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This issue covers the following topics:

Malaysia

UPDATES ON BENEFICIAL OWNERSHIP FRAMEWORK

マレーシアの企業委員会（Companies Commission of Malaysia）が 2020 年に制定した法人の実質的所有者の報告に関するガイドラインは、2021 年 1 月より施行される予定であったが、会社法及び LLP 法の改正まで施行が延期されることになった。他方で、ガイドラインの解釈に関しては FQA 形式で指針が示されており、実際の報告の際にはこの指針を参照しながら対応する必要がある。

As mentioned in our May 2020 Edition of the Asia Legal Review, the Companies Commission of Malaysia ("**CCM**") had issued the Guideline for the Reporting Framework for Beneficial Ownership of Legal Persons ("**BO Guideline**") on February 27, 2020. The BO Guideline provided, *inter alia*, that from January 1, 2021 ("**Initial Enforcement Date**") all entities will be required to submit information on its beneficial owners within the time frame stipulated in the Guideline.

In this regard, the CCM has issued several updates and we have summarized the key points of such updates below:

Extension of Initial Enforcement Date

The CCM had announced, on December 17, 2020 ("**Announcement**") that the Initial Enforcement Date will now be extended to coincide with the coming into operation of the proposed Companies (Amendment) Bill ("**Companies Bill**") and Limited Liability Partnerships (Amendment) Bill ("**Revised Enforcement Date**"). Corollary to the foregoing, this also means that the transitional period for compliance with the BO Guideline (which was set to expire on December 31, 2020), will be extended to the Revised Enforcement Date.

Nonetheless, CCM had, in the Announcement, stated that considering the importance of the beneficial ownership reporting framework, CCM will conduct inspections to ensure that entities comply with the beneficial ownership reporting requirements. As such, notwithstanding the delay of the Initial Enforcement Date, all entities are advised to ensure the beneficial ownership information is accurate and up to date, and remains accessible in a timely manner.

FAQs relating to the BO Guideline

To date CCM had issued two sets of Frequently Asked Questions ("**FAQs**") in relation to the BO Guideline.

We set out below the key points mentioned in the FAQs which provide clarity on certain matters relating to the beneficial ownership reporting framework:

Question	Answer
Who is a beneficial owner?	A beneficial owner (BO) is an individual or natural person who ultimately owns or control an entity.
For a person to be a BO, must he fulfill all the criteria mentioned in the BO Guideline?	A person is a BO if he fulfills at least one of the criteria or a combination of any of the criteria stated in the BO Guideline. For the purpose of beneficial ownership reporting where the person fulfills more than one criteria, each criteria must be reported accordingly.
If a person is unable to determine the date he becomes a BO, what will be the date for him to state when he responds to the entity's requests for BO information?	During the transitional period, if a person has taken reasonable steps to ascertain the date he becomes a BO but he is still unable to do so, he can deem that he is a beneficial owner as at January 31, 2017 or the date he has reasonable cause to believe he is a beneficial owner, whichever is the later. However, if the person can determine the date he becomes a beneficial owner, he is required to state that date.
Who should be responsible to determine a BO of an entity?	The entity or the person appointed by the entity must determine the BO based on the reasonable measures as specified in the BO Guideline. Upon obtaining the BO information, the company secretary must update the register of BO maintained by the entity.
What should an entity do if an entity is unable to identify its BO?	If the entity has taken all reasonable measures provided in Part I Section 4 of the BO Guideline and the entity is still unable to identify its BO, the entity shall name the senior management / managing director / managing partner of the entity who controls the entity as its BO(s).
Does the BO Guideline apply to all foreign entities?	The BO Guideline is applicable to all foreign companies registered under the Companies Act 2016 ("**CA 2016**"), or foreign limited liability partnerships registered under the Limited Liability Partnerships Act 2012. *NO&T Note: This means that branches of foreign companies in Malaysia must also comply with the BO Guideline.*
Who can have access to the register of BO?	Only law enforcement agencies will have the right of access to the register of beneficial owners to carry out enforcement activities. *NO&T Note: Pursuant to the consultative paper issued by CCM in 2020 regarding the Company Bill, the proposed amendment seeks to specify in the CA 2016 that the law enforcement agencies shall only be limited to the Royal Malaysian Police, Malaysian Anti Corruption Commission, Royal Malaysian Customs Department, Bank Negara Malaysia and the Securities Commission.*
Can auditor have access to the register of BO by virtue of his duty to form an opinion on the registers maintained by the company including subsections	No, auditors are not required to state in their report particulars of any deficiency, failure or shortcoming in respect of the register of BO. Therefore, auditors

