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# NEWSLETTER

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# INTELLECTUAL PROPERTY

## Shaping up the Trade Mark — lessons from Toblerone

IN THIS ARTICLE, YAP KHAI JIAN CONSIDERS THE RECENT HIGH COURT DECISION IN **KRAFT FOODS SCHWEIZ HOLDING GMBH V PENDAFTAR CAP DAGANGAN** ON THE RECOGNITION OF THREE DIMENSIONAL TRADE MARKS/SHAPE MARKS IN MALAYSIA.

### Introduction

The **Trade Marks Act 1976** ("TMA") does not expressly provide for the registration of 3-dimensional ("3D") shapes as trade marks unlike legislation in the United Kingdom, Singapore and Australia where shapes are expressly recognised.

For many years the position taken was that shapes were not registrable. Malaysian courts held to the position taken in **Re Coca-Cola Co's Applications**[1] ("Coca-Cola Trade Marks"). The House of Lords, in applying the United Kingdom Trade Marks Act 1938 (now repealed), held that the shape of the famous Coca-Cola bottle could not be a "*trade mark*" as it was the product itself rather than a mark applied in relation to a product. As the definition of a trade mark under the now repealed United Kingdom Trade Marks Act 1938 was in *pari materia* with the definition of "*trade mark*" under the TMA, this position held sway and 3D marks were deemed not registrable in Malaysia.

Recently, the High Court in **Kraft Foods Schweiz Holding Gmbh v Pendaftar Cap Dagangan**[2] departed from this long-standing position.

### Facts of the case

Kraft Foods, the manufacturer of chocolates and confectionary, sought to register the prism shape of their "*Toblerone*" range of chocolate products ("Toblerone Mark") as a trade mark in Malaysia. The Registrar of Trade Marks ("Registrar") refused to register the Toblerone Mark on the grounds that, among others, the Toblerone Mark did not fall within the definition of a "*trade mark*" under the TMA.

Kraft Foods appealed against this decision seeking an order for the Registrar to register their Toblerone Mark. Essentially Kraft Foods took the position that there was nothing in the TMA to exclude their Toblerone Mark, which according to Krafts Foods was distinctive of the chocolates.

### Decision of the High Court

While the High Court dismissed the appeal of Kraft Foods on various grounds, there were some important observations made on the registrability of 3D shape marks. The High Court, in relying on the decision of the House of Lords in **Smith, Kline and French Laboratories v RD Harbottle (Mercantile) Ltd & Ors**[3] ("Smith Kline"), held that 3D shapes were registrable under the TMA. Citing Lord Diplock, who allowed the registration of "*a mark which covers the whole of the visible surface of the goods to which it is applied*"[4] , the High Court held that 3D shapes should not be excluded from the definition of a "*trade mark*"[5]. The High Court further took the position that a shape mark may be a "*device*" as envisaged by section 3(1) of the TMA[6] by its obvious and

## ▪ In This Issue ▪

01 ▪ Shaping up the Trade Mark — lessons from Toblerone

03 ▪ The New Financial Ombudsman Scheme

05 ▪ Corporate Rescue under the Companies Act 2016

08 ▪ Embracing the Change: Bank Negara Malaysia introduces Fintech Regulatory Sandbox Framework

10 ▪ Uber Drivers — employee or self-employed?

11 ▪ Budget 2017 Highlights

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clear dictionary meaning. The usage of the word "*includes*" in the definition of "*mark*" under section 3(1) of the TMA, as found by the High Court, must be given its ordinary meaning as not being exhaustive.

In arriving at its decision, the High Court had also considered **Coca-Cola Trade Marks** although the High Court was more inclined to follow the earlier decision of **Smith Kline**. It is not completely clear as to why this preference was made although it has to be noted that in **Coca-Cola Trade Marks**, the House of Lords distinguished **Smith Kline** and held that **Smith Kline** was confined to its own facts. Lord Templeman stated that "*the Smith Kline case only relates to the colour of goods and has no application to the goods themselves or to a container for goods. A colour combination may tend to an undesirable monopoly in colours but does not create an undesirable monopoly in goods or containers*"[7].

Despite Kraft Foods' success in getting their 3D Toblerone Mark recognised as a "*trade mark*" under the TMA, they still failed to prove that the Toblerone Mark was inherently and factually distinctive of the goods applied for. This led to Kraft Foods' appeal being dismissed.

## Conclusion

It could be said that this case opens the door for traders to register 3D shape marks in Malaysia. It is pertinent to note that a trade mark must be "*used or proposed to be used*" in relation to goods or services as per the definition accorded to it in section 3(1) of the TMA. It remains open how registration of shape marks can be reconciled with the definition of "*use or proposed to be used*" under section 3(2) of the TMA[8]. The distinction between the product and the mark applied on the product itself requires further clarification from the Malaysian courts.

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[1] [1986] 2 All ER 274

[2] [2016] MLJU 402

[3] [1975] 2 All ER 578

[4] Id at 582.

[5] Section 3(1) TMA defines a "*trade mark*" as *"...a **mark used or proposed to be used in relation to goods or services** for the purpose of **indicating or so as to indicate a connection in the course of trade between the goods or services and a person having the right either as proprietor or as registered user to use the mark** whether with or without an indication of the identity of that person..."*

[6] Section 3(1) TMA defines that a "mark" includes "***a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof***".

[7] [1986] 2 All ER 274 at 276.

[8] Section 3(2) TMA states that: -

a) References to the **use of a mark** shall be construed as references to the **use of a printed or other visual representation of the mark**;

b) References to the **use of a mark in relation to goods** shall be construed as references to the **use thereof upon, or in physical or other relation to, goods**; and

c) References to the use of a mark in relation to services shall be construed as references to the use thereof as a statement or as part of a statement about the availability or performance of services.

