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MEMORANDUM

BAR COUNCIL MALAYSIA'S MEMORANDUM ON THE PROPOSED AMENDMENTS TO THE SUBORDINATE COURTS ACT 1948

30 JUNE 2010

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ANNEXURE

A) COMPARATIVE ANALYSIS OF OTHER JURISDICTIONS

1. Introduction

- 1.1. The Government of Malaysia has tabled the Subordinate Courts (Amendment) Bill 2010 [D.R. 21/2010]. It is stated to be a Bill related to an Act to amend the Subordinate Courts Act 1948.

2. Background

- 2.1. Previously, the Subordinate Courts Act 1948 (Act 92) conferred jurisdiction upon the Sessions Court to try all actions and suits of a civil nature where the amount in dispute or the value of the subject matter does not exceed **RM25,000-00**. It also conferred jurisdiction on a First Class Magistrate to try all actions of a civil nature that do not exceed **RM10,000-00** and a Second Class Magistrate to try all actions of a civil nature that do not exceed **RM250-00**.

- 2.2. Pursuant to the Subordinate Courts (Amendment) Act 1987 (A671) (*Date of coming into force : 22.5.1987*), section 65 of the Subordinate Courts Act 1948 (Act 92) was amended to increase the monetary jurisdiction of the Sessions Court from RM25,000-00 to **RM100,000-00**. The monetary jurisdiction of the First Class Magistrate was increased from RM10,000-00 to **RM25,000-00** and the Second Class Magistrate was increased from RM250-00 to **RM3,000-00**.

- 2.3. Pursuant to the Subordinate Courts (Amendment) Act 1994 (A887) (*Date of coming into force : 24.6.1994*), section 65 of the Subordinate Courts Act 1948 (Act 92) was amended again to increase the monetary jurisdiction of the Sessions Court from RM100,000-00 to **RM250,000-00**. The Sessions Court was also given **unlimited jurisdiction** to try all actions of a civil nature in respect of motor vehicle accidents, landlord & tenant and distress.

3. Present Position

- 3.1. There has not been an increase to the monetary jurisdiction of the Subordinate Courts since 1994. As stated above, presently the monetary jurisdiction of:

- (a) the Sessions Court is RM250,000-00;

- (b) a First Class Magistrate is RM25,000-00; and
 - (c) a Second Class Magistrate is RM3,000-00.
- 3.2. There is also provision for a Penghulu Court with monetary limit of RM50.
- 3.3. And the Sessions Court does have unlimited jurisdiction to try all actions of a civil nature in respect of motor vehicle accidents, landlord & tenant and distress.
- 3.4. Section 69 provides that the Sessions Court currently has no jurisdiction in actions:
- (a) relating to immovable property;
 - (b) specific performance or rescission of contracts;
 - (c) for an injunction;
 - (d) for cancellation or rectification of instruments;
 - (e) to enforce trusts;
 - (f) for accounts;
 - (g) for declaratory decrees;
 - (h) for probate and administration matters;
 - (i) guardianship or custody of infants;
 - (j) the validity or dissolution of marriages.

4. The Proposed Amendments

- 4.1. The Subordinate Courts (Amendment) Bill 2010 contains the following proposed amendments:
- (a) Monetary Jurisdiction of the Sessions Court to be increased to **RM1,000,000-00** (*see Clause 7(a)(ii)*);
 - (b) Monetary Jurisdiction of a First Class Magistrate to be increased to **RM100,000-00** (*see Clause 11*);

- (c) Monetary Jurisdiction of a Second Class Magistrate to be increased to **RM10,000-00** (see *Clause 13*);
- (d) The Sessions Court is to be conferred with jurisdiction to try all actions for **specific performance** or **rescission of contracts** or for **cancellation or rectification of instruments** within the monetary limit of RM1,000,000-00 (*Clause 7(a)(iii)*);
- (e) The Sessions Court is to be conferred with jurisdiction to **grant injunctions** and **make declarations**, within the monetary limit of RM1,000,000-00 (*Clause 7(b)*);
- (f) The Penghulu Court is to be abolished (*Clause 2, 3(b), 4(b), 5(c), 10, 12 and 15*).

THE BAR COUNCIL'S CONCERNS

5. The Increase in Monetary Jurisdiction

- 5.1. The Bar Council is concerned that the increase in the monetary jurisdiction of the Sessions Court and the Magistrates Court represents a 4-fold increase from the current position.
- 5.2. The Bar Council is mindful of the fact that no amendment has been made since 1994 to the monetary jurisdiction of the Subordinate Courts and the related inflationary-based arguments for an increase. It has been more than 15 years since the present jurisdictional limits were set. We accept that a further increase in the monetary jurisdiction is now due.
- 5.3. But the Bar Council is of the view that the proposed increase is too large and there are concerns as to the ability of the current structure of the Subordinate Courts to handle the corresponding increase in workload that would arise from such an increase. As it presently stands, the Sessions Court already has unlimited jurisdiction in matters pertaining to personal injury (motor vehicle accidents), landlord and tenant and distress. This means that such matters must be filed in the Sessions Court

regardless of whether it is for an amount not exceeding RM250,000-00. The bulk of criminal cases are also heard in the Subordinate Courts.

