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JEFF LEONG, POON & WONG

JLPW LEGAL

HONOR STRENGTH COURAGE WISDOM INTEGRITY EXCELLENCE

Company Directors And Auditors Indemnity

Aftershock Emanating From Ang Ming Lee's Case

A Woulda Coulda Shoulda Pupillage? Certainly Not!

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Editor's Note

2021 was a year full of vicissitudes, having had to cope with the new norms and get used to the new ways of accomplishing routines. This is especially so in light of the unprecedentedly stringent restrictions placed on our physical activities, which inevitably affect the working lifestyle and routines that have been going on for decades. We, at Jeff Leong, Poon & Wong ("JLPW"), are no exception.

Despite the challenges of adjusting ourselves to the new normal and the need to deal with the invisible war which started ever since the end of 2019, JLPW successfully went more digital in 2021, where we launched and organised a number of virtual programmes such as webinars and in-house trainings, just to name a few.

It is now the e-magazine's turn. We are unveiling this challenging yet exciting project with the sole intention of it being an eye-opener for our readers, be it our clients, potential clients or the public at large. Tremendous hard work, dedication and positive thinking have been put in by the team of JLPW in bringing about this project.

Being a loyalist to our tagline, "Your Success, Our Work Ethic," we have been unstoppable in delivering our best to our clients. We constantly step up the game and tailor our approach to ensure the best possible outcome is achieved for our clients.

As the saying goes:

'By strong action on the Way, one can bring the body to the realm of longevity, bring the mind to the sphere of mystery, bring the world to great peace, and bring tasks to great fulfilment'.

– The Book on Balance and Harmony

Balqis Ali

EDITOR IN CHIEF

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Together with JLPW Econo Legal Studies Research Centre ("the Research Centre"), we adopt a pragmatic interdisciplinary approach to research, innovation and problem solving in the field of law and economics from a practical, real world standpoint with a focus on structuring business transactions and problem solving of complex business issues.

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- 2021: Leading and Recommended Law Firm in Malaysia
- 2020: Leading and Recommended Law Firm in Malaysia
- 2019: Leading and Recommended Law Firm in Malaysia

IFLR1000

- 2019: Recommended Firm
- 2018: Recommended Firm
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- 2022: Recommended Law Firm
- 2020: Leading Lawyer and Highly Recommended Law Firm
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- 2020: Top Ranked Leading Firm
- 2019: Top Ranked Leading Firm
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Our Senior Partner Jeff Leong is recognised on Asia Business Law Journal's A List of Malaysia's Top 100 Lawyers and Legal 500's Hall of Fame for Corporate and M&A in Malaysia.

Fellow Senior Partner Kenny Poon is recognised as a Distinguished Practitioner for his practice in Corporate, M&A and Restructurings by asialaw Leading Lawyers (a division of Euromoney Institutional Investor) and also recognised on Asia Business Law Journal's A List of Malaysia's Top 100 Lawyers in 2019.

SENIOR PARTNER'S NOTE

I would like to offer my heartfelt congratulations to the whole editorial team for putting their effort and making the publication of this e-magazine possible during these trying times. It is a great achievement, a steppingstone indeed, for all of us at Jeff Leong, Poon & Wong to create awareness of the development of law in Malaysia for our clients. I am optimistic that we will publish more fascinating e-magazines in the future.

I am honoured to say that, despite the pandemic and the need to maintain physical distancing, our commitments to our clients are in no way compromised. I firmly believe that we have successfully adapted to this new normal within our working environment, in which we have lawyers delivering high quality services in both terms of delivery and speed.

JEFF LEONG

SENIOR PARTNER OF
JEFF LEONG, POON & WONG

On behalf of Jeff Leong, Poon & Wong and our associates, we would like to thank our clients for their continuous support over the past two and a half decades.

Stay safe!

Mediate First

Driven by the desire to act in the best interest of all its clients and the belief that litigation is not a panacea for the variety of disputes, Jeff Leong, Poon & Wong (JLPW) had on 23 September 2021, signed a pledge to be "Mediate First Law Firm for Covid-19 Disputes". As part of its commitments to the campaign, JLPW agrees to encourage all its clients to first explore the possibility of resolving COVID-19 related disputes via mediation before turning to other dispute resolutions or litigation. JLPW promises to also encourage its clients to have a clause to this effect included in their agreements. As a firm that is always keen to find a solution for its clients, JLPW undertakes to give professional guidance, assistance and support pertaining to mediation to all its clients if one is needed.

JLPW firmly believes that mediation is an expeditious and cost-effective way of resolving disputes. With the professionalism and considerable expertise in the industry, JLPW is confident that it can provide a decent mediation-related service to its clients.

CASES OF INTEREST – DR'S PICK

1. Company Law: Trust Agreement

Heng Tang Hai & Anor v Dr Gue See Sew & Ors **[2019] MLJU 1709 (HC)**

A number of the arrangements and agreements had been concluded between the Plaintiffs and the Defendants and one of them is the Company Policy which, among others, provides that the 2nd Defendant was to hold 29.4% shares in G&P Structures on trust for the 1st Defendant and 9.8% for the 3rd Defendant. The issue in this case is whether the trust agreements or arrangements amongst the shareholders contravene article 15 of the G&P Structures' Article of Association which in no uncertain terms provides that *'the Company shall not be bound by or compelled in any way to recognise any equitable... interest in any share'.*

In dismissing the originating summons filed by the Plaintiffs, the High Court held that such arrangements or agreements are valid and enforceable as between the shareholders. The High Court held that article 15 is intended to safeguard the company and does not seek to invalidate an arrangement or agreement among the shareholders with respect to the shares held by them, including the rights and interests attached to the shares.

Source: The Edge/ Malayan Law Journal Unreported

2. Construction

Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd and another appeal **[2019] MLJU 1212 (FC)**

The question before the Federal Court is whether Construction Industry Payment and Adjudication Act 2012 (CIPAA) applies to construction contracts entered into before the coming into operation of CIPAA on 15.4.2014. The appellant was a subcontractor appointed by the respondent by a Letter of Award dated 16 March 2011 for a project. Payment disputes then arose between the parties and the appellant issued a payment claim to the respondent pursuant to the CIPAA. The adjudicator found in the appellant's favour. The appellant subsequently applied to the High Court to enforce the adjudication decision. The application was allowed by the High Court. The aggrieved respondent then appealed to the Court of Appeal to which the appeal of the respondent was allowed.