CORPORATE LAW

# The New Financial Ombudsman Scheme

IN THIS ARTICLE, MANFRED TEE JEOK RENN EXAMINES THE NEW FINANCIAL OMBUDSMAN SCHEME.

## Introduction

The Financial Services (Financial Ombudsman Scheme) Regulations 2015 and the Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 (collectively, the "Regulations") came into force on 14 September 2015. These Regulations provide for the approval, oversight and obligations of a Financial Ombudsman Scheme ("FOS") in Malaysia.

The FOS, which commenced operations on 1 October 2016, is an initiative of the Central Bank of Malaysia ("BNM") to enhance financial dispute resolution arrangements for financial consumers and to strengthen consumer protection. The Ombudsman for Financial Services (formerly known as the Financial Mediation Bureau) has been appointed as the operator of the FOS ("Scheme Operator") by BNM pursuant to the Regulations. The FOS, which is provided to financial consumers free of charge, will serve as an alternative (as opposed to a replacement) to court proceedings.

Prior to the FOS, the Financial Mediation Bureau ("FMB"), which commenced operations on 20 January 2005, was the alternative dispute resolution channel whose structure is broadly similar to that of the FOS. However, the operational scheme of the FMB was based on a voluntary arrangement between the FMB and its members which were the financial service providers ("FSPs") and was not regulated by any legislation.

There are many enhancements introduced to the FOS by the Regulations which were not previously found in the FMB's scheme. Some of the material ones are set out below:

a) **Scope** — The monetary limits for all types of banking and insurance claims or Islamic banking and *takaful* claims have been increased except for the claims arising from unauthorised transactions through the use of designated payment instruments or a payment channel (for example, internet banking, mobile banking or automatic teller machine).

b) **Governance** — The FOS is governed by its board of directors ("Board of Directors") which will be responsible for the management and oversight of the operations of the FOS[1]. The Regulations set out the requirements in respect of the appointment of members, composition as well as the responsibilities of the Board of Directors[2].

c) **Resolution Process** — Under the FMB's scheme, the dispute resolution services were provided by mediators only. This, however, has changed under the FOS and is now conducted in two stages (as further elaborated below under "Mechanism").

## Objectives

The Scheme Operator functions as an alternative complaint and/or dispute resolution body to assist financial consumers resolve their complaints and/or dispute with the FSPs who are the members of the FOS. FSPs include[3]:

| Under Conventional Financial Services | Under Islamic Financial Services |
|---|---|
| Licensed bank | Licensed Islamic bank |
| Approved insurance broker | Approved *takaful* broker |
| Licensed insurer (excluding professional reinsurer and licensed insurer carrying on financial guarantee insurance business) | Licensed *takaful* operator (excluding professional re-*takaful* operator) |
| Approved financial adviser | Approved Islamic financial adviser |
| Approved issuer of a designated payment instrument | Approved issuer of a designated Islamic payment instrument |

The Board of Directors must appoint an Ombudsman to adjudicate disputes referred to it in accordance with the terms of reference ("TOR") approved by BNM.

## Guiding Principles[4]

In dealing with disputes, the Scheme Operator must observe and adhere to six principles:

a) **Independence** — The Scheme Operator will be subject to the oversight of the Board of Directors to ensure the integrity of the operations and its ability to provide effective and independent services to complainants. Every decision made by the Scheme Operator must be objective and independent of the FSPs and complainants.

b) **Fairness and Impartiality** — The Scheme Operator must ensure that all information provided by the FSPs and complainants is carefully and objectively considered by the Ombudsman before reaching a well-reasoned decision — without neglecting the law, BNM's guidelines and industry best practices. Further, the Scheme Operator must ensure that none of its officers (including Case Managers and Ombudsman) is in a position of conflict with any of the disputing

parties.

c) **Accessibility** — The Scheme Operator must promote easy and affordable access to its services for the benefit of the complainants.

d) **Accountability** — An annual report detailing the activities and operations carried out by the Scheme Operator (including its audited annual accounts) must be published for public review and a copy of the same must be submitted to BNM.

e) **Transparency** — The Scheme Operator must publish information relating to its services and scope of coverage which include the types of disputes resolved, the awards granted, the approach adopted in handling the disputes and the manner in which the decisions were made by an Ombudsman.

f) **Effectiveness** — The Scheme Operator must have all necessary resources, coverage and power to resolve disputes in a timely and effective manner. In this regard, it is important to ensure that there is an adequate number of suitably qualified and competent Case Managers and Ombudsmen. The Scheme Operator is allowed to proceed with minimum formality and technicality to resolve disputes.

## Scope

The applicability and coverage of the FOS to a dispute will be subject to the following factors:

a) Eligible complainant[5]

Generally a person will be eligible for the purposes of the FOS if the person is a financial consumer (be it a natural person or corporate entity) who uses or has used any financial services or products provided by any FSP:

i. for personal, domestic or household purposes; or

ii. in connection with a small business.

The term "*small business*" refers to small and medium enterprises (SMEs) as defined in the *Guideline for New SME Definition* issued by SME Corporation Malaysia in October 2013.

b) Types of disputes[6]

A dispute against any FSP will be considered by the Scheme Operator if the complainant's direct financial loss is within the prescribed monetary limits as set out below:

| No. | Type of Dispute/Complaint | Monetary Limit |
|---|---|---|
| 1. | A dispute involving financial services or products or Islamic financial services or products, developed, offered or marketed by a Member, or by a Member for or on behalf of another person, other than a dispute under paragraph (2) and (3) below. | RM250,000.00 |
| 2. | A dispute on motor third party property damage insurance/ *takaful* claims. | RM10,000.00 |
| 3. | A dispute involving –<br>(a) An unauthorised transaction though the use of a designated payment instrument or a Islamic designated payment instrument or a payment channel such as internet banking, mobile banking, telephone banking or ATM; or<br>(b)An unauthorised use of a cheque as defined in section 73 of the **Bills of Exchange Act 1949**. | RM25,000.00<br><br>RM25,000.00 |

Regardless of the above, in the event there is a dispute involving a monetary claim exceeding the above monetary limits, such dispute may be referred to the FOS subject to the agreement by the Scheme Operator, the complainant and the FSP involved in the dispute[7].