Question	Answer
266(3), (4), (5) and (12) of the CA 2016?	do not need to have the right of access to the register of BO together with its related information and explanations for the purposes of audit.
Will SSM take any enforcement action for failure to comply with the provisions in the CA 2016 / Limited Liability Partnerships Act 2012, and the BO Guideline during the extension of the transitional period?	Due to the importance of the beneficial ownership reporting framework, CCM will conduct inspections during this period to ensure all companies and limited liability partnerships comply with the beneficial ownership reporting requirements. *NO&T Note: Nonetheless, under Section 20C of the Companies Commission of Malaysia Act 2001, CCM has power to issue guidelines and any person who fails to comply with the guidelines commits a breach where actions can be taken pursuant to Section 20E of the same Act. Thus, compliance with the BO Guideline even during the extended transitional period is highly recommended*.
What must a company / limited liability partnership do during the extended transitional period to comply with the relevant provisions under the CA 2016 / Limited Liability Partnerships Act 2012 and the BO Guideline?	Every entity shall continue to identify and verify its BO during this period. The entity shall maintain accurate and up to date BO information, which is kept at the entity's level, and can be accessed in a timely manner. Notwithstanding that, companies shall continue with the current practice to include BO information as part of the annual return requirements under the CA 2016.

Conclusion

To date, there is no indication as to when the Companies Bill and Limited Liability Partnerships (Amendment) Bill will be debated in Parliament. Notwithstanding the Revised Enforcement Date and the extended transitional period however, we highly recommend that all entities comply with the beneficial ownership reporting framework embodied in the BO Guideline as the CCM is still vested with powers to impose any actions under Section 20E of the Companies Commission of Malaysia Act 2001. Such actions include, imposing administrative penalty not exceeding RM5000.00.

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Singapore

SINGAPORE HIGH COURT RULES ON LEASE DISPUTE ARISING FROM COVID-RELATED MEASURES

シンガポールの高等裁判所は、2021 年 9 月 28 日付判決で、新型コロナウイルスの感染拡大に伴う政府の規制強化に起因して生じたオフィスの賃貸借契約を巡る紛争に関連して、賃貸借契約に基づく賃借人の解除権の規定が置かれていない場合にも慣習法（コモンロー）に基づく解除権の行使を認める旨の判断を下した。

Introduction

In a recent judgment dated 28 September 2021, the High Court ruled on one of the first few cases in Singapore on a commercial lease dispute arising from COVID-19 related government measures. *Dathena Science Pte Ltd v Justco (Singapore) Pte Ltd* [2021] SGHC 219 is a timely reminder to all that, parties' contractual rights potentially have statutory and common law constraints, which will be enforced by the Singapore courts. Dathena Science Pte Ltd ("Dathena"), the Plaintiff in this case, had prevailed on its right to termination at common law and alternative claim under the Frustrated Contracts Act to discharge itself from a two-year lease signed with Justco (Singapore) Pte Ltd ("JustCo").

Summary of the Facts

Dathena is a cybersecurity company in the business of developing software that provides data security and privacy applications to its customers. On 16 January 2020, Dathena and JustCo (a company that provides workspaces to its customers in offices or commercial buildings that it rents) entered into a Membership Agreement whereby Dathena agreed to lease 4 units in OCBC Centre East ("OCBC Premises"), a prime location in the Central Business District area in Singapore. The lease was to run from 1 May 2020 to 30 April 2022, for a period of two years.

Due to the nature of Dathena's business, of which JustCo was aware as Dathena had rented office space from the same JustCo's representative at JustCo's Bangkok office, JustCo knew that it was of paramount importance to Dathena that the OCBC Premises could meet Dathena's information technology ("IT") requirements and that Dathena could move its servers into the premises before the start date of the lease on 1 May 2020.

Upon the signing of the Membership Agreement, Dathena made payment of SGD 186,900 as a refundable security deposit and SGD 99,991.50 as the monthly membership fee for May 2020. Dathena also paid SGD 18,350.50 for its set up and separate housing of IT and servers within the OCBC Premises.

