The Impact of Money Laundering Legislation on Advocates and Solicitors

Assoc. Prof. Dr. Norhashimah Mohd. Yasin[1]

Introduction

Before the Anti-Money Laundering Act 2001[2] (AMLA) came into force on 15 January 2002, the only provisions relating to money laundering in Malaysian law are s 4[3] of the Dangerous Drugs (Forfeiture of Property) Act 1988 and s 18[4] of the Anti-Corruption Act 1997.

An amendment to AMLA has been passed to cover aspects relating to terrorism. The main amendment is to add a new Part 6A titled Suppression of Terrorism Financing Offences and Freezing, Seizure and Forfeiture of Terrorist Property. AMLA will also be re-titled as the Anti-Money Laundering and Anti-Terrorism Financing Act (AMLATFA). The Penal Code has also been amended to create the relevant 'serious offences.'

AMLA covers the 'proceeds of an unlawful activity.' 'Unlawful activity' is defined in the Interpretation Section as 'any activity which is related, directly or indirectly, to any serious offence…' 'Serious offences' are listed in the Second Schedule of AMLA, of which there are currently 150.

Currently, the Malaysian legal profession is not specifically bound by Part 4 of AMLA which only applies to 'reporting institutions.' However, the rest of the Act applies to advocates and solicitors in the same way than any person

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[1] Advocate and Solicitor, High Court in Malaya, Ph.D, LL.M (Warwick), MCL, LL.B(Hons), Postgrad. Dip. Islamic Banking and Finance (IIUM), External Advisor (Islamic Banking & Financial Services), Azmi & Associates. E-mail: norhashimah@iiu.edu.my.

[2] For an overview of the provisions of this Act, see Norhashimah Mohd. Yasin, An Examination of the Malaysian Anti-Money Laundering Act 2001 (AMLA), [2002] 6 CLJ, pp. i-xxiii. See also Norhashimah Mohd. Yasin, Precedents Relating to Money Laundering, CLJ (Forthcoming).

[3] Dealing with or using, holding, receiving or concealing illegal property.

[4] Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence.

that is not a reporting institution is bound by the legislation.

As a result of s 2(2) of AMLA, the Act has extra-territorial application. Legislation in other countries also have such an application and it would not be impossible for a Malaysian advocate and solicitor to find himself subject to foreign money laundering laws if a client has non-Malaysian interests.

AMLA has serious implications regarding Legal Professional Privilege, particularly Legal Advice Privilege, which will be touched on in this article.

The Offence of Money Laundering in AMLA

As well as specific provisions of the Act that relate to certain legal practitioners, the provisions relating to the actual offence of money laundering will affect all lawyers. S 4(1) of AMLA states:

> (1) Any person who -
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> (a) engages in, or attempts to engage in; or
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> (b) abets the commission of,
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> money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.

This section must be read together with the definition of money laundering in s 3 (Interpretation) which provides:

> 'money laundering' means the act of a person who -
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> (a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
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> (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or
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> (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity;

where -

(aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or

(bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity;

A prudent Malaysian legal practitioner must take steps to ensure that he does not get caught by the offence in s 4(1)(b) of abetting money laundering, such as by allowing funds which are the proceeds of crime to pass through the client account.

For a lawyer to be deemed to have 'reason to believe,' as stated in point (aa), that the funds being handled were illegal proceeds, the prosecution would have to show that the transaction in question was not in line with what would be a 'normal' transaction and should have aroused suspicions.

Although lawyers in Malaysia currently have no guidance on this from the Bar Council, institutions conducting banking and insurance business do have such guidelines issued by Bank Negara, BNM/GP 9 (Guidelines on Money Laundering and Know Your Customer Policy), issued in 1993, and JPI/GPI 27 (Guidelines on Anti-Money Laundering Measures for the Insurance Industry), issued in 2001. The same general principles would also apply to lawyers.

As to what would be 'reasonable steps,' reference can be made to the 'reasonable banker' (or 'protection against fraud') test as enumerated by the judge in the English case of *Lloyds Bank Ltd v EB Savory & Co.*[5] Based on the above principle, a lawyer should always apply a 'reasonable lawyer' test when engaging in any transaction.