## Mechanism[8]

For a person to file a complaint/dispute with the Scheme Operator, such complaint/dispute must have been referred to the relevant FSP first by the person with a view to seek an amicable settlement and:

a) the final decision made by the FSP in relation to the complaint/dispute is not acceptable to the person; or

b) there is no response from the FSP within 60 days from the date the dispute was referred to the FSP.

Once a complaint/dispute is filed with the Scheme Operator, the dispute resolution process will be carried out following a two-tier approach. At the

first stage, the dispute will be managed by a Case Manager. The role of the Case Manager is to encourage and facilitate dialogue, provide guidance, assist the parties to the dispute clarify their interests and understanding differences, and to work towards a mutually acceptable settlement[9]. In the event the parties fail to reach an amicable settlement, the Case Manager will issue a recommendation on the manner in which the dispute should be resolved.
If the parties accept the recommendation, the dispute will be resolved on such basis. If either party does not accept the recommendation, the parties are free to pursue their rights through any other means including to refer the dispute to an Ombudsman for adjudication, to initiate legal action or arbitration.

Should the parties choose to refer the dispute to the Ombudsman, the latter will adjudicate the dispute and issue a final decision which will be binding on the parties if the complainant accepts the decision. Otherwise, where the complainant does not accept the decision, the parties may resort to court proceedings or arbitration.

Both the Case Manager and Ombudsman may adopt any method (including negotiation, conciliation, mediation or adjudication) in their resolution process.

### Conclusion

Financial ombudsman services are available and common in many countries including the United Kingdom and Australia. It is encouraging to note that our FOS has developed from the former FMB and possesses certain traits, including guiding principles and mechanisms built into the process, which are comparable to those found in foreign jurisdictions. The introduction of the FOS in Malaysia would no doubt bring benefits and inject more confidence into the Malaysian financial sector.

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[1] Section 10 of both Financial Services (Financial Ombudsman Scheme) Regulations 2015 and Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015.
[2] Sections 8, 9 and 10 of both Financial Services (Financial Ombudsman Scheme) Regulations 2015 and Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015.
[3] First Schedule of both Financial Services (Financial Ombudsman Scheme) Regulations 2015 and Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015.
[4] Paragraph 3 of the TOR.
[5] Paragraph 9 of the TOR.
[6] Paragraph 10 and Schedule 2 of the TOR.
[7] Paragraph 12(3) of the TOR.
[8] Paragraph 34 of the TOR.

DISPUTE RESOLUTION

# Corporate Rescue under the Companies Act 2016

IN THIS ARTICLE, HEE HUI TING LOOKS AT TWO METHODS OF CORPORATE RESCUE IN THE NEW **COMPANIES ACT 2016 ("ACT")**.

Under the **Companies Act 1965**, companies which are facing financial difficulties can either enter into a Scheme of Arrangement and Reconstruction[1] or be wound up by the Court and have a liquidator appointed as the receiver of the insolvent company[2]. The Act[3] introduces two new means of corporate rescue, namely, judicial management and corporate voluntary arrangement, which aim to avoid companies going into liquidation. Both judicial management and corporate voluntary arrangement require the need for judicial intervention.

### Judicial management

Sections 403–430 of the **Companies Act 2016** set out the law in relation to judicial management. Judicial management has as its overriding objective the ability for companies facing difficulties to rehabilitate under the Court's supervision to allow them to return to financial health, avoid liquidation, and ultimately benefitting both the shareholders and creditors of the company.

### Application to the Court

The company or the creditors of the company may file an application to the High Court ("Court") for the company to be placed under judicial management[4] . The circumstances under which the Court will make an order for judicial management are as follows:

- the Court is satisfied that the company is or will be unable to pay its debts[5]; and
- the Court considers that the survival of the company as a going concern is likely to be achieved[6]; or
- the Court considers that it is likely that a scheme of compromise or arrangement can be achieved[7]; or

- the Court considers that judicial management is a more advantageous mode of realisation of the company's assets than under a winding up[8].

### Limitations of judicial management

Judicial management is not applicable to the following:

- Licensed institutions or operators of payment systems regulated under laws enforced by the Central Bank of Malaysia[9]. As such, banks and financial institutions are not able to apply for judicial management.
- Companies governed under the **Capital Markets and Services Act 2007**[10]. This would include stockbroking companies and fund management companies.
- A company that has already gone into liquidation[11].

### Judicial management

A judicial manager nominated by the company or its creditors is required to be an insolvency practitioner. Auditors of the company are precluded from being the judicial manager[12]. The Act does not define the term "*insolvency practitioner*". The powers of a judicial manager are contained in the Ninth Schedule of the Act[13] and include but are not limited to the following:

- To take possession, sell and dispose of property of the company;
- To commence and defend action in the name and on behalf of the company;
- To borrow money and grant security for the borrowing over property of the company;
- To do all acts necessary for the realisation of property of the company; and
- To carry out business of the company, establish subsidiaries, appoint agents, appoint and dismiss employees of the company.

### Moratorium

Upon an application for judicial management, and until an order for judicial management is made by the Court, an automatic moratorium applies. During that period, the following is automatically restrained:

- The passing of a resolution for the winding-up of the company;
- The enforcement of a charge or security over the company's assets or repossession of goods under hire purchase (without leave of the Court);
- The execution of any legal processes or distress action against the company (without leave of the Court)[14].

