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The firm was established with two (2) main objectives; namely to enable the partners to have control over their professional career and to provide the best possible solution to our clients' legal requirements taking into account not only the law but also the commercial aspects of our clients' circumstances.

It is the firm's strong believe that lawyers, though professionals, are essentially service providers. Accordingly, we strive to provide our clients' with the best possible solution in the shortest time possible.

AREAS OF PRACTICE		Articles
Arbitration & Alternative Dispute Resolution	-	Appointment and Removal of the board of directors
Banking & Finance	-	
Banking & Recovery Litigation	-	Conclusive Evidence Clause – A review of recent cases
Construction and Building Contracts	-	
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General Litigation Practice	-	Letter of Offer
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Securities & Corporate Litigation	-	

BRIEFLY

The price of commodities especially crude oil has finally fallen, whether temporary or permanent only time will tell. However, what is interesting to note is that historically a fall in commodity prices (during the 70s and 80s) has lead to a recession. We hope that this will not happen and that Governments and Central Banks will be able to learn from the past to take the necessary measures so as to enable economies to have a controlled slow down and avoid a recession.

Company

"Appointment and removal of the board of directors" by Dion Kor Shiang Hua

Shareholders have the power to appoint and remove directors of the company, however, this is only if the company decides to grant them that power by providing for such removal in its Articles of Association ("AA").

This right to appoint directors is derived from the AA and the Companies Act 1965 ("Act").

Under the AA, a shareholder can have the power to appoint a director when the AA contains a provision to allow the shareholders, upon giving proper notice to the company, to propose the appointment of a person as director.

The reappointment of directors can be carried out in the following instances (i) when the AA provides that when a board appoints a director to fill a casual vacancy, that director must be put up for re-election by shareholders at the next Annual General Meeting ("AGM") (ii) when the AA provides for a rotation of directors, in which case 1/3 of the directors on the board must step down at each AGM and be re-elected by shareholders.

These last two instances are taken from the 4th Schedule of the Act, which states all directors have to retire from office at the company's 1st AGM and that at every subsequent AGM, 1/3 of the directors will have to retire. The shareholders will vote to reappoint them or appoint new ones.

With regards to the removal of directors, the AA would normally allow its shareholders to remove directors by ordinary resolution at a general meeting.

If the AA does not have such provisions in its Articles, then its shareholders are deprived of the right to appoint or remove directors in this manner. But such shareholders can turn to the Act.

Section 128 of the Act allows the shareholders of a public company to call a meeting to remove a director of a company by ordinary resolution.

When attempting to use Section 128 of the Act, shareholders have to understand that the success of their proposal to remove directors at these meetings is not certain and will depend on whether they can secure enough votes (usually, a simple majority) to push their resolutions through.

So while shareholders do have extensive powers when it comes to appointing and removing directors, their potential is curtailed by two factors: the company's decision to let them have the power via the AA, and their own strength in numbers in pushing the decision through, via the Act.

Litigation

"Conclusive Evidence Clause – A review of recent cases" by Eric Soon Boon Teck

Introduction

A conclusive evidence clause is usually found in banking agreements. Lately, it has found its way into commercial agreements.

A conclusive evidence clause is a clause that is inserted into an agreement for the benefit of a creditor. It provides that a certificate of indebtedness that is issued and signed by a designated officer of the creditor pursuant to a conclusive evidence clause shall be binding and conclusive evidence as to the amount owing from a debtor to the creditor. It dispenses with the legal proof of the actual indebtedness of a creditor.

The purpose of a certificate of indebtedness is to prevent the debtor from disputing the creditor's claim. Once issued, it becomes binding and conclusive evidence of the debtor's indebtedness to the creditor.

A certificate of indebtedness can be challenged. The law recognizes 2 grounds for challenging a certificate of indebtedness: one, fraud and two, a manifest error on the face of the certificate. Once a debtor successfully challenges a certificate of indebtedness, the creditor will have to prove its claim by ordinary legal evidence i.e. by producing all the relevant evidence to establish its claim against the debtor.

Although the words used in a conclusive evidence clause may vary, the effect of the clause is the same. Some examples of a conclusive evidence clause are given below:-

Example 1

It is hereby agreed that any admission or acknowledgment in writing by the Borrower or by any person authorised on behalf of the Borrower or a judgment (by default or otherwise obtained against the Borrower) or a statement of account in writing showing the Indebtedness of the Borrower which is duly certified by an officer of the Bank shall be binding and conclusive evidence against the Borrower for whatever purpose including as being conclusive evidence of Indebtedness in a court of law.

