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Beauty and Safety

Heard about the new ruling on registration of cosmetic products? If you are in the cosmetic industry or intend to venture into it, **Don't Miss This...**

What do the new rules require?

The Control of Drugs and Cosmetics Regulations 1984 (the Regulations) regulates the manufacturing, sale and importation of cosmetic products by imposing the following conditions:

- Cosmetic products must be registered with the National Pharmaceutical Control Bureau (NPCB)
- The manufacturer, importer and wholesaler of cosmetic products must obtain an appropriate licence (retailer is excluded)

Why these rules?

The rules are mainly about consumers' safety. The registration system will enable the NPCB to gather sufficient information for evaluation and assessment of the quality and safety of cosmetic products.

A proper record of all cosmetic products available in the market will also facilitate the enforcement and investigation by the responsible authority especially when a complaint is received.

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When did they take effect?

The requirement for registration and licensing took effect from 1 February 2002. However, during the transition period of 2 years (until 31 December 2003), the cosmetic industries can still continue to market their cosmetic products whilst waiting for approval.

Legally speaking, after the 2-year transition period, all cosmetic products must be registered. However, on 19 December 2003, the Minister from the Ministry of Health announced that to avoid disruption of supply to costumers, a grace period of a further 6 months until June 2004 is given to those who have submitted their applications before 1 January 2004 but have yet to secure registration. After June 2004, manufacturing, selling, supplying and importing unregistered cosmetic products is an offence under the Regulations.

What is a 'cosmetic'?

The Regulations define 'cosmetic' as follows:

"Any substance or preparation intended to be used, or capable or purported or claimed to be capable of being used, on the various external parts of the human body (including epidermis, hair system, nails, lips and external genital organs) or the teeth and the mucous membranes of the oral cavity for the exclusive or main purpose of cleaning, perfuming or protecting them, or of keeping them in good condition, or of changing or modifying their appearance, or correcting body odours."

In short, you may consider 3 basic questions in determining whether a product is a cosmetic:

1 Where do you intend to apply the product?
If the product is not intended for one of the following areas, then it is unlikely to be cosmetic.

- Epidermis
- Hair system
- Nails
- Lips
- External genital organs
- Teeth
- Mucous membranes of the oral cavity

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...from cover

2 What is the purpose of the product?

If the main purpose of the product is not to perform one of the followings, then it is unlikely to be cosmetic

- To clean
- To perfume
- To change appearance
- To correct body odour
- To protect
- To keep in good condition

An example given by the NPCB is that toothpaste that whitens teeth and freshen the breath is a cosmetic whereas a toothpaste with fluoride to prevent caries or cavities is not a cosmetic.

3 What is the product's composition or ingredient?

A cosmetic product must not contain prohibited ingredients, substances, colouring agents, preservatives and UV filters, other than those permitted under the Regulations.

Who should apply?

Importers or manufacturers of cosmetic product should apply for the registration of cosmetic products before marketing the products. An applicant for the registration of cosmetic products must be a locally incorporated company.

In addition to the above, a manufacturer, importer or wholesaler must obtain the appropriate licence which is valid for 1 year.

What if you fail to register your cosmetic product?

Under the Regulations, it is an offence to manufacture, sell, supply, import or possess for sale unregistered cosmetic products and/or without obtaining the appropriate licence.

An individual who commits the offence shall, upon conviction, be liable to a fine not exceeding RM25,000 or to imprisonment for a term not exceeding 3 years or to both. For a second or subsequent offence, he shall be liable to a fine not exceeding RM50,000 or to imprisonment for a term not exceeding 5 years or to both.

A company shall be liable, upon conviction, to a fine not exceeding RM50,000 and for a second or subsequent offence, the fine is increased to an amount not exceeding RM100,000.

Labeling Requirements

Apart from the registration requirement, you must not overlook the new guidelines on labeling of cosmetic product, the list of non-permissible claims and the advertising code for cosmetic products.

Compliance with the labeling requirements prescribed under the Regulations is essential to the registration of cosmetic products.

Labeling means information written, or printed or graphic matter on the immediate or outer packaging and any form of leaflets.

The following information should appear on the outer packaging of cosmetic product or where there is no outer packaging, on the immediate packaging of the cosmetic product:

- Name of the cosmetic
  The name given to a cosmetic product, which may be an invented name, together with a trademark or the name of the manufacturer
- Country of manufacture
- Name and address of person responsible for placing the product on the local market
- Manufacturer's batch number
- Instructions on use
- Contents in weight or volume
- Manufacturing date or expiry date
- Registration number
- Full ingredients listing
- Manufacturer's recommendation
  Special precautions to be observed in use, especially those listed in the Regulations
- Additional statements

Specific warnings such as declaration of ingredients from animal parts is mandatory.

