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Data Privacy - Guidelines on Data Processing Based on Legitimate Interest

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Background

On 13 December 2023, the National Privacy Commission (“NPC”) issued NPC Circular No. 2023-07 on the Guidelines on Legitimate Interest (the “**Guidelines**”) which clarify how a personal information controller (“PIC”) may establish the existence of legitimate interest as a lawful basis for the processing of personal information under Republic Act No. 10173 or the Data Privacy Act of 2012 (the “**DPA**”).

The Guidelines are significant since Section 12(f) of the DPA allows processing of personal information (without the consent of the data subject) if necessary to pursue the legitimate interest of the PIC or by any third party to whom data is disclosed, except where such interest is overridden by the constitutional rights and freedoms of the data subject.

Overview of the Guidelines**1. *Applicability to processing of personal information***

It should be noted that processing based on legitimate interest may be relied on for processing a specific category of personal data only, which is the processing of personal information, and not for purposes of processing sensitive personal information or privileged information.

Personal information refers to any information (by itself or when put together with other information) from which the identity of an individual is apparent or can be reasonably and directly ascertained. On the other hand, sensitive personal information refers to information about an individual’s race, ethnic origin, marital status, age, color, health, education, or information issued by government agencies peculiar to an individual, among others. When processing sensitive personal information, the other lawful basis for processing (aside from consent) is more limited in nature.

2. *Definition of “legitimate interest” and “third party”*

Prior to the Guidelines, there was no definition of the terms “legitimate interest” and “third party” as used in Section 12(f) of the DPA. The Guidelines now clarify both concepts and state that “legitimate interest” refers to any actual and real interest, benefit, or gain that a PIC or third party may have or may derive from the processing of specific personal information, while “third party” refers to any natural or juridical person to whom the personal

information is disclosed who is not a PIC, personal information processor, or data subject of the specific processing activity.

3. *Conditions for processing based on legitimate interest*

The following conditions must be fulfilled to process personal information based on legitimate interest under the Guidelines:

- (a) Existence of a clearly established legitimate interest (purpose test);
- (b) The means or method of processing the personal information to accomplish the legitimate interest is necessary and lawful (necessity test); and
- (c) The legitimate and lawful interest does not override the data subject's fundamental rights and freedoms (balancing test)

To satisfy the purpose test, the processing activity must be pursued for a lawful and specific purpose (not vague or overbroad), and the data subject must be informed of the legitimate interest established prior to the processing or at the next practical opportunity. As for the necessity test, the means and method chosen for the specific processing activity should be proportionate (adequate, relevant, and suitable) to fulfill the legitimate interest. Finally, for the balancing test, among the factors to be considered are the impact of the processing activity on the data subject, measures implemented to protect the personal information, and the data subject's reasonable expectation of privacy, depending on the circumstances of each case.

We note that the three tests above have already been mentioned by the NPC in some of its earlier advisory opinions. For example, the NPC applied the three tests to limit the manner of processing of personal information based on legitimate interest in NPC Advisory Opinion No. 2018-080, which involved a query on whether the joint viewing and releasing of closed-circuit television ("CCTV") camera footage by a restaurant to its customer to assist the customer in pursuing the individuals liable for the loss of her cellphone may be justified relying on the legitimate interest clause.

While the NPC confirmed in said advisory opinion that the viewing and disclosure of the CCTV footage to the customer and her legal counsel can be considered necessary to pursue a legitimate interest, the viewing or disclosure should be limited to (i) the specific date of the incident, and the particular time and duration of stay of the data subject in the establishment, and (ii) the viewing of the camera posted at the precise location of the data subject during the incident (and not other cameras operated), among others.

As such, even when relying on the legitimate interest clause of the DPA, PICs should still ensure that only necessary information is processed and that the processing is done in a fair, lawful and transparent manner, and take necessary steps to protect and uphold the rights of the data subject.

4. *Legitimate interest assessment*

A PIC is expected to conduct a legitimate interest assessment (i.e., applying the tests above) or verify the legitimate interest of a third party to whom personal information may be disclosed before proceeding. Further, a PIC is required under the Guidelines to keep records or documentation of the evaluation process and results of its assessment, since the NPC may require the submission of records during an investigation or compliance check.

Processing of personal information in violation of the Guidelines may be subject to penalties under the DPA and other related issuances of the NPC.

Conclusion

The Guidelines provide a clear framework to determine whether a legitimate interest exists that can be used as the basis for PICs to process personal information. However, it should be noted that the NPC has emphasized that legitimate interest is not intended to be a broad justification for processing personal information, and PICs should still balance their legitimate interest with the rights and interests of the data subject. PICs should therefore

carefully evaluate whether applying other lawful criteria for processing may be better suited under the circumstances, taking into consideration the general principles of transparency, legitimate purpose, and proportionality.

