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This issue covers the following topics:

Malaysia

MALAYSIA'S CORPORATE LIABILITY UNDER THE MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 EFFECTIVE 1ST JUNE 2020 – ADEQUATE PROCEDURES GUIDELINES ISSUED

マレーシアでは 2018 年に反汚職委員会法が改正されて両罰規定が導入され、同年末の首相演説の中で、2020 年 6 月 1 日より同規定が施行されることが公表された。改正法では、法人が汚職の防止に向けた「十分な」手続を取っていた場合には両罰規定の適用を免れる旨の例外規定が置かれているところ、今般その「十分な」手続とは何かについて新たなガイドラインが制定されたことから、その具体的な内容について紹介する。

Background

As previously stated in our August 2018 Edition of the NO&T Asia Legal Review, Section 17 of the Malaysian Anti-Corruption Commission (Amendment) Bill 2018 ("**Bill**") which seeks to introduce the concept of corporate liability under the Malaysian Anti-Corruption Commission Act 2009 ("**MACC Act**") has not yet come into force.

In a speech delivered on 10 December 2018, the Prime Minister of Malaysia announced that the corporate liability amendments to the MACC Act will come into force on **June 1st, 2020**. The Prime Minister's Department has also issued the Guidelines on Adequate Procedures ("**Guideline**") pursuant to Section 17A(5) of the MACC Act.

Defense of Adequate Procedures

To recap, the main purpose of the Bill is to introduce a wide reaching corporate liability provision under Section 17A. It imposes strict liability on commercial organizations, in that organizations can be held liable regardless of whether they had actual knowledge of the corrupt actions of its associated persons. The only exception is if, pursuant to Section 17A(4) of the MACC Act, the commercial organization could prove that it had adequate procedures in place to prevent such associated persons from carrying out the corrupt conduct, then it can amount to a defense.

In this regard, the Guideline aims to assist commercial organizations to employ fundamental measures to minimize the risk of corruption and to understand what adequate procedures should be implemented to prevent the occurrence of

corrupt practices in their business activities.

Five Guiding Principles for Adequate Procedures - T.R.U.S.T.

The Guideline outlines the five guiding principles of T.R.U.S.T. and they are summarized as follows:

1. Top Level Commitment:

This first principle refers to the responsibility of top level management to ensure that the commercial organization essentially practices the highest level of integrity and ethics. The top level management must be able to provide assurance to its stakeholders, both internal and external, that the commercial organization is in compliance with its policies and regulatory requirements and it should carry out among others, the following:

(a) establish, maintain and periodically review its anti-corruption compliance program;

(b) issue instructions on communicating its anti-corruption policies and commitments to both internal and external parties;

(c) encourage the use of reporting (whistleblowing) channels for the reporting of any suspected or real corruption incidents or inconsistency with its policies; and

(d) assign and adequately resource a competent person or function (compliance officer) to be responsible for anti-corruption compliance.

The Guideline also defines "top level management" to be a person who is the organization's director, controller, officer or partner, or a person who is concerned in the management of its affairs. This is a far reaching definition and can be imposed on a wide range of persons managing a commercial organization.

2. Risk Assessment:

This second principle recommends that a comprehensive risk assessment is done every three years, with intermittent assessment conducted when necessary. The assessment may include:

(a) opportunities for corruption and fraud activities resulting from weaknesses in the organization's governance framework and internal systems / procedures;

(b) business activities in countries or sectors that pose a higher corruption risk; and

(c) relationships with third parties in its supply chain (e.g. agents, vendors, contractors and suppliers) which are likely to expose the commercial organization to corruption.

3. Undertake Control Measures:

Under the third principle, commercial organizations should put in place appropriate controls and contingency measures that are reasonable and proportionate to the nature and size of the organization. These should include, among others:

(a) ***Due Diligence*** – Commercial organizations should establish key considerations and criteria for conducting due diligence on any relevant parties or personnel prior to entering into any formalized relationships; and

(b) ***Reporting Channel*** – Commercial organizations should establish an accessible and confidential reporting channel, encourage persons to report, in good faith, any suspected, attempted or actual corruption; establish a secure information management system to ensure confidentiality of the whistleblower, and prohibit retaliation against those who make reports in good faith.