Point (bb) of the definition of money laundering refers to negligence. As such, negligence is not a defence against a charge under s 4(1)(b). Again,

[5] [1933] AC 201.

reference can be made to a banking case. In *Commissioners of State Savings Bank v Permewan, Wright & Co*,[6] the 'ordinary practice of bankers' test was established regarding negligence. Therefore, until Malaysian lawyers have official guidance, they should formulate an 'ordinary practice of lawyers' test to apply to any financial transaction.

There are only two statutory defences to a s 4 money laundering charge, which are found in s 5 (Protection of informers and information). S 5(1)(a)(i) allows an act of money laundering if done with the consent of the relevant enforcement agency, and s 5(1)(a)(ii) exempts the person from complicity if he makes a disclosure as soon as reasonably possible after the act. Unlike the legislation in some other jurisdictions, which allow a defence of having a reasonable excuse for failing to disclose his knowledge or suspicion, AMLA offers no such explicit defence.

Therefore, if a legal practitioner is party to an apparent money laundering action he will have to report under section 5 as an 'informer.' As such he is not liable for damages as per s 5(1)(c) if his identity does come to light.

Under AMLA, if such a position arose regarding a 'reporting institution,' it would also be covered against being sued for any s 14 report to Bank Negara Malaysia, by the provisions of s 24 (Protection of person reporting). Particularly pertinent is s 24(1)(bb) which protects against 'any consequences that follow from the disclosure or supply of that information.' However, as legal practices are not reporting institutions, they are not covered by Part 4 and have no legal obligation to report suspicious transactions under s 14(b). However, consideration is being given to gazetting advocates and solicitors as reporting institutions, and the Bar Council is being consulted over this matter.

To emphasize, if a lawyer has 'knowledge or belief that any property is derived from or used in connection with money laundering,' and does not report it, there is a possibility of prosecution for abetting the commission of money laundering under s 4(1)(b).

In many other jurisdictions, lawyers are covered by requirements to report

[6] [1914] 19 CLR 457.

suspicions of money laundering. In July 2002, an English solicitor was convicted for failing to report a suspicion of money laundering. He received a six-month sentence, and so became the first British lawyer to be convicted for such an offence. In June 2002 a New Zealand solicitor was convicted for failing to report a suspicious transaction. The judge gave a discharge without a conviction as he wanted this precedent case to serve as a warning to all New Zealand lawyers.

If legal firms are defined as reporting institutions, they will be subjected to s 14 (Report by reporting institutions). S 14(a), not in force, refers to any transaction over a certain amount (usually known as a Cash Transaction Report) and s 14(b) refers to any transaction that appears to be 'suspicious' (this is known as a Suspicious Transaction Report).

Malaysian advocates and solicitors are not currently 'reporting institutions' under ALMA, so the Malaysian Bar Council is not a 'relevant supervisory authority' for the purposes of the Act, and as such has issued no money laundering guidelines.

In Canada, the various Provincial Law Societies, led by the British Columbia Law Society, successfully challenged in court the reporting provisions of money laundering regulations that applied to lawyers on the grounds of being detrimental to the lawyer-client relationship. The Federal Government repealed the relevant section of the regulations, and the current position is that the Government can only bring in regulations covering lawyers with the agreement of the legal profession.

In New Zealand, what a lawyer can be requested to reveal is in statute. Only information regarding financial transactions is not covered by legal professional privilege.

Investigation by Bank Negara

As legal practices are not currently 'reporting institutions' as defined in Schedule 1, they have no legal obligation to comply with any of the provisions of Part 4

Reporting Obligations (ss 13-28), except s 26 (Examination of person other than a reporting institution) which states:

(1) An examiner authorized under s 25 may examine - ….
   (c) a person whom he believes to be acquainted with the facts and circumstances of the case, including an auditor or an advocate and solicitor of a reporting institution,
   and that person shall give such document or information as the examiner may require within such time as the examiner may specify.

(2) Any person who contravenes subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

(3) Notwithstanding any other written law, an agent, including an auditor or an advocate and solicitor of a reporting institution, shall not be liable for breach of a contract relating to, or a duty of, confidentiality for giving any document or information to the examiner.