For small or odd shaped products, the Regulations prescribe the minimum information that should appear on the packing and the balance could be displayed on leaflets, pamphlets, hand tags etc.

Non-permissible claims for cosmetic

Cosmetic product should not make claims that are regarded as medicinal in nature. NPCB provides a guidance document on a non-exhaustive list of non-permissible claims. Some examples of acceptable and unacceptable claims are as follows:

Unacceptable claims	Acceptable claims
Stop wrinkles	Reduced fine line
Prevent aging	Reduce the signs of aging
Stop acne, pimple, blackheads	Hides acne, pimple, blackheads
Eliminate dandruff flakes from the hair	Removes loose dandruff
Removal of cellulite	Reduce the appearance of orange peel effect, also called cellulite
To provide relief and soothes irritated skin	To provide relief to dry skin
Gives you up to 6 times more sun protection than wearing nothing at all	Gives skin a bronze appearance

As noted from the examples above, the differences between acceptable and unacceptable claims are very fine. Therefore, the NPCB advises applicant to obtain legal or expert advice to ensure that their proposed claims are not in breach of the Regulations.

Conclusion

It seems a lot to watch out for... So, make sure you know the DOs and DON'Ts under the rules and comply fully within the stipulated time.

Failure to do so, apart from attracting the prescribed penalty, may cause serious damage and loss to your business and reputation, something which you may not be able to rebuild over a short period of time.

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Shipping Law

Priorities of claim

When it comes to the distribution of proceeds in an "in rem" action, where a claim ranks in the priorities of claim could make all the difference between a judgment sum being met in full or not at all.

Introduction

The pivotal question asked before commencing any action is "will I get my money back?" When it comes to debt recovery in an in rem action, the answer to that question lies in the priorities of claims.

In the economics of business, ship owners accumulate other debts in addition to the existing mortgage on their vessel. Therefore as the ship owner's main asset and collateral, claims made against the ship owner or the vessel will normally be met with the sale proceeds of the vessel.

How much will it cost?

The sheriff's charges in the arrest of any vessel are an area of common concern amongst those who are new to the area of maritime debt recovery and who have been disheartened by the enormous expenses incurred in pursuing an in rem claim. Depending on the location of the arrest, it may easily run into hundreds of thousands of dollars.

The undeniable reality in this as in many other things is that you have to pay money to get money. The Courts are aware of this and in fairness, the first priority in distributing the sale proceeds of a vessel is to pay the sheriff's charges and then to pay the plaintiff's costs of and incidental to the arrest of the vessel1.

Another frustrating reality is that the sale proceeds are not normally enough to settle all claims made against the vessel. Despite getting all legal costs paid in respect of the arrest and sale of the vessel, all efforts would be an act of futility if the actual claim could not be met in part or even at all. Hence a claim that ranks higher in priority has a better chance of being met in full.

Priority of claims

The principles of priority are an equitable jurisdiction and have been developed primarily by the courts2 where the established principles of priority are applied unless certain aspects of a case could justify a deviation3.

Once a vessel has been sold, the court will decide on the priorities and payment of the proceeds of sale. In order to understand the importance of establishing priority, observe the case of Den Norske Bank ASA v the Owners of the Ship or Vessel "Forum Akasaka" [1998] 3 CLJ Supp 10.

The plaintiff was the mortgagee bank who had obtained judgment against the defendants that led to the eventual sale of the vessel. There were two other intervening actions brought by two groups of crew members with a claim for outstanding wages. In this case, the sale proceeds were not even enough to settle the plaintiff's claim alone, let alone those of the intervenors.

The judge first turned to the established principles of priorities which are as follows: (1) sheriff's charges4; (2) plaintiff's costs of and incidental to the arrest of the vessel; (3) a possessory lien5; (4) claims for salvage; (5) damages arising from collision; (6) wages and disbursements for master and crew; (7) claim for mortgagee; (8) necessaries and (9) contractual claims.

In this case, the first intervenor's action ranked above the plaintiff's claim as mortgagee bank and was therefore settled in full. Unfortunately, as the second intervenors had failed to effect service of their writ against the vessel and were therefore unable to obtain judgment in their case. For that reason, they were not apportioned any of the proceeds. The plaintiff's claim was settled by the balance of whatever proceeds that remained after those deductions.

The importance of possessory lien

Knowing where a potential claim ranks in the priority of claims could make all the difference between a claim being met in full or not at all. Of notable importance are those parties having a possessory lien over the vessel concerned.

There are two problems that would jeopardise any possibility of recovering any debt once possessory lien has been lost. Firstly, locating the vessel for arrest will prove problematic once it has sailed into the open sea. Secondly, once possessory lien is lost, the claim falls to the bottom of the priority list as merely a contractual claim or a miscellaneous claim. Depending on the amount of the mortgagee bank's claim, all other claims would have a significantly better chance of being met if they ranked higher than the mortgage claim and especially so where the sale proceeds are insufficient.

