85% of products imported from TPP countries, which will result in consumers in Malaysia enjoying a wider range of TPP-origin products at competitive prices.

In addition, the TPPA parties have agreed on a single set of rules of origin which define whether a particular good "originates" from the TPP and is therefore eligible to receive TPP preferential tariff benefits. The rules of origin provide for "accumulation" of inputs, so that, generally inputs from one TPPA party will be treated the same as materials from any other TPPA party, if used to produce a product in any TPPA party. This will make it easier for goods from Malaysia to qualify for preferential duty and allow Malaysian producers of parts and components greater opportunities to supply the regional value chain. In particular, it is hoped that the rules of origin for automotive vehicles, parts and components will encourage automotive manufacturers currently purchasing components from outside TPP countries to source them from Malaysia.

Intellectual property

The intellectual property chapter in the TPPA has been considered to be one of the most controversial chapters in the entire agreement.

Although the TPPA does not change the duration of patent protection, which remains at 20 years in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), it does provide for the extension of patent terms in limited circumstances (for example, if there have been unreasonable delays in obtaining approval for a patent application). Malaysia's current processing procedures for patent applications are relatively effective, and therefore it is unlikely that the extension of a patent period would arise in practice.

The TPPA also mandates data exclusivity protection of at least five years for biologic drugs (i.e. non-chemical drugs produced using biotechnology processes), plus a further three years of "comparable" protection through other measures. This means that pharmaceutical test data related to the safety and efficacy of the product will belong exclusively to the pharmaceutical research company seeking regulatory approval during the data exclusivity period, and such data cannot be used by a manufacturer of a follow-on bio-similar drug in seeking approval for that follow-on drug during such period.

Malaysia had already introduced data exclusivity protection in 2011 in relation to pharmaceutical test data of new drug products containing a "new chemical entity". Under the TPPA, data exclusivity protection will be extended to biologic drugs as well.

The TPPA will also bring about major changes to the copyright regime. The TPPA parties are required to extend the duration of copyright protection to the life of the creator plus 70 years. In contrast, Malaysia's Copyright Act currently provides for copyright protection for the duration of the life of the creator plus 50 years.

The TPPA also covers other forms of intellectual property rights, such as trademarks, industrial designs and geographical indications, the provisions of which are largely in line with current Malaysian intellectual property laws.

Investor-state dispute settlement

The TPPA also contains provisions on an investor-state dispute settlement ("**ISDS**") mechanism that allows a foreign investor to bring an arbitration claim against its host state for violation of the foreign investor's rights. Aggrieved foreign investors who intend to avail themselves of the ISDS mechanism under the TPPA must go through a multi-tiered dispute resolution process.

When a tribunal makes a final award, it may award, separately or in combination, only:

- monetary damages and any applicable interest; and
- restitution of property, in which case the award will provide that the host state may pay monetary damages and any applicable interest in lieu of restitution.

A disputing party may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention.

Reference material

For more information about the TPPA from the MITI website www.miti.gov.my, please click **here**.

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End of government construction contracts exemption under the Construction Industry Payment & Adjudication (Exemption) Order 2014

From 1 January 2016 onwards, government construction contracts specified in the Second Schedule of the Construction Industry Payment & Adjudication (Exemption) Order 2014 ("**Exemption Order**") have ceased to be exempted from certain provisions of the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA**").

Background

The Exemption Order came into operation on 15 April 2014. It exempted government construction contracts specified in the Second Schedule of the Exemption Order ("**Second Schedule Contracts**") from certain provisions of the CIPAA for the period commencing on 15 April 2014 and ending on 31 December 2015, and provided for the procedures under sub-paragraph 2(3) of the Exemption Order to be applicable instead. A Second Schedule Contract is a "contract for any construction work as defined under the CIPAA with the contract sum of RM20,000,000 and below".

Applicable CIPAA sections

Following the cessation of the exemption described above, the procedures under sub-paragraph 2(3) of the Exemption Order are no longer applicable to Second Schedule Contracts. Instead, the procedures described in the following sections of CIPAA will apply to such contracts:

- **Section 6(3)**: Section 6 concerns the procedure relating to a party filing a response to a payment claim made under the CIPAA. Section 6(3) provides that a payment response issued under this section must be served on the unpaid party within 10 working days of the receipt of the payment claim.

- **Section 7(2)**: Section 7 sets out the right to refer a payment claim dispute to adjudication, with section 7(2) providing that the right to refer a dispute to adjudication may only be exercised after the expiry of the period to serve a payment response as specified in section 6(3).

- **Section 10(1):** Section 10 concerns the procedure for an adjudication response. Section 10(1) provides that the respondent must serve a written adjudication response, which must answer the adjudication claim, together with any supporting document, on the claimant within 10 working days of receipt of the adjudication claim.

- **Section 10(2):** Section 10(2) provides that the respondent must provide the adjudicator with a copy of the adjudication response together with any supporting document within 10 working days of receipt of the adjudication claim.

