

# Shearn Delamore & CO.

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Dear valued clients and business partners,

We are pleased to highlight the following legal updates for December 2018.

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## COMPETITION LAW AND ANTITRUST

On 20 December 2018, the High Court overturned the decision of the Competition Appeal Tribunal and reinstated the decision of the Malaysia Competition Commission ("MyCC") in the long fought battle between MAS-AirAsia and the MyCC.

In 2014, the MyCC made a finding of infringement under section 4(2)(b) of the **Competition Act 2010** against Malaysian Airline System Berhad ("MAS") and AirAsia Berhad ("AirAsia") and imposed a fine of RM10 million on each party. The MyCC's decision was later overturned by the Competition Appeal Tribunal in 2016.

It has been reported that an appeal will be filed against the High Court's decision.

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For further information regarding competition law and antitrust matters, please contact our [Competition Law and Antitrust Practice Group](#).

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## DISPUTE RESOLUTION

The Federal Court in the landmark decision of **CIMB Bank v Anthony Lawrence Bourke & Another** [Civil Appeal No.: 02-105-10/2017(W)] ruled that a bank cannot rely on the exclusion clause in the loan agreement to exclude its liability in respect of any loss or damage suffered by the borrower.

The exclusion clause reads:

*"Notwithstanding anything to the contrary, in no event will the measure of damages*

*payable by the Bank to the Borrower for any loss of 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.”*

The Federal Court accepted that generally it is the Court’s duty to give effect to the clear and plain meaning of the words in the exclusion clause no matter how unreasonable the Court may think it is.

However, in this case, the borrowers were precluded from claiming any remedies for breach of contract or negligence and in effect they were restricted from enforcing their rights in respect of the contract.

The Federal Court also considered the fact that in banking agreements, the bargaining powers of the parties are never equal. Under the circumstances, section 29 of the **Contracts Act 1950** ought to be invoked to invalidate the exclusion clause.

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For further information regarding dispute resolution matters, please contact our [Dispute Resolution Practice Group](#).

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## EMPLOYMENT AND ADMINISTRATIVE LAW

### **Workmen’s Compensation Act 1952 to be repealed**

The **Workmen’s Compensation Act 1952** ("WCA 1952") will be repealed in accordance with the Malaysian Cabinet’s decision to include foreign workers under the Social Security Organisation ("SOCSO"). The WCA 1952 covers personal injury arising in the course of employment for foreign workers who:

1. earn less than RM500 per month; or
2. is employed for manual labour on more than RM500 a month.

However, given the recent announcement that foreign workers will be covered under SOCSO effective 1 January 2019, the Minister of Human Resources has announced that the WCA 1952 will be abolished to facilitate the transfer from the WCA to SOCSO.

Source: [www.nst.com.my/news/nation/2018/11/435868/kula-workmens-compensation-act-1952-be-abolished](http://www.nst.com.my/news/nation/2018/11/435868/kula-workmens-compensation-act-1952-be-abolished)

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For further information regarding employment and administrative law matters, please contact our [Employment and Administrative Law Practice Group](#).

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## FINANCIAL SERVICES

### **Regulation of digital assets in Malaysia**

Pursuant to a joint statement issued by both the Securities Commission Malaysia and the Central Bank of Malaysia on 6 December 2018, it has been announced that the Securities Commission Malaysia will regulate the issuance of digital assets via initial coin offerings ("ICOs") and the trading of digital assets on digital asset exchanges in Malaysia.

Any digital asset exchange or issuer of ICOs involved in the issuance or dealing of digital assets with payment functions will have to comply with the applicable laws and regulations issued by the Central Bank of Malaysia relating to payments and currency matters.

The Central Bank of Malaysia continues to reiterate its policy that digital assets are not legal tender in Malaysia.

### **Exploration of blockchain technology by the Securities Commission Malaysia**

The Securities Commission Malaysia announced the successful completion of its pilot project called Project Castor during the recent Synergistic Collaborations ("SCxSC") conference. Project Castor is a project whereby the Securities Commission Malaysia sought to explore the technical implementation and feasibility of using distributed ledger technology as the underlying market infrastructure for unlisted and over-the-counter ("OTC") markets.

A blueprint entitled Capital Market Architecture Blueprint in a Decentralised World, has been issued and it outlines the regulator's vision for "*a future multi-tiered market environment*" which contains both centralised and decentralised markets, with the latter underpinned by distributed ledger technology.