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Malaysia

Departure from an Exclusive Jurisdiction Clause

一般的な取引契約では、紛争解決条項において特定の紛争解決機関を使用する旨の専属的管轄合意がなされることが多いが、マレーシアの高等裁判所において、専属的管轄合意を許容すべきでない例外的な状況の場合には、必ずしも専属的管轄合意に縛られないという判断が示された。当事者間の合意を覆す可能性のある判断であり、実務上の重要性が高いことから本稿で紹介する。

Commercial agreements may contain a clause on an exclusive jurisdiction in which a claim arising out of the agreements must be brought. Such clause is often known as an “exclusive jurisdiction clause”. In the recent Malaysian High Court decision of ***B Braun Medical Industries Sdn Bhd v Pyramid Lines Singapore Pte Ltd & Ors*** [2023] MLJU 2760, the Court allowed a departure from the exclusive jurisdiction clause on the basis that there are “exceptional circumstances amounting to a strong cause that effect ought not to be given to the exclusive jurisdiction.”

The Court also discussed about whether a third party to an agreement may rely on the exclusive jurisdiction clause by virtue of a contractual provision that is intended to confer rights and benefits under the agreement on a third party who is not a contractual party to the agreement. This article will provide a summarized overview of the judgment in ***B Braun Medical Industries***.

Facts of the *B Braun Medical Industries* Case

Pursuant to a non-negotiable bill of lading (the “**Bill of Lading**”), Pyramid Lines Singapore Pte Ltd (“**Pyramid Lines**”) (as the carrier) had agreed to transport a consignment of medical products which was sensitive to temperature (the “**Cargo**”) from Malaysia to Cambodia. However, when the Cargo was delivered to Cambodia, it was discovered frozen and damaged due to failure to maintain an appropriate temperature for the Cargo.

B. Braun Medical Industries Sdn. Bhd. (“**B. Braun**”) then claimed against Pyramid Lines and its Malaysian freight agent (i.e. Ceva Freight Holdings (M) Sdn. Bhd. (“**Ceva Freight**”)) for breach of their duties as bailees and/or under an implied contract of carriage between the parties, pursuant to the terms of the Bill of Lading. B. Braun also brought a claim against YCH Distripark Sdn. Bhd. (“**YCH**”) (as the bonded warehouse keeper of the Cargo) for breach of its duties as bailee. Both claims are on the basis that Pyramid Lines, Ceva Freight and YCH failed to exercise reasonable care in handling the Cargo during shipment, resulting in extensive damage to the entire Cargo.

Exclusive Jurisdiction Clause

Pyramid Lines and Ceva Freight had applied for a stay of the proceedings in Malaysia because of the exclusive jurisdiction clause in the Bill of Lading. The Bill of Lading was governed by Singapore laws and the parties also agreed on the following exclusive jurisdiction clause in the Bill of Lading:

“any claim against Carrier or arising from the Carriage or in relation to the Goods shall be determined exclusively by the Singapore High Court to which jurisdiction Merchant irrevocably submit”.

Notwithstanding the exclusive jurisdiction clause above which provides the parties’ express agreement to determine their disputes before the Singapore High Court, B. Braun argued that Malaysian Court is the suitable forum for adjudicating its claim.

Jurisdiction of Malaysian Court

Based on the facts of this case, the Court found that the events giving rise to the proceedings or those alleged to have transpired are situated in Malaysia. Where the cause of action of a case arises in Malaysia, or that one of the defendants (e.g. Ceva Freight) resides or has its place of business in Malaysia, Malaysian Courts have the jurisdiction and power to preside over such case under Section 23 of the Malaysian Courts of Judicature Act 1964.

Although the parties acknowledged Malaysian Courts’ jurisdiction over B. Braun’s claim in this matter, the Court was requested to decide on whether to refrain from exercising its jurisdiction and give effect to the parties’ express

agreement on the exclusive jurisdiction clause.

Departure of Exclusive Jurisdiction Clause

Following court precedents, the High Court held that the party seeking a departure from the exclusive jurisdiction clause (i.e. B. Braun) will need to show exceptional circumstances amounting to a strong cause that effect ought not to be given to the exclusive jurisdiction. In making such determination, the Court applied the test endorsed by the Malaysian Federal Court in ***Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad* [1976] 2 MLJ 154** and a more recent Court of Appeal decision, in which the Court should consider where the ends of justice will be best served and all the circumstances of the case, particularly the following matters:

- “(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the [Malaysian] and foreign courts;*
- (b) Whether the law of the foreign court applies and, if so, whether it differs from [Malaysia] law in any material respects;*
- (c) With what country either party is connected, and how closely;*
- (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; and*
- (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would-*
 - (i) be deprived of security for that claim;*
 - (ii) be unable to enforce any judgment obtained;*
 - (iii) be faced with a time-bar not applicable in [Malaysia]; or*
 - (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.”*

