ISSUE 1/2019 • MARCH 2019

KDN No. PP 13699/01/2013 (031337)

# LEGAL INSIGHTS

A SKRINE NEWSLETTER

## MESSAGE FROM THE EDITOR-IN-CHIEF

The first quarter of 2019 witnessed several noteworthy developments in the local digital currency space. The Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 came into effect on 15 January 2019. Digital assets that fulfil the criteria set out in that Order are deemed to be "securities" for the purposes of Malaysian securities laws.

Second, the Securities Commission Malaysia ("SC") revised the Guidelines on Recognised Markets ("Guidelines") with effect from 31 January 2019 to introduce provisions to facilitate the registration of operators of digital asset exchanges in Malaysia.

The developments mentioned above are welcomed by those involved in the digital currency business as they shed light on the types of digital assets which are deemed to be securities under Malaysian law and set out the requirements that have to be satisfied in order to operate a digital asset exchange in Malaysia.

On 6 March 2019, the SC issued a consultation paper to seek feedback on the proposed Regulatory Framework for the Issuance of Digital Assets Through Initial Coin Offerings ("ICO Framework"). As the consultation period closed on 29 March 2019, it is likely that the ICO Framework will be launched in the near future. This will provide guidance on the requirements that have to be complied with in order to carry out an ICO offering in Malaysia.

To assist our readers to keep abreast of the developments in this aspect of the fintech space, we feature an article on the framework for digital asset exchanges in Malaysia in this issue of Legal Insights. We will likewise endeavour to feature an article on the ICO Framework after it has been launched.

Fintech aside, I hope that our readers will find the other articles and case commentaries in this issue of Legal Insights interesting.

With best wishes,

Kok Chee Kheong
Editor-in-Chief

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## ANNOUNCEMENTS

### ALB MALAYSIA LAW AWARDS 2019

Our Firm was ranked by Asia Legal Business as the Malaysian Law Firm 2019 in Arbitration, Labour and Employment, and Real Estate. Our Partner, Dato' Lim Chee Wee, was named the Dispute Resolution Lawyer of the Year 2019.

### NEW PARTNERS

The Partners are pleased to announce that Shaleni Sangaran, Nur Syafinaz Vani Abdullah and Addy Herg have been admitted as Partners of the Firm from 1 January 2019.

Shaleni is a member of our Dispute Resolution Division. Her work includes commercial litigation, regulatory compliance investigations and fraud and asset recovery matters.

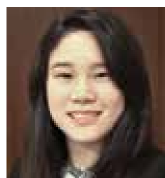
Syafinaz is a member of our Dispute Resolution Division. Her portfolio includes banking, defamation and insolvency litigation. Syafinaz also represents clients in land dispute matters.

Addy is a member of our Corporate Division. His portfolio includes mergers and acquisitions, foreign direct investments and joint ventures. Addy is one of the liaison Partners for our China Desk.

### SENIOR ASSOCIATES

The Firm congratulates Tatvaruban Subramaniam, Yee Xin Qian and Lee Zhi Wei on their promotion to Senior Associates.

Ruban is a member of our Construction and Engineering Practice Group. He focuses on construction related disputes.



Xin Qian is a member of our Corporate Division. Her portfolio includes mergers and acquisitions and corporate advisory matters.

Zhi Wei is a member of our Banking and Property Practice Group. Her work focuses on real estate and bank financing transactions.



# FEDERAL COURT DEPOSITS AND

Loshini Ramarmuty and Siew Suet Mey analyse

In the recent decision of *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723 ("Cubic Electronics"), the apex court of Malaysia revisited the principles on forfeiture of deposits and the treatment of liquidated damages clauses in contracts.

### FACTS

Cubic Electronics Sdn Bhd ("Cubic") was the owner of a piece of land in Melaka together with the plant and machinery on the land ("properties"). When Cubic was wound up, the properties were put up for sale by way of an open tender exercise. Prior to the open tender exercise, Mars Telecommunications Sdn Bhd ("Mars") offered to purchase the properties for RM90,000,000.00. Mars also offered an initial earnest deposit of RM1,000.000.00 which it paid to Cubic. The liquidators accepted Mars's offer and did not proceed with the open tender exercise. The acceptance of Mars's offer was subject to a term that the sale and purchase agreement ("SPA") must be executed within 30 days from 7 October 2011, failing which the earnest deposit would be forfeited as liquidated damages and not by way of a penalty.

*Forfeiture of Earnest Deposit*

Mars was given a total of four extensions of time before Cubic terminated the sale. For the first and second extensions, Mars paid a further earnest deposit of RM500,000.00 each time bringing the total earnest deposit sum to RM2,000,000.00. Thereafter, Mars requested and obtained a third extension of time, subject to payment of a further earnest deposit of RM1,000,000.00 plus interest of RM40,000.00 due to the delay in making the earlier payment. When granting all extensions of time, Cubic informed Mars that if Mars fails to execute the SPA by the extended date, the earnest deposit would be forfeited as liquidated damages and not by way of a penalty. Mars was then granted a fourth and final extension of time. Mars's request for another extension of time was refused by Cubic which then terminated the sale. Cubic further informed Mars that the sum of RM3,040,000.00 being earnest deposit and interest paid to date was forfeited. The property was subsequently sold to a third party.

### COURT PROCEEDINGS

*High Court and Court of Appeal*

Mars initiated a civil action seeking for, among others, a declaration that the termination of the sale by Cubic was wrongful and invalid. Mars further sought for the return of its deposit money and interest of RM3,040,000.00 or alternatively, RM2,040,000.00 less the first deposit of RM1,000,000.00. The High Court dismissed Mars's claim. The Court of Appeal ruled that the forfeiture of the RM3,040,000.00 was impermissible but allowed Cubic to forfeit RM1,000,000.00 of the earnest deposit.

*Positions canvassed in the Federal Court*

Cubic's position in the Federal Court was that in the case of a deposit, section 75 of the Contracts Act 1950 ("Act") did not

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# RESTATES THE LAW ON DAMAGES CLAUSES

## a recent landmark case on contract law

apply and accordingly, it need not prove its loss before forfeiting the earnest deposit.

Mars contended that section 75 of the Act, as applied by the Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamay* [1995] 2 CLJ 374 ("Selva Kumar"), disentitles Cubic from recovering simpliciter the sum fixed in the contract whether as penalty or liquidated damages and that Cubic must prove the damage suffered unless the sum named is a genuine pre-estimate of the loss.

*The Federal Court's Approach*

In arriving at its decision, the Federal Court dealt with the primary issue of how deposits should be treated *vis-à-vis* section 75 of the Act. The Court went on to consider the treatment of provisions in a contract where a sum is payable on breach of contract, i.e. liquidated damages clauses.

*Recovery of deposits*

The Court noted that there is no statutory definition for a true deposit under the Act and therefore it was necessary for the Court to consider the principles of law applicable to forfeiture of deposits bearing in mind section 75 of the Act.

After analysing the position in various jurisdictions, the Court found that the Courts in the United Kingdom and India have held that the principles of law on damages clauses are equally applicable in relation to forfeiture of deposits and are not mutually exclusive. Therefore, the Court was of the view that the time had come for the Malaysian courts to adopt a similar approach.

As a starting point, the Court sought to distinguish between deposits that can be forfeited and those that are recoverable. A deposit which is not merely part payment but also a guarantee of performance is generally not recoverable whereas any money paid in advance of performance and as part-payment of the contract price is generally recoverable. Whether a payment is part payment of the price or a deposit is a question of interpretation that turns on the facts of the case and the usual principles of interpretation apply. Once it has been ascertained that the payment made is a deposit, the said sum is subject to section 75 of the Act. What this means is that, the next step is to determine whether the deposit sum is reasonable.

In determining whether or not the deposit is reasonable under section 75 of the Act, the concepts of "*legitimate interest*" and "*proportionality*" as enunciated in the joined cases of *Cavendish Square Holding BV v Makdessi and ParkingEye v Beavis* [2015] UKSC 67 ("Cavendish") are relevant. Once the innocent party has demonstrated that it has a legitimate interest to safeguard and that the provision made for the said interest is proportionate to the interest identified, the onus then shifts to the defaulting party to show that the forfeited deposit is excessive. In short, the burden to demonstrate whether the forfeited deposit is reasonable or otherwise lies with the defaulting party.

*Liquidated damages clauses*

Having dealt with deposits, the Court went on to clarify the position in law in relation to the enforceability of damages clauses. The Federal Court relied heavily on the English position on liquidated damages in restating the law on liquidated damages in Malaysia.

*The Cavendish Approach*

In the UK, the traditional common law approach of enforcing liquidated damages clauses is as set out in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1914] AC 79 in which the House of Lords held that a liquidated damages provision would be enforceable only if the amount of liquidated damages was a reasonable estimate of the actual damage suffered by the innocent party (i.e. a genuine pre-estimate of loss). A liquidated damages clause that seeks to compensate the innocent party for a sum greater than the sum which ought to have been paid, that is, not a genuine pre-estimate of loss, would necessarily be penal and unenforceable.

Subsequently, the UK Supreme Court in *Cavendish* reformulated the approach to the penalty doctrine. The court distinguished between primary obligations and secondary obligations. Primary obligations are the legal obligations imposed upon each party to a contract to do what he promised would be done. A breach of the primary obligation would then lead to the secondary obligation to pay monetary compensation for the loss sustained by the innocent party. The distinction is important as the penalty doctrine does not apply to primary obligations.

The court went on to consider the concept of 'legitimate interests' of the innocent party. This would mean that in determining whether or not a clause is a penalty, the court is entitled to look at whether the innocent party's 'interests', i.e. losses that go beyond financial losses, have been taken into account. Ultimately, the test is whether the sum or remedy stipulated is proportionate and not 'extravagant, exorbitant or unconscionable' having regard to the innocent party's legitimate interest that it was designed to protect.

*Restating the position in Malaysia*

The Federal Court noted that section 75 of the Act had done away with the distinction between liquidated damages and penalties. Therefore, an innocent party in a contract that has been breached cannot recover simpliciter the sum fixed in a damages

*continued on page 4*

# FEDERAL COURT RESTATES THE LAW ON DEPOSITS

*continued from page 3*

clause whether as penalty or liquidated damages. He must prove the actual damage he has suffered unless his case falls under the situation where it is difficult to assess actual damage or loss as enunciated in *Selva Kumar*. In doing so, the innocent party must prove actual damage or reasonable compensation in accordance with the principles set out in *Hadley v Baxendale* (1854) 9 Exch 341.

Having set out the existing legal position, the Court was of the view that there is, however, no necessity for proof of actual loss or damage in every case where the innocent party seeking to enforce a damages clause. Therefore, as a starting point for recovery, the Court noted that section 75 of the Act allows reasonable compensation to be awarded irrespective of whether actual loss or damage is proven. In making this pronouncement, the Court cautioned that *Selva Kumar* should not be interpreted as imposing a requirement that proof of actual loss is the sole conclusive determinant of reasonable compensation.