According to the blueprint, the regulator used equity crowdfunding and Ethereum-based tokens to represent equity and monies. It also used smart contracts to codify

the rules of offerings and distribute the appropriate tokens and assets once offerings were closed, as well as for KYC/AML requirements.

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For further information regarding financial services matters, please contact our [Financial Services Practice Group](#).

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## INTELLECTUAL PROPERTY


### A white coffee affair

Section 28 (1) of the **Trade Marks Act 1976** ("Act") allows for opposition to be filed against an application for the registration of a trade mark.

After considering the evidence, exhibits and written submissions by the applicant of the trade mark and the opponent, the Registrar of Trade Marks ("Registrar") will decide whether to refuse registration of the trade mark or to allow registration of the trade mark with or without conditions, amendments, modifications or limitations. A decision of the Registrar on the opposition is subject to appeal to the High Court pursuant to section 28(5) of the Act.

In the case of **Kong Kin Loong v Kong Sou Keet**<sup>[1]</sup>, the High Court considered the novel question of whether a party, who is not previously a party before the Registrar for the opposition proceeding, can be subsequently cited as a party in the appeal to the High Court.

This case concerns a dispute between siblings on the rights over the trade

mark  ("Chang Jiang Mark") in relation to "*coffee and teas*". The three defendants in this case are sisters. The plaintiff ("Kong Kin Loong") is the younger brother of the defendants. Kong Kin Loong filed an opposition against the first defendant's ("Kong Sou Keet") application for registration of the Chang Jiang Mark but the Registrar decided to allow for the registration of the Chang Jiang Mark in the name of Kong Sou Keet.

Dissatisfied with the Registrar's decision, Kong Kin Loong appealed to the High Court. During the appeal, Kong Kin Loong cited the second and third defendants, who are the business partners of Kong Sou Keet, as the defendants. However, the second and third defendants were not the applicants for the application for registration of the Chang Jiang Mark and were not previously parties before the Registrar for the opposition proceeding.

The High Court held that an appeal to the High Court against the Registrar's decision on an opposition can only be instituted against parties who were previously before the Registrar for the opposition. The Court further held that it is unjust to cite parties who were not previously before the Registrar during the appeal to the High Court when they have not been given any opportunity to adduce evidence and to submit before the Registrar. Accordingly, the second and third defendants cannot be cited in the appeal to the High Court.

The High Court further reaffirmed the rule that the parties may not introduce further materials or additional grounds of objection not previously raised in the proceedings before the Registrar, on appeal to the High Court, except by leave of the Court as provided under section 28(7) of Act and held that Kong Kin Loong is barred from relying on new grounds of objection during the appeal.

The High Court's decision illustrates the importance of strategising and preparing for the opposition proceeding before the Registrar with due care and diligence as parties may be barred from relying on further materials or grounds of objections during appeal to the High Court. This includes naming the correct parties for opposition, particularly for cases involving corporate group or group of companies.

**MIKE HO MUN KEAT**  
**INTELLECTUAL PROPERTY PRACTICE GROUP**

[1] [2018] MLJU 1152

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For further information regarding intellectual property law matters, please contact our [Intellectual Property Practice Group](#).

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**TAX AND REVENUE**

**Income tax**

The Inland Revenue Board of Malaysia ("IRB") has recently issued three new public rulings on:

1. **Tax Incentive for Investment in Bionexus Status Company (Public Ruling No. 10/2018)** — issued on 4 December 2018;
2. **Withholding Tax on Special Classes of Income (Public Ruling No. 11/2018)** — issued on 5 December 2018 to replace Public Ruling No. 1/2014 dated 23 January 2014; and

3. **Income from Letting of Real Property (Public Ruling No. 12/2018)** — issued on 19 December 2018 to replace Public Ruling No. 4/2011 dated 10 March 2011.

The IRB issued **Operational Guidelines No. 1/2018 on Special Program for Voluntary Disclosure** on 3 November 2018. This was later superceded by an amended version on 26 November 2018 and thereafter by a further amended version on 30 November 2018.

### **Sales and services tax**

The following new and revised Specific Guides have been published on the [Royal Malaysian Customs Department's MySST website](#):

1. **SST-02 Form** (as at 14 December 2018);
2. **Guide to Completing the SST-02 Tax Return Manually** (as at 14 December 2018)

### **Director General's decision**

The Director General of Customs and Excise has issued **Amendments To DG's Decision 1/2018 & 3/2018** and this has also been published on the [Royal Malaysian Customs Department's MySST website](#).

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For further information regarding tax and revenue matters, please contact our [Tax and Revenue Practice Group](#).

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