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Changes to
Bankruptcy Law

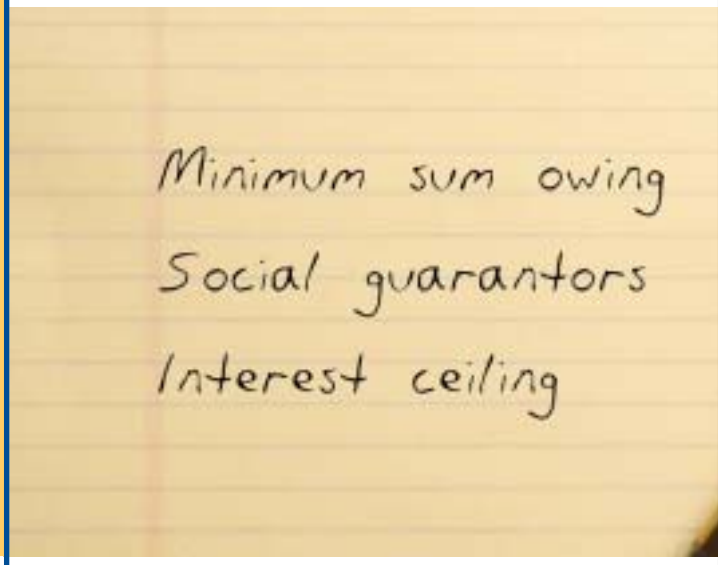
The Bankruptcy (Amendment) Act 2003 ("the Amendment Act") made substantial changes to our present Bankruptcy Act 1967 ("the Principal Act"). These changes are effective from 1 October 2003.

In a nutshell, the substantial changes to the Bankruptcy laws are as follows:

a The minimum sum owing to creditors before a bankruptcy petition can be filed was increased from RM10,000.00 to RM30,000.00.

b Guarantors who provides guarantees for purposes of other than making profits are afforded limited protection against bankruptcy proceedings.

c The ceiling interest rate claimable against the estate of a bankrupt and the duration of which the interest is chargeable has been capped by the Amending Act.



Shipping Law - Priorities of claim (continued)

Conclusion

In the overall scheme of things, there are other aspects, such as a weak case, that would also affect the possibility of full recovery. Nonetheless, the priority of a claim should weigh equally with the strength of a particular case in the mind of a potential claimant when considering whether to embark on an in rem action.

An understanding of their rank in the priorities of claim would assist potential claimants in making informed decisions prior to commencement of legal proceedings and also improve the likelihood of recovery.

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1 Such costs include the Notice of Motion for priority and the eventual payment out of proceeds.

2 s389(2) Merchant Shipping Ordinance of Malaya - priority of salvage of persons over salvage of property
s43 of the Merchant Shipping Ordinance as amended by s3 of the Merchant Shipping (Amendment and Extension) Act of Malaysia - priority of ship mortgages based on order of registration of mortgages.

3 Emmanuel E. Okwuosa & 26 Others v The Owners of and Other Persons Interested in the Ship "MV Brihope" and Hong Leong Leasing Sdn Bhd (Intervenors) [1995] 2 CLJ 250 at p258

4 In claims for port or harbour dues, the Sheriff may seek leave of the court to make such payments and therefore categorise them under the Sheriff's expenses.

5 (a possessory lien) only operates if the person seeking to enforce it against a chattel comes into possession of the chattel lawfully and for so long as he lawfully retains uninterrupted possession of the chattel" Tappenden v Artus [1964] 2 KB 185. This is particularly relevant to claims brought by ship builder, ship repairers as well as port authorities.

1. MINIMUM SUM OWING

1.1 Effective 1 October 2003, a creditor (or joint creditors) are not allowed to present a bankruptcy petition against a debtor unless the debt owing to the creditor or joint creditors amounts to RM30,000.00 - as provided for in Section 4(a) of the Amending Act.

1.2 With the change, section 5(1)(a) of the Principal Act should now read as follows:

A creditor shall not be entitled to present a bankruptcy petition against a debtor unless -

(a) the debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors, amounts to thirty thousand ringgit; and ...

1.3 The wordings of the section implies that any petition filed with effect from 1 October 2003 onwards must be based on an outstanding debt of at least RM30,000.00. The pre-amendment law would still be effective in respect of petitions presented before 1 October 2003 for amounts lesser than RM30,000.00.

2. SOCIAL GUARANTORS

2.1 The Amending Act provides limited protection for social guarantors in the following manner in the new Section 5(3) of the Principal Act:

A petitioning credit or shall not be entitled to commence any bankruptcy action against a social

guarantor unless he proves to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtor.