Example 2

Any admission or acknowledgement in writing by the Borrower or any person on behalf of the Borrower of the amount of the Indebtedness and any judgment or award obtained by you against the Borrower or a statement signed by you as to the Indebtedness for the time being remaining unpaid to you by the Borrower shall be final and conclusive evidence (save for manifest errors) against and be binding on me/us for all purposes

Example 3

It is hereby agreed that a statement of account in writing the indebtedness of the Customer to you duly certified by your Managing Director or any authorised representative, shall be binding and conclusive evidence against the Guarantors and/or the Guarantor's personal representative, heirs and assigns.

The Legal Position

In *Citibank N.A. v. Ooi Boon Leong & Ors. [1981] 1 MLJ 282*, the Federal Court decided, *inter alia*, that the respondents were bound under the contract of guarantee to accept the certificate of indebtedness duly executed by an officer of the bank as conclusive evidence of the debt due to the bank and that the bank was entitled to summary judgment. Raja Azlan Shah C.J. (Malaya) in his judgment said:

> In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus "A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives." It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate…
>
> In the circumstances the respondents are bound under clause 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled for judgment as prayed for.

So long as there is a conclusive evidence clause in an agreement, all a creditor needs to do is to produce a certificate of indebtedness and the burden shifts to the debtor to establish fraud or manifest error on the face of the certificate. In the absence of fraud or manifest error on the face of the certificate, the plaintiff will succeed in obtaining summary judgment for the amount based on a certificate of indebtedness.

In *Chen Heng Ping @ Tian Seow Hock & 5 ors. v. Intradagang Merchant Bankers (M) Berhad [1995] 3 CLJ 690*, Mahadev Shanker JCA delivering the judgment of the Court of Appeal said "… even though the guarantors are contractually precluded from requiring the bank to prove the accuracy of the certificate, it does not prevent the guarantors from adducing evidence to show that there is a manifest error on the fact of the certificate or fraud. **The initial onus is on the guarantors**." [emphasis added]

Therefore, once a certificate of indebtedness is issued pursuant to a conclusive evidence clause, a debtor is precluded from requiring the bank to prove its accuracy. The debtor can however challenge the certificate and the burden is on the debtor to adduce evidence to show manifest error on the face of the certificate or fraud.

However, the Court of Appeal in *Ho Lai Ying & Anor. v. Cempaka Finance Bhd [2004] 1 CLJ 232* seemed to have ignored the principles enunciated by the cases mentioned above. The facts of *Ho Lai Ying & Anor v. Cempaka Finance Bhd* are as follows.

The 1st appellant was granted a loan facility by the respondent bank, Cempaka Finance Berhad. The 2nd appellant was a guarantor for the said loan facility. The 1st appellant defaulted and the respondent commenced legal action to recover the loan.

The respondent bank proceeded by way of summary judgment. The application for summary judgment was supported by an affidavit by the respondent in which was exhibited three documents:-

(i) the loan agreement (exh. P1);

(ii) the guarantee agreement (exh P2); and

(iii) the certificate of indebtedness exh. P3).

The appellants challenged the correctness of the certificate of indebtedness and pointed out that the respondent had failed to produce supporting documents to show the correctness of the sum claimed such as the statement of accounts to show the quantum of the sum claimed.

The application for summary judgment was granted by the senior assistant registrar. The Appellants' appeal to the judge in chambers was dismissed, hence the appeal to the Court of Appeal.

The Court of Appeal allowed the appellants appeal. Mohd Ghazali Yusoff JCA delivering judgment of the Court of Appeal said:

> All the said documents showed is that the said facility was granted to the first appellant with the second appellant as the guarantor. What we were gravely concerned with is whether the evidence introduced up to now is sufficient *prima facie* to establish the respondent's case. …, the legal burden of establishing that the said sum stated in exh. P3 is owing from the appellants to the respondent rests on the latter. The conclusiveness of exh. 3 is binding only upon the parties. The court would still have to determine whether sufficient evidence has been adduced to prove the quantum and correctness of the amount claimed by the respondent. …
>
> On the whole it is our view that the evidence adduced by the respondent for the purpose of this application is lacking in certain particulars which would entitle them to enter final judgment against the appellants. Seeing that the appellants dispute the

> indebtedness in relation to interest imposed which is an issue which ought to be tried, we allowed this appeal with costs.

The decision of the Court of Appeal went against established principles relating to conclusive evidence clause. Further, the Court of Appeal did not make any reference to the Federal Court decision in *Citibank N.A. v. Ooi Boon Leong & Ors.* and the Court of Appeal decision in *Chen Heng Ping @ Tian Seow Hock & 5 ors. v. Intradagang Merchant Bankers (M) Berhad*.

The whole purpose of a conclusive evidence clause is to enable a creditor to prove its claim against a debtor by producing a certificate of indebtedness. To challenge the certificate, the debtor must adduce evidence to show that there is fraud or manifest error on the face of the certificate.