As to what amounts to "reasonable compensation" as stipulated in section 75 of the Act, the Court noted that the central feature of *Cavendish* and section 75 is the notion of reasonableness, and accordingly there was nothing objectionable in holding that the concepts of "legitimate interest" and "proportionality" as enunciated in *Cavendish* are relevant in deciding what amounts to "reasonable compensation". The Court explained that in a straightforward case, reasonable compensation can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if indeed the breach occurred. In deriving a reasonable compensation, there must not be a significant difference between the level of damages expressed in the contract and the level of loss likely to be suffered.

*Burden of Proof*

Having restated the position in relation to the enforcement of a damages clause, the Court went on to address the issue of burden of proof. The Court stated that the first step is that it is the onus of the party seeking to enforce a damages clause to adduce evidence that firstly, there was a breach of contract and that, secondly, the contract contains a clause specifying a sum to be paid upon breach. Once the innocent party has established these two elements, the innocent party is entitled to the sum stipulated in the damages clause.

If the defaulting party disputes the sum stated in the damages clause, the burden is on the defaulting party to show that the damages clause is unreasonable (i.e. by showing that the sum stipulated in the contract is extravagant and unconscionable in amount in comparison with the highest conceivable loss which could possibly flow from the breach) or to demonstrate from available evidence and under such circumstances what ought to be the reasonable compensation caused by the breach of contract.

*Distilling the Principles*

The Federal Court then distilled the principles that it had laid down into the following propositions:

(1) If there is a breach of contract, any money paid in advance of performance and as part payment is generally recoverable by the payer. A deposit paid which is not merely part payment but also a guarantee of performance is generally not recoverable.

(2) Whether a payment is part payment of the price or a deposit is a question of interpretation that turns on the facts of a case.

(3) A deposit is subject to section 75 of the Act.

(4) In determining what amounts to "reasonable compensation" under section 75 of the Act, the concepts of "legitimate interest" and "proportionality" as enunciated in *Cavendish* are relevant.

(5) A sum payable in breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in comparison with the highest conceivable loss which could possibly flow from the breach.

(6) Section 75 of the Act allows reasonable compensation to be awarded irrespective of whether actual loss or damage is proven.

(7) The initial onus lies on the party seeking to enforce a damages clause under section 75 to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven.

(8) If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause, including the sum stated therein, is unreasonable.

*Decision of the Federal Court*

The Court, applying the principles laid down in this case, held that it was evident from the correspondence that Mars had agreed that the additional RM2,000,000.00 paid for the three extensions would form part of the earnest deposit guaranteeing its performance in the execution of the SPA. As such, the Court found that the additional payments bore the characteristics of a deposit and therefore subject to the same test of reasonableness applicable to a damages clause.

The Court was of the view that when the three extensions of time were granted, the primary obligation on Mars's part was to ensure that the SPA was completed by the new deadline. Its failure to perform this primary obligation resulted in it having to fulfil its secondary obligation to forfeit the agreed sums.

The Court was satisfied that Cubic had various legitimate interests to safeguard. These included the duty to maximize the amount available to its creditors, the additional expenditure incurred and the depreciation in value of the moveable assets due to Mars's

delay in completing the SPA, and the loss of opportunity to negotiate with a third party.

The Court considered that the RM2,000,000.00 was not too large an amount as to be disproportionate when compared against the total purchase price of RM90,000.000.00. The total deposit of RM3,000,000.00 represented only 3.33% of the purchase price.

In view of the foregoing, the onus had shifted to Mars to show that the forfeiture was excessive. Mars had not adduced any proof to show that the forfeited payments were exorbitant or unreasonable. Instead, it only argued that Cubic had not proved actual loss or damage. Consequently, the Court ruled that the additional RM2,000,000.00 amounted to reasonable compensation.

As for the RM40,000.00 paid by Mars by way of interest, the Court was satisfied that this amount was calculated at an agreed rate and was paid because of Mars's delay in paying the balance of the deposit. It did not constitute part payment for the properties and was not refundable regardless of whether the sale was completed. It was payable regardless of any breach and fell outside the scope of section 75 of the Act.

For the aforesaid reasons, the Court upheld Cubic's forfeiture of the RM2,000,000.00 (in addition to the initial deposit of RM1,000,000.00) and held that the RM40,000.00 was not refundable to Mars.

*Comments*

*Cubic Electronics* is a significant decision as it restates the law regarding deposits and damages clauses in Malaysia. The decision makes it clear that both areas are subject to section 75 of the Act and lays down the burden of proof under section 75 in a manner that is fair and logical.

The case lays to rest the perception that arose from *Selva Kumar* that there is, in general, a legal requirement for an innocent party to prove actual loss in order to determine what amounts to reasonable compensation.

*Cubic Electronics* also aligns the legal position in Malaysia to the current position in England and India.

## OTHER JURISDICTIONS

It is also useful to note the approach taken by other jurisdictions in light of *Cavendish.*

*Singapore*

Singapore follows the traditional common law approach in its enforcement of liquidated damages clauses as set out in *Dunlop*, though there has been a recent trend to consider the *Cavendish* approach at the High Court level in recent years. The Singapore High Court did this most recently in *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd and another suit (YTL PowerSeraya Pte Ltd, third party)* [2019] SGHC 2.

The plaintiff in *Seraya* commenced two actions against the defendants for liquidated damages pursuant to three electricity retail agreements ("ERAs") as it had terminated the ERAs due to the defendant's alleged wrongful conduct. Applying *Dunlop*, the court was of the view that each provision for liquidated damages under the ERAs was a penalty and therefore not enforceable as there was no evidence that the liquidated damages sum was a genuine pre-estimate of the losses likely to be suffered by the plaintiff on the termination of the ERAs. In doing so, the court considered the fact that the same formula was included in each ERA, regardless of the terms or duration of the particular ERA or the severity of the breach, potentially enabling the plaintiff to terminate the ERA and claim liquidated damages even for minor breaches. The court considered but declined to follow *Cavendish* as it could not see any legitimate interest that would justify imposing liquidated damages on termination at the proposed rate as the plaintiff failed to prove that it had some legitimate interest in claiming the liquidated damages sum, other than financial loss.

To date, the Singapore Court of Appeal has yet to have the opportunity to consider the *Cavendish* approach.

*Australia*

The Australian courts' approach to the penalty doctrine is also consistent with the approach in *Dunlop* (see the High Court decision of *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 222 ALR 305) and was well-settled until the High Court of Australia's decision in *Andrews v Australia and New Zealand Banking Group Pty Ltd* [2012] HCA 30 where it was held that *'there subsisted, independently of the common law rule, an equitable jurisdiction to relieve against any sufficiently onerous provisions which was conditional upon a failure to observe some other provision, whether or not that failure was a breach of contract'*. The extension of the penalty doctrine in *Andrews* (that breach is not an essential aspect of the doctrine) was not considered favourably by the UK Supreme Court in *Cavendish*. Rather it was viewed as a 'radical departure' from the existing law.

The penalty doctrine was subsequently revisited in *Paciocco & Anor v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, where the Australian High Court ruled that a contractual obligation to pay a specified sum of money upon breach of contract will be enforceable as long as the amount payable is not 'all out of proportion' to the party's interest in ensuring compliance with the relevant obligation. The relevant 'interest' may include financial interests such as the cost associated with making accounting provisions and therefore may extend beyond the costs recoverable by way of damages in litigation.

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# THE FRAMEWORK FOR DIGITAL ASSET EXCHANGES

Neo Hwee Yong discusses the Malaysian framework for digital asset exchanges

In January 2019, Malaysia took two leaps forward in the digital currency space. First, by recognising digital assets as securities under the Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 ("Prescription Order") that came into effect on 15 January 2019.

Second, the Securities Commission Malaysia ("SC") issued the revised Guidelines on Recognised Markets ("Guidelines") on 31 January 2019 to introduce provisions to facilitate the registration of operators of digital asset exchanges in Malaysia. By doing so, an operator of a digital asset exchange is to be registered as a Recognised Market Operator ("RMO") under section 34 of the Capital Markets and Services Act 2007 ("CMSA") and the Guidelines.

The Guidelines set out the registration and on-going requirements that apply to a person who applies to be and is registered as an RMO.

This article will first briefly discuss the requirements for the registration of an operator of a digital asset exchange and delve in greater detail on the ongoing requirements that apply to such an operator and a digital asset exchange under the Guidelines.

## THE REQUIREMENT TO REGISTER

A person or entity that operates a digital asset exchange must be registered as an RMO under section 34 of the CMSA and the Guidelines. A digital asset exchange operator ("DAX Operator") is an RMO who operates an electronic platform which facilitates the trading of a digital asset ("DAX Exchange"). A digital asset refers collectively to a digital currency or digital token, each as defined in the Prescription Order (collectively "Digital Asset").

## CRITERIA FOR REGISTRATION

An applicant to be a DAX Operator must be incorporated in Malaysia and have a minimum paid-up capital of RM5 million. The applicant must, among other criteria, satisfy the SC that: (i) it is able to operate an orderly, fair and transparent market in relation to the securities or derivatives that are traded through its platform; (ii) it and its directors, chief executive, controller and certain senior management staff are fit and proper persons taking into account the factors set out in paragraph 3.01(f) of the Guidelines; and (iii) its business model has a clear or unique value proposition or will contribute to the overall development of the Malaysian capital market.

The applicant must also satisfy the SC that the rules of the market it seeks to operate make satisfactory provision to: (i) protect investors and public interest; (ii) promote fairness and transparency; (iii) manage conflicts of interest; (iv) promote fair treatment of its users; (v) ensure proper regulation and supervision of its users or any person using and accessing its platform (including taking appropriate action against a person who breaches its rules). The applicant must have appropriate security arrangements, including maintaining a secured environment pursuant to the Guidelines on Management of Cyber Risk and other relevant guidelines.

The SC may impose terms and conditions in its approval for the registration of a DAX Operator, and may, at any time vary, add to or remove any term and condition. It may also issue directions to the DAX Operator, its board, controller or any other person with regard to the matters set out in paragraphs 5.02 (e.g. conduct of business or operations, fees payable, record keeping etc.) and 5.03 (removal of director or chief executive) of the Guidelines.

## ONGOING OBLIGATIONS

*Obligations of a DAX Operator*

A DAX Operator must, among others: (i) monitor and ensure compliance with its rules; (ii) ensure fair treatment of its users; (iii) obtain and retain self-declared risk acknowledgment forms from its users before they invest in the DAX Exchange; (iv) ensure that all fees and charges payable are fair, reasonable and transparent; (v) refrain from engaging in any deceitful, oppressive or improper practices or practices that discredit its method of conducting business; and (vi) have appropriate processes to monitor anti-money laundering and terrorism financing requirements.

In relation to its DAX Exchange, a DAX Operator must: (i) ensure that its DAX Exchange is operating in an orderly, fair and transparent manner; (ii) have in place rules and procedures for the trading, clearing and settlement of Digital Assets traded on its DAX Exchange; and (iii) conduct real-time market surveillance.