Applying the test above, the Court held that B. Braun had established a strong cause to justify the departure from the exclusive jurisdiction clause and decided that Malaysia was the appropriate forum for adjudicating the dispute based on, amongst others, the following key considerations:

1. Governing law of the implied contract of carriage

- (a) As the vessel departed from Malaysia, the Malaysian Carriage of Goods by Sea Act 1950 was applicable to the carriage contract. This application is one of the factors in favour of permitting the action to stay in Malaysia.*

2. B. Braun would be time-barred to file in Singapore

- (a) The Hague-Visby Rules applies to the Bill of Lading by virtue of the Malaysian Carriage of Goods by Sea Act 1950. Pursuant to Article III, Rule 6 of the Hague-Visby Rules, legal actions against the carrier must be initiated within 1 year from the delivery date of the goods.*
- (b) If the Court granted a stay of this proceeding, B. Braun’s ability to pursue its claim against Pyramid Lines or Ceva Freight in Singapore would effectively be out of time under the Hague-Visby Rules. Such a decision would cause substantial prejudice to B. Braun’s right to seek a legal redress.*

3. It would be reasonable and appropriate for B. Braun to commence proceedings in Malaysia

- (a) In the same proceedings, B. Braun had also commenced action against YCH (a Malaysian-based entity) as the cause of action arose in Malaysia. There is a risk that if the proceedings against Pyramid Lines and Ceva Freight were brought in Singapore, while the claim against YCH remained in Malaysia, this may lead*

to an unsatisfactory situation where conflicting judgments or findings of facts regarding the parties' responsibility for the damage may be determined.

- (b) Other than the fact that Pyramid Lines is a company based in Singapore, there is no nexus between B. Braun's claims and Singapore. Both Ceva Freight and YCH are Malaysian-based entities, and the focal points of B. Braun's claims revolve around actions which transpired in Malaysia.
- (c) Pyramid Lines, being an international cargo carrier with experience in diverse legal systems and compliance with various international conventions and treaties governing the transportation of goods by sea, would not suffer prejudice if this matter were to be heard in Malaysia.

Ceva Freight's reliance on a "Himalaya Clause"

As mentioned above, B. Braun claimed against Ceva Freight for its alleged breach of duties as bailees and/or under the implied contract of carriage pursuant to the terms of the Bill of Lading. However, as Ceva Freight is not a contractual party to the Bill of Lading and merely signed it as an agent for Pyramid Lines, due to rules on privity of contract, Ceva Freight does not appear to have the legal right to enforce the exclusive jurisdiction clause.

However, Ceva Freight argued that it was conferred with the right to enforce the exclusive jurisdiction clause based on the following provision in the Bill of Lading:

*"Without prejudice to the generality of the foregoing, every such person shall have the **benefit of all the Rights and Defences of Carrier** under or pursuant to this Bill of Lading **as if the same were expressly made also for such person's benefit**. For the foregoing purposes, Carrier contracts for itself as well as agent and trustee of all such persons."*

(own emphasis added).

The clause above is commonly known as the "Himalaya clause" which derives its name from the case, ***The Himalaya; Adler v Dickson and Another* [1954] 2 Lloyd's Rep.267**. A Himalaya clause is intended to confer rights and benefits on an entity which is not a direct party to that contract. In the context of a bill of lading, the Himalaya clause extends the benefit of rights and defences conferred by the bill of lading on the carrier to the carriers' employees, agents, service providers or independent contractors in a multimodal logistics chain.

The Court then cited a decision by the Privy Council (which is a persuasive authority under Malaysian jurisprudence) and distinguished the exclusive jurisdiction clause from the term "benefit" stated in the Himalaya clause on the basis that the former is a clause which creates mutual rights and obligations between the contractual parties and to provide third parties with the benefit of an exclusive jurisdiction clause does not contribute to the policy objective of the Himalaya clause. In summary, the Himalaya clause in the Bill of Lading does not extend to an exclusive jurisdiction clause.

Conclusion

Applying this *B. Braun Medical Industries* case, contractual parties will need to take note that Malaysian Courts have the discretion not to give effect to explicitly worded exclusive jurisdiction clause if there are compelling reasons and there is a strong cause to depart from the said clause. The application of this principle is not solely limited to shipping cases, but it also covers, amongst others, cross border transactions and commercial trades.

Further, with regard to third parties who intend to be covered by benefits, rights and protections through the adoption of a Himalaya clause in a contract, the scope of the Himalaya clause and its applications to the third party's intended benefit, right and protection will need to be perused in detail to ensure that these are extended to the third parties as intended.

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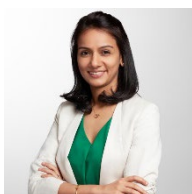
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