Fortunately for the respondent, leave to appeal was granted by the Federal Court and the decision of the Court of Appeal in *Ho Lai Ying & Anor. v. Cempaka Finance Bhd* has since been reversed by the Federal Court. The Federal Court decision can be found in *Cempaka Finance Bhd v. Ho Lai Ying & Anor. [2006] 3 CLJ 544*. Steve Shim CJ (Sabah & Sarawak) delivering judgment of the Federal Court said:

> Although the case of Chen Heng Ping & Ors. v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 (CA), was relied on by the High Court in holding a certificate of indebtedness to be binding unless manifest error on the face of it or fraud is shown, the Court of Appeal in the instant case, seems to have place no significance on this. …
>
> This observation appeared to have escaped the attention of the Court of Appeal in the present case. In the result, the Court of Appeal took the position that the conclusiveness of the certificate of indebtedness exh. P3 was binding only upon the parties and that the court would still have to determine whether sufficient evidence had been adduced to prove quantum and the correctness of the amount claimed. With respect, such a proposition goes against the entrenched principles enunciated by Raja Azlan Shah CJ (Malaya) (as His Highness then was) in *Citibank N.A. v. Ooi Boon Leong & Ors.* …
>
> … A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. **Such a certificate shifts the burden onto the defendant to disprove the amount claimed.** [emphasis added]
>
> …

The certificate of indebtedness, exh. P3, issued in accordance with cls. 27 and 7.03 aforesaid, is lucid enough. There is nothing to indicate or suggest any manifest error on the face of the said certificate nor is any fraud shown.

Conclusion

The recent Federal Court decision in *Cempaka Finance Bhd v. Ho Lai Ying & Anor.* is welcomed.

A certificate of indebtedness that is properly issued pursuant to a conclusive evidence clause is sufficient to establish the indebtedness of a debtor. A creditor is not required to prove its accuracy or adduce evidence to support its claim. A certificate of indebtedness is binding and conclusive evidence of indebtedness in the absence of fraud or manifest error on the face of the certificate. The burden of establishing fraud or manifest error on the face of the said certificate is on the debtor.

Employment

"Lawful and Reasonable Order" by Gan Wee Howe

An employee must obey all lawful and reasonable orders of an employer.

If an employee is unsure whether the order issued by the employer is legal or not, he/she is obliged to carry out the order first and then challenge its legality in separate proceedings.

To allow otherwise i.e. for any employee to disobey an order he/she thinks is not legal, will make it impossible for an employer to maintain discipline and industrial peace.

The above was held by the Federal Court in *Ngeow Voon Yean v. Sungei Wang Plaza Sdn. Bhd./Landmarks Holding Bhd*. [2006] 3 CLJ 837.

Stamp Duty

"Letter of Offer" by Gan Wee Howe

In *Affin-ACF Finance Bhd. v. Green Formation Sdn. Bhd.* [2006] 7 CLJ 81, the High Court held that a letter of offer granting a loan need not be stamped.

Instruments chargeable with stamp duty are contained in Section 41(1) of the Stamp Act, 1949. Section 41(1) in turn, states that the instruments specified in the First Schedule shall be chargeable with the several duties specified in the said Schedule.

As “letter of offer” is not found in the First Schedule, the judge held that a letter of offer is not an instrument chargeable with stamp duty under Section 41(1) of the Act.

N.B. Item 4 of the First Schedule of the Stamp Act provides that “Agreement or Memorandum of Agreement made under hand only, and not otherwise specially charged with any duty, whether the same is only evidence of a contract or obligation on the parties from its being a written instrument” is (subject to specific exemptions) chargeable with stamp duty of RM10.00.

We are of the view that a letter of offer once accepted by the borrower becomes an agreement and thus will be chargeable with stamp duty under Item 4 of the First Schedule.

Miscellaneous Matters

“Occupying Premises after the expiry of the tenancy period” by Dion Kor Shiang Hua

Under Section 28(4)(a) of the Civil Law Act 1956, it is stated that every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given of not.

In other words, should a tenant refuse or fail to vacate the tenanted premises after the expiry of the tenancy, he is liable to pay to the landlord two times the original rental amount until he vacates and hand over possession of the said premises back to the landlord.

Seriously Speaking

The Old Pastor's Last Request

An old pastor lay dying. He sent a message for an IRS agent and his lawyer to come to the hospital. When they arrived, they were ushered up to his room. As they entered the room, the pastor held out his hands and motioned for them to sit on each side of the bed.

The pastor grasped their hands, sighed contentedly, smiled, and stared at the ceiling. For a time, no one said anything. Both the IRS agent and lawyer were touched and flattered that the old man would ask them to be with him during his final moments. They were also puzzled because the pastor had never given any indication that he particularly liked either one of them.

Finally, the Lawyer asked, "Pastor, why did you ask the two of us to come here?"

The old pastor mustered all his strength, then said weakly, "Jesus died between two thieves, and that's how I want to go.