*Obligations of the Board*

The Guidelines also impose specific obligations on the board of a DAX Operator. The board must, among others: (i) ensure that the DAX Operator complies with all relevant requirements under the Guidelines and any direction issued or term or condition imposed by the SC; (ii) identify and manage risks associated with the business and operations of the DAX Operator, including having a business continuity plan; (iii) establish and maintain policies and procedures to (a) manage actual and potential conflicts of interest; and (b) monitor trading and other market activity to detect non-compliance with securities laws or the rules of the DAX Exchange.

The board must also immediately notify the SC: (i) of any irregularity or breach of any provision of the securities laws, the Guidelines or the rules of the DAX Exchange or suspected violation by its participants of money laundering and terrorism financing laws or guidelines; or (ii) if it becomes aware of any matter which adversely affects or is likely to adversely affect the ability of the DAX Operator to meet its obligations or to carry out its functions under the Guidelines.

*Rules of the DAX Operator*

A DAX Operator must submit to the SC, any proposed rules or

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any proposed amendments to existing rules. The SC may at any time, direct a DAX Operator to vary or amend any rule submitted.

*Requirements Relating to Directors*

A DAX Operator must notify the SC in writing of any appointment or reappointment of a director, within the time specified by the SC or prior to any public announcement on the appointment or reappointment of a director, whichever is earlier. It must also ensure that any member of its board vacates his office immediately if such member becomes subject to any disqualification or becomes otherwise unfit to hold office and immediately notify the SC of the disqualification and when the position is vacated. A DAX Operator which is a public company must have at least one independent director.

*Responsible person*

A DAX Operator must have at least one responsible person who must be a chief executive or a person who is primarily responsible for the operations and financial management of the DAX Operator. The responsible person is to be the main contact for liaising with the SC and to perform any duty as may be directed by the SC.

*Reporting Requirements*

A DAX Operator must submit to the SC: (i) an annual compliance report to demonstrate its compliance with any conditions imposed by the SC pursuant to the registration of the DAX Operator and the CMSA; and (ii) its latest audited financial statements within three months after the close of each financial year or such period as the SC may allow.

*Managing Conflicts of Interest*

The DAX Operator's framework relating to conflict of interest must, among others, include policies and procedures relating to: (i) proprietary trading by the DAX Operator on its DAX Exchange; (ii) trading in Digital Assets by its officers and employees on its DAX Exchange or other platforms; (iii) the management of non-public material information; and (iv) the offering of any Digital Assets to be traded on its DAX Exchange.

*Risk Management*

A DAX Operator should identify the possible sources of operational risk and mitigate their impact through the use of appropriate systems, policies, procedures and controls. The Guidelines also require the systems to have a high degree of security, operational reliability and adequate capacity.

A DAX Operator's business continuity plan must: (i) address events that pose a significant risk of disruption to its operations; (ii) incorporate the use of a secondary site and be designed to ensure that critical information systems can resume operations within reasonable recovery time objectives following the occurrence of a disruptive event.

*Trading of Digital Assets*

All Digital Assets, including digital tokens, must be approved for trading by the SC before they can be traded on a DAX Exchange. The information to be provided to the SC is set out in paragraph 15.16 of the Guidelines.

*Internal Audit*

A DAX Operator is required to establish an internal audit framework that commensurate with its business and operations.

*Market Integrity Provisions*

To ensure the integrity of the operations of a DAX Exchange, a DAX Operator must comply with the requirements specified in the Guidelines in relation to its trading operations, market transparency and the protection of client's assets.

*Outsourcing*

While outsourcing is permitted, the board of a DAX Operator remains accountable for all outsourced obligations. The board is required to establish effective policies and procedures for its outsourcing arrangements, including having a framework to monitor service delivery and performance reliability of the service provider.

A DAX Operator must ensure that the service provider has adequate policies and procedures to monitor the conduct of any appointed sub-contractor, including performing an assessment on a service provider periodically. The DAX Operator must notify the SC of any adverse development arising in relation to any outsourced function that could significantly affect the DAX Operator within two weeks from the occurrence of the event.

A DAX Operator is also required to procure a letter from a service provider or sub-contractor undertaking to give the SC access to all information, records and documents relating to material outsourced arrangements.

*Prohibition of Financial Assistance*

The Guidelines prohibit a DAX Operator from providing direct or indirect financial assistance to investors, including its officers and employees, for investing or trading in Digital Assets on its DAX Exchange.

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# LICENCE TO DEFAME – A STRETCH TOO FAR?

## Oommen Koshy and Kwan Will Sen examine the Federal Court's decision on the republication of the contents of a police report

The Federal Court in *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 ("Lee Yoke Yam") had, in November 2012, held that statements made in a police report pursuant to Section 107 of the Criminal Procedure Code attract absolute privilege as a defence to defamation claims. This was a landmark decision, which introduced a new category of absolute privilege to the existing ones, namely that of parliamentary proceedings and judicial proceedings.

Thereafter, in August 2017, the Federal Court in *Dato' Dr Low Bin Tick v Datuk Chong Tho Chin and other appeals* [2017] 5 MLJ 413 ("Low Bin Tick") extended the principles in *Lee Yoke Yam*. The Court held that absolute privilege also applies to statements in reports or letters of complaints made to the Registrar of Societies ("ROS"), Anti-Corruption Agency (now the Malaysian Anti-Corruption Commission) ("MACC") and the Commercial Crime Division ("CCD") of the police force.

> **"the extension of absolute privilege is viewed with the most jealous suspicion and resisted unless its necessity is demonstrated"**

Most recently, in January 2019, the Federal Court in *Noor Azman bin Azemi v Zahida binti Mohamed Rafik* [2019] 3 CLJ 295 ("Noor Azman") had the occasion to consider the following question of law:

*"Whether the publication of the contents of a police report by its maker to the public at large is protected by absolute privilege having regard to the decisions in Lee Yoke Yam v Chin Keat Seng [2013] 1 MLJ 145, Taylor v Serious Fraud Office [1998] 4 All ER 801 and Darker v Chief Constable of the West Midlands Police [2000] 4 All ER 193?"*

This article discusses the *Noor Azman* decision, where the Federal Court curtailed a further extension of the principles in *Lee Yoke Yam* to a republication of contents of a police report by its maker to the public at large. The Court held that this is not protected by absolute privilege.

### BACKGROUND FACTS

*The Facts*

The case concerns a police report lodged by the Defendant/ Respondent (an actress) against the Plaintiff/Appellant (a former driver of the Defendant). In the police report, the Defendant alleged that the Plaintiff had run off with the Defendant's money amounting to RM200,000. These words were plainly defamatory of the Plaintiff, and the literal and ordinary meaning of which, meant that the Plaintiff is a criminal and untrustworthy.

After making the police report, the Defendant was approached by reporters who were waiting for her outside the police station. The Defendant informed them that she had lodged a police report against the Plaintiff, where she repeated the contents of the report to the reporters.

This then led to an article in *Harian Metro*, entitled '*Zahidah Rafik Terkedu*' (i.e. '*Zahidah Rafik Speechless*') on 3 March 2012, the subject matter of the defamation suit, which the Plaintiff contended, contains defamatory statements against him. The Plaintiff sued the Defendant.

*The High Court Decision*

The High Court allowed the Plaintiff's claim for defamation. The High Court found that the natural and ordinary meaning of the impugned words, in their natural and ordinary meaning meant or were understood to mean that the Plaintiff is *"someone who is not honest; is a thief; is someone who cannot be trusted; is a criminal; is someone who is dishonest; is someone who does not have a good reputation; is someone who has no moral."* The High Court held, amongst others, that the impugned words are not covered by absolute privilege.

> **"The Court had to strike an appropriate balance between freedom of expression and the protection of reputation."**

*The Court of Appeal Decision*

The Court of Appeal overturned the High Court's decision. In doing so, the Court of Appeal held that the impugned words in the article were in fact nothing more than a regurgitation of the words in the police report. The police report was republished in the impugned article.

The Court of Appeal was of the view that the High Court had erred in holding that the defence of absolute privilege was not available to the Defendant. The publication of the alleged defamatory contents of the police report in *Harian Metro* attracts the same privilege in an ancillary manner and thus would enjoy the protection of absolute privilege.

### NO ABSOLUTE PRIVILEGE FOR SUBSEQUENT PUBLICATION

The Federal Court answered the question of law set out above in the negative for the reasons elaborated below.

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*General Rule*

As a general rule, the Court observed that the defence of absolute privilege is in principle inconsistent with the rule of law. Any such protection should not be given any wider meaning than is absolutely necessary in the interests of the administration of justice. In this regard, the general rule is that the extension of absolute privilege is viewed with the most jealous suspicion and resisted unless its necessity is demonstrated.

*No Authorities to Support Contention of Ancillary Privilege*

The Defendant argued that the republication of the contents of a police report by its maker to the public at large is protected by ancillary privilege, extended from the absolute privilege of the police report. The Defendant relied on *Lee Yoke Yam, Low Bin Tick, Tan Sri Dato' Seri Hj Hassan v Dato' Seri Anwar Ibrahim* [2010] 8 CLJ 239 ("Dato' Seri Hj Hassan"), and *Sharifuddin Mohamed & Anor v Dato' Anas Khatib Jaafar & Another Appeal* [2016] 3 CLJ 574 ("Sharifuddin").

First, the Federal Court noted that the decision in *Lee Yoke Yam* did not deal with the subsequent publication of defamatory statements contained in a police report by its maker to the public at large. Further, it held that the Court of Appeal should not have relied on *Dato' Seri Hj Hassan* and *Sharifuddin*. The Federal Court took the view that the Court of Appeal in *Sharifuddin* "*fell into serious error when it erroneously relied on [Lee Yoke Yam and Dato' Seri Hj Hassan] to hold that the subsequent publication of the … report, is an absolutely privileged document, which would enjoy the same protection of ancillary absolute privilege*".

As for *Dato' Seri Hj Hassan*, the Federal Court observed that "*upon closer reading, there is nothing … which is capable of being read or support the proposition … that a subsequent publication of it also enjoys the protection of absolute privilege in an ancillary manner*".

Nevertheless, the Federal Court referred to the English case of *Taylor v Serious Fraud Office* [1998] 4 All ER 801 and held that absolute privilege is accorded to subsequent publication or the use of the contents of a police report in judicial or quasi-judicial proceedings – these are the only two exceptions to republication.

*Public Policy*

The learned judge, Azahar bin Mohamed, FCJ then considered the question of law put to it from the public policy aspect.

His Lordship was of the view that there is no valid reason of public policy as to why the maker of a police report should be free from accountability by way of defamation action to publish the defamatory words contained in the police report to the world at large. The right of the maker of the police report to speak and write freely to the public at large cannot override an individual's interest in protecting his reputation. Absolute privilege, must at some point, give way to protection against reputational damage. The Court had to strike an appropriate balance between freedom of expression and the protection of reputation.

In this regard, the Court chose not to extend the ambit of absolute privilege unnecessarily, particularly where to "*hold otherwise would result in persons irresponsibly slandering others with impunity.*"

It follows that subsequent publication of a police report by its maker to the public at large is not protected by absolute privilege, save where the contents of the police report were made in or in connection with judicial or quasi-judicial proceedings.