### Judicial management order

When the Court grants a judicial management order, it will specify the purpose of such judicial management. Upon the grant of a judicial management order, the following will take effect:

- Any application for the winding up of the company shall be dismissed and any receiver of manager shall vacate its office[15];
- No resolution shall be passed for the winding up of the company, and receivers and managers shall not be appointed[16];
- No proceedings or execution of legal processes shall be commenced or continued against the company except with the Court's leave[17];
- No enforcement of security over the company's property or repossession of goods under hire purchase shall take place except with the Court's leave[18];
- No transfer of shares or alteration of status of any member of the company shall take place except with the Court's leave[19].

A judicial management order remains in force for six months. An extension for a further six months may be allowed subject to leave of the Court[20]. During the period the judicial management is in force, the judicial manager will exercise his powers and functions to do all things necessary for the management of affairs, business and property of the company[21]. The judicial manager may apply to the Court for a discharge of the judicial management order if the purpose of the order has been achieved, or is not achievable[22].

### Corporate Voluntary Arrangement

Sections 394–402 of the **Companies Act 2016** govern Corporate Voluntary Arrangement ("CVA"), a scheme of debt restructuring proposed by the company to the creditors of the company with the aim of returning the company to financial health. CVA is available to private companies and also available to companies under liquidation and under judicial management[23]. It is unavailable to licensed institutions or operators of payment systems governed by the Central Bank of Malaysia and financial market institutions under the **Capital Markets and Services Act 2007**[24]. CVA is also not available to companies which have charges over its property or any of its undertakings[25].

### Proposal for voluntary arrangement

The directors of a company[26], or in the case of the company that is wound up, the liquidator of the company[27], or in the case of the company under judicial management, the judicial manager[28], may make a proposal to the company and the creditors for the company to be placed under a voluntary arrangement[29]. The proposal will include:

- The appointment of a nominee[30]. The nominee shall be an insolvency practitioner[31].
- The submission of documents to the nominee setting out the proposed voluntary arrangement[32].
- The submission of a statement of the company's affairs to the nominee setting out the list of creditors, debts, liabilities, assets and other information[33].

### Nominee

Upon receipt of the documents, the nominee shall form an opinion and submit to the directors whether the proposed voluntary arrangement has a reasonable prospect of being approved and implemented[34]. The nominee will consider whether the company has sufficient funds to carry out business during the moratorium period and whether meetings are necessary to be called to consider the proposal[35].

### Moratorium

Once the proposal is complete, the company may make an application to the Court for a voluntary arrangement. The documents to be submitted to the Court will include:

- The terms of the proposed voluntary arrangement;
- A statement of the company's affairs;
- A statement that the company is eligible for the moratorium;
- A statement from the nominee; and
- A statement disclosing full particulars of previous proposed voluntary arrangements or an application for moratorium and the results of the application, if any[36].

A moratorium will take effect upon the filing of the documents[37] stated above. This moratorium will remain in force for 28 days[38]. The moratorium may be extended for a period of not more than 60 days upon obtaining special majority in value of creditors in a meeting[39]. During the period of the moratorium, the following cannot take place:

- No petition of winding up should be presented to the Court;
- The company may not call for any meetings unless with the nominee's consent or with leave of the Court;
- No resolution to be passed for winding up or judicial management order against the company;
- Landlords of the company may not exercise the right of forfeiture by re-entry except with leave of the Court;
- No steps may be taken to create a security over the company's property or to repossess goods of the company under a hire purchase arrangement except with leave of the Court;
- Legal proceedings and execution of the same may not be commenced and continued against the company except with leave of the Court;
- The company's shares shall not be transferred and status of members of the company shall not be altered except with leave of the Court[40].

During the period the moratorium is in force, the company and its creditors will meet to decide on whether the proposed voluntary arrangement may be approved[41]. The quorum required is a special majority of the total value of creditors[42] or in a meeting of members, a simple majority is sufficient[43]. The approved proposal becomes binding on all creditors after the quorum is reached[44] and is then subsequently implemented and supervised by the nominee.

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[1] Section 176 of the **Companies Act 1965**
[2] Section 185 of the **Companies Act 1965**
[3] The **Companies Act 2016** (Act 777) received Royal Assent on 31st August 2016. As of date of publication, it is not yet in force.
[4] Section 404 of the **Companies Act 2016** ("Act")

[5] Section 405(1)(a)
[6] Section 405(1)(b)(i)
[7] Section 405(1)(b)(ii)
[8] Section 405(1)(b)(iii)
[9] Section 403(a)
[10] Section 403(b)
[11] Section 405(6)
[12] Section 407(1)
[13] Section 414(4)
[14] Section 410
[15] Section 411(1)
[16] Section 411(4)(a) and (b)
[17] Section 411(4)(c)
[18] Section 411(4)(d)
[19] Section 411(4)(e)
[20] Section 406(1)
[21] Section 414(1)
[22] Section 424(1)
[23] Eight Schedule, Paragraph 2(a) and (b)
[24] Eight Schedule, Paragraph 1(a),(b) and (c)
[25] Eight Schedule, Paragraph 1(d)
[26] Section 396(1)
[27] Section 396(3)(a)
[28] Section 396(3)(b)
[29] Section 396(1)
[30] Section 396(2)
[31] Section 394. "*Insolvency Practitioner*" is not defined.
[32] Section 397(1)(a)
[33] Section 397(1)(b)
[34] Section 397(2)(a)
[35] Section 397(2)(b) and (c)
[36] Section 398(1)
[37] Section 398(1)
[38] Eight Schedule, paragraph 3
[39] Eight Schedule, paragraph 3
[40] Eight Schedule, paragraph 17
[41] Section 399 and 400
[42] Section 400(2)
[43] Section 400(3)
[44] Section 400(4)

FINANCIAL SERVICES

# Embracing the Change: Bank Negara Malaysia introduces Fintech Regulatory Sandbox Framework

IN THIS ARTICLE, TANG JIA YI DISCUSSES THE FINTECH REGULATORY SANDBOX FRAMEWORK.

