Newsletter

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FRONT PAGE FOCUS

Financial Services

Transition from LIBOR

In this article, Krystle Lui Shu Lin reports on the transition from LIBOR rates to risk-free rates.

Introduction

The Financial Conduct Authority ("FCA") in the United Kingdom announced in 2017 that it would no longer be necessary to persuade or compel banks to submit the rates required to calculate LIBOR after 31 December 2021

What is IBOR/LIBOR?

Interbank Offered Rates ("IBORs") are benchmark interest rates which represent the average rate at which banks are willing to borrow wholesale unsecured funds. The London Interbank Offered Rate ("LIBOR") is the most widely used interest rate benchmark in the world. It is often referenced in, amongst others, derivative, bond and loan documentation. It also serves as a gauge of market expectation regarding central bank interest rates, liquidity premiums in the money markets and, during periods of stress, as an indicator of the health of the banking system[1].

LIBOR is administered by ICE Benchmark Administration ("IBA") and calculated based on submission of rates provided by a panel of 20 banks. The rates are submitted to, and used by, IBA for the overall LIBOR index calculation.

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LIBOR is calculated and published daily for five currencies (Sterling, Euro, Swiss Franc, Japanese Yen and US Dollar) and seven tenors[2].

As the methodology of determining LIBOR is based on submissions by panel banks, this would mean that it is subjective and open to manipulation. This was proven to be true in the LIBOR scandal which occurred in 2012 when a bank admitted that its traders submitted estimates which considered requests by colleagues and external traders which they did not believe to be precisely accurate. Furthermore, the submission by that bank was also influenced by a desire to portray an image of its own liquidity that belied the difficulties it was then experiencing[3].

The FCA, as regulator of LIBOR, announced the timeline for the discontinuation of LIBOR as follows[4]:

Date	LIBOR (currency and tenor)
after 31 December 2021	• all tenors for Sterling • all tenors for Euro • all tenors for Swiss Franc • all tenors for Japanese Yen • 1-week and 2-month tenor for US Dollar
after 30 June 2023	Overnight, 1-month, 3-month, 6-month and 12-month US Dollar tenors

Replacement rates

In view of the prospective discontinuation of IBORs, risk free rates ("RFRs") have been identified as an alternative to IBORs. RFRs are all overnight interest rate benchmarks, and therefore "backward-looking", based on actual transactions.

IBORs on the other hand represent interest rates for unsecured interbank loans across various tenors and so IBORs are forward-looking term rates which incorporate unsecured bank credit risk.

The table below summarises the differences between IBOR and RFR:

Benchmark	IBOR	RFR
Tenor	**Various[5]** **(overnight/spot, 1 week, 1 month, 2 months, 3 months, 6 months and 12 months)**	**Overnight**
Publication	**Prospectively**	**Retrospectively**
Secured/Unsecured	**Unsecured**	**Either**
Credit risk	**Incorporate a spread**	**Minimal or none**
Rate determination	**Judgment based**	**Transaction based**

The prospective demise of IBORs means that Malaysian entities (banks and corporates) which have existing IBOR-based loan and/or derivative contracts will have to re-negotiate benchmark replacements and develop fallback provisions with their counterparties in an effort to reduce the consequential legal risks following the non-publication of the IBORs from the specified dates.

Fallbacks Protocol by ISDA

The International Swaps and Derivatives Association ("ISDA") has created the ISDA protocol mechanism to amend the ISDA standard contracts on a multilateral basis[6]. On 23 October 2020, ISDA published an ISDA 2020 IBOR Fallbacks Protocol ("Protocol") and IBOR Fallback Supplements ("Supplements") to the 2006 ISDA Definitions which came into effect on 25 January 2021[7].

The Protocol read with the Supplements seeks to:

- incorporate either the terms of, or a particular defined term included in, the Supplement in the terms of existing non-cleared derivative contracts referencing to IBORs; and/or
- on the permanent cessation of the relevant IBOR, to replace references to IBOR, or what ISDA calls as "*falls back*", with the applicable new benchmark rates into an existing derivative contract, provided that the parties to the derivative contract agree to adhere to the Protocol[8].

Any party may adhere to the Protocol.

Local IBOR

The current IBOR used in Malaysia is the Kuala Lumpur Interbank Offered Rate ("KLIBOR") which was introduced in June 1987[9]. Similar to LIBOR, the rates quoted for KLIBOR are based on submissions by appointed licensed banks or licensed Islamic banks which indicate the rates at which the KLIBOR submitters

are willing to lend ringgit funds for the relevant tenors and are mainly used as reference for other products such as the floating leg of interest rate swaps, options, futures and structured products[10].