4. Systematic Review, Monitoring and Enforcement:

Under this fourth principle, the top level management should ensure that regular reviews are conducted to assess the performance, efficiency and effectiveness of its anti-corruption program. Such reviews may take the form of an internal audit or an audit carried out by an external party. For the foregoing purpose, the commercial organization is to consider, among others, an external audit (e.g. MS ISO 37001 auditors) by a qualified and independent third party at least once every three years to obtain assurance that the commercial organization is operating in compliance with its policies and procedures in relation to corruption.

5. Training and Communication:

Under this fifth principle, the commercial organization's anti-corruption policy should be made publicly available and communicated to all personnel and business associates. The commercial organization should provide its employees and business associates with adequate training to ensure thorough understanding of the commercial organization's anti-corruption position.

Conclusion

The Guideline may be used as a reference point for any anti-corruption policies, procedures and control that a commercial organization may choose to implement but it is not, however, intended to be prescriptive in nature. The principles therein should be applied practically, in proportion to the scale, nature, industry, risk and complexity of the commercial organization.

With the enforcement of Section 17A is set for June 1st, 2020, commercial organizations should have ample time to prepare themselves for the new obligations under the said Section.

[Author]

Aizad Bin Abul Khair (Nagashima Ohno & Tsunematsu Singapore LLP)
aizad_khair@noandt.com
Aizad Bin Abul Khair is a Malaysian and UK qualified foreign attorney in the Singapore office. His areas of practice include mergers and acquisitions, equity capital markets, joint ventures and general corporate matters. Aizad has extensive experience working in Malaysian related matters and this includes sale and acquisition of private companies and businesses, listing and other equity capital raising on the Malaysian Stock Exchange, take-overs and corporate restructuring. <Profile text: 9pt>

Singapore

SINGAPORE – ANTI-SUIT/ ANTI-ENFORCEMENT RELIEF WHERE A FOREIGN JUDGMENT IS OBTAINED IN BREACH OF AN ARBITRATION AGREEMENT

シンガポールを仲裁地とする仲裁合意に違反して、一方当事者が外国において裁判を提起した場合、シンガポール裁判所が当該訴訟の差止命令を出すことができるかどうかについて初めて判断した判決が 2019 年 2 月 12 日に出された。本稿ではその内容について概説する。

Background

In a recent decision dated 12 February 2019, the Singapore Court of Appeal in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] SGCA 10 ("**Sun Travels**") considered for the first time, as the supervisory court of a Singapore-seated arbitration, an application for injunctive relief against a party which obtained a foreign judgment in breach of an arbitration agreement.

Summary

Sun Travels & Tours Pvt Ltd ("**Sun**") and Hilton International Manage (Maldives) Pvt Ltd ("**Hilton**") entered into a resort management agreement ("**Management Agreement**"). In 2013, a dispute arising out of the agreement was referred to ICC arbitration pursuant to an arbitration agreement contained in the Management Agreement. The seat of the arbitration is Singapore.

The arbitral tribunal issued two awards against Sun, including an order for damages in excess of USD 20 million to be paid to Hilton. Hilton sought to enforce the awards in the Maldives, but the application was ruled to have been brought in the incorrect division of the Maldivian courts. Sun commenced a separate civil action in the Maldives, in which it effectively sought to re-litigate the issues which had already been determined in the arbitration. The Maldivian court issued a judgment in favour of Sun. The findings reached by the Maldivian court were the opposite of those made by the arbitral tribunal ("**Maldivian Judgment**").

Thereafter, Hilton sought enforcement of the awards in the Maldives once more before the appropriate court. This time, however, its application was refused on account of the Maldivian Judgment awarded in Sun's favour.

Hilton then applied to the Singapore courts for relief, including a permanent anti-suit injunction to restrain Sun from commencing and/or proceeding with any court actions in the Maldives. Hilton's appeal against the Maldivian Judgment was pending at the time of its application to the Singapore courts. The Singapore High Court did not grant an anti-suit injunction, but ordered that Sun was permanently restrained from relying on the Maldivian Judgment on the ground that the judgment was obtained in breach of the arbitration agreement between the parties ("**Injunctive Order**").