Advances in technology coupled with evolving consumer demands have led to a growing number of financial technology ("fintech") companies not only in Malaysia, but all over the world. The emergence of such companies is reshaping the financial sector at a rapid pace.

Having recognised this change in the financial services landscape, foreign regulators such as the United Kingdom, Australia, Hong Kong and Singapore have launched regulatory sandbox frameworks to provide a safe-harbour for financial institutions and fintech companies to test their innovations within regulated parameters. The United States' Office of the Comptroller of the Currency has recently announced its intention to establish a responsible innovation framework to improve the agency's ability to identify, understand and respond to financial innovations affecting the federal banking system[1].

On 18 October 2016, Bank Negara Malaysia ("BNM") issued the Financial Technology Regulatory Sandbox Framework ("Framework") which took immediate effect with the goal of providing a regulatory environment to foster innovations of fintech in Malaysia.

Under the Framework, financial institutions and fintech companies are able to deploy and test the proposed product, service or solution in a live environment within the specified parameters, subject to appropriate safeguards and regulatory requirements.

**Who can apply?**

The Framework is applicable to a financial institution either on its own or in collaboration with a fintech company, or a fintech company which intends to apply or has applied for BNM's approval to participate in the sandbox[2].

**What are the requirements?**

An applicant seeking the BNM's approval to participate in the sandbox must first demonstrate, among others, that the product, service or solution is genuinely innovative and clearly has potential to:

i. improve accessibility, efficiency, security and quality in the provision of financial services;

ii. enhance the efficiency and effectiveness of Malaysian financial institutions' management of risks; or

iii. address gaps in or open up new opportunities for financing or investments in the Malaysian economy[3].

Given the fact that the sandbox operates in a live environment, it is not without risk. BNM recognises this and has taken into account the possibility that failure may occur which may result in financial loss or other risks to the sandbox participants or even the customers participating in the sandbox.

In view of the potential risks and/or losses that may arise from the sandbox, an applicant is required to identify the potential risks to financial institutions and consumers that may arise from testing the product, service or solution in the sandbox and propose appropriate safeguards to address the identified risks[4]. An applicant must also prove that the product, service or solution is functional and the applicant has the required resources and expertise to mitigate and control potential risks and losses arising from the offering of such product, service or solution[5].

**BNM's approval**

BNM will inform a successful applicant within 15 working days of it's receipt of a complete application[6]. Upon obtaining the approval, the successful applicant may then start testing the product, service or solution for a period of not more than 12 months[7].

The testing period as provided by BNM under the Framework is relatively long as opposed to the timeframe provided under the regulatory sandbox of Australia (six months) and of the United Kingdom (three to six months).

Upon completion of the testing period, BNM will consider whether or not to allow the product, service or solution to be introduced in the market on a broader scale. If allowed, participating fintech companies intending to carry out regulated businesses will be assessed based on applicable licensing, approval and registration criteria, as the case may be, under the relevant legislations[8].

**Conclusion**

The rapid growth and development of fintech are changing the financial sector both locally and globally. The establishment of the Framework shows BNM's recognition as regulator of such transformation as well as its acknowledgement of the significance of fintech companies to the local financial services industry. While the regulations in relation to fintech in Malaysia is still at an early stage, the introduction of the Framework is a good start to a seemingly promising future in this area.

The Framework should be applauded as it not only provides a platform for applicants, particularly fintech startups, to promote, engage and secure potential financial customers, but also helps to forge collaborations between financial institutions and fintech companies. Fintech companies that collaborate with financial institutions could gain extra benefits from guidance and support provided by financial institutions in regard to regulatory requirements and risk mitigations by participating in the sandbox[9].

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[1] See more at https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-135.html
[2] Paragraph 4.1, Financial Technology Regulatory Sandbox Framework.
[3] Paragraph 5.1(a), Financial Technology Regulatory Sandbox Framework.
[4] Paragraph 6.1, Financial Technology Regulatory Sandbox Framework.
[5] Paragraphs 5.1(b) and (c), Financial Technology Regulatory Sandbox Framework.
[6] Paragraph 7.3, Financial Technology Regulatory Sandbox Framework.
[7] Paragraph 9.2, Financial Technology Regulatory Sandbox Framework.
[8] Paragraph 9.3, Financial Technology Regulatory Sandbox Framework.
[9] Paragraph 5.2, Financial Technology Regulatory Sandbox Framework.

EMPLOYMENT LAW

# Uber Drivers — employee or self-employed?

IN THIS ARTICLE, WONG KIAN JUN ANALYSES THE CASE OF **MR Y ASLAM AND OTHERS V UBER BV AND 2 ORS**.

## Introduction

The recent proliferation of disruptive technology had greatly impacted conventional business models around the world — from transportation with the likes of Uber and Grab to accommodation with the likes of Airbnb. The availability of these services to consumers have greatly expanded their choices; however, normal taxi services and hoteliers have been up in arms. The rise of Uber/Grab have given rise to what is termed a gig economy[1] and one of the issues concerning Uber/Grab is whether the drivers for these services are their employees or independent contractors.

The concepts of an employee and self-employed individual, that is, consultants, independent contractors and so on are recognised in law. In this article, we will be discussing the recent decision by the Employment Tribunal in the United Kingdom in the case of **Mr Y Aslam and Others v Uber BV and 2 Ors (Case Nos: 22202550/2015)** on the issue of whether Uber drivers are employees or otherwise.