Although the Federal Court set limits on the right of the maker of a police report to republish the report to the public at large, it declined to interfere with the Court of Appeal's decision as the Plaintiff had failed to show that a serious miscarriage of justice had occurred to warrant intervention by the apex court.

## CONCLUSION

The Federal Court's decision is welcomed, as it sets clear parameters on absolute privilege vis-à-vis statements made in police reports.

Although the Federal Court's decision relates to ancillary privilege or republication vis-à-vis a police report, it is likely that the republication by the maker of reports or complaints made to other enforcement agencies (such as the ROS, MACC and CCD) as in the case of *Low Bin Tick*, would likewise not be protected by ancillary absolute privilege.

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Editor's Note:

A commentary on *Lee Yoke Yam* was published in Legal Insights 1/2013 under the title "Licence to Defame?" and on *Low Bin Tick* was published in Legal Insights 3/2017 under the title "Licence to Defame – The Sequel?"

# IS CASH STILL KING?

Lee Ai Hsian discusses the electronic money system in Malaysia

"*Cash is king*", or so the old adage goes.

With the advent of digital payment services and the two biggest electronic payment providers, Alibaba and WeChat, making their mark in Malaysia - could this be the end of cash? In this article, we take a closer look at electronic monies, its governing laws and how Malaysian consumers are protected under our existing legislation.

## ISSUANCE OF ELECTRONIC MONIES

Payment instruments in Malaysia are governed by the Financial Services Act 2013 ("FSA"). The issuance of a "*designated payment instrument*" requires the prior approval of Bank Negara Malaysia ("BNM"). Under the Financial Services (Designated Payment Instruments) Order 2013, the following instruments have been prescribed as "designated payment instruments": (a) charge cards; (b) credit cards; (c) debit cards; and (d) electronic money.

Under the FSA, "*electronic money*" is defined as "*any payment instrument, whether tangible or intangible, that:*

*(1) stores funds electronically in exchange of funds paid to the issuer; and*
*(2) is able to be used as a means of making payment to any person other than the issuer.*"

> **"The issuance of a "designated payment instrument" requires the prior approval of Bank Negara Malaysia"**

One of the most recognisable form of electronic money ("e-money") in Malaysia is the *Touch 'n Go* card which can be used for transit-related services and at selected merchants.

## WHAT IS AN 'ELECTRONIC WALLET'?

The advance in technology and the affordability of mobile devices in recent years have seen the introduction of mobile electronic wallets which now allow consumers to also use their smartphones as wallets.

An electronic wallet ("e-wallet"), or sometimes also referred to as a 'digital wallet', is a digital account that stores funds electronically in order to make payments. An e-wallet will generally need to be linked to an individual's bank account or credit/debit card so that a 'top-up' of funds can be made into his e-wallet to purchase goods and/or services from a merchant. An e-wallet essentially operates in the same way as a debit card, and once funded, can be used as an instrument of payment.

With the introduction of Quick Response ("QR") code payments for mobile e-wallets, the e-wallets of today can now not only be used for online transactions but also at physical retail outlets through the use of mobile devices fitted with scannable QR codes to facilitate such transactions.

## MOBILE PAYMENTS AND QR CODES

China is leading the way to becoming a cashless society in which hundreds of millions of shoppers are increasingly using their smartphones to buy everything from designer handbags to street snacks. It has been reported in Beijing that even beggars are now soliciting for alms using QR codes and e-wallets, and that bridesmaids are wearing QR codes around their necks to collect gifts of money for the bride and groom (and reportedly upsetting the groom's mother with the unorthodox behaviour!). At the heart of the country's digital payments boom are QR codes which are essentially two-dimensional images made up of a series of black and white squares.

> **"An electronic wallet ... is a digital account that stores funds electronically in order to make payments"**

Digital payments using mobile e-wallets are processed by scanning QR codes at the point of sale with the use of a QR scanner and smartphone with a built-in camera. Depending on the merchant or nature of business, there are generally two different methods for a merchant to accept QR code payments:

(a) **Static QR codes**: During payment, a consumer will need to scan the merchant's business' unique QR code (printed or generated from that merchant's smartphone or mobile payment app) and enter the relevant amount payable.

(b) **Dynamic QR codes**: For every sale transaction, a dynamic QR code will be generated by the merchant which is tied to the amount of that transaction. This QR code will be scanned by the consumer using his mobile phone and the equivalent amount will be deducted from the funds in his mobile e-wallet.

QR codes are generated instantaneously and a transaction is completed within seconds once a consumer inputs his PIN or verification code within the app in his mobile device.

## HOW SAFE ARE E-WALLETS?

Because QR codes appear to be so simple and accessible, they are vulnerable to scammers who may try to trick users into scanning ones that may have pre-installed viruses designed to steal money or personal information. As a consumer, one would

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ask as such, "*How safe are e-wallets*?"

Consumers can take comfort that there are adequate laws and security measures in place in Malaysia to safeguard their e-wallet funds. Pursuant to the Guideline on Electronic Money ("E-Money Guidelines") issued by BNM, e-money issuers are required to comply with specific operational, security and risk standards when operating their e-money schemes to safeguard the integrity of their systems, data and records.

Issuers of e-money in Malaysia can be divided into two categories, namely:

(a) **Large e-money scheme issuers** – these are issuers with a purse limit exceeding RM200 or outstanding e-money liabilities for six consecutive months amounting to RM1 million or more; and

(b) **Small e-money scheme issuers** – these are issuers with a purse limit not exceeding RM200 and outstanding e-money liabilities of less than RM1 million.

Under the Financial Services (Minimum Amount of Capital Funds) (Approved Person) Order 2013, large e-money scheme issuers are required to maintain minimum capital funds of RM5 million or 8% of its outstanding electronic money liabilities, whichever is higher. Small e-money scheme issuers are subject to a minimum capital funds requirement of RM100,000.

Large e-money scheme issuers, specifically, are also required under the E-Money Guidelines to deposit all funds collected in exchange of the e-money issued in a trust account with a licensed institution in Malaysia. This trust account must be established in accordance with the Trustee Act 1949 and a copy of the trust deed must be submitted to BNM. The funds in the trust account are to be used only for refunds to users and payments to merchants.

Investment of such funds are permitted under the E-Money Guidelines. However, this is limited to only high quality liquid ringgit assets such as deposits with licensed institutions, debt securities issued or guaranteed by the Government and BNM, Cagamas debt securities, and other instruments specified by BNM.

For small e-money scheme issuers, BNM requires such issuers to place the funds collected in deposit accounts with licensed institutions, separate from their other accounts, and for such account to be managed in a manner akin to a trust account arrangement. Funds held by small e-money scheme issuers may only be invested as bank deposits.

The requirement for e-money issuers to establish trust arrangements in respect of funds collected in exchange of the e-money issued serves to protect the consumers' e-wallet funds in the event an issuer becomes insolvent.

Apart from the specific requirements stipulated in the FSA and E-Money Guidelines, an approval issued by BNM may also be subject to conditions, for example:

(a) the imposition of a maximum prescribed limit for e-wallets and daily transactions by a user;

(b) the prior approval by BNM's Consumer and Market Conduct Department of any proposed fees and charges and the terms and conditions of the e-money scheme;

(c) the submission of monthly statistics on the operation of the e-money business;

(d) the maintenance of a prescribed liquidity ratio;

(e) the requirement to store sensitive customer information in Malaysia and not offshore;

(f) the maintenance of a secure QR and bar code security setup; and

(g) the restriction for all transactions and transfers to be conducted within Malaysia.

E-money issuers are also subject to anti-money laundering laws of Malaysia and are required to adhere to the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 of Malaysia and the relevant regulations and guidelines – these include reporting obligations, customer due diligence and record-keeping requirements.

## CONCLUSION

The adoption of electronic payments and mobile banking have seen an exponential rise in Malaysia in recent years. According to BNM's Quarterly Bulletin (Second Quarter 2018), financial transactions via mobile banking have increased at a compounded annual growth rate of 91% over the past seven years, recording a total of 106.1 million transactions valued at RM48.3 billion in 2017 (2011: 2.2 million transactions; RM0.9 billion). The number of subscribers to mobile payment services offered by non-banks have also more than quadrupled from 0.8 million subscribers in 2017 to 3.4 million subscribers as at end-June 2018. And in the first half of 2018 alone, mobile payment transactions processed by non-bank e-money issuers stood at 7.2 million transactions (valued at RM404.7 million), which is more than seven times

*continued on page 22*

# SOMEWHERE OVER THE (FIDIC) RAINBOW

Richard Khoo and Rachel Chiah highlight some amendments in the latest FIDIC contracts

In December 2017, the International Federation of Consulting Engineers ("FIDIC") launched the second edition of their Red Book (Conditions of Contract for Construction), Yellow Book (Conditions of Contract for Plant and Design-Build), and Silver Book (Conditions of Contract for EPC/Turnkey Projects) (collectively "2017 Edition"). Forming part of FIDIC's "*Rainbow Suite*" of standard form contracts, the Red, Yellow, and Silver Books are an established presence in the international construction and engineering industry and the 2017 Edition was a much-anticipated update to the first edition of these contracts ("1999 Edition").

This article provides an overview of several key changes in the 2017 Edition. Capitalised terms used shall have the meaning assigned to them in the 2017 Edition, unless defined otherwise.

## THE POT OF GOLDEN PRINCIPLES

FIDIC contracts are intended to be fair and balanced in nature. In practice, this is not always the case. Parties often amend the general terms of the FIDIC Contracts for purposes of their respective projects, sometimes even to the extent that a contract may become overly onerous on one party. At FIDIC's International Contract Users Conference 2017, FIDIC emphasised the importance of parties maintaining the fundamental characteristics of their contracts. In this regard, they recommend that parties take into consideration the following Five Golden Principles during the drafting and negotiation stages of a project:

> "FIDIC contracts are intended to be fair and balanced in nature"

(1) the duties, rights, obligations, roles and responsibilities of all the parties to the contract must be generally as implied in the General Conditions, and appropriate to the requirements of the project;
(2) the Particular Conditions must be drafted clearly and unambiguous;
(3) the Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions;
(4) all time periods specified in the contract for parties to the contract to perform their obligations must be of reasonable duration; and
(5) all formal disputes must be referred to a Dispute Avoidance/Adjudication Board for a provisionally binding decision as a condition precedent to arbitration.

The abovementioned principles, which are included in the Guidance section of the 2017 Edition, are intended to guide parties towards a fair and balanced contract. It is pertinent to note, however, that the Five Golden Principles are not expressly incorporated in the 2017 Edition. As mere guidance, these principles may carry little weight, if any, when pitted against the commercial considerations of the parties or specific project requirements.

## IMPROVED FORM AND STRUCTURE

Aside from the contents of their contracts, FIDIC has also updated the form and structure thereof in the 2017 Edition.

While the contract still comprises the Contract Agreement, the General Conditions, and the Particular Conditions, there are changes in these documents which make the task of referencing easier. For one, definitions are now listed in alphabetical order rather than by topic. In addition, the Sub-Clauses now contain subheadings and divisions, which is a welcome change from the multiple unnumbered paragraphs used in the 1999 Edition.