In holding that the CIPAA can only be applied prospectively and not retrospectively, the Federal Court held that if it is the intention of the legislature to allow the CIPAA to have retrospective effect, it would have expressly done so by including a provision to that effect.

Source: The Edge/ Malayan Law Journal Unreported

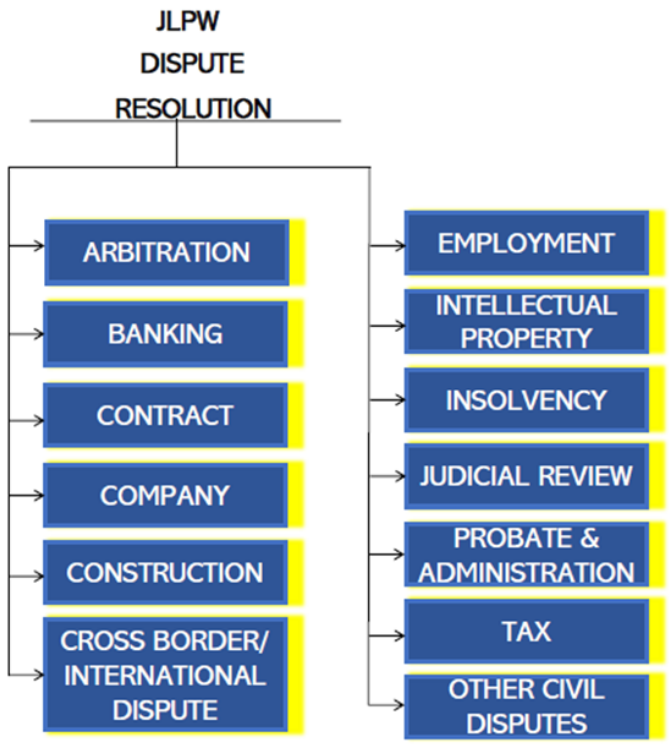
3. Company Law: Director Liability

***Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors* [2021] 4 CLJ 721 (FC)**

In this case, Appellant was the minority shareholder (held 20% of the shares) of the 1st Respondent while and Hoe Leong was the majority shareholder (held 80% of the shares). It is the Appellant's case that the present case fell within the ambit of section 181 Companies Act 1965 (equivalent to section 346 of the Companies Act 2016) as Hoe Leong had utilised its majority powers to cause Ebony Ritz to enter into a conditional sale and purchase agreement which in essence enabled Hoe Leong to retain 51% equity interest of Sumatec Resources Bhd in Semua International Sdn Bhd. The issue before the Federal Court, among others, is whether the directors of the 1st Respondent could be personally liable for the breaches or the acts of the company.

The Federal Court held that not only will the directors be personally liable for the breaches or the acts of the company, all alleged oppressors and third party who participated in the impugned transactions will be personally liable provided *'there is a sufficiently close nexus between the oppressive or unfairly discriminatory conduct, or disregard of the minority's interests or otherwise prejudicial conduct and that party'.*

Source: Current Law Journal



4. Company Law: Post-Liquidation Payment

***Tetuan Sulaiman & Taye v Wong Poh Kun & Anor* [2021] 8 MLJ 550 (HC)**

One of the issues that the High Court had to decide in this case is, when the Court decided that a director of a company is to assume personal liability for the debts of the company, whether the delinquent directors are to make the payment directly to the creditor who filed the claim or to be directed to pay into the common assets of the company.

After considering a number of Malaysian and English authorities in this respect, the High Court judge held that unless there are good reasons to decide otherwise, the general rule is that where a claim is made under section 304(1) or under section 540(1) of the Companies Act 2016 and the company has already been wound up, the payment should be made to the liquidator as contribution to the company's assets instead of directing the payment to be made directly to the creditor who filed the claim.

Source: The Edge/ Malayan Law Journal Reports

COMPANY DIRECTORS AND AUDITORS INDEMNITY

BY SEOW WEE LOONG AND TYLER CHAN

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Abstract: On 15th October 2021, the Court of Appeal passed down their judgment in Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd) v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors where the Court decided that a director cannot rely on the mere existence of an indemnity provision set out in the constitution of a company and his appointment as a director, and that the director must adduce evidence showing that the indemnity provision is incorporated into his contract of employment/appointment. This article explores the deliberations of the appellate court and its effects on the indemnification of the officers of a company.

INTRODUCTION

Companies are empowered under the Companies Act 2016 ("CA 2016") to indemnify their directors and auditors against any costs incurred by the director or auditor in legal actions or proceedings brought against them, provided that the director or auditor successfully obtains a judgment in their favour or successfully defends against such legal actions or proceedings brought against them.

The case of Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd) v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors ("Perdana case") deals with such an indemnity. In the Perdana case, the appellant, Perdana Petroleum Bhd ("Appellant") was appealing against the decision of the High Court which allowed the claim of four former directors of the Appellant ("Respondents") to be indemnified by the Appellant for their legal expenses and costs incurred in having to defend 2 separate legal proceedings which the Respondents claimed were decided in their favour.

The Respondents relied on Article 170 of the Articles of Association ("AoA") of the Appellant and Section 289 of the CA 2016 as the basis for their claim for indemnity. Article 170 is reproduced herein:

Article 170 of the Appellant's Articles of Association

Every director, managing director, agent, auditor, secretary, and other officer for the time being of the Company shall be indemnified out of the assets of the Company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under the Act in which relief is granted to him by the court in respect of any negligence, default breach of duty or breach of trust.

Writer's note: Notwithstanding that the 'articles of association' are now referred to as the 'constitution' under the CA 2016, for purposes of this article, the term 'articles of association' is used to reflect the Court of Appeal's usage of 'articles of association' in lieu of 'constitution'.

THE COURT OF APPEAL'S FINDINGS

Darryl Goon JCA, in delivering the unanimous decision of the Court of Appeal, overturned the decision of the High Court and ruled that the Respondents could not rely on the indemnity provision in Article 170.