This issue is indeed relevant for Uber and even Grab because if Uber drivers are deemed to be employees then they would be entitled to, amongst others, minimum wage, sick leave, annual leave, statutory contributions and this in turn would surely increase the operating costs of their business and result in both Uber and Grab not being able to provide cheaper fares.

## Uber's argument

At the forefront of Uber's argument in this case was that the individuals had signed up to Uber as independent contractors and not employees of Uber. Therefore, it was the intention of both parties not to create an employee-employer relationship. Uber had gone to great lengths to highlight that the nature of the relationship between Uber and the drivers was not an employee-employer relationship in its agreement and other documentation with the drivers and passengers.

Uber had also argued that its relationship with the drivers was inconsistent with the existence of an employee-employer relationship for, among others, the following reasons:

a) The drivers can undertake work in any other organisation including a direct competitor.

b) The drivers are responsible for all the operating costs of the vehicle.

c) The drivers were under no obligation to turn on the Uber software.

d) The drivers treat themselves as self-employed for tax purposes.

e) Uber does not provide the drivers with any uniform and in fact are discouraged from displaying any Uber branding.

Uber argued that it merely provides the platform or the technology to the drivers and consumers and ultimately it is not a transport provider. The arguments raised by Uber above are clearly consistent with the drivers being independent contractors.

## Ruling

Despite Uber's arguments above, the Employment Tribunal was not convinced and essentially ruled that the drivers were in fact working for Uber. Among their findings were as follows:

a) Although the drivers were not compelled to turn on the Uber software, nevertheless, when it is turned on the drivers were working for Uber.

b) The terms and conditions drafted by Uber do not reflect the true nature of the relationship between the drivers and Uber and had in fact misrepresented the actual relationship.

c) Uber essentially is in the business of providing transportation services and not a company selling software.

d) The drivers accept any trips based strictly on the terms set out by Uber.

e) The fact that Uber dictates how the drivers are to provide the transport services to passengers.

The above decision by the Employment Tribunal has a significant impact on how the drivers for Uber will be treated. Effectively, Uber would now have to assume the obligation as an employer in the United Kingdom. However, Uber confirmed that it would appeal against the decision.

No doubt the development of this case and the cases in America concerning this issue would be closely watched by not only Uber drivers in the United Kingdom but Uber drivers across the world including in Malaysia.

### Conclusion

What this decision tells us is that is that the courts/tribunals have the power to not only evaluate the terms and conditions of the agreement but also look beyond it to see the actual relationship between parties.

Although this issue concerning Uber/Grab has not been determined in any court of law in Malaysia, the development in the United Kingdom could very well serve as persuasive authority.

It remains to be seen whether the courts in Malaysia have their own interpretation of the facts and law if such a case is brought before them.

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[1] A gig economy is an environment in which temporary positions are common and organisations contract with independent workers for short-term engagements.

## TAX LAW

# Budget 2017 Highlights

IN THIS ARTICLE, BOO SHA-LYN HIGHLIGHTS SOME OF THE TAX PROVISIONS IN THE RECENT 2017 BUDGET.

The Prime Minister tabled Budget 2017 in his capacity as Finance Minister on 21 October 2016, with the theme "*Ensuring Unity and Economic Growth, Inclusive Prudent Spending, Wellbeing of the Rakyat*".

Several key highlights from the Budget 2017 are discussed below and, unless otherwise stated, the budgetary proposals below when passed by Parliament will take effect from Year of Assessment ("Y/A") 2017.

### Corporate Tax

*Reduction in corporate income tax for increase in chargeable income*

While maintaining the current corporate income tax rate[1] at 24%, Budget 2017 introduces a new scheme whereby reductions in the income tax rate are given to taxpayers based on the percentage of increase in their chargeable income compared to the previous Y/A. Thus, the reduced income tax rates only apply to the increase or the incremental portion of the taxpayer's total chargeable income.

The reductions are calculated accordingly in the table below:

| Increase in Chargeable Income | Rate of Deduction | Resultant Income Tax Rate |
|---|---|---|
| Less than 5% | *Nil* | 24% |
| Between 5% and 9.99% | 1% | 23% |
| Between 10%–14.99% | 2% | 22% |
| Between 15%–19.99% | 3% | 21% |
| Greater than 20% | 4% | 20% |

This scheme is effective for Y/A 2017 and 2018.

*Reduction in corporate income tax rate for SME*

The Government has proposed that the corporate income tax rate of Small and Medium Enterprises (SME)[12] be reduced from the prevailing rate of 19% to 18% on chargeable income up to the first RM500,000.

### Goods and Services Tax ("GST")

*GST Relief for the Disabled*

It is proposed that disabled persons holding valid OKU ("*Orang Kurang Upaya*" in Malaya or Persons with Disabilities) cards will enjoy GST relief on the purchase of approved aid equipment from the suppliers designated by the Social Welfare Department. In addition, the list of equipment eligible for GST relief has also been expanded to include, among others, artificial prosthetics and orthotics, motorised wheelchairs and crutches.

This comes into effect on 1 January 2017.

*Goods and Services Tax ("GST") Treatment in Free Zones*

In a welcome move, the Government proposes to streamline the GST treatment in free zones, which consist of the Free Industrial Zone ("FIZ") and the Free Commercial Zone ("FCZ"). Currently, GST applies to both FIZ and FCZ but special treatment is accorded under section 162(a) of the **Goods and Services Tax Act 2014** where goods imported into FCZ are not imposed GST where it is for commercial purposes or retail trade purposes as approved under the **Free Zones Act 1990**.

Based on the new proposals, the following will not be subject to GST:

- Free Industrial Zone
  - Goods imported into FIZ;
  - Supply and removal of goods made within and between FIZ;

- Free Commercial Zone
  - Supply and removal of goods made within and between FCZ;

- Others
  - Supply and removal of goods made within FCZ and FIZ, and vice versa;
  - GST is suspended on the removal of goods from FIZ and FCZ to Designated Areas (namely Langkawi, Labuan and Tioman) and vice versa; and
  - GST is suspended on the removal of goods from FIZ and FCZ to an approved warehouse under the Warehousing Scheme and vice versa.