## FITNESS FOR PURPOSE

In the Yellow and Silver Books, the Contractor undertakes design responsibility for the works. Part of his obligations thereunder is to ensure that the works are fit for purpose. While this obligation to ensure fitness for purpose is retained in the 2017 Edition, it has been modified. It is expressly provided that the purpose will be as stated in the Employer's Requirements. This differs from the more general provision in the 1999 Edition, which stated that the purpose was as defined in the contract. The Employer can therefore no longer rely on the argument that the purpose can be derived from the contract in its entirety.

> "FIDIC has included more grounds for termination of the contract"

At the same time, the Contractor is not released from his obligation to ensure fitness for purpose simply because the Employer did not state the purpose of the works in the Employer's Requirements – Sub-Clause 4.1 states that even if no purpose is defined or described in the Employer's Requirements, the works should still be fit for their ordinary purpose. This illustrates FIDIC's intention for their contracts to have a balanced risk allocation between the parties.

The 2017 Edition also expands on the Contractor's design responsibility in that he now indemnifies the Employer against all acts, errors, or omissions in the performance of his design obligations which result in the works not being fit for purpose. Such an indemnity was absent in the 1999 Edition. Contractors are likely to be displeased with the introduction of this new indemnity on their part. However, the blow is somewhat softened by Sub-Clause 1.15, which operates to exclude liability for indirect or consequential losses as well as to limit the liability of the Contractor under this indemnity to the agreed cap in the contract.

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## A DETAILED CLAIMS PROCEDURE

Claims are an inevitable occurrence in the development of a project. As a result, construction and engineering contracts typically contain a claims procedure which imposes obligations on the parties. It is unsurprising that FIDIC's update for the 2017 Edition extended to the making of Claims under the contract.

Firstly, both the Employer's Claims and the Contractor's Claims are housed together in the same Sub-Clause. This differs from the 1999 Edition, which provided for both separately. More significantly, the 2017 Edition distinguishes claims for money and/or time from other claims. Such a distinction between Claims is an important one. Claims for money and/or time are subject to the detailed and rather lengthy procedure described in Sub-Clause 20.2. This includes provisions on the documents required to be submitted to the Engineer by the claiming party, specified time frames for the parties' performance of their respective obligations, and specified time frames for the Engineer's performance of his obligations in his role as the contract administrator. In contrast, other claims are determined by the Engineer in accordance with Sub-Clause 3.7, which is a simpler process.

> "FIDIC's update for the 2017 Edition extended to the making of Claims under the contract"

Further, for the Claims procedure under Sub-Clause 20.2, parties have to exercise great care with regard to the time frame within which they are to perform an obligation, particularly in respect of the giving of Notices to each other. In the event a party fails to submit a Notice to the other within the stipulated number of days, it loses its entitlement to make the relevant Claim. Moreover, there are deeming provisions – for instance, if the claiming party fails to submit a statement of the basis of its Claim, which is one of the documents specified as required, its Notice of Claim will be deemed to have lapsed and therefore becomes invalid.

The more comprehensive Claims procedure in the 2017 Edition is reflective of FIDIC's aim to increase clarity and certainty in order to achieve better project management. The success of this, however, very much depends on all parties involved performing their respective obligations satisfactorily and complying with the different time frames.

## ADDITIONAL GROUNDS FOR TERMINATION

FIDIC has included more grounds for termination of the contract in the 2017 Edition. This is briefly discussed below:

(1) failure to comply with a final and binding Engineer's determination, and such failure constitutes a material breach of contract;
(2) failure to comply with a decision of the Dispute Avoidance/Adjudication Board, and such failure constitutes a material breach of contract;
(3) the cap on Delay Damages has been exceeded; and
(4) a party has been found, based on reasonable evidence, to have engaged in corrupt, fraudulent, collusive or coercive practice in relation to the contract.

The inclusion of the failure to comply with the Engineer's determination or a decision of the Dispute Avoidance/Adjudication Board as additional grounds for termination is evidence of FIDIC's emphasis on the importance of project management mechanisms in resolving, at an early stage, issues that may give rise to a dispute. However, including the failure to comply with a decision of the Dispute Avoidance/Adjudication Board as grounds for termination hinges on the said board being established in the first place. While FIDIC has long encouraged parties to maintain the provisions on the Dispute Avoidance/Adjudication Board, in practice these provisions are often removed from the contract. The envisaged costs involved in establishing the Dispute Avoidance/Adjudication Board, as well as doubts about the binding effect of the decisions of this purely contractual creature, have made it an unpopular choice in many markets, including Malaysia.

Aside from the above, the contract may also be terminated if a party has been found by the other to have engaged in corrupt or fraudulent behaviour. It is common for such a provision to be inserted by the parties themselves in the Particular Conditions, particularly for projects involving the government or government-linked companies. Certain standard form construction contracts, such as the Malaysian Public Works Department standard forms, have already incorporated this provision. This inclusion by FIDIC therefore appears to be an update based on market practice.

## CONCLUSION

Taken as a whole, the 2017 Edition appears to be a step towards more effective project management and efficient resolution of issues that may give rise to a dispute. However, at FIDIC's International Contract Users Conference 2017, several lawyers took the view that the detailed procedures and requirements in the 2017 Edition could make for a dispute minefield. It will be interesting to see whether FIDIC's hard work pays off, or if the devil truly is in the details.

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# BEYOND SIGHT: MAXIMISE YOUR SENSES

## An overview of non-traditional trade marks by Sri Komathy and Loke Sin Wei

Corporations around the world strive to implement unique business strategies to set themselves apart from their competitors. One such strategy is the development of brand loyalty where trade marks are seen as instruments for recognition. Trade marks that have established reputation and goodwill are valuable, and sometimes even invaluable. Hence, it is not surprising that owners of these marks will go to great lengths to protect the same. Generally, businesses utilise traditional marks such as words, logos, or even taglines, which are capable of protection in many jurisdictions.

Marketing and advertising strategies are becoming more creative and often go beyond conventional means. Brands now use different forms to be recognisable in the market. Trade indicia other than the traditional marks, for example sounds, scents, tastes, colours, shapes, textures, motion, and holograms, are slowly gaining recognition as trade marks which are capable of protection in various jurisdictions. These indicia are, by and large, referred to as non-traditional marks.

**“ Trade indicia other than the traditional marks ... are slowly gaining recognition as trade marks ”**

Although there is no universal acceptance of non-traditional marks, certain non-traditional marks have been accepted for registration by countries with more developed jurisprudence like the United States of America, Canada, the United Kingdom, and Australia. McDonald’s Corporation’s well-known five-note “*I’m Lovin’ It*” jingle and Metro-Goldwyn-Mayer Studios Inc.’s signature lion roar were both allowed registration in the European Union as sound marks.

The Coca-Cola Company secured registration for its unique contoured bottle as a shape mark in Australia. The United Kingdom accepted Mondelez International, Inc.’s iconic triangle-shaped Toblerone chocolate bar for registration as a shape mark. In Australia, Cadbury (now part of Mondelez) registered the specific purple colour (Pantone 2685C) used on its Dairy Milk chocolate bar packaging and 7-Eleven Inc., the three horizontal stripes in the colours of orange, green, and red. More recently, Hasbro, Inc. succeeded in registering the smell of its Play-Doh modelling clay as a scent mark in the United States.

Other countries, such as China, Japan, and India have also started to recognise and introduce a mechanism to protect non-traditional marks.

### WHY NOT NON-TRADITIONAL MARKS

Presently, Malaysian trade mark laws arguably only cater for the registration of traditional marks. When the Trade Marks Act came into force in the 1970s, it was unlikely that non-traditional marks would be considered capable of protection, particularly due to their rarity. Hence, the current requirements relating to the registrability of trade marks in Malaysia do not appear to accommodate non-traditional marks.

The current statutory registrability requirements would apply to both traditional and non-traditional marks. However, the unique nature and characteristics of non-traditional marks may not meet the conventional requirements presently enforced, which may explain the reluctance of some countries to allow non-traditional marks to be registered. Although each type of non-traditional mark poses different complications for registration, they share three common issues, i.e. definitive representation of the mark, distinctiveness, and functionality limitation.

*Definitive representation of the mark*

As a prerequisite, graphic representation of a trade mark is required for the purposes of substantive examination of registrability and record keeping on the register. The lack of such representation restricts or even worse, disallows the subject matter from being considered for protection altogether.

Due to the intrinsic features of non-traditional marks, there may be uncertainties and ambiguities relating to the representation of such marks and the scope of the monopoly when it comes to enforcement. For instance, a concise description of the sound, smell, or taste may not accurately capture the essential features of a mark, due to inherent limitations of certain languages. Such description may also be affected by the subjective perception and preference of the individual who is defining the mark which could have an impact on the interpretation. In other words, it may be difficult to develop a standardised methodology to represent non-traditional marks and store them for record purposes.

The European Union recently did away with the requirement for graphic representation. It has adopted the criteria of clear and precise representation to determine the subject matter of protection. To this extent, there is no particular method prescribed for the representation of non-traditional marks. An applicant is at liberty to determine the most appropriate manner of presenting a non-traditional mark and may even opt to utilise technology to represent, for example, a sound mark in mp3 format. However, as there is no standardised representation requirement, there is a risk of having multiple standards which may not provide a level playing field for comparisons to be made between non-traditional marks in instances of determining prior rights.

Australia, on the other hand, imposes an additional requirement of providing a concise and accurate description of the trade mark on top of graphic representation but does not accept highly technical information as part of the description. In such cases, description which requires the help of sophisticated technology to be precise may not be used.

Considering the above, intellectual property offices may consider providing guidelines instead of setting out rigid requirements on the manner of representation for each type of non-traditional

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mark together with relevant examples to provide some clarity without imposing stringent restrictions.

*Distinctiveness*

One of the foremost requirements for trade mark registration is the distinctiveness of the mark as a badge of origin. A trade mark needs to be distinctive to serve as an indicator of the proprietor as the source of the goods or services. A mark can be inherently distinctive, or it can acquire distinctiveness through use over time. Marks that are inherently distinctive are capable of identifying the source of the goods or services intrinsically as compared to marks that describe the goods or services in relation to which the marks are used.

To illustrate this, the word mark "KODAK" is an example of an inherently distinctive mark. It is an invented word without a dictionary meaning, and serves to identify the goods and services of the Eastman Kodak Company, that is, the business of digital imaging and photographic materials.

On the other hand, a mark which consists of a word with a dictionary meaning and is descriptive of the goods or services in relation to which the mark is used, is not inherently distinctive. It may, however, acquire distinctiveness through extensive use by which the public would associate the goods or services bearing the mark exclusively with a particular proprietor. An example of a mark that has acquired distinctiveness is "GENERAL MOTORS". Although this mark consists of two words with dictionary meanings, it has acquired distinctiveness as the public have come to associate the mark with the goods and services, namely automobiles and automobile parts, of its proprietor, General Motors Company.