2.2 Social guarantors are defined as follows:
A person who provides not for the purpose of making profit, the following guarantees:
(a) a guarantee for a loan, scholarship or grant for educational or research purposes;
(b) a guarantee for a hire-purchase transaction of a vehicle for personal or non-business use; and
(c) a guarantee for a housing loan transaction solely for personal dwelling.

2.3 The Amending Act makes it clear that a social guarantor is one who provides a guarantee not for the purpose of making a profit. Therefore, before commencing bankruptcy proceedings against guarantors, it is important to ascertain whether or nor a particular guarantor falls within the meaning of a social guarantor defined in section 3 (c) of the Amending Act.

2.4 There are no decided authorities on Section 5(3) as yet and it would be interesting to see the Court's interpretation of what is meant by exhausted all avenues. The question to be answered is whether a creditor bank is required to exhaust all means of execution proceedings first or merely enforces the charge/assignment and subsequently proceed with bankruptcy proceedings against the debtor.

2.5 The new section 5(3) may have implications on some clauses found in the banks' loan documentation and guarantees i.e. clauses on "Concurrent Remedies" and "Principal Debtors".

2.6 The "Concurrent Remedies" clause allows a creditor bank to among other things commence legal proceedings against a guarantor simultaneously with a borrower. Nonetheless, upon obtaining judgment against both, the creditor bank may not be able to commence bankruptcy proceedings against the guarantor unless it has exhausted all avenues against the borrower.

2.7 It is to be noted however that there is no prohibition on the commencement of other forms of execution proceedings against a guarantor i.e. judgment debtor summons, garnishment proceedings, writ of seizure and sale etc.

2.8 The "Principal Debtor" clause found in guarantees makes a guarantor liable to a creditor bank not only as surety but as a principal debtor i.e. as if the guarantor is the actual borrower. In the light of the new amendments which are designed to protect social guarantors, the courts may view such clauses as an attempt to remove this protection by contractual agreement and may strike down these clauses.

3. INTEREST CEILING

3.1 The new amendments have placed a cap on the interest rate chargeable against the bankrupt's estate and duration in which the interest is chargeable. The changes are as follows:

PRE AMENDMENT	POST AMENDMENT
Any surplus in the bankrupt's estate can be applied to pay interest at the rate of 6% per annum on all debts proved in bankruptcy - Section 43(5). Where a creditor is entitled to a higher rate of interest, he may receive such higher rate after all debts proved in the bankrupt's estate have been paid in full - Section 43(6). Where interest is not reserved or agreed for, creditors can prove interest at a rate not exceeding 6% per annum from the time the debt became payable until the time of payment - Rule 24 Schedule C.	Surpluses can no longer be applied in any payment of interest to any creditor after the date of the receiving order EXCEPT to a secured creditor subject to Section 8(2A). Creditors entitled to claim interest higher than 6% per annum can no longer claim such higher interest rate. Interest is calculated at a rate not exceeding 6% per annum up to the date of the receiving order. The creditor may prove for interest at a rate not exceeding 6% per annum to the date of the receiving order from: a) if the debt was payable by virtue of a written instrument at a certain time, the time the debt was payable; or b) if the debt was payable otherwise than by virtue of written instrument, the time when demand in writing was made.

3.2 In addition, the new interest rate cap prevents a bankrupt's debt from continuing into perpetuity.

3.3 The 6% per annum interest cap imposed by the new Amendments would appear to be in conflict with the Civil Law Act on contractual interest or under the Rules of the High/Subordinate Court where interest is provided for at 8% per annum from the date of judgment.

In summary, the most fundamental changes to the bankruptcy laws would be the interest rate cap which prevents a bankrupt's debt from continuing to run into perpetuity and the protection afforded to social guarantors.

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Guarantees

What you should know before you accept one

It is fairly common for companies to request a guarantee, whether a corporate guarantee or a personal guarantee, prior to starting business relations with a new associate (let's call it "the principal debtor").

Apart from giving a certain degree of assurance that the debt will be paid, the guarantee is meant to simplify the procedure of suing and obtaining judgment on the debt should the debtor neglect to pay up.

In many cases, however, we have noticed that the guarantee has not been properly executed, did not contain crucial terms or that the beneficiary of the guarantee has simply not followed the procedure laid down in the guarantee with respect to the giving of notice of default, etc.

As a result, what ought to be a clear case for summary judgment, turns out to be a prolonged court proceeding, involving a full trial, significant legal expenses and much delay.

This article aims to give you a list of practical issues you should consider before you request a guarantee and just before you call upon the guarantee, with a view to averting difficulties if ever you had to sue on the guarantee.