- **Section 11(1):** Section 11 concerns adjudication replies. Section 11(1) specifies that the claimant may serve a written reply to the adjudication response, together with any supporting document, on the respondent within five working days of receipt of the adjudication response.

- **Section 11(2)**: Section 11(2) provides that the claimant must provide the adjudicator with a copy of the adjudication reply, together with any supporting document, within five working days of receipt of the adjudication response.

Reference materials

For further information, please refer to the Kuala Lumpur Regional Centre for Arbitration Circular 06 which is available on the KLRCA website klrca.org or by clicking **here**. The Exemption Order is available from the Federal Government Gazette website www.federalgazette.agc.gov.my by clicking **here**.

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Publications

Getting the Deal Through: Government Investigations 2016 - Malaysian chapter

Partner Chong Yee Leong of Rahmat Lim & Partners contributed the Malaysian chapter to *Getting the Deal Through: Government Investigations 2016*. Topics covered in the chapter include the relevant enforcement agencies and authorities, the requirements, triggers and procedures of an investigation, whistle-blowing regime, document preservation, notification of investors, and cooperation with enforcement agencies.

To read the article, please click **here**.

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Deals

RM3.0 billion renounceable rights issue by Hong Leong Bank Berhad

Rahmat Lim & Partners advised the underwriters, CIMB Investment Bank Berhad ("**CIMB**"), Maybank Investment Bank Berhad ("**Maybank**"), Public Investment Bank Berhad ("**Public Bank**") and UBS Securities Malaysia Sdn. Bhd. ("**UBS**") in connection with the RM3.0 billion rights issue by Hong Leong Bank Berhad. The rights issue was one of the largest issuances in Malaysia.

CIMB, Hong Leong Investment Bank Berhad ("**HLIB**"), Maybank, Public Bank and UBS were appointed joint underwriters. CIMB, HLIB and UBS were appointed joint global coordinators.

Advising CIMB, Maybank, Public Bank and UBS was Partner Zandra Tan of Rahmat Lim & Partners.

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RM1.9 billion commodity *murabahah* financing to Weststar Aviation Services Sdn. Bhd.

Rahmat Lim & Partners advised AmIslamic Bank Berhad ("**AmIslamic**"), CIMB Islamic Bank Berhad ("**CIMB**"), Maybank Islamic Berhad ("**Maybank**") and RHB Islamic Bank Berhad ("**RHB**") on the RM1.9 billion financing to Weststar Aviation Services Sdn. Bhd. ("**Weststar Aviation**"), based on the *Shariah* principle of commodity *murabahah* (via a *tawarruq* arrangement). Weststar Aviation is one of the largest offshore helicopter transportation service providers in South-east Asia.

Advising AmIslamic, CIMB, Maybank and RHB was Partner Azman bin Othman Luk of Rahmat Lim & Partners.

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Establishment of RM1.5 billion Islamic medium term notes programme by Country Garden Real Estate Sdn. Bhd.

Rahmat Lim & Partners advised Country Garden Real Estate Sdn. Bhd. ("**Country Garden**") on the establishment of an Islamic medium term notes programme of RM1.5 billion ("**Programme**"), based on the *Shariah* principle of *murabahah* (via a *tawarruq* arrangement).

The Programme is the first-of-its-kind issued in Malaysia by a Chinese corporation and a Hong Kong-listed mainland property company.

Advising Country Garden was Partner Kelvin Loh of Rahmat Lim & Partners.

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RM1.1 billion renounceable rights issue by Hong Leong Financial Group Berhad

Rahmat Lim & Partners advised the underwriters, AmInvestment Bank Berhad ("**AmInvestment**"), CIMB Investment Bank Berhad ("**CIMB**"), Maybank Investment Bank Berhad ("**Maybank**") and Nomura Singapore Limited ("**Nomura**"), in connection with the RM1.1 billion rights issue by Hong Leong Financial Group Berhad.

AmInvestment, CIMB and Maybank were appointed joint underwriters. Hong Leong Investment Bank Berhad, Maybank and Nomura were appointed joint global coordinators.

Advising AmInvestment, CIMB, Maybank and Nomura was Partner Zandra Tan of Rahmat Lim & Partners.

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Acquisition of a portfolio of five retail malls in Malaysia

Rahmat Lim & Partners together with Allen & Gledhill LLP advised Harmonie III Holdings Limited ("**Harmonie III**") on its acquisition of a portfolio of five retail malls located across Malaysia, through the acquisition of an investment group structure comprising subsidiaries incorporated in the British Virgin Islands, Bermuda and Malaysia. Harmonie III is a subsidiary of a property fund managed by ARA Fund Management (Harmony III) Limited.

Advising Harmonie III as transaction counsel and lead adviser were Allen & Gledhill Partners Penny Goh, Tan Boon Wah and Shalene Jin.

Advising Harmonie III as to Malaysia law were Partners Chen Lee Won, Amelia Koo and Ho Wei Lih of Rahmat Lim & Partners.