- 5.4. There are concerns whether a proper and comprehensive study has been undertaken to ascertain what would be the impact of such an increase on the workload of the Subordinate Courts and the corresponding decrease in the workload of the High Court. Further, no study appears to have been done to ascertain what would be the appropriate and realistic boundary between the Subordinate Courts and the High Court to ensure cases are effectively dealt with at the proper level, in terms of complexity and value of subject matter. An increase in the workload of the Subordinate Courts would also require an increase in the number of judges and court infrastructure in the Subordinate Courts and an assessment ought to be carried out to ascertain the cost and economic factors associated with the eventual increase in the number of cases to be heard in the Subordinate Courts and the number of additional judges and court infrastructure required.
- 5.5. A proper study also ought to be undertaken to determine the most appropriate monetary jurisdiction for the Subordinate Courts taking into account of inflation and cost of living. It would incorrect to equate the cost of living and inflationary elements associated with residents living in Kuala Lumpur and the larger cities with that of those living in the smaller towns and other states. In many states and smaller towns, increasing the jurisdiction of the Sessions Court to RM1,000,000-00 may have the effect of moving most or a substantial part of the present workload of civil matters in the High Court to the Subordinate Courts.
- 5.6. Without undertaking such studies, such a large increase could lead to unwanted consequences and subject litigants in Malaysia to hardship and place undue stress and pressure on the present structure and resources of the Subordinate Courts.
- 5.7. Cases of a higher value do also normally entail a higher level of complexity, which in turn requires more judicial time and consideration. This must also be taken into account as opposed to a straightforward analysis of the numbers and data.
- 5.8. On the other hand, the fact that a claim is less than RM1,000,000-00 does not mean it is not complex and can easily be handled by the Subordinate Courts. There are

areas of law whereby the legal principles are complex but the law has developed such that the amount that may be awarded as damages normally would not exceed RM1,000,000-00. Defamation is one such area. A direct consequence of the proposed amendments would be that defamation claims would have to be filed in the Sessions Court.

- 5.9. Corresponding with the greater level of complexity of cases would be the concern as to the competence and quality of judicial officers to effectively deal with claims up to RM1,000,000-00 and RM100,000-00 respectively. It is important to consider whether they will be given the adequate training required to handle such matters and also whether they possess the necessary experience and qualifications to preside over such matters.
- 5.10. There are further concerns as to the right of appeal. As it presently stands, for a matter filed in the Sessions Court where the amount or value of the subject of the claim is less than RM250,000-00, an appeal may be filed to the High Court as of right. But a further appeal to the Court of Appeal would first require leave of the Court of Appeal before the appeal can be heard by the Court of Appeal (*see section 68 of the Courts of Judicature Act 1964*). No further appeal is available to the Federal Court.
- 5.11. Assuming the said section in the Courts of Judicature Act would also be amended to increase the limit to RM1,000,000-00, it is therefore a direct consequence of the proposed amendments that such claims not exceeding RM1,000,000-00 would also now require leave of the Court of Appeal before an appeal may be lodged to the said Court. And there will no longer be a right of appeal to the Federal Court (*even on a novel point of law or a matter of public importance*) if the value of the subject matter of the claim does not exceed RM1,000,000-00.
- 5.12. A comparative analysis of the monetary limits of the subordinate courts in other jurisdictions is attached as Annexure A, together with the prevailing exchange rates as at 29 June 2010.
- 5.13. The Bar Council is of the view that an increase of the monetary jurisdiction of the Sessions Court from RM250,000-00 to RM500,000-00 and that of a First Class

Magistrate from RM25,000-00 to RM50,000-00 may be more appropriate than what has been proposed. Such a gradual and incremental increase would be a more appropriate and realistic division. It would also be less likely to adversely impact on the subordinate court structure and its capacity to handle and dispose of such claims in an effective and efficient manner.

6. The Power to Grant Injunctions

- 6.1. As it stands, the Sessions Court is not empowered to grant equitable relief and remedies even if it is within the monetary jurisdiction of that court. So for injunctions, specific performance, declaratory relief, rescission of contracts and cancellation/rectification of instruments, the matter would have to be filed in the High Court even if the subject matter was less than RM250,000-00.
- 6.2. Under the proposed amendments, the Sessions Court would be conferred the jurisdiction to hear and grant all of the above relief and remedies provided the claim is within the monetary jurisdiction of the Sessions Court.
- 6.3. Equitable relief and remedies are at present specifically excluded from the jurisdiction of the Sessions Court under section 69 of the Subordinate Courts Act 1948 (*see para 3.4 above*). The Bar Council is of the view that such relief and remedies are expressly excluded from the jurisdiction of the Sessions Court for good reasons.
- 6.4. Equitable relief and remedies are varied and flexible. The legal principles involved are complex and difficult. The legal implications of such relief and remedies are far-reaching and wide-ranging.
- 6.5. Injunctions, in particular, have drastic and serious consequences on the litigant. An injunction is an order of court directing a party to do or to refrain from doing a particular act. They can be granted in a myriad of situations and, if such power is not exercised properly and judiciously, an injunction has the potential of causing serious damage and extremely harsh consequences on a litigant. They have been referred to as a drastic and extraordinary remedy that should not be granted as a matter of course. *Mareva* and *Anton Piller* injunctions are especially draconian and have been

described as the *nuclear weapons of the law*+because of their drastic impact on the litigant (see *Bank Mellat v Mohammed Ebrahim Nikpour* [1982] Com. LR 158). A *Mareva* injunction freezes the assets of a party until further order by court. An *Anton Piller* Order allows a party to enter the premises of another and to inspect and seize documents of the other party.