Inherent distinctiveness of a non-traditional mark largely depends on the nature and characteristics of the mark taken together with the goods and services to which it is applied. Some non-traditional marks are considered incapable of being inherently distinctive. Colour marks generally fall into this category as a colour, by itself, may lack the capacity to communicate information on the origin of goods or services without the presence of other features.

Similarly, scent and taste marks which exist in the goods as natural features or characteristics of the goods, cannot be considered inherently distinctive. A scent or taste must be added by the proprietor to identify the goods and be recognised by the public as indicating the trade origin.

In the absence of inherent distinctiveness, substantial evidence of use is generally required to prove that a non-traditional mark has acquired distinctiveness. Establishing acquired distinctiveness of a traditional mark can be an uphill task, and may be even more challenging in the case of a non-traditional mark where records of use may not be easily obtained or maintained. In some jurisdictions, it is also incumbent on the applicant to prove that the mark has acquired distinctiveness across a substantial part of the geographical territory that it covers.

For the purposes of registering and proving the distinctiveness of a particular non-traditional mark, it must be shown that the public associates the non-traditional mark with its proprietor or the proprietor's goods or services, without the aid of other indications or features. For example, the renowned Nokia start-up tune has been successfully registered as a sound mark in some jurisdictions. The tune is highly distinctive of the Nokia Corporation even though it does not have any reference or indication of Nokia. Another example is the light medium robin egg blue colour (Pantone 1837), colloquially known as 'Tiffany Blue', is a protected colour mark in certain jurisdictions. The public are able to associate that particular colour with Tiffany & Co without the presence of any other indication or feature.

*Non-functionality*

A major hurdle that may be peculiar to the registration of non-traditional marks is the requirement that marks should not be functional. A mark is said to be functional if it is essential to the use or purpose of the goods, or if it affects the cost or quality of the goods. This serves to preclude a business from monopolising a useful product feature under the pretext of identifying such functional feature as the source of the goods.

The United States of America has relied on the functionality doctrine in determining the registrability of such marks. In respect of sound marks, for example, the sound of a siren in connection with an ambulance or fire engine and their services is functional for the purpose of alerting the public. This supports public policy arguments opposing the registration of such sound marks.

Scents such as lemon for dishwashing liquids or floral for laundry detergents, which act as masking agents in those goods to conceal the unpleasant odour of the chemicals, are unlikely to serve as identifiers of the source of the goods.

Certain colours, or combination of colours, may be considered functional and hence, cannot be considered as a source identifier especially if it is due to technical results or a particular meaning associated with the colour. For illustration purposes, black colour in respect of solar power collectors is functional as it is associated with the technical result of absorbing heat while red colour has developed a recognised meaning for heat or fire; thus, the use of the colour on items such as thermal products or fire extinguishers is considered functional.

The extension of protection to include non-traditional marks does not alter the basic function of trade marks as source

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# FEDERAL COURT INVALIDATES EXCLUSION OF DAMAGES CLAUSE

Kok Chee Kheong discusses a significant decision on exclusion clauses

On 17 December 2018, the Federal Court in *CIMB Bank Berhad v Anthony Lawrence Bourke and Alison Deborah Essex Bourke* [2019] 2 CLJ 1 held that an exclusion clause in a loan agreement was void and unenforceable as it was an agreement in restraint of legal proceedings under section 29 of the Contracts Act 1950 ('the Act') and was also contrary to public policy.

## BACKGROUND

The Plaintiffs, Anthony Lawrence Bourke and Alison Deborah Essex Bourke, are foreigners residing in the United Kingdom. The Defendant, CIMB Bank Berhad, granted a loan of RM715,487 to the Plaintiffs to finance the purchase of a property in Malaysia pursuant to a loan agreement dated 22 April 2008 ('Loan Agreement'). As the property was under construction, the loan was to be disbursed progressively against certificates of completion issued by the architect.

Under the Loan Agreement, the Defendant was to make direct payment to the developer on behalf of the Plaintiffs when the progressive payments became due for payment. On or around 12 March 2014, the developer sent an invoice and an architect's certificate to the Defendant seeking payment of RM25,557.12. The documents were received by the Defendant on 13 March 2014 and the payment was due on 25 March 2014 ('payment due date').

> **"Clause 12 precludes the Plaintiffs from claiming any loss or damage"**

After receiving the invoice, the disbursement department of the Defendant requested its branch to conduct a site visit to inspect the property. Three months after the payment due date, and despite five internal emails by the Defendant's disbursement department, the branch did not conduct the site visit or respond to the e-mails.

The Defendant did not inform the developer or the Plaintiffs of the requirement for a site visit as a condition to disburse payment. The Defendant also did not request the developer to extend the payment due date in order to conduct the site visit.

After about one year, the sum remained unpaid and the developer terminated the sale and purchase agreement with the Plaintiffs on 10 April 2015.

The Plaintiffs filed a claim against the Defendant seeking damages resulting from the termination of the sale and purchase agreement on grounds of breach of contract and/or negligence and breach of fiduciary duty.

The Plaintiffs' claim was dismissed by the High Court which held that Clause 12 of the Loan Agreement ("Clause 12") absolved the Defendant from any liability to the Plaintiffs. The Plaintiffs' appeal was allowed by the Court of Appeal.

## APPEAL TO THE FEDERAL COURT

Leave was granted to the Defendant to appeal to the Federal Court on two questions of law –

(1) Whether section 29 of the Act may be invoked to strike down and invalidate an exclusion clause which exonerates a contract breaker of liability for a breach of that contract (i.e. exclusion clauses that absolve primary obligations);

(2) Whether section 29 of the Act may be invoked to strike down and invalidate an exclusion clause which negates the contract breaker's liability to pay compensation for non-performance of that contract (i.e. exclusion clauses which absolve general secondary obligations).

> **"Their Lordships also agreed with the Court of Appeal's view that a right cannot be disassociated from its remedy"**

Clause 12 and section 29 which are central to this appeal, read as follows –

<u>Clause 12 of the Loan Agreement</u> -

"Notwithstanding anything to the contrary, in no event will the measure of damages payable by the Bank to the Borrower for any loss or damage incurred by the Borrower include, nor will the Bank be liable for, any amounts for loss of income or profit or savings, or any indirect, incidental consequential exemplary punitive or special damages of the Borrower, even if the Bank had been advised of the possibility of such loss or damages in advance, and all such loss and damages are expressly disclaimed."

<u>Section 29 of the Act</u> -

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extent."

## DECISION OF THE FEDERAL COURT

The Federal Court summarised that the issue for determination by their Lordships is whether Clause 12 offends section 29.

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According to Balia Yusof FCJ who delivered the judgment of the Court, Clause 12 precludes the Plaintiffs from claiming any loss or damage and the Defendant will not be liable for any amount for loss of income or profit or savings, or any indirect, incidental, consequential, exemplary or special damages.

The Court agreed that the Court of Appeal was correct in relying on the Supreme Court decision in *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 CLJ Rep 230 to conclude that Clause 12 was caught by section 29. Their Lordships also agreed with the Court of Appeal's view that a right cannot be disassociated from its remedy. Balia FCJ added that if Clause 12 is allowed, it would be an exercise in futility for the Plaintiffs to file any suit against the Defendant as they would be precluded from claiming the remedies against the Defendant. Clause 12 negates the rights of the Plaintiffs to a suit for damages, and the kinds of damages spelt out in that clause encompasses all forms of damages under a suit for breach of contract or negligence.

The learned judge added that based on the plain meaning of the words used, Clause 12 is an absolute restriction in that whatever the Plaintiffs are claiming has been negated and as such, section 29 of the Act ought to be invoked.

**“ There is patent unfairness and injustice to the Plaintiffs had Clause 12 been allowed ”**

The Federal Court rejected the Defendant's reliance on the Federal Court's decision in *Pacific Bank Berhad (sued as guarantor) v Kerajaan Negeri Sarawak* [2014] 6 MLJ 153. Relying on case authorities on section 28 of the Indian Contracts Act (which is in *pari materia* with section 29 of the Act), the Court in *Pacific Bank* held that section 29 only invalidates agreements which limit the time within which a person has to enforce his rights. It does not invalidate agreements which determine when a right arises or the time when a right will arise. In other words, a distinction must be made between the accrual of a cause of action and the enforcement of a cause of action.

Balia FCJ was of the view that the Federal Court in *Pacific Bank* had not given any consideration to the ratio in *New Zealand Insurance* where the Supreme Court had expressed the view that "*the distinction between a right and a remedy which as a matter of law does not appear to exist in our jurisprudence.*"

The Federal Court then distinguished *Pacific Bank* on the ground that the instant appeal is on the right to enforce rights by the usual legal proceedings under the first limb of section 29 of the Act whereas *Pacific Bank* was in respect of the limitation of time to enforce rights.

The Federal Court then considered, as a separate ground, whether Clause 12 was contrary to public policy. Section 24(e) of the Act provides, *inter alia*, that the consideration or object of an agreement is not lawful if it is opposed to public policy.

The Court first referred to *New Zealand Insurance* where it was stated that –

"*… The primary duty of a Court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts into which the parties have an unfettered right to enter provided they are not opposed to public policy or are not hit by any provision of the law of the land …*"

The Court then referred to *Pollock and Mulla on Indian Contract Act and Specific Relief Act*, 10th Ed. wherein the principle of 'public policy' is described as "*ex dolo malo non oritur actio (i.e. from a fraud a right of action does not arise). Lord Brougham defines public policy as the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare.*"

The Court cited *ABS Laminart Pvt Ltd and Ausher v A.P. Agencies, Salem* [1989] AIR SC 1239 where the Indian Supreme Court held that an agreement to oust absolutely the jurisdiction of the court will be unlawful and void as being against public policy.

Clause 12, said the Judge, may typically be found in most banking agreements. His Lordship added that in reality, the bargaining powers of the parties to the Loan Agreement are different and never equal. In the opinion of the Court, this is an instance which merits the application of the principle of public policy. According to Balia FCJ –

"*There is patent unfairness and injustice to the Plaintiffs had Clause 12 been allowed to deny their claims/rights against the Defendant. It is unconscionable on the part of the bank to seek refuge behind the clause and an abuse of the freedom of contract.*"

The Defendant, relying on a Singapore Court of Appeal case of *CKR Contracts Services Pte Ltd v Asplenuim Land Pte Ltd and another appeal and another matter* [2015] SGCA 24, contended that courts should be careful not to apply illegality and public policy to every contract in which limitations are placed on the rights and remedies of the contracting parties and that contracts

*continued on page 23*

# THE CLASSIFICATION CONUNDRUM

## Nicholas Lai suggests ways to mitigate the risk of an adverse classification of goods by customs

You are a manufacturer in a highly competitive industry. After tirelessly marketing your products to a potential new customer, they finally decided to place a batch of orders with your establishment. It is imperative that you deliver on your promises to the new customer. You impress on your supplier that there can be no delays on delivering the raw materials. The raw materials are packed, loaded and are finally on their way to Malaysia. You receive the usual documentation from your supplier – the commercial invoice, bill of lading, certificate of origin, packing list, *etc*. You forward these documents to your trusted forwarder ahead of time for customs clearance.

