

Dear valued clients and business partners,

We are pleased to highlight the following legal updates and developments for February 2018.

COMPETITION LAW AND ANTITRUST

Malaysia Competition Commission (“MyCC”) proposed decision against seven tuition and day care centres for price fixing conduct

On 8 February 2018, MyCC proposed, *inter alia*, to impose a financial penalty on seven tuition and day care centres by reason of their collective agreement to fix fees in the SS19 Subang Jaya area. Such an arrangement infringes section 4 of the **Competition Act 2010** (“CA 2010”). Price fixing is a serious offence under the CA 2010.

MyCC’s action against the tuition and day care centres demonstrates its stance in respect of horizontal price fixing agreements. It also demonstrates how seemingly small enterprises are not precluded from competition law oversight and sends a clear message that all enterprises, whether big or small, are not to engage in anti-competitive practices.

Draft guidelines published by the Malaysian Aviation Commission (“MAVCOM”)

MAVCOM has recently published three draft guidelines which are:

- the Guidelines on Anti-competitive Agreements; and
- the Guidelines on Abuse of Dominant Position.
- the Guidelines on Aviation Service Market Definition;

These are some of the highlights.

1. **Draft guidelines on Anti-competitive Agreements**

An airline code sharing agreement, an alliance and a partnership or joint venture agreement (which does not amount to a merger) falls within the definition of “*agreement*” for the purposes of the **Malaysian Aviation Commission Act 2015** (“MAVCOM Act”). Horizontal agreements such as those which have the object to directly or indirectly fix price, share aviation service market or sources of supply in connection with aviation services would be deemed to have the object of significantly restricting competition. The MAVCOM will apply this legal presumption even if the parties to the agreement have very low combined market share in a relevant aviation service market.

2. **Draft guidelines on Abuse of Dominant Position**

A market share above 60% may indicate that an enterprise holds a dominant position in a relevant aviation service market. The MAVCOM, in evaluating whether a dominant enterprise is abusing its dominant position, will consider the actual or likely adverse effects of the conduct. A conduct of a dominant enterprise would not amount to abuse of dominant position if the conduct has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct by a competitor. The onus is on the dominant enterprise to establish the same.

3. **Draft guidelines on Aviation Service Market Definition**

The MAVCOM will adopt the Hypothetical Monopolist Test (“HMT”) comprising two elements —the service market and the geographic market. For the purpose of defining and identifying a service and geographic market, the “*Demand-side substitution*” and the “*Supply-Side substitution*” analysis may be considered.

There are various other factors which should be considered in ascertaining the relevant aviation service market and the market share of the respective parties. This includes switching costs, brand loyalty, neighbouring airport, timing (peak/off peak hours).

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INTELLECTUAL PROPERTY

Spind Malaysia Sdn Bhd v Justrade Marketing Sdn Bhd & Anor [2018] (Civil Appeal No 02(f)-55-08/2016(W))

This recent Federal Court decision affirms the decision of the High Court and Court of Appeal in declaring a patent invalid and dismissing the claims for infringement on the basis that one cannot infringe an invalid claim, thereby affirming the previous Federal Court decision in SKB Shutters.

Facts of the case

At the High Court, the Appellant filed an action against the Respondents in the High Court for, *inter alia*, infringement of Patent No MY-125567-A. The Respondents filed a counterclaim seeking a declaration that the patent is invalid. The High Court judge dismissed the Appellant's claim and allowed the Respondent's counterclaim in holding the patent invalid.

Dissatisfied, the Appellant appealed to the Court of Appeal. However, its appeal was dismissed unanimously at the Court of Appeal. The Appellant appealed again to the Federal Court.

Questions of law at the Federal Court

The Appellant was granted leave for appeal to the Federal for the following questions:

- i. Whether for the purpose of considering whether a patented invention is inventive (or not obvious), the court is required to apply and carry out the four-step test from the case of **Windsurfing International Inc v Tabur Marine (Great Britain) Ltd** [1985] RPC 59 (or commonly known as the “*Windsurfing test*”);
- ii. Whether there is a distinction to be drawn between determining the “*claimed features*” of the claims of a patent (for the purposes of assessing novelty and infringement) and determining the “*inventive concepts*” of the invention in the patent (for the purpose of assessing inventiveness);
- iii. If the answer to Question ii is in the affirmative, whether an assessment of the “*inventive concepts*” of the invention is to be confined to just the claims of the patent or should be construed from reading the patent specifications as a whole and with the common knowledge of the skilled person.

Decision

The Appeal was dismissed. The Federal Court, after having examined the answers to the three questions posed, held that the Appellant’s patent is invalid. The Federal Court affirmed the decisions of both the High Court and Court of Appeal.

On the issue of infringement, the Federal Court, in quoting S Thorley, R Miller, G Burkill, C Birss, *Terrell on the Law of Patents*, 15th Ed, and following the decision of **SKB Shutters Manufacturing Sdn Bhd v Seng Kong Shutter Industries Sdn Bhd & Anor** [2015] 6 MLJ 293, held that there cannot be, in any event, an infringement of an invalid patent. The Federal Court further

granted the Respondents the reliefs in their counterclaim save for prayer (9) pertaining to an injunction to restrain the Appellant from instigating, instituting or initiating or threatening to institute or initiate civil or criminal action in respect of the first Respondent's floor gully traps.

On the point of novelty and construction of claims, the Federal Court applied the principles of purposive construction and noted that the feature alleged to be novel by the Appellant was not expressively stated or alluded in the language of the claims. It would not be therefore taken into account in the assessment of novelty or inventiveness.

On the point of inventiveness, as the Federal Court agreed with the High Court and Court of Appeal's findings that the patent is not novel, the question of whether it involves an inventive step would not arise. Notwithstanding the above, on the assumption that the patent is novel, the Federal Court went on to apply the Windsurfing test and found that a number of features were anticipated by the prior art.

On the issue of the Respondent's expert witness who was challenged by the Appellant, the Federal Court held that it was not apparent from the grounds of judgement that the High Court Judge had relied substantially, if at all, on the expert's opinion in reaching the decision on the issue of inventiveness. All in all, even if the patent was novel, in applying the Windsurfing test, the Federal Court saw no reason to depart from the conclusion reached by the High Court and the Court of Appeal.

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TAX AND REVENUE

Labuan tax

The **Labuan Business Activity Tax (Automatic Exchange of Financial Account Information) Regulations 2018** have been gazetted on 5 February 2018 and are deemed to have come into operation on 1 July 2017.

The newly introduced revised **Guidelines on the Establishment and Operations of Labuan Leasing Business** took effect on 1 January 2018 except for the substance requirements in the guidelines which are to take effect from 1 January 2019.

Goods and Services Tax (“GST”)

The revised version of the **Guide on Accounting Software Enhancement towards GST Compliance** (revised as at 5 February 2018) has been published on the [Royal Malaysian Customs Department's GST website](#).

For further information regarding tax and revenue law matters, please contact

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This Alert is issued for the information of the clients of the Firm and covers legal issues in a general way. The contents are not intended to constitute any advice on any specific matter and should not be relied upon as a substitute for detailed legal advice on specific matters or transactions.

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