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Awards & Rankings

Rahmat Lim & Partners is ranked in *Chambers Asia-Pacific* 2016

Rahmat Lim & Partners is ranked in the 2016 edition of *Chambers Asia-Pacific* in Banking & Finance, Corporate/M&A, Dispute Resolution, Intellectual Property and Projects, Infrastructure & Energy. This is the first year our Firm is ranked in Dispute Resolution. In addition, six of our Partners have been recognised as Leading Individuals in Banking & Finance, Corporate/M&A, Dispute Resolution, Intellectual Property and Employment & Industrial Relations.

Chambers Asia-Pacific is published by Chambers & Partners. Over the past two decades, Chambers & Partners have built a reputation for in-depth and objective research.

For more information, please click **here**.

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Rahmat Lim & Partners Corporate and M&A maintains Tier 1 ranking in *The Legal 500 Asia Pacific*

Rahmat Lim & Partners continues to be a Tier 1 firm in the area of Corporate and M&A in the 2016 edition of *The Legal 500 Asia Pacific* and is recommended by the publication in the areas of Capital Markets, Dispute Resolution, Intellectual Property, Real Estate and Construction and Labour and Employment. Partners Chen Lee Won and Pauline Khor have been named Leading Individuals for their outstanding work in each of their practice areas of Corporate and M&A and Intellectual Property respectively.

For more information, please click **here**.

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Rahmat Lim & Partners maintains rankings in *IFLR1000* 2016

Rahmat Lim & Partners continues to maintain its rankings across all practice areas covered by *IFLR1000*, namely, Banking and Finance, Capital Markets and Corporate and M&A.

The directory recognises six of our Partners as Leading Lawyers, namely, Managing Partner Lim Teong Sit, Deputy Managing Partner Azman bin Othman Luk, Partners Moy Pui Yee, Kelvin Loh, Chen Lee Won and Wan Kai Chee, an increase from the 2015 edition. In addition, Partner Chia Chee Hoong has been recognised as a Rising Star.

For more information, please click **here**.

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Rahmat Lim & Partners has nine lawyers listed in *Asialaw Leading Lawyers* 2015

Rahmat Lim & Partners has nine lawyers listed in *Asialaw Leading Lawyers* 2015.

In addition, Rahmat Lim & Partners has been highly recommended in nine practice areas covered in *Asialaw Profiles* 2015, a related publication of *Asialaw Leading Lawyers*. These are:

- Banking & Finance
- Capital Markets
- Competition & Antitrust
- Construction & Real Estate
- Corporate/M&A
- Dispute Resolution
- Energy & Natural Resources
- Intellectual Property
- Private Equity

For more information, please click **here**.

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Rahmat Lim & Partners named Malaysia Copyright Firm of the Year at the *Asia IP* Awards 2015

Rahmat Lim & Partners was named Malaysia Copyright Firm of the Year at the 2015 *Asia IP* Awards ceremony held on 13 November 2015.

The 2015 *Asia IP* Awards highlight outstanding achievements in patent, trade mark and copyright work in Asia and around the world. Winners were selected based on the nomination of in-house counsel surveyed by *Asia IP.*

For more information, please click **here**.

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Rahmat Lim & Partners wins Restructuring Deal of the Year at the *IFLR* Asia Awards 2016

Rahmat Lim & Partners has been recognised by *International Financial Law Review* (*IFLR*) for our involvement in the PT Berlian Laju Tanker matter which was named Restructuring Deal of the Year at the *IFLR* Asia Awards 2016 in Hong Kong on 3 March 2016.

The *IFLR* Asia Awards recognise the region's most innovative deals and the firms that worked on them. First published in 1982, *IFLR* is the market-leading financial law publication for lawyers specialising in international finance in financial institutions, corporates and in private practice.

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Rahmat Lim & Partners recognised in *Asian-MENA Counsel* Deals of the Year 2015

Rahmat Lim & Partners has been recognised by *Asian-MENA Counsel* for our involvement in the following matters which were named Deals of the Year 2015.

- Merger of four operating subsidiaries of Temasek Holdings and JTC Corporation
- TPG's investment in PropertyGuru

The winning deals were selected by *Asian-MENA Counsel* on the basis of innovation, complexity, size and uniqueness.

Asian-MENA Counsel is a monthly publication providing thought-provoking analysis and discussion of vital legal, regulatory and business issues, along with news and profiles of leading in-house practitioners.

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Rahmat Lim & Partners
IN ASSOCIATION WITH ALLEN & GLEDHILL LLP (SINGAPORE)

Rahmat Lim & Partners Publications

The Editorial Team at Rahmat Lim & Partners hopes that you enjoy reading this publication. Rahmat Lim & Partners has produced this publication for our clients as part of our learning and knowledge-sharing culture.

If you find the information in this publication useful, we encourage you to explore our online library of legal publications and articles available on our website at www.rahmatlim.com. If you wish to be included in our client mailing list to receive our complimentary electronic publications, you may also do so via our website.

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