In arriving at its decision, the Court of Appeal firstly held that the AoA of a company is a contract between the members, acting as members of the company, and the company itself. This position is also enshrined under Section 33 of the CA 2016.

Notwithstanding, the Court of Appeal held that terms of the AoA may be incorporated (whether expressly or impliedly) into a contract between the company and a third party such as a director. The Court of Appeal determined that it would take comparatively little for the incorporation of a term in the AoA that provides indemnity to an auditor or director but notwithstanding however little it may be, there must be some material, no matter how little, upon which it may be established that an article was in fact incorporated into a director's contract of appointment or employment.

In other words, the mere fact of the existence of the articles and the appointment of an auditor or director would not automatically result in the incorporation of specific articles into the auditors' or directors' terms of appointment.

Based upon the foregoing, the Court of Appeal determined that the Respondents' claim for indemnity under Article 170 failed on the grounds that the Respondents did not adduce any evidence or circumstances in respect of their appointment as directors of the Appellant, nor was there any reliance by the Respondents on any contractual basis or how Article 170 may have been incorporated as a term of a contract.

There was essentially no evidence upon which the Court of Appeal may have concluded that the Respondents were appointed on the footing of the AoA, hence the ruling by the Court of Appeal to overturn the decision of the High Court.

INCORPORATION OF PROVISIONS

The Court of Appeal also referred to several instances in other cases where articles in the AoA were found to be incorporated into a directors' or auditors' appointment:

1. Where a director accepts his appointment by signing on the AoA, an implied contract between the director and the company was found to have arisen and the terms of such implied contract are the articles;

2. Where a director accepts his remuneration which is set out in the AoA, it is also implied as a term in his appointment as a director that the company may alter his remuneration by altering the AoA; and

3. The acceptance by auditors of a letter of offer enclosing only the company's memorandum and AoA (and there being no other terms of appointment save for the memorandum and AoA) was found to have incorporated the articles into the auditors' contract of appointment.

SECTION 289 OF THE COMPANIES ACT 2016

In disposing of the claim for indemnity under Section 289 of the CA 2016, the Court of Appeal also ruled that the Respondents could not rely on Section 289 of the CA 2016 as the section is merely permissive and does no more than to authorise a company to indemnify their directors and auditors where applicable. The section itself does not confer any statutory rights of indemnity towards the directors or auditors such that they may solely be the foundation for a claim for indemnity.

CONCLUSION

In conclusion, the Perdana case sets out the necessity for the incorporation of indemnity rights under the AoA into the terms of a director's or auditor's appointment before directors and auditors can rely on such indemnity. Directors and auditors are reminded not to place sole reliance on indemnity provisions in the constitution of a company, and to take steps to ensure that the terms of their appointment incorporate suitable indemnity provisions from the company or at the very least, make reference to the indemnity provisions in the constitution.

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[1] [2021] 6 MLJ 663.

[2] *Re Anglo-Austrian Printing and Publishing Union's Issacs' Case* [1892] 2 Ch 158 (UK)

[3] *Swabey v Port Darwin Gold Mining Co* [1889] 1 Meg 385 (UK)

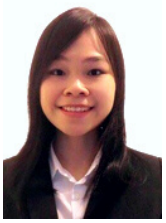
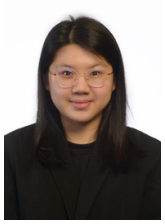
[4] *Chee Kheong Mah Chaly and others v Liquidators of Baring Futures (Singapore)* Pte [2003] 2 SLR (R) 571 (SG)

WE CREATE, INNOVATE AND EVOLVE SOLUTIONS IN NEW AND IMAGINATIVE WAYS.

FINANCE BILL 2021: PROPOSED AMENDMENTS TO THE STAMP ACT 1949 & REAL PROPERTY GAINS TAX ACT 1976

BY JAMES WONG, TEE HUI PENG AND LAM XIN YEE

With Malaysia moving into post-pandemic economic recovery mode, the RM332.1 billion Budget 2022 has been tabled to focus on the national development in rebuilding national resilience and catalysing reform. In furtherance of Budget 2022 tabled before the Malaysian Parliament on 29 October 2021, the Finance Bill 2021 ('the Bill') was presented for its First Reading in the Dewan Rakyat of the Malaysian Parliament on 9 November 2021. All the proposed amendments that introduced under the Bill will come into operation on 1 January 2022. This article outlines the main amendments to be made to the Stamp Act 1949 ('Stamp Act") and Real Property Gains Tax Act 1976 ("RPGT Act").

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STAMP ACT 1949

No stamp duty refund until assessment is final

Section 39 of the Stamp Act allow any person to make an appeal against the Collector of Stamp Duties' ('Collector') assessment to the High Court. Upon an appeal, the court may order the excess duty and any fine or penalty paid to be repaid to the taxpayer if the Court is satisfied that the assessment or additional assessment by the Collector is erroneous.

The Bill has proposed to a new section 39(4A) which provide that Collector shall not be compelled to refund the excess amount of stamp duty together with any fine or penalty until and unless the assessment has become final and conclusive.

To give effect to the proposed amendments to section 39(4A), a section 36D has also been introduced to provide a guidance where assessment shall be final and conclusive when:-

a) no valid notice of appeal against the assessment has been given under section 39 within the 21 days period specified by that section;
b) the assessment has been determined on appeal and there is no right of further appeal; or
c) a valid notice of appeal against the assessment has been given but the appellant dies before the hearing of the appeal by the High Court is commenced or completed and no personal representative of the estate of the deceased appellant has applied within 2 years after his death to proceed with or complete the hearing.

Imposition of processing fee for endorsement on exempted instruments

The Bill proposed to insert a new Section 37(2A) in the Stamp Act 1949 that any exempted instrument which but for the exemption, is chargeable with more than RM10 of stamp duty, will be chargedwith a fee of RM10 forcertificate of endorsement of exemption of stamp duty.

As an example, First Home Buyers who have never owned any residential property and are entitled to full Stamp Duty exemption on the instruments of transfer and loan agreements for property worth up to RM500,000 for Sale and Purchase Agreements on or before 31 December 2025 under Section 2(1)(a) & (b) of Stamp Duty (Exemption) Order 2021, will need to pay RM10 to Collector to certify the exemption of such documents from duty.