Bank Negara Malaysia ("BNM") has appointed the Financial Markets Committee ("FMC") to oversee the development of a transaction-based alternative reference rate ("ARR") for Malaysia and deliberate on the strategic direction for KLIBOR and the Kuala Lumpur Islamic Reference Rate ("KLIRR").

BNM indicated in its Financial Stability Review — Second Half 2020 that:

- the FMC will conduct a public consultation to gather feedback on the identification of a suitable ARR and enhancement of the KLIBOR framework if it is retained; and
- the publication of the ARR is expected to commence in the second half of 2021, pursuant to which banks can price its product based on ARR[11].

On 19 May 2021, BNM issued, and invited written feedback by 18 June 2021, on a discussion paper[12] that addresses the development of an ARR, refinements to KLIBOR, IBOR fallback language and review of the KLIRR.

KRYSTLE LUI SHU LIN
FINANCIAL SERVICES PRACTICE GROUP

Please contact us for further information regarding financial services matters.

Endnotes:

[1] Overview on LIBOR by ICE Benchmark Administration available at www.theice.com/iba/libor.
[2] *Ibid*.
[3] Toomey K, LIBOR, 1 October 2012, *Journal of International Banking and Financial Law* (2012) 9 JIBFL 538.
[4] Announcement by FCA on "*Announcements on the end of LIBOR*" dated 5 March 2021 available at https://tinyurl.com/2weusfak.
[5] News by FCA on "*Transition from LIBOR*" dated 4 September 2019 and as updated on 26 March 2021 available at www.fca.org.uk/markets/libor.
[6] More information on the application of ISDA Protocol is at https://www.isda.org/protocols/isda-standard-adherence-refund-policy/.
[7] Press release by ISDA on "*New IBOR Fallbacks Take Effect for Derivatives*" dated 25 January 2021.
[8] ISDA's response to question 2B to the ISDA 2020 IBOR Fallbacks Protocol (IBOR Fallbacks Protocol) FAQs, available at http://assets.isda.org/media/3062e7b4/3cfa460a-pdf/.
[9] Paragraph 1.1 of policy document on KLIBOR Rate Setting, available at https://tinyurl.com/f4u7cv8x.
[10] Paragraph 1.2 of policy document on KLIBOR Rate Setting.
[11] Page 7 of Financial Stability Review – Second Half 2020 https://www.bnm.gov.my/documents/20124/3026574/fsr2020h2_en_ch2_fi.pdf.
[12] Available at https://tinyurl.com/pvd5z7ny.

Corporate/M&A

The Malaysian Code on Corporate Governance 2021

In this article, Teo Eu John examines amendments to the Malaysian Code on Corporate Governance.

Introduction

The Securities Commission Malaysia ("SC") has published a revised version of the 2017 Malaysian Code on Corporate Governance ("2017 MCCG"), which is effective from 28 April 2021 ("2021 MCCG"). The first batch of companies to report on their adoption of the 2021 MCCG practices will be those with financial years ending 31 December 2021[1].

The 2021 MCCG is a set of corporate governance best practices for companies to adopt. While the 2021 MCCG is applicable to listed companies, certain practices are only applicable to Large Companies[2]. Non-listed entities are also encouraged to adopt the practices in the 2021 MCCG.

The 2021 MCCG adopts the "*apply or explain an alternative*" approach. Listed companies are required to disclose the application of each practice set out in the 2021 MCCG in their Corporate Governance Report and announce the same together with the annual report[3].

If the board finds that it is unable to implement any of the 2021 MCCG practices, alternative practices may be adopted to meet the Intended Outcome of the 2021 MCCG by providing an explanation for the departure and disclose the alternative practice it has adopted[4]. Large Companies that depart from any of the practices are required to identify and disclose a reasonable timeframe for the adoption of the practices[5].

The 2021 MCCG introduces new best practices and guidance to strengthen the corporate governance culture of listed companies and to encourage the adoption of best practices which have relatively lower levels of adoption[6].

The 2021 MCCG also introduces new best practices that emphasise the need for collective action by boards and senior management to address the urgent need for companies to manage environmental, social and governance ("ESG") risks and opportunities and global commitment and acceleration of efforts to transition towards a net-zero economy[7].

Overall, the 2021 MCCG updates and introduces new practices and guidance on board responsibilities, board composition, remuneration, audit committee and conduct of general meetings.

The following three changes will be the focus of this article:

1. Governance of Sustainability

The role and management of directors and senior management for the governance of sustainability in the company is a new requirement. Under the 2021 MCCG, the board together with management are responsible for the sustainability governance in the company including setting the company's sustainability strategies, priorities and targets. The board is required to consider sustainability considerations when exercising its duties, and the senior management to drive the strategic management of material sustainability matters[8].

The 2021 MCCG clarifies the link between ESG and corporate governance where integration of sustainability consideration is required in corporate strategy, governance and decision-making as sustainability and its underlying ESG issues become increasingly material to the ability of companies to create durable and sustainable value and maintain the confidence of their stakeholders[9].