Finally, you receive word that the shipment has arrived. But your forwarder also informs that the goods have been declared under the wrong HS Code (see below for definition), requiring payment of additional customs duties and sales tax. You are puzzled as this HS Code has never given problems in previous batches of raw materials. But because you cannot afford a delay, you have no choice but to pay the additional customs duties and sales tax.

Whether you are a manufacturer, a trader, or just simply an importer of goods, this scenario happens all too often. The next step for the importer in question entails undertaking internal appeal processes with the Royal Malaysian Customs Department ("RMCD") on whether the attending customs officer had properly classified the imported goods under the HS Code.

**“ the … ‘HS Code’ … is a common standard worldwide for describing the type of commodity that is shipped ”**

This article does not intend to explore the appeal processes but rather seeks to highlight ways to reduce the risk of a differing HS classification at the point of entry.

### MINIMISING THE RISK

By way of background, the Harmonized Commodity Description and Coding System, 'HS Code' in short, is a common standard worldwide for describing the type of commodity that is shipped. Developed by the World Customs Organisation ("WCO"), the HS Code is adopted by customs authorities throughout the world to differentiate the classification of goods, and the tariffs/customs duties applicable thereto.

In Malaysia, the RMCD is guided by the Customs Duties Order 2017 ("CDO 2017") which sets out over 5,400 HS Codes and the accompanying customs duties. In classifying goods, the CDO 2017 provides that classification is governed by the six General Rules for Interpretation of the Harmonized System under the International Convention on the Harmonized Commodity Description and Coding System, as developed by the WCO. Similarly, for sales tax, the Sales Tax (Rates of Tax) Order 2018 and Sales Tax (Goods Exempted from Tax) Order 2018 are also sorted by HS Codes.

One of the best ways to minimise the risk of a differing HS Code classification is to engage the RMCD prior to importing the goods. We will explore two methods, namely Customs Ruling and Customs Advice on classification.

*Customs Ruling*

Under the Customs Act 1967, the Director General of Customs and Excise ("DG") may upon the application of any person, issue rulings ("Customs Rulings"). Customs Rulings may be issued in respect of (1) classification of goods; (2) principles to be adopted for the purposes of determining the value of goods; or (3) any other matter prescribed by the DG.

**“ A Customs Ruling … is binding … and remains valid for three years ”**

An applicant for a Customs Ruling is required to complete the prescribed form (known as '*Schedule A*'), suggest a HS Code and provide supporting documents (brochures, product catalogue, certificates, safety data sheet, *etc*.) or a product sample to enable the RMCD to conduct its analysis. The applicant is also required to pay the prescribed application fee of RM200.00. Under the Customs (Customs Ruling) Regulations 2007, the RMCD is obliged to provide a ruling within 90 days from receipt of a complete Customs Ruling application, or in a case where an analysis report is required for the good, 60 days from the receipt by the DG of the report.

A Customs Ruling issued by the DG is binding on the RMCD and the applicant, and remains valid for three years. Before the expiry of the 3–year period, the applicant may apply to extend the Customs Ruling for a further two years.

The RMCD division that handles Customs Ruling applications is the Technical Services Division located in the RMCD Headquarters in Putrajaya. A Customs Ruling application may also be submitted via the RMCD Regional/State branches.

*Customs Advice*

Alternatively, an applicant may seek a Customs Advice on the classification of a good. Similar to Customs Rulings, an applicant would complete a prescribed form (known as '*Lampiran B*') and provide supporting documents for the RMCD to provide its advice on the HS Code classification. Unlike Customs Rulings, however, the advice is non-binding and is limited to products or

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goods which have been classified by the RMCD Headquarters, the RMCD State Classification unit or the WCO. The analysis that forms the basis of a Customs Advice tends to be less robust as compared to a Customs Ruling on classification.

An application for a Customs Advice is submitted to the RMCD State branch, under the classification unit ("State Classification unit"). Upon submission of a complete application, the State Classification unit will issue an advice in 30 days.

## THE CONUNDRUM: RULING vs ADVICE

Herein lies the conundrum - there are risks in both a Customs Ruling and a Customs Advice. For Customs Advice, the risk is that it is non-binding. The attending officer at the port may not agree with the advice issued by the State Classification unit. While Customs Rulings are binding and provide greater certainty when it comes to importing goods, there is a risk that the RMCD assigns a HS Code which the applicant does not agree with. In these circumstances, the applicant is bound by the ruling for three years. There are appeal processes available, but unless the applicant has compelling technical evidence to the contrary, it is likely that the appeal forum will agree with the initial ruling.

The RMCD appears to takes a 'literal' approach in reviewing the materials provided to arrive at a HS classification for a Customs Ruling. A workshop conducted by the RMCD on classification considered a case study on classifying a Japanese-make 'double cab' pickup truck ("the Pickup"). Typical pickup trucks are classified under HS Code 87.04 "*Motor vehicles for the transport of goods*". In this instance however, the Pickup has a double cabin for passengers, it could be argued that the Pickup can also be classified under HS Code 87.03 "*Motor cars and other motor vehicles principally designed for the transport of persons...*". The classification is critical as a pickup vehicle classified under HS Code 87.04 would attract 30% import duties whereas one that is classified under HS Code 87.03 would only attract 10% import duties. Hence, whether the Pickup is classified under HS Code 87.03 or HS Code 87.04 could have a significant financial impact on the importer, especially if the Pickup is imported in large quantities.

This is how the RMCD arrived at a classification:

(1) It identified from the specifications that the Pickup's payload is 1,060kg;

(2) Payload was defined as maximum cargo load and passenger weight;

(3) It then identified the average male weight as 87kg (basis unspecified);

(4) The total passenger weight is approximately 435kg (87kg x 5 passengers);

(5) The cargo load is therefore 625kg (Payload of 1,060kg minus total passenger weight of 435kg);

(6) As cargo load (625kg) exceeds the total passenger weight (435kg), the Pickup would be classified under HS Code 87.04 "*Motor vehicles for the transport of goods*". Hence the RMCD concluded in this instance that 30% import duties are payable.

This case study illustrates the method and 'literal' approach adopted by the RMCD in classifying goods. There is always a risk that the RMCD's method and approach differ from what the applicant has in mind.

## TO APPLY OR NOT APPLY?

Between having a Customs Advice and no documents/feedback from the RMCD, it is better to have a Customs Advice from the State Classification unit. A Customs Advice is free and there is no risk should the Customs Advice result in a different HS Code. At least the Customs Advice serves as an indicator of the HS Code which the RMCD may apply. If the Customs Advice is favourable, a copy of the advice could be sent to the forwarders for reference and may ease the goods clearing process.

If the applicant's objective is to obtain a legally binding decision, it should apply for a Customs Ruling. Given that such a ruling is valid for three years, it would be prudent for the applicant to seek advice from lawyers or consultants familiar with the classification process on the prospects of its case before submitting an application, especially where the Customs Ruling would have a long term impact on the applicant's business.

The customs classification conundrum is here to stay. Under the Goods and Services Tax ("GST") regime, the classification conundrum was confined to customs duties under the CDO 2017. With the repeal of the Goods and Services Tax Act 2014, and the reintroduction of the Sales Tax Act 2018 in September 2018, we expect to see the classification conundrum return to impact goods the same way that it did prior to the introduction of GST.

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# FLYING ON COURSE TO A BETTER CONSUMER EXPERIENCE

## A review of the directive on the quality of service framework by Shannon Rajan

The much-anticipated Directive on the Implementation of the Quality of Service Framework at KLIA and KL International Airport 2 ("Directive") came into operation in two stages and is now fully in force. The Directive was developed by the Malaysian Aviation Commission ("Commission") to improve passenger comfort at airports, to ensure that aerodrome operators gave priority to consumer service levels and to facilitate better airport user experience for airlines, ground-handling operators and other users of airports in Malaysia.

The Directive only applies to the nation's two main international airports, namely KLIA and klia2, because of the resource constraints faced by the Commission. However, it is expected that similar requirements will be extended to the remaining airports operated by Malaysia Airports Holdings Berhad ("MAHB"), Senai Airport Terminal Services Sdn Bhd, Sanzbury Stead Sdn Bhd and Tanjung Manis Development Sdn Bhd progressively until the end of 2019.

### THE AIRPORT QUALITY OF SERVICE FRAMEWORK

The Directive consists of five components, namely: (a) service quality category; (b) service quality element; (c) measurement mechanism; (d) target; and (e) revenue at risk.

There are three service quality categories, which are passenger comfort and facilities, operator and staff facilities and passenger flow. Within each of these service quality categories, there are service quality elements which are to be measured in a clear and precise manner on a monthly basis *via* specific measurement mechanisms. The aerodrome operator must achieve the stipulated target allocated to each service quality element, failing which the Commission ***may*** impose a financial penalty on the aerodrome operator based on the percentage of the revenue risk assigned to each service quality element. It appears that the Commission has a discretion as to whether it wants to impose a financial penalty for non-compliance with the standards under the Directive.

The quality of service framework is set out in Schedule 1 and the summary thereof is reproduced in the Table on page 21.

### THE COMPUTATION OF PENALTIES

If there is non-compliance with the Directive, the amount of penalty for each non-compliance will be calculated by applying the percentage of the revenue at risk against the monthly accrued regulated aeronautical revenue of the aerodrome operator, which consists of passenger service, security, landing and parking charges. However, the penalties imposed shall not exceed 5% of the annual turnover of the operator for the preceding financial year.

The stakes are very high for aerodrome operators. Taking MAHB as an example, it was reported that MAHB's revenue in the financial years ending 2016 and 2017 were RM4.173 billion and RM4.652 billion, with 49.5% of those amounts coming from the aeronautical segment. This roughly means that 5% of that portion translates to a whopping RM103 million to RM105 million respectively, although the penalties would be imposed on an individual airport's basis, and not collectively.

If it is found that the aerodrome operator has failed to comply with the Directive, the Commission ***shall*** issue a notice of financial penalty on a quarterly basis and the aerodrome operator ***shall*** pay the financial penalty to the Commission within 30 days from the date of the issuance of the notice. There appears to be an inconsistency in the Directive as to whether the Commission has a discretion or is under a mandatory obligation to issue a notice of financial penalty on an infringing aerodrome operator.

### SPECIFIC POWERS OF THE COMMISSION

To determine whether the targets for some aspects of the quality of service framework (such as passenger flow and availability of aerobridge) have been achieved, the Commission would have to rely on the aerodrome operators' reports and data of which it has no direct access to. The Directive expressly empowers the Commission to require the aerodrome operator to provide any information or document, and the latter is mandatorily obliged to not only disclose the same to the Commission, but also to ensure that the information or documents are not false or misleading in nature. The aerodrome operators would need to ramp up their efforts to improve the management of their documents and data system.

A related issue is whether the Commission can break down the voluminous information and data expeditiously and efficiently to provide monthly assessments of whether the aerodrome operator had achieved its prescribed service and quality targets under the Directive. There is also pressure on the Commission to balance its existing human capital and resources with the administrative burden of ensuring compliance to the requirements under the Directive.