Other instruments such as bonds and Sukuk issuance documents which are entitled to stamp duty exemption under Stamp Duty Exemption (No. 23) Order 2000, will similarly attract RM10 fee for certificate of endorsement of exemption of stamp duty.

Extension of period for an application for Allowance for Spoiled and Misused Stamps

Currently under proviso (a) to Section 57, an application for relief for spoiled stamps must be made within 12 months:

a) after the stamp has been spoiled or becomes useless;
b) after the date of the executed instrument, or
c) after the execution of an undated instrument by the first or only person executing such instrument.

It is proposed to amend the Stamp Act to extend the 12 months period to 24 months.

Similarly, the period has also been extended from 12 months to 24 months under Section 58 for application for allowance for misused stamps.

Use of electronic medium

The Bill proposes to widen section 77A of the Stamp Act to allow instruments to be presented to be made via electronic medium for the following matters:

1. to seek a review on the assessment or additional assessment from the Collector under section 38A; and
2. to obtain a refund of duty under the following provisions of the Stamp Act:
   - section 57 - spoiled stamps;
   - section 58 - misused stamps;
   - section 80B - remission in whole or in part by the Collector on grounds of poverty;
   - section 21(7) - contracts deemed to be conveyances or transfer that have been rescinded, annulled, or not substantially carried into effect;
   - section 39(4) – refund of excess duty in respect of erroneous or additional assessment which ordered by the Court; and
   - section 80(3) - exemption, reduction or remission of duty pursuant to an order made by the Minister of Finance under section 80(1A).

Increase in stamp duty on contract notes for the trading of listed shares

It is proposed that the current rate of stamp duty on contract notes for the trading of listed shares on Bursa Malaysia in Item 31 of the First Schedule, be increased from 0.1% to 0.15% (which is equivalent to RM 1.50 for every RM 1,000) and that the existing stamp duty cap of RM 200 for each related contract note be abolished.

REAL PROPERTY GAINS TAX ACT 1976

RPGT Rates

To relief the financial burden of individual citizens, permanent residents and persons other than a company, the government proposed that the RPGT rate on gains from the disposal of real property and shares in a real property company in the sixth and subsequent years after the acquisition date be reduced from 5% to 0%.

TIN in RPGT transactions

The Bill also proposed to implement Tax Identification Number (TIN) on the taxpayers for the purpose of RGPT and Stamp Duty. TIN will be required in all transactions that are under the supervision of the Inland Revenue Board of Malaysia.

Acquirer's retention sum obligations

Currently, where the disposer of the chargeable asset is a company incorporated in Malaysia or a trustee of a trust or a society registered under the Societies Act 1966 [Act 335], the acquirer shall retain the whole of the money consideration or 3% of the total value of the consideration,

Expansion of scope of no gain no loss transaction to include nominee and trustee for inter-family asset transfer

Currently, paragraph 3 of Schedule 2 of the RPGT Act set out various types of disposals whereby the disposal price is deemed equal to acquisition price (i.e. no gain no loss).

Paragraph 3(1)(b) of Schedule 2 of the RPGT Act presently provides it shall be a no gain no loss transaction when it involve the transfer of chargeable assets owned by:-

i) an individual;
ii) the wife of an individual; or
iii) an individual jointly with his wife

or

with a connected person to a company resident in Malaysia or not, controlled by:
i) the individual
ii) the individual's wife; or
iii) the individual jointly with his wife or with a connected person;

for a consideration consisting of shares in the company, or substantially of shares in the company and the balance of a money payment.

It is proposed that the scope of the abovementioned transaction be expanded to include the transfer of assets owned by a nominee or a trustee of an individual, the wife of the individual or both to a company controlled by the nominee or trustee of the aforesaid individual, or his wife, or both.

whichever is the less, to pay to the Director General of Inland Revenue. Under the Bill, the phrase 'society registered under the Societies Act 1966 [Act 335]' will be revised to replace with 'body of persons registered under any written law in Malaysia'.

Expansion of losses disallowed for deduction for transfer of shares to a controlled company

Paragraph 33 of Schedule 2 of the RPGT Act sets out various circumstances in which a loss suffered from the disposal of a chargeable asset is not allowed to be set off against other chargeable gains of a person in a year of assessment.

Under the Bill, it is proposed that the scope of restriction be expanded in that a loss arising from disposal of chargeable assets under Paragraph 34 of Schedule 2 of the RPGT Act (i.e. transfer of shares to a controlled company) will not be allowed for deduction.

Computation on the exemption for partial disposal of shares

Currently, where a chargeable asset is partly disposed of, an ascertained amount would be given an exemption based on the prescribed formula under Paragraph 2 of Schedule 4 of the RPGT Act. In view that the prescribed formula does not take into account on the disposal of shares, the Bill has proposed that a separate formula shall be applied to ascertain the exemption amount if shares are partly disposed of:-

$$\frac{A \times C}{B}$$

where

The Bill has further proposed the percentage of the total value of the consideration be increased from 3% to 5% in the event that the disposer of the above categories dispose the chargeable assets within a period of three (3) years after the acquisition date.

A is the number of shares deemed to be a chargeable asset under paragraph 34 or 34a of Schedule 2 disposed;

B is the total number of issued shares deemed to be a chargeable asset in relation to shares deemed to be chargeable asset under paragraph 34 or 34a of Schedule 2;

C is ten thousand; or ten per cent of the chargeable gain, whichever is greater.

Non-payment of moneys by person leaving Malaysia

Currently, under Section 32 of the RPGT Act, any person who voluntarily leaves or attempts to leave Malaysia without paying all the tax payable by him shall be guilty of an offence and on conviction shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding RM5,000 or both. It is proposed that the scope of this offence be extended to include failure to pay a sum of money or debt due and payable. It is also proposed to increase the maximum fine to RM20,000 with a minimal fine of RM200.