The above will not apply to the following:

- Goods prescribed under the Free Zones (Exemption of Goods and Services) Order 1998;

- Goods and services as prescribed under Goods and Services Tax (Imposition of Tax for Supplies in Respect of Designated Areas) Order 2014; and

- Any other goods prescribed by the Minister of Finance.

This comes into effect on 1 January 2017.

*GST Treatment under the Warehousing Scheme*

In a further move to streamline GST treatment, goods from a Licensed Manufacturing Warehouse, Excise Warehouse or Free Industrial Zone that are deposited into and supplied within or between warehouses under the Warehousing Scheme are not subject to GST.

This comes into effect on 1 January 2017.

**Tax deductions and incentives**

- *Islamic banking and Takaful businesses*

  To further widen the Islamic financial market, the current tax incentives are extended for another four years, effective from Y/A 2017 to Y/A 2020.

- *Four- and five-star hotels*

  Hotel operators undertaking investments in new four- and five-star hotels are currently eligible for Pioneer Status and an Investment Tax Allowance as part of the Government's efforts to provide international standard accommodation facilities. The Budget 2017 envisions that the same tax incentives be extended for another two years, that is, applications received from 1 January 2017 to 31 December 2018.

- *Halal industry players*

  In enhancing Malaysia's competitiveness in the halal products industry, it is proposed that the existing tax incentives be extended to include the production of nutraceutical and probiotic products. This is effective for applications received by the Halal Development Corporation from 22 October 2016.

- *Arts, culture and heritage*

  To encourage arts, cultural and heritage activities in Malaysia, the Government has proposed that the limit of tax deduction for a company that sponsors arts, cultural and heritage activities in Malaysia, as approved by the Ministry of Tourism and Culture, is increased to RM700,000 per year of which the limit for sponsoring foreign arts, cultural and heritage activities is increased to RM300,000.

- *Vendor Development Programme ("VDP")*

  Currently, anchor companies that develop local vendors under the VDP enjoy double deduction on several operating expenses pursuant to a Memorandum of Understanding ("MoU") signed with the Ministry of International Trade and Industry ("MITI"). To further encourage the participation of anchor companies in developing more competitive local vendors, the Government proposes that the current incentives be extended for another four years.

  The incentive is given to anchor companies that have signed MoU with MITI from 1 January 2017 to 31 December 2020.

- *Structured Internship Programme ("SIP")*

  Currently, companies that participate in the SIP, approved by TalentCorp, are eligible for double deduction on expenses incurred in implementing the programme. To encourage more companies to participate in SIP and contribute towards the employability of local graduates through an early exposure to the working environment, the Government proposes that the current incentives be extended for another three years.

  Effective for Y/A 2017 to Y/A 2019.

**Personal tax**

The Government has proposed the following individual tax relief:

- *Relief for lifestyle*

  Current tax relief for purchase of reading materials, purchase of sports equipment and computers are combined in the introduction of a new "*lifestyle relief*" which has a limit of up to RM2,500. The scope of this relief is expanded to include the purchase of printed daily newspapers, smartphone or tablet, internet subscription and gymnasium membership fee.

- *Relief for child care centres/kindergartens*

  To ease the burden of taxpayers with regard to the increasing costs of child care and early childhood education, the Government proposes a new tax relief of up to RM1,000 for taxpayers who enrol their children aged up to six years, in child care centres or kindergartens registered with the Department of Social Welfare or the Ministry of Education. The relief can only be claimed by either parent of the child.

- *Relief for breastfeeding equipment*

  To encourage and support women to return to employment while continuing to breastfeed their infant, the Government proposes a new tax relief of up to RM1,000 for the purchase of breastfeeding equipment which may be purchased in a complete set or separate parts consisting of: breast pump (manual or electric), cooler bag and containers for collection and storage. The relief can only be claimed once in two years from Y/A 2017 and by tax payers who are women with children aged up to two years.

**Stamp duty**

*Exemption for purchase of first residential home*

Budget 2017 continues the Government's efforts in encouraging home ownership and it is proposed that the current 50% stamp duty exemption on instrument of transfer and loan agreement be increased to 100%, limited to the first RM300,000. Stamp duty is fully exempted where the value of the home does not exceed RM300,000 while the remaining balance is subject to the prevailing rate of stamp duty.

This applies to residential properties with a value not exceeding RM500,000 and for agreements executed from 1 January 2017 to 31 December 2018.

*Increase in duty for transfers valued more than RM1 million*

On the other hand, the rate of stamp duty on instrument of transfer of properties valued more than RM1 million is to be increased from 3% to 4% effective from 1 January 2018.

**Finance Bill 2016 ("Finance Bill")**

The Finance Bill was tabled and had its first reading before the Dewan Rakyat (Malay for House of Representatives, the lower house of the Parliament of Malaysia) on 25 October 2016.

Several of the proposed amendments will have far-reaching consequences, for example, the proposed removal of the proviso to section 15A will have the effect of making payments for technical advice, assistance or services performed outside Malaysia deemed to be derived from Malaysia. In addition, the time frame for a relief application relating to withholding tax claims is within one year after the end of the year the payment is made, rather than the time frame of five years provided under subsection 131(1).

In relation to Goods and Services Tax, of particular note is the increase in penalties for late payment of GST and the GST registration threshold which may now include supply of capital assets.
Some of the proposals in this year's Finance Bill are highlighted below:

*Income Tax Act 1967*

- *Definition of "royalty"*

  The definition of "*royalty*" under the proposed amendment to section 2 has been revised to expressly cover payments in the telecommunication sector with regard to transmission by way of satellite or cable, fibre optic or radiofrequency spectrum or similar technology, while payments for total or partial forbearance are now expressly included in the definition.