Matters to consider before requesting/ accepting a guarantee

Is the proposed guarantor resident in Malaysia or overseas?

- If it is a corporate guarantee, it is often obtained from the principal debtor's parent company, and if a personal guarantee, it is obtained from the principal debtor's director.
- As far as possible, you should obtain the guarantee from a Malaysian resident. If your guarantor is resident overseas, you must obtain the Court's permission to serve your Writ of Summons overseas. This will cause some delay to the progress of your suit.
- Also, if you have secured judgment against an overseas resident guarantor, in order to execute on the judgment, you will need to either register your judgment in the court of the country in which the guarantor resides or issue fresh proceedings in that country to make it enforceable there. Again, much delay and cost is involved.

Is there more than one guarantor?

- If you are considering having more than one guarantor, you must obtain a guarantee that is joint and several. Otherwise, liability is shared by all the guarantors in equal proportions. You will not have the option of recovering the full sum due from just one or a few of the guarantors.
- In cases of joint guarantees, if one party fails to properly execute the guarantee or has executed it although he has no capacity to contract (for example, he's a minor), the guarantee will fail totally. To avoid this risk, the guarantee must contain terms that ensure the guarantee will remain enforceable against the other guarantors even if it is invalid against one guarantor.

Is the proposed guarantor resident in Malaysia or overseas?

Is there more than one guarantor?

Make sure the correct person has executed the guarantee

Should it be a continuing guarantee?

Make sure you have appropriate service provisions

Matters you should be alert to when calling on a guarantee

Make sure the correct person has executed the guarantee

- The person or entity signing should be the one stated as the guarantor. This may sound elementary, but we have had cases where the principal debtor itself has executed the guarantee. If you want the director of the principal debtor to give the guarantee, make sure he signs the guarantee in his own capacity and not for and on behalf of the principal debtor.

Should it be a continuing guarantee?

- If you envisage repeat transactions with the principal debtor on a running account, you should obtain a continuing guarantee. A non-continuing guarantee ends with the first transaction. A continuing one extends the guarantee to subsequent transactions and covers a fluctuating outstanding balance payable in the account.

Make sure you have appropriate service provisions

- Most modern guarantees provide that a demand must be made against the guarantor before enforcing the guarantee. Sometimes, the guarantor avoids service of the demand to delay or frustrate your efforts.
- You can avoid these delays by specifying in your guarantee a particular address and mode of service at or by which the guarantor is deemed served. Choose a mode of service that does not give the guarantor the option of refusing acceptance such as fax or ordinary post. Keep the fax transmission confirmation or the certificate of proof of posting for use later in the court proceedings.

Matters you should be alert to when calling on a guarantee

Have you issued the necessary notice of default or demand to the principal debtor and guarantor?

- A guarantor has a secondary liability - in that his liability arises only if the principal debtor has failed to pay up. In the usual case, you would have granted the principal debtor some indulgence in paying up and it is only when you can wait no more that you call on the guarantee.
- It is crucial that you make known to the principal debtor, in writing, that the extensions of time have come to an end and that he must pay by a final deadline. Keep a copy of the acknowledgment by the principal debtor. If he fails to pay, you must then inform the guarantor of the default and demand payment from the guarantor.

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Whistle Blowing
[Part 1]

Introduction

What is the reason behind whistle blowing? To protect the public, investors (potential and actual) from unscrupulous corporate behaviour, to promote better corporate governance (which will lead to a better market), as a deterrent to those intending to cheat shareholders, bankers, suppliers or innocent parties who deal with the company.

Whistle blowing is not a new phenomenon. Legislation specifically protecting and encouraging disclosure by 'whistleblowers' dates from the past four decades but instances can be traced back to at least the 1780s, for example Thomas Cochrane's The Autobiography of a Seaman; the exposure of corruption within the British navy and its contractors.

Today, in the wake of the massive corporate scandals like Enron Corp. and WorldCom., new laws and initiatives are being undertaken to enhance protection for shareholders and the public by the imposition of more stringent rules on those who control and manage companies. In Malaysia, the Securities Commission had undertaken steps to amend the securities law in Malaysia to make provisions for whistle blowing.

What is Whistle Blowing?

What is whistle blowing - really? Whistle blowing is an attempt by a current or former employee to disclose what he or she believes to be a wrongdoing committed by a company or organization. It should also include those who have access to an organizations records and a detailed knowledge of how the organization functions such as external professionals like accountants and lawyers. They would be in a position to "blow the whistle" on the illegalities of the organization. The whistle blower calls attention to corporate actions that he or she believes are illegal and immoral, if not just plain wrong. Internal disclosure within the organization or company to prevent harm is not whistle blowing. The whistle blower would have to disclose the information to an outside authority such as the press, the law enforcement agency, public-interest groups or the regulatory agencies. The content of the disclosure must be substantial and not a mere gossip or speculation. An example of substantial disclosure would be that of accounting improprieties and valuation issues among others.