AFTERSHOCK EMANATING FROM ANG MING LEE'S CASE

BY JAMES WONG & CYNTHIA LAM

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1. OVERVIEW

The effects of the Federal Court's case of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281 ("Ang Ming Lee")* in year 2020 on the housing development industry
have been nothing short of earthshattering. One year on, tremors continue to be felt, now perhaps with more emboldened purchasers armed with the rulings from *Ang Ming Lee*, mounting challenges to housing developers in a series of court cases.

This article briefly recaps *Ang Ming Lee's case* and discusses further development of the law post *Ang Ming Lee*.

2. *ANG MING LEE*

2.1 Brief Facts

a. In this case, BHL Construction Sdn Bhd ("Developer") and the purchasers entered into prescribed Schedule H contract of sale ("SPAs"). The SPAs allowed the purchasers to claim for liquidated damages if the Developer failed to deliver vacant possession of purchased units within the prescribed 36 months from the SPA date ("LAD").

b. After execution of the SPAs, the Developer applied to the Controller of Housing ("Controller") under reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ("Regulations") for an extension of time to deliver vacant possession of the units. Reg. 11(3) of the Regulations states that:

"(3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:

Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller."

c. The Controller initially rejected the Developer's application for extension, but in an appeal by the Developer to the Minister of Urban Wellbeing, Housing and Local Government ("Minister"), the Developer's appeal was allowed and it was granted 12 months through a letter signed by a person on behalf of the Controller
("Decision").

d. With the Decision, the purchasers were unable to claim LAD as the Developer now had 48 months instead of the statutorily prescribed 36 months to deliver vacant possession. The purchasers filed an application for judicial review to the High Court to quash the Decision.

2.2 High Court

The High Court allowed the application by the purchaser to quash the Decision and held that the Controller had no power to waive or modify the terms and conditions of the statutory contract of sale under Reg. 11(3).

2.3 Court of Appeal

The Court of Appeal held that Reg. 11(3) was not ultra vires the HDA and the Minister could delegate to the Controller the power to waive or modify the terms and conditions of the SPA. However, the Court of Appeal also held that:

a. the Decision was not made on behalf of the Minister, or that the signatory was acting on the authority of the Minister. Hence, the Decision was made without jurisdiction and ultra vires of the HDA; and

b. since the purchasers were not given an opportunity to be heard before the Decision was made, the Decision for the extension of time was set aside.

2.4 Federal Court

The Federal Court in allowing appeals by the purchasers and dismissing appeals by the Developer held as follows:

a. The Minister is empowered or given the discretion by the Parliament to regulate and prohibit the terms and conditions of the contract of sale (section 24(2) of the HDA). As the power to regulate did not include power to delegate, the Minister in delegating the power to modify the terms and conditions of the contract of sale to the Controller, exceeded what was intended by Parliament.

b. Reg. 11(3) of the Regulations, conferring power on the Controller to waive and modify the terms and conditions of the contract of sale, is therefore ultra vires of the HDA.

2.5 Significance of Federal Court's decision

Ang Ming Lee has fortified the idea that the HDA is a social legislation which calls for the protection of the home buyers' interest. To many, especially house purchasers, the judgment of *Ang Ming Lee* is welcomed albeit its hard impact on housing developers.

This case serves as a caution to housing developers in applying for extension of completion time. It is more likely than not that housing developers will now pay heed to this in new project undertakings.

That being said, for existing housing developments which have commenced before *Ang Ming Lee*, there remains residual issues stemming from *Ang Ming Lee* which were left unanswered then, and to which subsequent cases have attempted to shed some light:

a. Does *Ang Ming Lee* apply retrospectively or prospectively?

b. Should *Ang Ming Lee* still be applicable under a different factual matrix, in the context where extension of time under Reg. 11(3) is granted before any execution of SPA by purchasers, and purchasers having entered into the SPA with full knowledge of the "extended" period?

c. Will voiding Reg. 11(3) and all extensions of time granted render the SPA void or will the SPA remain valid but with the completion period being replaced by the statutory prescribed period?

d. Should purchasers who have entered into SPA with full knowledge of the "extended period" be estopped from insisting a shorter prescribed period?

e. Is there any time limit for a purchaser who has completed purchase of a property under a sale and purchase agreement based on an extended period to make claims against the developer?

f. Whether the extension of time granted by the Minister for the Developer to complete the housing development is invalid in light of *Ang Ming Lee*?

3. POST ANG MING LEE CASES

3.1 Ang Ming Lee has the unwitting effect of encouraging opportunistic purchasers to claim for LAD beyond what they had originally contracted for in the SPA or terminate the SPA on ground of anticipatory breach. The adjudication by the courts of these ripple of cases have aided us in better understanding the judicial approach on these residual issues.

3.2 Retrospective or Prospective effect

a. The question on whether the decision of Ang Ming Lee has retrospective effect was discussed in ***Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and other applications [2020] 10 MLJ 689***, where the High Court judge was of the view that Ang Ming Lee has retrospective effect.

b. His Lordship Wong Kian Kheong J held that:

"[29] *I am not able to accept the … submission that …Ang Ming Lee can only have prospective effect. My reasons are as follows:*

(a) *the Federal Court in Ang Ming Lee has not expressly ruled that its decision can only have prospective effect. Hence, in accordance with the general rule, the judgment in Ang Ming Lee has retrospective effect and applies to these three applications; and*

(b) there are no exceptional circumstances for the doctrine of prospective overruling to apply to the decision in Ang Ming Lee. On the contrary, as held in many cases (including Ang Ming Lee), the object of HDA and HDR is to protect a 'homebuyer' (as defined in s 16A of the HDA). Accordingly, in line with the purpose of HDA and HDR, it is in the interest of homebuyers for the judgment in Ang Ming Lee to be given retrospective effect."
[Emphasis added]

c. The Court of Appeal in *UE E&C* ***Sanjia (M) Sdn Bhd v Lee Jeng Yuh & Anor [2021] 8 AMR 293*** **("*UE E&C Sanjia*")** also ruled that the decision of the Federal Court in *Ang Ming Lee* operates retrospectively as there is nothing expressly mentioned in *Ang Ming Lee* regarding the prospectivity of the said decision.