### CONCLUSION

The Directive will force the relevant aerodrome operators to channel more capital expenditure into back-up systems and building up a sufficient buffer in the quality of service provided to the consumers to avoid incurring the penalties that may be imposed by the Commission. This would translate into higher fixed costs for the aerodrome operators. The full financial impact on the aerodrome operators and the aviation industry cannot be fully ascertained now and it would be interesting to examine the first quarter results and the potential issues or problems that will surface to affect both parties.

In September 2018, the first phase of the Directive that was implemented at KLIA measured the service quality elements encompassing the cleanliness of the passenger and staff toilets, and the reliability of ramp Wi-Fi at KLIA and klia2. KLIA achieved a 98% score, surpassing the target score of 90% for the service quality element of passenger washroom cleanliness and 94.5% above the targeted passing score of 80% for the staff washrooms (Source: *Bernama*, 6 November 2018).

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The remaining five service elements, namely availability and reliability of aerotrain service at KLIA main terminal, availability and reliability of people movers such as lifts, escalators and walkalators, availability and reliability of passenger boarding bridges (aerobridges), efficiency of visual docking guidance system for aircraft, and operator readiness prior to aircraft on-chock time upon arrival, were rolled-out in October 2018. It was reported that both KLIA and klia2 terminals had exceeded the service level targets for all service elements (Source: *Bernama*, 21 December 2018).

It is hoped that the Directive will enhance user experience for passengers and non-passengers alike and help to dispel the traditional view of airports as unfriendly places.

| No. | Service quality category | Service quality element | Measurement mechanism (monthly) | Target | Revenue at risk |
|---|---|---|---|---|---|
| 1. | Passenger comfort and facilities. | Cleanliness of washrooms. | Independent inspection based on the 20 items of the inspection checklist for washrooms found in Schedule 2, such as working ventilation systems, free from unpleasant smells, working flush systems, cleanliness and amenities being in good working order. | •At least 90% compliance of the 20 items per washroom.<br>•At least 90% compliance of the total washrooms inspected. | 0.30% |
| 2. | Operator and staff facilities. | Availability of aerobridge. | The Equipment Service Availability based on aerodrome operator's reports. | 99.5% | 0.21% |
| | | Availability of aerobridge operator. | The percentage of arrival of flights where the aerobridge operator was available 10 minutes before on-chock time. | 95% of arrivals. | 0.10% |
| | | | The percentage of arrival flights where the aerobridge operator was available for 5 minutes before on-chock time. | 99% of arrivals. | 0.10% |
| | | Availability of Visual Docking Guidance System. | The Equipment Service Availability based on aerodrome operator's reports. | 99.5% | 0.10% |
| | | Availability of ramp wi-fi service. | Independent inspection of service availability, weekly on-site random checking of hot-spots and weekly device connectivity testing for Baggage Reconciliation System. | •At least 99.7% compliance of the availability of ramp wi-fi.<br>•Signal strength indication of "Good", which is -50 to -60 dBm or more than -50dBm.<br>•Successful authentication of Baggage Reconciliation System device. | 0.13% |
| 3. | Passenger flow | Availability of 2 aerotrain TTS (KLIA only). | The Equipment Service Availability based on aerodrome operator's reports. | Availability of 2 trains for at least 98% of the time when the train is in service. | 0.25% |
| | | Availability of 1 aerotrain TTS (KLIA only). | The Equipment Service Availability based on aerodrome operator's reports. | Availability of 1 train for at least 99.5% of the time when the train is in service. | 0.25% |
| | | Availability of lifts, escalators and walkalators. | The Equipment Service Availability based on aerodrome operator's reports. | Availability of lifts, escalators and walkalators for at least 99.5% of the time when they are in service. | 0.25% |

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# DIGITAL ASSET EXCHANGES

*continued from page 7*

## OTHER MATTERS

*Transaction Fee or Levy*

The SC may impose a fee or levy on each transaction conducted on a DAX Exchange.

*Cessation of business or operations*

A DAX Operator shall not cease the business or operations of its DAX Exchange without prior engagement with the SC. The SC may issue a direction or impose any term and condition for the purpose of ensuring the orderly cessation of the business or operations of the DAX Exchange.

*Withdrawal of Registration*

The SC may withdraw the registration of a DAX Operator. A DAX Operator may also, by notice in writing, request the SC to withdraw its registration.

## COMMENTS

DAX Exchanges are the third electronic trading initiative launched by the SC, after equity crowdfunding and peer-to-peer financing. The launch of the DAX Exchange framework has been much anticipated by operators and prospective operators of digital asset exchanges. The framework provides much needed clarity in the digital currency and digital asset exchange space, and the registration requirement is in line with other jurisdictions such as the United Kingdom, Switzerland, Luxembourg, Gibraltar and South Korea.

Whilst the framework is a welcomed approach intended to promote innovation, there continues to be reservations against the use of digital currency or cryptocurrency as a form of currency in transactions. Following on from the Central Bank of Malaysia's official statement that Bitcoin is not legal tender in Malaysia, the Guidelines prohibit the use of digital currencies to invest or trade in Digital Assets, and only allow such investment or trading using Ringgit Malaysia or any foreign currency which is recognized as legal tender. This effectively prohibits "trading pairs" or "crypto-to-crypto pairs" (the trading of one type of cryptocurrency for another) on DAX Exchanges in Malaysia.

Another initiative that is eagerly anticipated by issuers of Digital Assets are the Guidelines on Initial Coin Offerings ("ICO") which will be released before the end of March 2019. The SC proposes to leverage on the framework adopted for equity crowdfunding and peer-to-peer financing, and to require the ICO issuer to approach a third party (i.e. an RMO or SC recognized entity) to agree to "host" the ICO and assess its Whitepaper.

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# IS CASH STILL KING?

*continued from page 11*

higher than the 1.0 million transactions in 2017 (valued at RM240.3 million).

To spur even greater adoption of mobile payments, the Interoperable Credit Transfer Framework ("ICTF") was introduced by BNM (effective 1 July 2018) to establish a shared payment infrastructure which connects bank and non-bank accounts to ensure the interoperability of their respective credit transfer services. The ICTF outlines requirements aimed at ensuring a fair and open access to shared payment infrastructure to promote a level playing field and to foster collaboration between banking institutions and non-bank e-money issuers at the infrastructure level.

In line with the ICTF's principle of 'collaborative competition', another key role in facilitating seamless and secure mobile payments is the recently launched Real-Time Retail Payments Platform ("RPP"). With the implementation of the RPP by Payments Network Malaysia Sdn Bhd ("PayNet") in early January 2019, participating e-wallet services are now able to use a single QR standard for payments for goods and services. Consumers would no longer need to switch between the different services provided by banks (e.g. Maybank's QRPay or CIMB's CIMB Pay) and non-banks (e.g. Alipay, WeChat Pay, Boost or Favepay) to make payments, as merchants will display a single QR code that will be compatible with multiple e-wallet services. It has been reported that PayNet has BNM as its largest shareholder and 11 other major banks in Malaysia as joint shareholders.

Malaysian consumers are currently spoilt for choice with over 40 e-money issuers in the market with a multitude of incentives, discounts and cash-back promotions on offer. The move towards electronic payments and a cashless society is aided by the reforms and measures which have been implemented by BNM to encourage the use of electronic payment methods. The main challenge for digital payments however is that cash is intuitive, and it remains to be seen whether Malaysian consumers are prepared to fully embrace a cashless society. Whilst cash may still be king for now in Malaysia, its reign may come to an end in the not-too-distant future as an increasing number of young tech-savvy consumers embrace electronic payments as the preferred means to carry out financial transactions.

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# EXCLUSION OF DAMAGES CLAUSE

*continued from page 17*

should be held void as being contrary to public policy only on rare occasions. The Court rejected this contention as Clause 12 was an absolute restriction to the Plaintiff's right to damages which is distinguishable from the relevant clause in *CKR Contract Services* which did not attempt to restrict or limit an innocent party's right to damages at common law but sought to limit a contracting party's right to an injunction in equity.

For the aforesaid reasons, the Court dismissed the Defendant's appeal and answered both leave questions in the affirmative.

## COMMENTS

Although the decision is made in respect of a particular provision in a loan agreement, it may have wider ramifications on the validity of limitation of liability clauses in Malaysia. The principles laid down by the Federal Court in this case can be applied equally to exclusion clauses in other types of agreements. In each case, it will be for the court to determine whether an exclusion clause in effect operates as an absolute restriction to a party's right to claim damages.

Although Balia FCJ criticised the decision in *Pacific Bank* for not considering the principle laid down in *New Zealand Insurance* that Malaysian jurisprudence does not recognise the distinction between a right and a remedy as a matter of law, the Federal Court did not expressly overrule *Pacific Bank* but distinguished it on grounds that the present appeal concerned the right to enforce rights by the usual legal proceedings under the first limb of section 29 whereas *Pacific Bank* relates to the limitation of time to enforce rights. Hence *Pacific Bank* appears to remain good law insofar as it decided that section 29 does not only invalidate agreements which determine when a right arises or the time within which a right will arise.

It does not appear from the judgment that an argument was canvassed that Clause 12 did not contravene section 29 of the Act as it only precludes the claimant from claiming the types of damages described in that clause, i.e. loss of income or profit or savings, or indirect, incidental consequential exemplary punitive or special damages, and not from claiming, and being awarded, general damages for breach of contract and/or negligence.

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# BEYOND SIGHT: MAXIMISE YOUR SENSES

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identifiers of the goods and services in trade. The functionality test goes in tandem with this core principle of trade mark law which prohibits the registration of marks which are dictated solely by the function, without which the goods or services cannot be provided. Ultimately, it also protects other traders as the test eliminates functional features from being registered as trade marks to avoid a monopoly of such features.

## CONCLUSION

It is interesting to observe that many jurisdictions have moved or are moving from only protecting what a person can see as trade marks to include also what one can hear, smell, or even taste.

It is believed that there are ongoing discussions among the Malaysian regulators to amend our trade mark laws to provide for, among others, the protection of non-traditional marks. While this is a welcomed development and will benefit businesses that seek to rely on non-traditional marks as part of their corporate branding, the procedures to be adopted in protecting these marks remain to be seen. In this regard, our legislators need not reinvent the wheel and can avoid pitfalls in their endeavour by drawing on the experience of jurisdictions that have already amended their laws and introduced procedures to protect non-traditional marks.

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# ANNOUNCEMENTS (CONTD.)

## LEGAL 500 ASIA PACIFIC 2019 RANKINGS

We were ranked in Tier 1 for Corporate M&A, Dispute Resolution, Intellectual Property, Labour and Employment and Telecommunications, Media and Technology.

Our following lawyers were ranked as leading lawyers: Theresa Chong (Corporate M&A), To' Puan Janet Looi (Corporate M&A), Charmayne Ong (TMT), Ivan Loo (Real Estate and Construction), Dato' Lim Chee Wee (Dispute Resolution), Siva Kumar Kanagasabai (Shipping), Selvamalar Alagaratnam (Labour and Employment) and Fariz Abdul Aziz (Corporate M&A and Projects and Energy).

# LEGAL INSIGHTS

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Printed By
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58 Jalan PBS 14/4,
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