- *Derivation of special classes of income*

  The proposed amendment to section 15A removes the proviso which allowed gross income in respect of special classes of income under subsections 4A(i) and (ii) to apply only to services performed in Malaysia. Now, the said classes of income shall be deemed to be derived from Malaysia irrespective of whether the services were performed in Malaysia or outside Malaysia.

- *On Mutual Administrative Assistance Arrangements (section 132B)*

  A new section 112A is proposed which provides that where a person fails to furnish a country-by-country report in relation to a Mutual Administrative Assistance Arrangement, the person commits an offence and on conviction is liable to a fine not less than RM20,000 and not more than RM100,000 or imprisonment for a term not exceeding six months or both. The section expressly states that the burden of proof of submission lies with the accused.

  In tandem with the above, a new section 113A is proposed to be inserted and the provision of incorrect or incomplete information or return in relation to a Mutual Administrative Assistance Arrangement is an offence and upon conviction is liable to a fine not less than RM20,000 and not more than RM100,000 or imprisonment for a term not exceeding six months or both. The defence of good faith applies.

  A new section 119B is proposed to be inserted and provides that failure to comply with rules made under section 154(1)(c) in relation to Mutual Administrative Assistance is an offence and upon conviction is liable to a fine not less than RM20,000 and not more than RM100,000 or imprisonment for a term not exceeding six months or both. The section expressly states that the burden of proof lies on the accused and the Court may make a further order for the accused to comply with the rules within 30 days, or such other period as the Court deems fit from the date the order is made.

- *Notification of Non-Chargeability*

  Several new subsections have been proposed to be inserted into the section 97A and the proposed amendments provide that, in circumstances where there is no chargeable income, the tax return submitted is deemed to be a notice by the Director General.

  Concurrent with the above, the proposed insertion of subsection 5 allows for a person to appeal against a return furnished that has no chargeable income if the person alleges that there is an error or a mistake in the amount computed in the return. However, subsection 8 expressly states that no amendment shall be allowed if the error or mistake was made on the basis of a Public Ruling or a practice of the Director General generally prevailing at the time the return was made.

- *Relief other than error or mistake*

  A new section 131A is proposed and clarifies that a person can apply for a relief if he has overpaid tax by reason of the person not being eligible to claim any exemption, relief, remission, allowance or deduction at the time such return is furnished as the law relating to such relief had not been gazetted or the claim for that relief has not been approved by the Director General of Inland Revenue. The relief application must be made within five years after the end of the year the exemption, relief, remission, allowance or deduction is published in the Gazette or the approval is granted, whichever is the later.

  The proposed subsections also applies to relief relating to withholding claims incurred under subsection 107A(2) or 109(2), section 109A and subsection 109B(2) or 109F(2). In respect of this category, the relief application must be made within one year after the end of the year the payment is made.

- *Interest Income*

  Proposed amendments to paragraphs 33A and 33B of Schedule 6 now provide that the interest income received by a company (whether a non-resident or resident company) from another company in the same group is not exempt from tax.

  In addition, a proposed substitution to paragraph 35A of the same Schedule provides that in the case of a unit trust which is a money market fund, the exemption shall only apply to a wholesale fund which complies with the relevant guidelines of the Securities Commission Malaysia.

*Goods and Services Tax ("GST") Act 2014*

- *Penalties for late payment*

  Proposed amendments to subsection 41(8) impose a minimum of 10% penalty and maximum of 40% penalty based on the numbers of days late. This amendment clarifies that the penalty is imposed on the remaining unpaid tax due and payable.

- *Time of supply for imported services*

  Proposed amendments to paragraph 13(4)(b) will have the effect of determining the time of supply of imported services at the date payment is made by the recipient or when invoice is received by the supplier, whichever is earlier.

- *Supply of capital assets*

  The words "due to cessation of business" have been proposed to be added to the end of paragraph 20(6)(a). This may have the effect of the value of capital assets being taken into account in determining the obligation to register for GST under section 20.

- *Provision of information*

  A proposed insertion of section 34A empowers the Director General to direct any person to provide information on all supply made and payment received by him, using a prescribed device. The subsections provide that the Director General may appoint an approved person to install the device at a registered person's business premises and the registered person shall allow the installation of such. Further, he has to ensure that the device installed is not tampered with and the use of the device is not obstructed by anything. A failure to comply with section 34A is an offence.

- *Supply of land for public amenities/public utilities*

  A proposed insertion as paragraph 8 into the Second Schedule provides that any supply of land to the government or local authority or any person in compliance of any written law for the purposes of providing public amenities and public utilities whether for no consideration or at nominal value is treated as neither a supply of goods nor supply of services.

- *Refunds*

  Proposed new amendments to section 57 will modify the shoulder note to "Overpaid, erroneously paid, remitted or being the subject of relief" and will now include any person who has made payment of tax due and payable and who subsequently had been granted relief or remission.

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[1] The following entities are currently charged at a fix rate of 24%:

a. A company with paid-up capital of more than RM2.5 million or a Limited Liability Partnership ("LLP") with total contribution of capital more than RM2.5 million;
b. A company with paid-up capital of up to RM2.5 million or a Limited Liability Partnership ("LLP") with total contribution of capital of up to RM2.5 million on the chargeable income more than RM500,000;
c. Trust body;
d. Court-appointed receiver; and
e. Executor of an estate of an individual who was domiciled outside Malaysia at the time of death.

[2] For the purposes of income tax, SMEs are currently categorised as a company with paid-up capital of up to RM2.5 million or a Limited Liability Partnership ("LLP") with total contribution of capital of up to RM2.5 million.

| | |
|---|---|
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