The Securities Industry Act 1983

Whistle blowing is given recognition in the amended Securities Industry (Amendment) Act 2003 (SIA)1.

Section 99E2 - Duties of auditor of listed corporations

(1) If an auditor, in the course of the performance of his duties as an auditor of a listed corporation, is of the professional opinion that there has been a breach or non-performance of any requirement or provision of the securities laws, a breach of any of the rules of the stock exchange or any matter which may adversely affect to a material extent the financial position of the listed corporation, the auditor shall immediately submit a written report on the matter -
   (a) in the case of a breach or non-performance of any requirement or provision of the securities laws, to the Commission;
   (b) in the case of a breach or non-performance of any of the rules of a stock exchange, to the relevant stock exchange and the Commission; or
   (c) in any other case which adversely affects to a material extent the financial position of the listed corporation, to the relevant stock exchange and the Commission.

(2) No auditor shall be liable to be sued in any court for any report submitted by the auditor in good faith and in the intended performance of any duty imposed on the auditor under this section.

The above section imposes and places additional reporting obligation on external auditors to whistle blow on listed companies audited by them if they uncover any corporate misdeeds or breaches which in their professional opinion amounts to a breach or non-performance of the securities laws and the rules of the Malaysian stock exchange to the relevant authorities for example the Commission3. For the auditors who whistle blow such breaches, they are accorded statutory protection. The statutory protection is that of a legal immunity legal action in any court for blowing the whistle. They must show that they reported the breaches of the securities laws and the rules of the Malaysian stock exchange in good faith.

Section 99F4- Protection for persons against retaliation for reporting to authorities in specific circumstances

(1) Where a chief executive, any officer responsible for preparing or approving financial statements or financial information, an internal auditor or secretary of a listed corporation by whatever name described, has in the course of performance of his duties reasonable belief of any matter which may or will constitute a breach or non-performance of any requirement or provision of the securities laws or a breach of any of the rules of the stock exchange or any matter which may adversely affect to a material extent the financial position of the listed corporation and any if the aforementioned persons submits a report on the matter -

(a) in the case of a breach or non-performance of any requirement or provision of the securities laws, to the Commission;

(b) in the case of a breach or non-performance of any of the rules of a stock exchange, to the relevant stock exchange or the Commission; or

(c) in any other case which adversely affects to a material extent the financial position of the listed corporation, to the relevant stock exchange or the Commission,

the listed corporation shall not remove, discriminate, demote, suspend or interfere with the lawful employment or livelihood of, the chief executive, any officer responsible for preparing or approving financial statements or financial information, internal auditor or secretary, of the listed corporation because of the report submitted by any of such persons.

(2) No chief executive, officer responsible for preparing or approving financial statements or financial information, be liable to be sued in any court for any report submitted by such person in good faith and in the intended performance of his duties.

The above section also provides protection for internal whistle blowers against removal, dismissal, discrimination, suspension or interference with the lawful employment or livelihood in the course of their employment and duties and they reasonably belief that there was a breach of the securities laws which may adversely affect the financial position of the listed company.

These provisions have a dual purpose: first, to impose obligations on external auditors as well as key officers whose duties are to prepare and approve information or statements of a financial nature to report any corporate breaches and misdeeds and secondly, to provide statutory protection for these people when they whistle blow.

These new provisions aim to curb corporate abuses and to promote better corporate governance in public listed companies and to legitimise whistle blowing.

All said and done, the question now is, does the immunity afforded to the select few in the SIA extent to employees? Difficulty may arise if the provision is extended to all employees and made mandatory for them to disclose. Whistle blowing is regarded as anti-social because it erodes trust among work colleagues and is seen to promote an unhealthy corporate culture. The main reason backing the new SIA provisions on whistle blowing is to encourage whistle blowers to disclose any corporate misdeeds or breaches and to protect them for their actions. More so if such disclosure is made in good faith and the whistle blower reasonably believes that the information is substantially true, and the disclosure is not made for any personal gains.

The United States Position

The US legislation at the federal and state levels impose obligations on corporate directors, employees and public officials to report on improper behaviour within the public and private sectors. The Sarbanes-Oxley Act enacted in 2002 in response to the massive corporate scandals like the collapse of the Enron Corp. disaster, require corporations to have systems for the internal reporting of misconduct to supplement surveillance by government agencies and reporting by third parties such as accounting firms. The Act is passed to oversee the audit of public companies that are subject to the securities laws5 in order to protect the interests of investors and public interest in the preparation of informative, accurate, and independent audit reports for companies, the securities of which are sold to, and held by and for, public investors.