The Singapore Court of Appeal overturned the decision of the High Court in relation to the Injunctive Order in view of Hilton's delay in applying to the Singapore court and the absence of exceptional circumstances justifying the grant of anti-enforcement relief.

Anti-suit injunctions

The Court of Appeal recalled its earlier decision in *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428, in which the court set out the following five factors to be considered when determining an application for an anti-suit injunction:

(i) whether the defendant is amendable to the jurisdiction of the Singapore court;

(ii) whether Singapore is the natural forum for resolution of the dispute between the parties;

(iii) whether the foreign court proceedings would be vexatious or oppressive to the plaintiff;

(iv) whether the anti-suit injunction would cause any injustice to the defendant by depriving it of legitimate juridical advantages sought in the foreign proceedings; and

(v) whether the commencement of foreign proceedings constitutes a breach of any agreement between the parties.

The Court of Appeal noted that where a party commences foreign court proceedings in breach of an arbitration agreement or exclusive jurisdiction clause, anti-suit injunctive relief would ordinarily be granted unless there are strong reasons not to do so. In such cases, there would be no need for a plaintiff to adduce additional evidence of unconscionable conduct on the part of the defendant. Importantly, however, the Court of Appeal reiterated that anti-suit relief must be "sought promptly and before the foreign proceedings are too far advanced". As injunctive relief is equitable in nature, the Court upheld the principle that a party may lose its claim to such relief "by dilatoriness or other unconscionable conduct".

Anti-enforcement injunctions

The Court of Appeal in *Sun Travels* also considered the principles applicable to anti-enforcement injunctions, which are sought after a foreign judgment has been obtained. The Court held that more stringent requirements would apply to applications for anti-enforcement injunctions as compared to applications for anti-suit injunctions. This is in view of the drastic effect an anti-enforcement injunction can have, which "is comparable to *nullifying* the foreign judgment or

stripping the judgment of any legal effect" when only the foreign court has the prerogative to set aside or vary its own judgments (emphasis in original).

Accordingly, the Court of Appeal held that to qualify for such relief, an applicant must establish more than a breach of a legal right or vexatious or oppressive conduct by the defendant. Anti-enforcement injunctions may be granted in exceptional circumstances involving an element of unconscionability, such as fraud and the applicant's lack of knowledge of the foreign proceedings until the issuance of the foreign court judgment. It follows that the court's jurisdiction to grant anti-enforcement injunctions will be exercised sparingly and with greater caution than in cases involving anti-suit relief.

Grounds of decision

The Court of Appeal overturned the Injunctive Order on the following grounds.

Hilton's delay in applying to the Singapore court for anti-suit relief had enabled the Maldivian proceedings to reach an advanced stage. Hilton's application was brought some nine months after Sun commenced a civil action in the Maldives, by which time various judgments had been issued by the Maldivian courts, with an appeal against the Maldivian Judgment pending.

In the Court's view, the fact that Hilton was making jurisdictional objections in the Maldivian courts did not excuse its delay in applying to the Singapore court for relief. The appropriate course of action was for Hilton to concurrently seek injunctive relief from the Singapore court, which it failed to do. Thus, there were no exceptional circumstances justifying the grant of anti-enforcement injunction in Hilton's favour.

The Court of Appeal further considered that it was unclear how the Injunctive Order could be carried out in practice given the state of affairs in the ongoing Maldivian proceedings. Sun would invariably seek to rely on the Maldivian Judgment in the appellate proceedings before the Maldivian courts, but doing so would place it in apparent breach of the Injunctive Order.

Conclusion

Sun Travels illustrates the challenges a successful party to an arbitration may face at the enforcement stage, in particular where enforcement of the award is sought in the home jurisdiction of the unsuccessful party. Attempts by an unsuccessful party to re-litigate matters already determined in an arbitration could significantly hamper efforts to enforce an award, especially if the court proceedings are allowed to ripen into a judgment against the party which prevailed in the arbitration.