However, the Singapore Government implemented Circuit Breaker Measures on 7 April 2020, under the COVID-19 (Temporary Measures) (Control Orders Regulations 2020). These restrictions disrupted the IT set up that were scheduled in April 2020 and also caused delays to the construction and renovation works at the OCBC Premises. Although the Circuit Breaker Measures were originally scheduled to end on 4 May 2020, the measures were extended to 1 June 2020 as the pandemic situation remained critical in Singapore.

JustCo informed that it could not ready the OCBC Premises for Dathena in time for moving in on 1 May 2020, which was problematic for Dathena as its tenancy at its previous premises expired on the date it was supposed to move into the OCBC Premises. On 26 May 2020, JustCo expressed that it could not be certain when the OCBC Premises would be ready. On 29 May 2020, Dathena issued a Notice of Termination to discharge the Membership Agreement on either of two grounds: termination or frustration, and requested a refund of the security deposit and advanced payment of membership fees (amounting to SGD 286,891.50).

JustCo rejected Dathena's request for a refund and denied that the Membership Agreement had been terminated or frustrated, arguing that Dathena had no contractual right to terminate the Membership Agreement, and that Dathena's inability to commence its lease was due entirely to the mandatory circuit breaker measures imposed by the Singapore government to address the pandemic crisis. JustCo then sought to offer alternative comparable office space in lieu of the OCBC Premises as a temporary measure, citing its discretion and right to do so under the Membership Agreement.

Dathena commenced the suit against JustCo on 4 September 2020 when JustCo refused to give a refund and

insisted that Dathena move into the OCBC Premises on 9 September 2020 (as it was finally ready). JustCo counterclaimed for SGD 2.4 million on the basis that it was entitled to the full membership fees it would have earned under the 2-year lease.

Grounds of Decision

The Singapore High Court found in favour of Dathena on all counts, holding that:

a. Dathena was entitled to give its Notice of Termination even though there was no clause in the Membership Agreement that allowed Dathena to terminate the contract. Even though the Membership Agreement had an entire agreement clause, it did not operate to constrain the application of common law or statutory legislations. The Court found that the one-sided termination clause (under which only JustCo had the option to terminate the Membership Agreement and to demand payment for membership fees for the entire length of the agreement), among other onerous terms, was unreasonable under the Unfair Contract Terms Act ("UCTA") and thus unenforceable. The Court accepted Dathena's position that there was a repudiatory breach of the contract by JustCo when it failed to deliver the OCBC Premises by 1 May 2020, thereby giving rise to Dathena's right to termination at common law.

b. Although Dathena had the right to waive its termination notice, the Court held that Dathena's willingness to consider alternatives offered by JustCo after the issuance of its Notice of Termination and actions in visiting the OCBC Premises in September 2020 did not amount to any waiver.

c. The application of the Frustrated Contracts Act was not dependent on parties' agreement, and once a supervening event occurs after the formation of the contract without the default of either party which renders the contractual obligation radically and fundamentally different from what was agreed or, a contract becomes impossible to perform, a contract is frustrated. JustCo's four-month delay in delivering the OCBC Premises, non-comparable alternatives and additional moving costs were not what parties had agreed to. The result is that both parties were discharged from their contract by operation of law, and Dathena was entitled to the refund.

d. JustCo was ordered to return Dathena's security deposit and advance payments, while JustCo's counterclaim was dismissed.

Conclusion

As many businesses reconsider their template or standard terms contracts based on challenges arising from the pandemic, this judgment comes at an opportune time to highlight that parties dealing under Singapore law must bear in mind the potential constraints of Singapore statutes such as UCTA that may apply to render certain unfair terms unenforceable, especially if a commercial party is dealing on its counterparty's standard terms of business. It is also helpful to note that even if parties have not considered possible supervening events and the consequences that should follow under a Force Majeure clause, the doctrine of frustration is nevertheless available in statute and at common law for a party looking to be discharged from its obligations under a contract. The Singapore High Court has shown that it is prepared to recognize the restrictions resulting from the COVID-19 pandemic as a supervening event that entitles a party to discharge the entire contract.