- 6.6. The relatively short time spent as a judicial officer and the relative lack of experience of such judicial officers in the Subordinate Courts do not adequately equip them to deliberate upon and grant equitable relief and remedies. They would not necessarily have the experience and ability to maturely deliberate upon such principles and come to a just and fair resolution of the matter. The Bar Council is opposed to the conferring of such powers on the Sessions Court.
- 6.7. The objective of increasing the monetary jurisdiction of the Subordinate Courts must be to efficiently redistribute to the Subordinate Courts matters that are relatively less complex that do not require the deliberation of a High Court Judge who possesses a much higher level of experience and knowledge of legal principles gained from years of sitting as a judicial officer. So, a straightforward banking or contract claim of RM500,000-00 (for example) may be adequately dealt with by a Sessions Court Judge (who does currently already possess the experience in handling banking and contractual matters below RM250,000-00) and does not necessarily require the deliberation and adjudication by a High Court Judge. But to confer upon the Sessions Court the power to grant equitable relief in its many shapes and forms, especially the power to grant an injunction, will potentially result in adverse consequences and impact on society arising from decisions that are not properly made.
- 6.8. The Courts in United Kingdom and Australia are moving towards a distribution that reflects more the relative complexity of the subject matter rather than the claim amount. In the circumstances, it may be more appropriate to review the redistribution of work of the courts from the viewpoint of subject matter rather than monetary value to ensure that more complex matters are heard by the High Court.

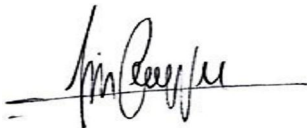
7. Amendment of Other Related Acts

- 7.1. For the proposed amendments to be effective, other related statutes require corresponding amendments such as the Courts of Judicature Act and the Subordinate Courts Rules.
- 7.2. The Bar Council together with the Judiciary are presently in the process of formulating a set of rules that would be applicable to both the Superior and Subordinate Courts. This is designed to replace the current Rules of the High Court 1980 and the Subordinate Courts Rules.
- 7.3. The proposed amendments cannot take effect without corresponding rules to govern the same, e.g. there are no provisions governing the grant of injunctions in the Subordinate Courts Rules.

8. Conclusion

- 8.1. The Bar Council is not opposed to an increase in the monetary jurisdiction of the Subordinate Courts but the proposed increase is far too large. The Bar Council is opposed to conferring powers on the Sessions Court to grant equitable relief and remedies.
- 8.2. It is recommended that a proper and comprehensive study be undertaken before such drastic amendments are made to the jurisdiction and powers of the Subordinate Courts. It is recommended that the Bar Council be consulted on the redistribution of work of the courts based on subject matter rather than monetary value.

Submitted by:



Lim Chee Wee

Vice-President, Malaysian Bar

Dated this 30th day of June 2010

COMPARATIVE ANALYSIS OF OTHER JURISDICTIONS

<u>Jurisdiction</u>	<u>Court</u>	<u>Monetary Limit</u>	<u>Power to grant Injunction</u>	<u>Other Equitable Relief</u>
Singapore	Magistrates Court	SG\$60,000-00 (Approximately RM139,575.72)	-	Specific Performance / Rectification / Cancellation
	District Court	SG\$250,000-00 (Approximately RM579,757.09)	Yes	
Hong Kong	Magistrates Court	HKD50,000-00 (Approximately RM20,653.09)	-	Specific Performance / Rectification / Cancellation
	District Court	HKD1,000,000-00 (Approximately RM413,044.415)	Yes	
England & Wales	County Courts	£25,000-00 (Approximately RM122,189.44)	Yes	Yes
	Either County or High Court	£25,000-00 to £50,000-00 (Approximately RM122,189.44 to RM244,602.72)	Yes	Yes
New Zealand	District Court	NZD200,000-00 (Approximately RM454,082.62)	Yes	Yes

Queensland	Magistrates Court	AUD50,000-00 (Approximately RM140,472.54)	-	
	District Court	AUD250,000-00 (Approximately RM702,141.40)	Yes	Yes
South Australia	District Court	No Limit	Yes	
Western Australia	District Court	AUD750,000-00 (Approximately RM2,105,663.49)		
Victoria	District Court	No Limit		
New South Wales	District Court	AUD750,000-00 (Approximately RM2,105,663.49)	Yes	