The decision of the Singapore Court of Appeal lends welcome clarity to the circumstances in which a court, exercising its supervisory powers over a Singapore-seated arbitration, would grant an anti-suit injunction or anti-enforcement injunction. When devising a foreign enforcement strategy, it is important for parties to consider the need for injunctive relief from the seat court and, where necessary, to ensure that such applications are made promptly.

[Authors]

Claire Chong (Nagashima Ohno & Tsunematsu Singapore LLP)
claire_chong@noandt.com
Claire Chong is a Singapore qualified attorney in the Singapore office. She focuses her practice on international commercial disputes and investor-state arbitration. She has experience both as counsel and tribunal secretary in international commercial arbitrations conducted under major arbitral rules, including the ICC, ICDR, HKIAC and SIAC rules.

Myanmar

TRADEMARK LAW FINALLY ENACTED IN MYANMAR

2019 年 1 月 30 日付けでミャンマー商標法が制定された。同法の施行は別途大統領による通知が出された時点と定められており、施行までには新たな商標の登録制度が整備される必要があることからまだ時間を要しそうではあるが、同法では先願主義が採用されていることから施行された場合には速やかな登録申請を行うことが望ましい。そこで本稿ではこの新商標法について概説する。

Background

The Myanmar Trademark Law (Pyihtaungsu Hluttaw Law No.3, 2019) ("**Trademark Law**") was signed into law on 30 January 2019. The effective date of the Trademark Law and its implementation will however be announced at a later date. The Trademark Law shall become effective upon the issuance by the President of Myanmar of a notification ("**Notification**"). To date, there has been no timeline set for the issuance of the Notification or the establishment of a trademark registry system, which is contemplated under the Trademark Law. Once the implementation of the new trademark registration system is in place, all existing trademark owners who are registered under the first-to-use system will need to file new applications under the first-to-file system to protect their marks under the Trademark Law.

Key Provisions

1. Eligible Marks for Registration

The Trademark Law provides that trademarks, service marks, collective marks and certificate marks are eligible for the filing of an application for registration in Myanmar. Further, geographical indications may also be registered under the Trademark Law.

2. Requirements for Registration of Trademarks

The application for registration of trademark may be applied in either Burmese or the English language. Translation into Burmese or the English language may be required if requested by Director General of the Department ("**Registrar**").

In relation to the application for registration, the applicant must provide the following documents:

(a) the applicant's request for registration;

(b) the name and address of the person or lawful organization applying for registration;

(c) if the application is submitted by a representative of the applicant, the representative's name, national identification number and address;

(d) the complete and clear description of the mark; and

(e) the name and standard of goods and services, or goods or services requested for registration in accordance with international mark classification.

In addition to the above, the following documents must be attached as necessary:

(a) if the application is for a lawful organization, the registration number, type and country origin of the organization;

(b) if the applicant requests right of priority, the documents supporting, describing and requesting the claim of such right of priority;

(c) if the applicant request trade fair right of priority, documents supporting, describing and requesting such trade fair right of priority;

(d) if the mark in the application is registered at the Office of the Registration of Deeds, the supporting documents of such registration; and

(e) any other documents required by the Intellectual Property Rights Agency and Department from time to time.

3. Trademark Protection Period and Renewal

The Trademark Law allows for a period of protection of 10 years commencing from the filing date of the registration of the trademark. Such period may then be renewed for a further period of 10 years each time upon its expiration.

The application for the aforementioned renewal may be made within 6 months prior to the expiry of each term and payment of the prescribed fees will have to be made. In addition, a trademark owner also has the right to apply for such renewal within a grace period of 6 months after the date of expiry of the relevant term by paying the prescribed fees and the applicable late renewal fees.

4. Rights Conferred to Registered Mark

Under the Trademark Law, the owner of the registered mark is entitled to the following rights:

(a) an exclusive right to prohibit and prevent a third party from confusing the public by using identical or similar mark for identical or similar goods or services in the course of trade without the owner's consent;

(b) an exclusive right to file litigation against any infringer of the rights to the registered mark in either criminal or civil action, or both;

(c) an exclusive right to prohibit and prevent a third party from using identical or similar well- known registered mark for different goods or services in the course of trade without the owner's consent, if the following situations are involved-

  (i) indicating a connection between the well-known registered mark owner and the applied goods or services; or

  (ii) affecting the interest of the registered mark owner,

(d) may transfer and license to any other party, his rights to the registered mark.