Positive Duty versus Negative Duty

What will it be? Will it be a positive duty or a negative duty to whistle blow? On the one hand, whistle blowers are viewed as the champion or the protector of the public from unethical business practices sacrificing their careers and livelihoods. On the other hand, they are also portrayed as betrayers, traitors or trouble makers often finding themselves isolated from their colleagues and management and sometimes given the sack. Are the repercussions worth it?

Should legislation be limited only to auditors?

So far, the legislation only recognizes the auditors as the external whistle blower. It did not extend the obligation to lawyers who would also be in a position to whistle blow as they would in the course of discharging their professional duties uncover corporate misfeasance.

We will attempt to discuss whether lawyers too are protected when they whistle blow, in the next issue .....

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1 Securities Industry Act 1983 introduced by the Securities Industry (Amendment) Act 2003, which came into force on 5 January 2004 pursuant to P.U. (B) 3/2004

2 Amended Section 99E(1)-(5) of the Securities Industry (Amendment) Act 2003

3 Section 2(1) of the Securities Industry Act 1983 defines the Commission as the Securities Commission established under the Securities Commission Act 1993

4 Amended Section 99F(1)-(3) of the Securities Industry (Amendment) Act 2003

5 "Securities laws" means the provision of law referred to in section 3(a)(47) of the Securities Exchange Act 1934 (15 U.S.C. 78c(a)(47)) as amended by the Sarbanes Oxley Act of 2002

Protection of Geographical Indications
in Malaysia

Introduction
Geographical Indications have only recently been recognised as an intellectual property right, brought about by an increase awareness of the economic value GIs have in respect of trade and the branding and marketing of products. GIS were first introduced as a viable and protectable Intellectual Property Right (IPR) during the 1986-1994 Uruguay Round of trade negotiations, which culminated in the negotiations and drafting of The World Trade Organisation's Agreement on Trade Related Intellectual Property Rights (TRIPS).

Definition of GIs
GIs are defined in the TRIPS Agreement of 1994 as "indications which identify a good as originating in the territory of a Member (of the WTO), or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."[1]

From the definition given to GIs, it is clear that the scope of the definition is limited to the identification of 'goods' alone, and excludes the protection of services, such as financial services for Switzerland and Liechtenstein, massages for Thailand, Bali and Sweden and, baths for Turkey. It is arguable, however, that the definition of GIs may be stretched to include industrial goods, such as Malaysian batik and other textiles.

A GI may be in the form of words/phrases, iconic symbols or emblems, for example, the Petronas Twin Towers and the Hibiscus flower, for Malaysia, and need not be a direct geographical name. As long as a good can be identified as originating from a specific geographical locale, albeit by a non-geographical name, that non-geographical name may be protected as a GI.

Further, under the GI definition, the good must possess (1) a 'given quality', (2) 'reputation' or 'other characteristic', (3) be 'essentially attributable' to the geographical area of origin. It is also necessary for the designated geographical area to be identified in some manner through the indication-good link. This may be in relation to the whole country, such as Malaysian batik, or an area within a country, such as Sabahan black peppers.

The value of GIs is in its given quality which is attributable to a specific geographical region, thereby contributing to the economic and social heritage of the specific region. In turn, GIs may help "create local jobs and favour the diversity and originality in production as well as contributing to the preservation of environment, natural resources and the protection of a culinary, artisan, cultural and often ancestral heritage."[2]

Registration of GIs in Malaysia
In Malaysia, the protection of GIs is governed by the Geographical Indications Act 2000 (Act 602), which affords protection to GIs, regardless of whether or not the GI is registered under the Act, and as against another GI which falsely represents to the public as to the origins of a good. However, not protected in Malaysia as GIs are -

- GIs which do not correspond to the definition of GIs;

- GIs which are contrary to public order or morality;
- GIs which have ceased to be protected in their country/ territory of origin; or
- GIs which have fallen into disuse in their country/territory

At present, any GI will be given the standard or basic level of protection, which means that the GI-holder bears the burden of proving that consumers or the public have been misled or deceived, or that there has been unfair competition. The exceptions to this are wines and spirits which have a higher level of protection under Article 23 of TRIPS, where the GI-holders only need to demonstrate that a good does not originate in the geographical area identified by the indication. There is not any need for deception to be established. As an example, while 'Malaysian Darjeeling' is not necessarily misleading, 'Malaysian Champagne' is strictly prohibited, though not misleading.

It is important to note that not withstanding the failure to register a GI, any interested person may file proceedings in court, for an injunction and an award of damages, to -

- prevent the use of a GI, in the course of trade, which misleads the public as to the orgin of the goods;
- constitutes an act of unfair competition;
- falsely represents to the public as to the origins of the goods;
- identifying wines for wines not originating in the place indicated by the GI

The Value of GIs

One of the main benefits of GIs is the recognition of its "commercial value" in linking a given quality with the geographical origin of a product. It is viewed that many products have 'added value' owing to their unique association with a specific geographical locality.