S 26(1)(c) makes it clear by the use of the word 'shall' that compliance with a request by the examiner appointed by Bank Negara is mandatory. Sub–section (3) gives a legal practitioner immunity against any civil litigation for breach of confidentiality. Legal privilege is not referred to in this section, and whether or not privilege could be claimed under common law would have to be tested in a Malaysian court. There are many precedent cases regarding legal privilege in England and Wales, as well as Australia and New Zealand. However, due to the Civil Law Act 1956, they might not be precedents for Malaysian courts. Any legal firm with a client listed as a 'reporting institution' can fall under this section.

Malaysian lawyers could also find themselves being ordered to produce information under the more general s 32 (Power to examine persons) and 37 (Delivery of property, record, report or document). Anyone prosecuted under s 32 or s 37 for non-production of documents could also be prosecuted under s 34 (Obstruction to exercise of powers by an investigating officer). S 26, 32, 34

and 37 all provide for a one-year sentence and/or a RM1,000,000 fine.

As the proceedings under s 26 are neither civil nor criminal, the principles established by the court regarding Legal Advice Privilege in the English case of *Three Rivers District Council & Ors and The Governor & Company of the Bank of England*[7] are instructive. This case, involving the production of documents held by the Bank's lawyers, resulted in the scope of legal advice privilege being narrowed. This case also has implications for money laundering cases.

The question of legal professional privilege in relation to investigatory powers apparently granted by statute was also at issue in another English case, *R v Special Commissioner and Another, Ex P Morgan Grenfell & Co Ltd*.[8] At issue was whether Morgan Grenfell had to give documents from its solicitors relating to legal advice, for which it claimed legal professional privilege, to the Inland Revenue. The court found that the documents did not have to be produced as there was no specific provision in the legislation for a solicitor's client to do so. It was also held by the court that legal professional privilege could not be presumed not to exist unless the statute expressly stated this to be the case. An Australian court independently came to the same conclusion in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*.[9] If this principle is accepted as applying to AMLA, then legal professional privilege applies unless the relevant section of the Act clearly states that it does not.

Tipping-Off

One aspect of money laundering legislation which could be very difficult for the legal profession in Malaysia, is the concept of 'tipping-off,' which is found in s 35 of AMLA. Tipping-off is making an unauthorised disclosure that a person is under investigation, or otherwise suspected of, money laundering.

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[7] [2003] EWCA Civ. 474.
[8] [2002] UKHL 21.
[9] [2002] HCA 49.

Section 35(1)-(4) stipulates:

(1) Any person who -

(a) knows or has reason to suspect that an investigating officer is acting, or is proposing to act, in connection with an investigation which is being, or is about to be, conducted under or for the purposes of this Act or any subsidiary legislation made under it and discloses to any other person information or any other matter which is likely to prejudice that investigation or proposed investigation; or

(b) knows or has reason to suspect that a disclosure has been made to an investigating officer under this Act and discloses to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure, commits an offence and shall on conviction be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding one year or to both.

(2) Nothing in subsection (1) makes it an offence for an advocate and solicitor or his employee to disclose any information or other matter -

(a) to his client or the client's representative in connection with the giving of advice to the client in the course and for the purpose of the professional employment of the advocate and solicitor; or

(b) to any person in contemplation of, or in connection with and for the purpose of, any legal proceedings.

(3) Subsection (2) does not apply in relation to any information or other matter which is disclosed with a view to furthering any illegal purpose.

(4) In proceedings against a person for an offence under this section, it is a defence to prove that -

(a) he did not know or suspect that the disclosure made under paragraph (1)(b) was likely to prejudice the investigation; or

(b) he had lawful authority or reasonable excuse for making the

disclosure….

Section 35(2)(a) refers to legal advice privilege and s 35(2)(b) refers to litigation privilege. Although these sections of the Act allow a lawyer to inform the client that he is under investigation or that the lawyer has made a report to Bank Negara, he will have to think very carefully before doing so. Firstly, the legal practitioner will have to be certain that informing the client does constitute legal advice. If the client asks a direct question as to whether he is being investigated for money laundering or if a report has been made, and the lawyer replies in the affirmative, legal advice privilege may apply. If, however, the lawyer simply informed the client on his own initiative, this would be likely to be 'tipping-off.' There would be no offence if litigation privilege applies, but if it is unclear whether there is a serious prospect of civil or criminal proceedings taking place, it may not be wise to disclose to the client.