3.3 Whether *Ang Ming Lee* is applicable where approval is granted by Housing Controller before execution of the SPA

a.Even though the principles enumerated in *Ang Ming Lee* are clear, there have been few attempts by housing developers to distinguish themselves from *Ang Ming Lee*. In *UE E&C Sanjia*, the housing developer contended that the extension of time in *Ang Ming Lee* was unilaterally obtained by the housing developer from the Controller subsequent to the execution of the SPA as opposed to the instant case where the extension of time was approved prior to the execution of the SPA.

b. The Court of Appeal disagreed and held that it was irrelevant whether the approval of the Controller was obtained before or after the execution of the SPA.

c. Similarly in *Alpine Return Sdn Bhd v Matthew Ng Hock Sing & 3 Ors [2021] 8 AMR 305* ("*Alpine Return*"),
the developer employed similar argument to distinguish *Ang Ming Lee* in that the extension of time was applied for subsequent to the entering of the SPA and without the knowledge and/or consent of the purchasers, as opposed to the instant case where the extension was applied for and obtained prior to the execution of the SPA. The High Court however, likewise ruled that it did not matter if the extension was granted before or after the SPA were signed with the purchasers. In this context, it was also not material whether the purchasers had notice of the amendments to the SPA. These considerations were irrelevant in the context where Reg 11(3) which was the source of all these extensions of time, has now been ruled to be void and ultra vires under *Ang Ming Lee*.

3.4 Whether the executed SPA is void and unenforceable for breach of the HDA

a. The Court of Appeal in *UE E&C Sanjia* ruled that the SPAs are void for illegality under Section 24 of the Contracts Act.

b. The Court of Appeal further ruled that as the purchasers were not aware of the illegality [as the decision in *Ang Ming Lee* came much later though it operates retrospectively], the parties should be put in their original position as if the SPAs had never been executed.

c. The decision of *UE E&C Sanjia* seems to differ from an earlier Court of Appeal decision in *Loh Tina & 6 Ors* ***v Kemuning Setia Sdn Bhd & 5 Ors (and another appeal) [2020] 6 MLJ*** *191* ("*Loh Tina*"). In *Loh Tina*, the developer deviated from the HDA and Regulations by modifying the statutory prescribed sale and purchase agreement in Schedule G without approval from Controller and was in breach of the HDA and Regulations. The Court of Appeal held that:

"[98] It is the relevant clauses in the unauthorised modification to the Schedule G SPA that would be null and void. Unlike the Moneylenders Act 1951 that declares all moneylending agreements not in compliances with the Act to be void and unenforceable, neither the HDA nor the Regulations so declare and the intention must be that the Legislature wanted to save that which is in compliance with the prescribed Schedule G contract of sale and only strike down as null and void those clauses that are in contravention of Schedule G."
[Emphasis added]

and that the purchasers would be entitled to enforce their rights as if the agreements had been in its prescribed form without any amendment.

d. The High Court in the case of ***Kaisar Maxim Sdn Bhd v Cheah Poh Hin [2021] 8 AMR 379*** **("Kaisar Maxim")** cited the decision of *Loh Tina* and held that even though the SPA which stipulated that vacant possession to be delivered to the purchasers within 54 months, contravened the HDA and that the decision to grant extension of time for delivery of vacant possession was ultra vires, such contravention of

Schedule H did not render the whole of the agreement void and unenforceable. The Court further stated that the failure to comply with the specified time frame would attract penalties under Reg. 13 of the Regulations and would render only that part of the agreement unlawful. The Court further ordered for the SPA to be valid and enforceable subject to the condition that the delivery of vacant possession period as provided under the SPA to adhere to the 36 months' time frame as provided under Schedule H.

e. There now appears 2 lines of possible consequences stemming from the 2 Court of Appeal cases, one ruling the SPA would be void (under *UE E&C Sanjia*), and the other ruling SPA to be valid and enforceable subject to changing completion delivery period to what is stated under the Regulation (under *Loh Tina*). Neither case bears good news for those housing developers which have dutifully complied with the Regulations to obtain the approval before selling development units, albeit unknowingly contravening the HDA in view of Reg 11(3) being held ultra vires. The former view potentially exposes housing developers to risks of purchaser pulling out from the concluded sale transaction especially if the purchaser views the purchase as a poor investment or is having second thought with the purchase in a lacklustre property market. Substantial withdrawals of sale could pose existential threat to affected developments, which could in turn adversely affect the developers, and may trigger similar domino effects on property development and banking industries. The second view does not also fare a better outcome for the housing developers with them being potentially liable to additional LAD of 10% - 20% of the gross development value to purchasers who decide to capitalise on the ruling in *Ang Ming Lee.*

3.5 Whether the purchasers having executed the SPA are estopped from claiming LAD

a. The High Court in the case of Alpine Return was posed with the question on whether purchasers should be estopped from not following the agreed terms of the "extended period" and from claiming LAD.

b. In this case, the parties had executed SPA with a completion timeline of 60 months (for which the developer had first secured approval for the extension of time by a then valid process). The developer completed construction and delivered vacant possession almost 60 months after execution of the SPA. However, the purchasers now contended that the extension of time is ultra vires and sought claims for LAD based on a 36 months period.

c. The Court, in taking cognisance of the commercial requirements in property development, first stated that in the absence of the extension to 60 months period, the developer would not have undertaken the development and it would have been impossible to complete 60 storey development within 36 months, knowing full well that the developer would then be contractually obligated to pay LAD to the purchasers for each day of delay.

d. The Court further added that the purchasers at the material time — even prior to the execution of the SPAs — were equally fully cognizant that the delivery of vacant possession of the parcels and the completion of common facilities for the development would be 60 months from the date of the SPAs. They had neither expected receiving the delivery of vacant possession within 36 months, nor raised any objections towards the extension until after the decision in *Ang Ming Lee*, post the delivery of vacant possession by the developer.

e. The Court in allowing the housing developer's claim that the purchasers should be estopped from denying the terms of the SPAs held that notwithstanding the extension was not valid given that Reg. 11(3) of the Regulations was ruled to be ultra vires, in situations where the extension was secured prior to the execution of SPA with the purchaser and was obtained without any illegality or irregularity on the part of the developer, there would be no concerns about the need to ensure the protection of the purchasers in the SPA.