GIs may be used as an effective and valuable marketing tool for producers. There are studies, albeit conducted outside Malaysia, which show that consumers are willing to pay a premium for products bearing GIs, since the quality of the product is considered to be guaranteed [3]. Darjeeling tea from India, for example, carries a higher premium than ordinary tea. Similarly, with some level of branding and marketing, our Cameron Highland tea may be a GI, indicating a certain quality and characteristic.

The importance of GI protection, cannot be sufficiently stressed. India has noted that of the 40 million kgs of "Darjeeling" tea sold around the world, only 11 million kgs are produced in India, generating some 30 million euro for the region [4]. Hence, the misappropriation of the GI for a product often of lower quality reduces the prestige and decreases prices for the original product.

Apart from the definite benefit to producers, it is argued that consumers or the public stand to benefit from the higher level of GI protection for all products. GIs have played a key role in trade, in helping consumers assess the quality and prestige of products. Thailand, for example, has noted that its silk is highly sought after by luxury fashion houses of the West. With the recent export of Malaysian fashion using homemade textiles, it is very likely that Malaysian batik and songket will find itself in similar positions, as long as there is GI protection.

In the rush to brand and market GIs, particular attention must be paid so as not to over brand a product such that it becomes generic. Already there is a growing catalogue of once famous GIs, such as Cheddar and Feta for cheese, which are now deemed generic. India is in a battle to prevent its Basmati rice from being deemed generic or semi-generic. Apart from agricultural products, traditional craft have also been catalogued as being generic, such as "Kohlapuri Slippers", a style of slipper originally from the Indian town of Kohlapur, but now denoting a certain kind of slipper, regardless of its place of production.

Since the standard protection for GIs allows the use of word such as 'like', 'type' or 'imitation' with GIs, as long as consumers are not confused as to the true origins of the products, there is a real risk that producers will be able to 'free ride' on the back of a reputable GI and derive commercial benefit from it, without needing the consent or paying for the use of such indication. The danger is that overtime, these terms may lose their geographical indicativeness and become generic terms. It is important to pay heed to the implications this will have in relation to other IPRs, especially in the grant of grant of patent and trade mark rights.

It must be noted however, that the effect of GI protection for products, in particular from developing nations, cannot be downplayed when viewed on the international trading floor. It has been recognised that, "GIs are a national asset and should be protected by the Government to avoid damage to consumers and the nation" [5], and that "A strong intellectual property system contributes significantly to national development, stimulating foreign trade and investment".[6]

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[1] www.wto.org/english/tratop_e/TRIPS
[2] www.orgin-gi.com
[3] DG Trade, July 30, 2003
[4] "Darjeeling" tea comes from a specific region in India, which, due to its terrain and rainfall, produces exceptional quality tea in the summer and autumn seasons. Darjeeling is registered as a GI in India.
[5] www.vietnamnews.vnagency.com.vn
[6] "Workshop on intellectual property held in Hanoi - www.mofa.gov.vn

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T&P News

Accolades to our IP and Technology practice group

As testament to its established IP practice, Tay & Partners has been voted recently as one of the top law firms in Malaysia for both patents and trade marks by the Managing IP World IP Survey Global Poll. The IP practice group has chalked up a commendable new entry at 4th position on the list of top Malaysian patent firms and scaled the rankings to attain 3rd place for top trade mark practice in the country.

The Asia Pacific Legal 500 2003/2004 edition has further described the IP practice group in Tay & Partners as having "risen in our rankings, being one of the few mid-size corporate firms to build a genuinely successful specialist IP department"

To fortify our IP enforcement practice, we are pleased to announce that Mr Suppiah Muthusamy has joined us. Suppiah has 25 years of experience in the Enforcement Division of the Ministry of Domestic Trade and Consumer Affairs (responsible for the enforcement of IP rights) and served as the State Director of Enforcement Division before he retired for private legal practice.

Legal Talks ...

Asmet Nasaruddin, our partner in Litigation and Dispute Resolution practice group spoke on Directors Duties in the Asia Business Forum Conference in January and MAICSA "Independent Directors" series of seminars on March 8 and 10

Leonard Yeoh, also a partner in our Litigation and Dispute Resolution practice group, presented papers on labour laws in the Industrial Relations 2003 Conference: Challenges and Benefits to Your Organization end of last year and the Labour Law & Wage Update Conference organized by the Asia Business Forum in February.

Linda Wang presented on IP laws and their enforcement to the US trade delegation organized by the US Embassy in Kuala Lumpur recently.