There is also the risk that the authorities could take the view that a disclosure falls under the ambit of s 35(3) of AMLA of furthering an illegal purpose. This problem arose in the United Kingdom where the National Criminal Intelligence Service chose to interpret UK money laundering legislation as meaning that all such disclosures furthered the criminal purpose of prejudicing an investigation. However, in the case of *P and P*,[10] the NCIS was ordered to drop this restrictive interpretation and adopt a broader interpretation.

Litigation Fees

A Malaysian advocate and solicitor who engages in litigation work is protected against any possible prosecution for handling money, in the form of legal fees, which may be proceeds of an illegal activity, due to the fact that the client will have had his assets frozen and which can only be released by the agency which issued the 'freezing order.' S 44(3)(b)(v) of AMLA provides that:

(3) The enforcement agency in making the order under subsection (1) may give directions to the person named or described in the order as to -

[10] [2003] EWHC 2260 (Fam).

(b) the disposal of that property, for the purpose of -

(v) the payment of the costs of that person to defend criminal proceedings against him;

Disclosure by Court Order

S 47 (Advocates and solicitors to disclose information) of AMLA applies to s 4(1) money laundering offences:

(1) Notwithstanding any other law, a Judge of the High Court may, on application being made to him in relation to an investigation into any offence under subsection 4(1), order an advocate and solicitor to disclose information available to him in respect of any transaction or dealing relating to any property which is liable to seizure under this Act.

(2) Nothing in subsection (1) shall require an advocate and solicitor to comply with any order under that subsection to the extent that such compliance would disclose any privileged information or communication which came to his knowledge for the purpose of any pending proceedings.

Some Malaysian lawyers may have already come across this section as it is identical (verbatim) to s 27 of the Anti-Corruption Act 1997. This section specifically allows litigation privilege, i.e. a legal practice does not have to reveal 'privileged information' if it is connected with legal proceedings. It does not say that it does not apply if the communication was for an illegal purpose, but this is likely as shown in *The Attorney General of Hong Kong v Lorrain Esme Osman & Ors*,[11] where the Malaysian High Court had to decide whether the communication between the legal practice and its client had been for an illegal purpose and whether the practice in question should reveal any transactions that took place.

[11] [1993] 2 MLJ 347, [1993] 3 CLJ 293.

Conclusion

Money laundering legislation, and its interpretation, has the potential to remove the common law right of legal professional privilege from the legal profession, although litigation privilege has not been interfered with, and money laundering legislation in Malaysia is clear on the preservation of this privilege.

In the United Kingdom, there was an attempt to extinguish the sub-category of legal advice privilege in the context of money laundering altogether, but this was reversed by the High Court. However, the *Three Rivers* case has sharply restricted the scope of legal advice privilege to the extent that even the material used to prepare the legal advice may not be subject to privilege.

Other decisions in Australia and the United Kingdom have upheld this privilege, although not in the context of money laundering. These cases, however, are instructive for Malaysia as they involved supervisory authorities acting under the provisions of statutes with a broad scope in terms of investigatory powers. If their principles are accepted in Malaysia, legal privilege will cease to apply only if expressively stated in the relevant section, such as when AMLA specifically states in particular sections that a certain criminal offence will be tried under civil standards.

Money laundering legislation has made the legal profession in jurisdictions such as the United Kingdom and New Zealand very fearful of the consequences of making a mistake involving matters that are subjective rather than objective. There has already been a solicitor sent to prison and struck-off in the UK, and another found guilty in New Zealand, because they did not take enough notice of the tight legal position that lawyers must now operate under.

Currently, the Malaysian legal profession does not face this kind of risk as yet, but the experience of jurisdictions such as the United Kingdom should be taken as a lesson as Malaysia may in the future also have a tight regime regarding money laundering and legal professional privilege.