f. The basis of estoppel by conduct is that a party has so conducted himself that it would be unfair or unjust to allow him to depart from the particular state of affairs which another has taken to be settled or correct.

g. The Court in arriving at its conclusion states that:

"[97] *Whilst it is crystal clear from Ang Ming Lee that the Housing Controller has no powers to grant extensions under reg 11(3) which is thus ultra vires the HDA, I do not*

see how the counterclaims by the defendants for LAD can be said to be a genuine pursuit to enforce the right of the weaker party against a defaulting stronger party (the plaintiff) which could instead potentially result in the defendants gaining an unfair benefit at the expense of the plaintiff. The plaintiff did not commit any illegality, irregularity or depart from the provisions of the Regulations in force at the material time…

[98] *Whilst taking full cognizant that the Regulations and the HDA are social legislation designed to protect the interest of the purchasers, the courts are ever entrusted with the duty to ensure that justice is served. An appropriate balance must be struck after taking into account the interests of especially the purchasers and also the developers, whilst at the same time not oblivious to the context of the housing development industry — of not only future but also completed and pending projects. As such, in my view, although reg 11(3) is now ultra vires, on the very specific facts of this case, the defendants are estopped from reneging on the SPAs and claiming LAD since all parties were under the same belief that the extension was valid at the time of the execution of the SPAs and the entire extension process was validly performed sans any infringement at the material time."*
[Emphasis added]

3.6 Time limit for a purchaser to make claims against the developer

a. The High Court in the case of **Obata Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd & Other Cases [2021] 10 CLJ 596 ("*Obata Ambak*")** held that the purchaser who wishes to enforce its rights under the prescribed contract of sale has to do so within time.

b. In the instant case, the purchasers who had entered into sale and purchase agreements with the developer dated between 11 July 2012 to 28 October 2013 filed an action against the developer on June 2020 to claim for LAD on the basis that the extension of time granted to the developer to deliver vacant possession of the property from 36 months to 54 months as envisaged in the sale and purchase agreements were invalid.

c. In this regard, the Court in dismissing the purchasers' claim held that the six years' time limitation should always run from the earliest time at which an action could be brought, and in this case, the Court held that it was from the date of the SPA. Therefore, the time limitation under section 6(1)(a) of the Limitation Act 1953 has set in to bar the purchasers' claims given that the breach as alleged by the plaintiffs had occurred as early as from the date of SPA. The Court is of the considered view that the period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed on the ground of equitable consideration.

d. It is to be noted that the court in *Obata Ambak* recognised that the breach has occurred as early as from the date of the SPA itself as it was so pleaded by the purchasers. The decision might have been different had the purchasers pleaded the breach occurred on date of delivery of vacant possession. The decisions **of Edward Stanislaus De Silva & Ors v Yeng Chong Realty Bhd** formerly known as **Yeng Chong Realty Sdn Bhd) [2021] MLJU 7 ("*Edward Stanislaus*") and Golden Approach Sdn Bhd v Lau Sen Leong [2019] 3 MLJ 777 ("*Golden Approach*")** would be preferred and the *Obata Ambak's* case can be distinguished based on its own facts.

e. In ***Edward Stanislaus*** case, the court was of the view that the purchasers' cause of action arose on the date of breach by the housing developers when the housing developer failed to deliver the vacant possession to the Property within 36 months from the date of the SPAs (which were dated in the years 1999 to 2000).

f. The *Edward Stanislaus* judgment was consistent with the Court of Appeal's case of ***Golden Approach***, whereby the court held that as a general rule, the purchasers' right of action for damages for breach of contract, accrued on the date of breach. In the case of *Golden Approach*, it was the day after the 36 months' time of delivery of vacant possession under the SPA. The purchaser was out of time in commencing the action against the housing developer and the purchaser's claim was statute-barred.

3.7 Whether the extension of time granted by the Minister for the developer to complete the housing development is invalid in light of *Ang Ming Lee*

a. In the recent Court of Appeal's case of **Bluedream City Development Sdn Bhd v Kong Thye & 184 others and 5 other appeals ("*Bluedream City Development*")** (ground of judgment dated 24 January 2022), the court distinguished *Ang Ming Lee's* case and

allowed the appeal from the housing developer and upheld the Minister's decision in granting the housing developer the extension of time.

b. The Court of Appeal in arriving at its decision held that the Minister has the power to "waive and modify" any provisions in the statutory contract of sale pursuant to section 24(2)(c) and (e) of the HDA which states that the Minister is empowered to prescribe the forms of contracts or to regulate and prohibit the conditions and terms of any contract.

c. The Court further stated that the vast power of the Minister as conferred on him by Parliament also extends to powers to give directions under section 11 and 12 of the HDA for the purpose of safeguarding the interests of the purchasers where the housing developer is unable to meet its obligations to its purchasers or is about to suspend its building operations.

d. In the present case, the housing developer was not able to complete constructions of the housing development due to the issuance of the stop work order ("SWO") for 17 months because of the subsidence and cracks in a nearby school caused by an underground stream and applied for and obtained extension of time from the Minister.

e. As such, the Court held that the extension of time granted by the Minister was reasonable, fair and just in the circumstances of the case taking into account the hardship suffered by the housing developer. The extension of time corresponded with the period of delay caused by the SWO which was not through any fault or negligence of the housing developer.

f. The Minister was entitled to arrive at its decision in granting extension of time taking into account the interest of the Purchasers who had faced the real likelihood of the housing development being abandoned because of the 17 months delay arising from the SWO.

g. It should also be noted that as a matter of public interest, the Court has taken the view that one must not end up punishing a housing developer so as to protect the purchasers.

4. CLOSING

Ang Ming Lee highlights the potential dire consequences resulting from unwary applications for extension of time by developers. With increasing awareness by purchasers of *Ang Ming Lee*, what were previously seemingly "normal" occurrences of extended completion for housing development have increasingly morphed into grounds for disputes in claiming substantial LAD, especially in this pandemic era which may contribute to completion delivery delay.