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Philippines

PENDING BILL TO AMEND RETAIL TRADE LAWS

フィリピンで改正法の制定作業が進められている小売自由化法について、上院で 9 月 20 日に、下院で 9 月 21 日にそれぞれ法案が可決され、これから大統領の署名を経て施行されることになる。両院が可決した改正案では、外資が小売業に参入する場合の最低資本金要件が引き下げられること等の重要な規制緩和が盛り込まれている。

Background

A bicameral conference committee report on Senate Bill No. 1840 (the "**Proposed Bill**") which covers amendments to Republic Act No. 8762 (the Retail Trade Liberalization Act or "**RTLA**") and lowers the paid-up capital requirements for foreign retail enterprises has been approved by the Philippine Senate on 20 September 2021 and by the House of Representatives ("**House**") on 21 September 2021.

Such Proposed Bill reconciles the conflicting provision of the House version (House Bill No. 59) and several Senate versions (Senate Bill Nos. 14, 921, 1113 and 1349), which sought to effect varying amendments to the RTLA. Now that the Proposed Bill has been approved by both the House and Senate, it is anticipated that the enrolled bill will soon be prepared and forwarded to the President for his signature or veto.

Anticipated Amendments

Should the Proposed Bill be passed into law as it is currently drafted, the significant amendments to the RTLA, which will be introduced by the Proposed Bill include the following:

a) Simplified conditions and reduced paid-up capital requirements for foreign retailers

With the Proposed Bill, foreign-owned partnerships, associations or corporations organized under Philippine laws and registered with the Securities and Exchange Commission ("**SEC**"), or foreign-owned single proprietorships registered with the Department of Trade and Industry ("**DTI**") may engage or invest in retail trade business in the Philippines, subject to meeting the following conditions, among others:

i) Minimum paid-up capital

Under the RTLA, the minimum paid-up capital requirement for retail trade enterprises with foreign ownership is currently the Philippine Peso equivalent of USD 2.5 Million. However, the Proposed Bill will reduce the paid-up capital requirement to Php 25 Million (around USD 500,000.00) which is expected to be used in actual operations and should be maintained in the Philippines at all times, unless the foreign retailer notifies the SEC or DTI (as applicable) of its intention to repatriate capital and cease operations in the Philippines. Failure to maintain the paid-up capital will subject a foreign retailer to penalties or restriction on future trading activities or businesses in the Philippines.

ii) Reciprocity

The Proposed Bill requires that laws of the foreign retailer's country of origin must also allow the entry of Filipino retailers. However, this reciprocity requirement is not new, as the RTLA already imposes the same condition.

iii) Investment per store for foreign retailers with more than one physical store

For foreign retailers engaged in retail trade through more than one physical store, the investment per store requirement will be at least Php 10 Million (around USD 200,000.00). This amount is much lower than the current investment per store requirement of USD 830,000.00 imposed by the RTLA.

Based on the foregoing, the Proposed Bill significantly simplifies and lowers investment requirements for foreign retailers. It will notably remove other "pre-qualification" requirements (e.g., track record in retailing, among others) that is found in the current RTLA, and which obligated a foreign retailer to separately secure a certification of pre-qualification from the Board of Investments.

b) Deletion of the requirement of public offering of shares

The Proposed Bill will delete the current language of Section 7 of the RTLA, which requires retail trade enterprises where foreign equity ownership exceeds 80%, to offer within 8 years from the start of operations a minimum of 30% equity to the public through any stock exchange in the Philippines. With this proposed amendment, existing and newly established foreign owned retail enterprises will be able to remain privately owned enterprises.

Conclusion

As with any piece of legislation, lawmakers have to strike a balance between the interests of various sectors and stakeholders. For foreign investors, the Proposed Bill will finally remove regulatory barriers which may have discouraged foreign investment in the Philippine retail industry. However, there are also concerns whether small and medium-sized Filipino-owned retail enterprises are ready for the entry of foreign players especially as the Philippine economy is still recovering from the effects of the COVID-19 pandemic.

With a few months still left before the end of term of the current administration, it will be interesting to see whether protectionism will yield to “progress” and competition, and whether the long-awaited amendments to the RTLA will finally be realized through the passage of the Proposed Bill.

[Note: This article has been updated as of 1 November 2021]

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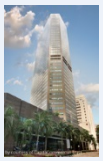

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