5. Transfer of Rights of Registered Mark

The applicant may apply to the Registrar to record the transfer of its application for registration to another person or a lawful organization. Likewise, the owner of a registered mark may apply to the Registrar to record the transfer of the ownership of its registered mark to another person or a lawful organization.

If the application for registration of the transfer of ownership of the registered mark is not submitted to the Department, such transfer of ownership will not be effective.

6. Procedure for Infringement of Rights

An aggrieved party may file to the court for a decision relating to a temporary sanction and such aggrieved party may also file to the court for the imposition of a civil or criminal charge with respect to the infringement of the rights of the owner of the trademark.

The court shall consider the unlawful exercise of trademark rights by any person who is not the owner of the trademark as an infringement of a trademark protected under the Trademark Law and the court shall in such cases, deem that the use of unregistered, popular, identical or similar trademark for identical or similar goods or services is misleading for the general public.

7. Penalties

The Trademark Law provides that the infringement of trademarks and/or the counterfeiting of such trademarks, shall be punishable with up to three years' of imprisonment or a fine of not exceeding 5 million Kyats or both.

Conclusion

The Trademarks Law implements the framework for a trademark registration system to any individual or entity, whether local or foreign trademark owners in Myanmar. The right of priority for a trademark depends on the date which the mark is earliest filed under the new registration system. Therefore, the trademark owner should not waste any time in registering its trademark when the trademark registry system has been properly established.

[Author]

Win Shwe Yi Htun (Nagashima Ohno & Tsunematsu Singapore LLP)
win_shwe_yi_htun@noandt.com
Win Shwe Yi Htun is a Myanmar qualified attorney in the Singapore office. Her areas of practice include mergers and acquisitions, general corporate matters, joint venture and employment sectors. Prior to joining NO&T, Shwe Yi worked at top-tiers corporate law firms in Myanmar, where she gained significant experience in handling corporate and commercial transactions, and had participated on various investment projects involving commercial parties from Japan, China, Singapore and Thailand.

www.noandt.com

NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com

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Singapore Office
(Nagashima Ohno & Tsunematsu Singapore LLP)

6 Battery Road #40-06
Singapore 049909
Tel: +65-6654-1760 (general)
Fax: +65-6654-1770 (general)
Email: info-singapore@noandt.com

Bangkok Office
(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)

34th Floor, Bhiraj Tower at EmQuartier
689 Sukhumvit Road, Klongton Nuea
Vadhana, Bangkok 10110, Thailand
Tel: +66-2-302-4800 (general)
Fax: +66-2-302-4899 (general)
Email: info-bangkok@noandt.com

HCMC Office
(Nagashima Ohno & Tsunematsu HCMC Branch)

Suite 1801, Saigon Tower
29 Le Duan Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84-28-3521-8800 (general)
Fax: +84-28-3521-8877 (general)
Email: info-hcmc@noandt.com

Hanoi Office
(Nagashima Ohno & Tsunematsu Hanoi Branch)

Suite 10.04, CornerStone Building
16 Phan Chu Trinh, Hoan Kiem District
Ha Noi City, Vietnam
Tel: +84-24-3266-8140 (general)
Fax: +84-24-3266-8141 (general)
Email: info-hanoi@noandt.com

Shanghai Office
(Nagashima Ohno & Tsunematsu
Shanghai Representative Office)

Two ifc, 25th Floor, 8 Century Avenue
Pudong New Area, Shanghai 200120, China
Tel: +86-21-6881-7080 (general)
Fax: +86-21-6881-7060 (general)
Email: info-shanghai@noandt.com

Jakarta Desk
(Nagashima Ohno & Tsunematsu Jakarta Desk)

c/o Soemadipradja & Taher
Wisma GKBI, Level 9
Jl. Jenderal Sudirman No. 28
Jakarta 10210, Indonesia
Email: info-jakarta@noandt.com

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