2. Board Diversity

Under the 2017 MCCG, Large Companies were required to have at least 30% women directors on boards. Other listed companies are only recommended to work towards achieving such target. The gender diversity agenda is not only limited to board level, as the 2017 MCCG also encourages companies in general to include women participation in senior management.

However, based on the SC's Corporate Governance Monitor Report 2020, gender diversity is one of the practices with the lowest levels of adoption[10]. The participation of women on boards is 25.3% for the top 100 listed companies, although the target was to reach at least 30% by end of 2020[11]. Further, 772 out of 937 listed companies (excluding LEAP market) have less than 30% women on board and 248 listed companies board are all-male boards[12].

To expedite the progress of women participation on boards under the 2021 MCCG, the boards of all listed companies will need to comprise at least 30% women directors[13]. Numerous studies have proven the business case for board diversity, in particular, the participation of women on boards. If the composition of women on a board is less than 30%, the board is required to disclose the action

it has or will be taking and the timeframe to achieve such target (reasonable timeframe should be three years or less)[14].

The 2021 MCCG also recommends the board to establish and disclose in the annual report a gender diversity policy for the board and senior management[15].

3. Independence of the Board

Voting

The 2017 MCCG discouraged an independent director to hold tenure for more than nine years. Under the 2017 MCCG, retention of an independent director above nine years required shareholders' approval, whereas retention of an independent director above 12 years required shareholders' approval through the two-tier voting process[16].

The SC reported that as of 31 March 2021, 434 independent directors have tenures of more than 12 years, out of which 49 independent directors have served on the same board for more than 20 years[17]. The SC's review further discloses that there are chairmen who have been in the same position for more than 40 years[18].

To tackle the issues relating to re-appointment of long-serving independent directors and to encourage periodic refresh of board composition, the 2021 MCCG requires that the two-tier voting process to be implemented for re-appointment of independent directors with tenures of more than nine years[19]:

- Tier 1: Voting by Large Shareholder(s)[20]; and
- Tier 2: Voting by other shareholders.

The two-tier voting requirement will be effective for resolutions tabled at general meetings held on or after 2 January 2022. Following this amendment, Bursa Malaysia will introduce a 12-year tenure limit without further extension for independent directors in the Listing Requirements with targeted issuance in Q4, 2021[21].

Appointment of Directors

The 2021 MCCG recommends the boards of State-owned Enterprises to observe practices in the OECD Guidelines on Corporate Governance of State-Owned Enterprises ("Guidelines"). To ensure the independence of the board's judgment, the Guidelines recommend that persons linked directly with the executive powers such as heads of state, heads of government and ministers, should not serve on boards. Further, listed companies are discouraged from appointing an

active politician[22] to promote the exercise of objective and independent judgment aligned with global best practices[23].

Additionally, the shareholders should have sufficient information to make an informed decision on the appointment and re-appointment of a director, including details of any interest, position or relationship that might influence, or reasonably be perceived to influence, in a material respect that director's capacity to exercise an independent judgment and to act in the best interests of the listed company, and the board's statement as to whether it supports the appointment or re-appointment of the candidate and the reasons why[24].

Conclusion

The 2021 MCCG is revised to reflect globally accepted corporate governance practices and will have to be read together with Bursa Malaysia's amended listing requirements when issued. The 2021 MCCG is a step forward in improving corporate governance, particularly regarding ESG.

Malaysia does not appear to be alone in this regard as other jurisdictions such as Hong Kong[25] and Japan[26] have recently announced proposed amendments to their corporate governance codes to, amongst others, address sustainability and ESG issues.

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Please contact us for further information regarding corporate/M&A matters.

Endnotes:

[1] Paragraph 6.2, Frequently Asked Questions on the Malaysian Code on Corporate Governance.

[2] Paragraph 2.7, Malaysian Code on Corporate Governance 2021. Large Companies are companies on the FTSE Bursa Malaysia Top 100 Index; or with a market capitalisation of RM2 billion and above at the start of their financial year.

[3] Paragraph 15.25, Main Market Listing Requirements.

[4] Paragraph 3.2A, Practice Note 9 of the Main Market Listing Requirements.

[5] Paragraph 6.4, Malaysian Code on Corporate Governance 2021. A timeframe of three years or less would be considered reasonable.

[6] Paragraph 2.6, Malaysian Code on Corporate Governance 2021.

[7] Securities Commission Malaysia, "*SC Updates The Malaysian Code On Corporate Governance To Promote Board Leadership And Oversight Of Sustainability*" (2021) — https://tinyurl.com/x34jf79m.

[8] Practice 4.1, Malaysian Code on Corporate Governance 2021.