The case has resulted in a clarion wake-up call to housing developers when applying for extension of time for completion. Whilst housing developers will almost certainly exercise more diligence post *Ang Ming Lee* for new developments, the rulings made from subsequent cases after *Ang Ming Lee* pose certain challenges for existing developments. The Court of Appeal's decision in *Bluedream City Development* would be welcomed by developers for extensions of time granted by the Minister. For extensions previously granted by the Controller, *Alpine Return's* High Court ruling that purchasers should be estopped from claiming LAD where the extension was secured prior to the execution of SPA without any illegality or irregularity, may also offer a silver lining to developers. Whether the approach adopted by *Alpine Return* would be affirmed or followed at higher court remains to be seen. Until then, developers may need to brace for more tremors.

A WOULDA COULDA SHOULDA PUPILLAGE? CERTAINLY NOT!

By Lim Yuh Shiun
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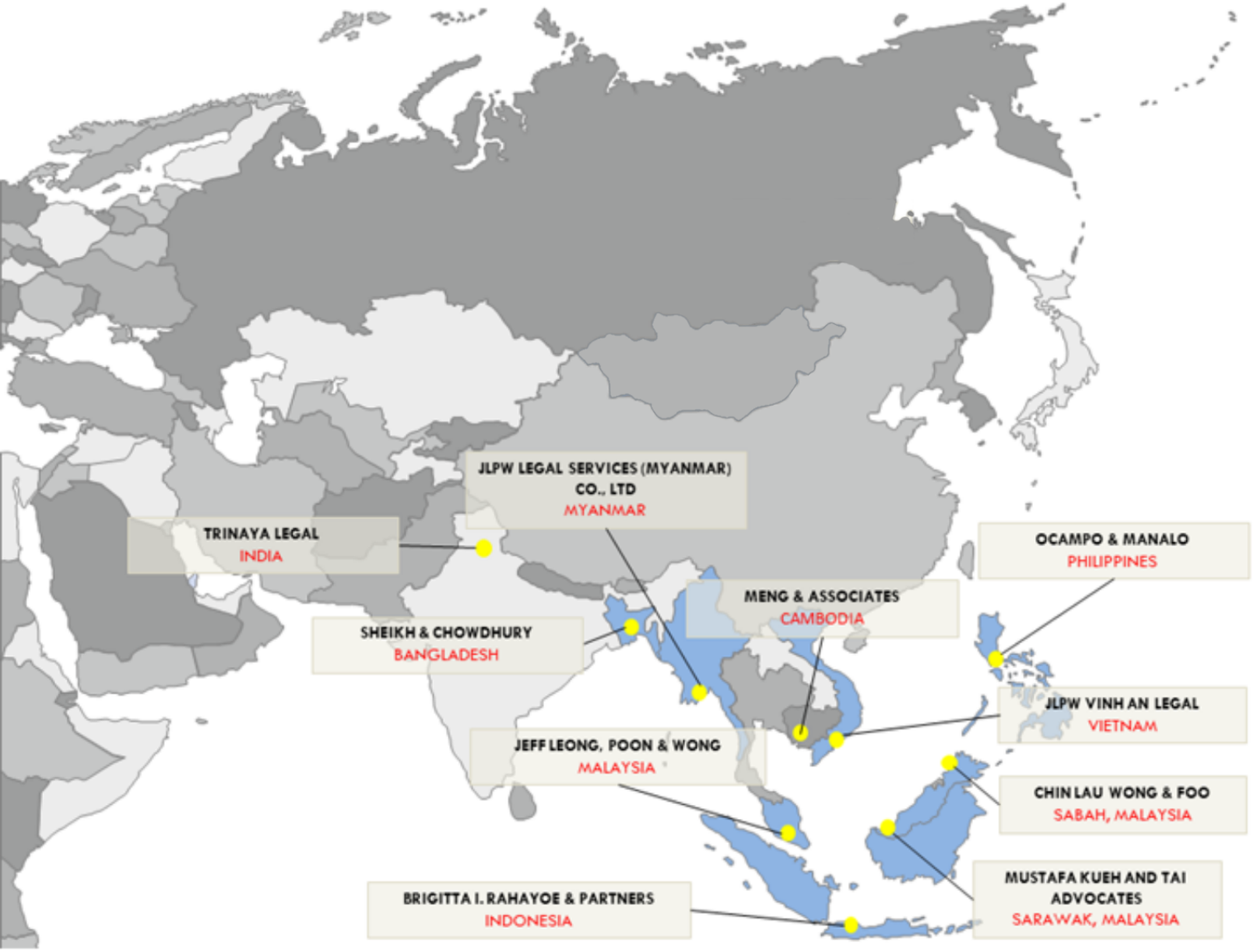
I was called to the Bar of England and Wales by The Honourable Society of Lincoln's Inn on 22nd July 2021. How did I feel? Mixed feelings I guess as I was about to begin a new chapter of my life – pupillage. As I was racking my brain trying to figure out the kind of law firm that I am interested in, a very good friend of mine came and asked me to apply to Jeff Leong, Poon & Wong. I then did extensive research into the firm and was truly intrigued by its achievements. I knew that this is the right firm for me. I submitted my resume without further procrastination and waited with bated breath for a reply from this reputable firm.

The wait had been daunting but luckily, I received an email from the Human Resources Department a few days later inviting me to an interview. The interview was conducted by the Senior Partner of the firm, Mr Kenny Poon. The interview was a pleasant one, with Mr Poon gave me a revealing insight into the firm which strengthened my earlier belief that this is the right firm for me. I was therefore over the moon to have finally received a call from the HR Department a couple of weeks later, who informed me that the firm was willing to offer me a pupillage position.

I started my pupillage on the 17th September 2021 and was introduced to my master, Mr Ganesh, who happens to be the new Head of the Dispute Resolution Department. I had a short yet delightful conversation with Mr Ganesh. I was also introduced to the lawyers and the support staff at the Department.

It has been almost three months since I started my pupillage and I have no hesitation to say that these three months have been rewarding and eye-opening, although it may at times be intense. In addition to the exposure to the different practice areas of dispute resolution in Malaysia, I am exposed to a variety of works, both local and international, from researching, drafting letters, emails and cause papers, to assisting in court matters. I too have the privilege of attending a few High Court and Court of Appeal hearings, which enables me to develop my advocacy skills and interest in litigation.



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