[9] Securities Commission Malaysia, "*SC Updates The Malaysian Code On Corporate Governance To Promote Board Leadership And Oversight Of Sustainability*" (2021) — https://tinyurl.com/x34jf79m.

[10] Securities Commission Malaysia, "*Corporate Governance Monitor 2020*" (2020) — https://tinyurl.com/puw9x579.

[11] Securities Commission Malaysia, "*SC Updates The Malaysian Code On Corporate Governance To Promote Board Leadership And Oversight Of Sustainability*" (2021) — https://tinyurl.com/x34jf79m.
[12] Securities Commission Malaysia, "*Corporate Governance Monitor 2020*" (2020) — https://tinyurl.com/puw9x579.
[13] Practice 5.9, Malaysian Code on Corporate Governance 2021.
[14] Paragraph G5.9, Malaysian Code on Corporate Governance 2021.
[15] Practice 5.10 and Paragraph G5.10, Malaysian Code on Corporate Governance 2021.
[16] Practice 4.2, Malaysian Code on Corporate Governance 2017.
[17] Securities Commission Malaysia, "*SC Updates The Malaysian Code On Corporate Governance To Promote Board Leadership And Oversight Of Sustainability*" (2021) — https://tinyurl.com/x34jf79m.
[18] Paragraph G5.1, Malaysian Code on Corporate Governance 2021.
[19] Practice 5.3, Malaysian Code on Corporate Governance 2021.
[20] Paragraph G5.3, Malaysian Code of Corporate Governance 2021, Large Shareholder means a person who (i) is entitled to exercise, or control the exercise of, not less than 33% of the voting shares; (ii) is the largest shareholder of voting shares; (iii) has the power to appoint or cause to be appointed a majority of the directors; or (iv) has the power to make or cause to be made, decisions in respect of the business or administration of the company, and to give effect to such decisions or cause them to be given effect to.
[21] Paragraph 6.2, Frequently Asked Questions on the Malaysian Code on Corporate Governance.
[22] A person is considered politically active if he is a Member of Parliament, State Assemblyman or holds a position at the Supreme Council, or division level in a political party.
[23] Paragraph G5.5, Malaysian Code on Corporate Governance 2021.
[24] Practice 5.7, Malaysian Code on Corporate Governance 2021.
[25] Hong Kong Exchange and Clearing Limited, "*April 2021 — Consultation Paper on Review of Corporate Governance Code and Related Listing Rules*" — https://tinyurl.com/3zh7cd3j.
[26] Financial Services Agency, "*Revisions of Japan's Corporate Governance Code and Guidelines for Investor and Company Engagement*" (2021) — https://tinyurl.com/32evprns.

Intellectual Property

Goodwill in a Name

A case note by Pravind Chandra.

Introduction

On 20 May 2021, the Federal Court delivered its decision in a passing off case, **Mohammad Hafiz Bin Hamidun v Kamdar Sdn Berhad** . The Court had granted leave for two questions raised by the appellant/plaintiff, of which the first question was:

> "*In a common law claim for passing off where two (2) entities may be entitled to claim goodwill, who has the locus standi to commence an action in passing off as the owner of such goodwill?*"

Brief facts

The appellant/plaintiff, Mohammad Hafiz Hamidun ("Hafiz"), is a popular traditional music singer and song composer. In addition to his career in the music industry, he is also in the business of selling fabrics such as *Baju Melayu* and other traditional costumes, both online and in boutiques, through his company named Haje Sdn Bhd ("HSB"). The respondent/defendant, Kamdar Sdn Bhd ("Kamdar"), is also in the business of selling fabrics with many stores located throughout various parts of Malaysia.

In 2017, Hafiz became aware that Kamdar was selling goods bearing the label "*Hafiz Hamidun*". Dissatisfied that Kamdar was using a label which was Hafiz's own name and an unregistered trademark for his own line of fabrics, Hafiz sent a cease and desist letter to Kamdar.

Kamdar, despite not replying to the letter, replaced the "*Hafiz Hamidun*" label with "*Afiz Amidun*". Aggrieved, Hafiz filed a suit for common law passing off at the High Court in the same year, upon which the Kamdar ceased usage of the replaced version of the label as well.

Findings of the High Court and the Court of Appeal

On the issue of *locus standi*, the High Court ruled in favour of Hafiz. The Court found that Hafiz had established goodwill in the label "*Hafiz Hamidun*". The Court further held that HSB was effectively owned by Hafiz, and that Kamdar

could not rely on the fact that HSB was not a party to evade liability on a technical issue of non-joinder of HSB. The High Court also found that the Hafiz had established misrepresentation and damage (or likelihood of damage) and thus allowed the Hafiz's claim.

However, the Court of Appeal took an opposing view and ruled that Hafiz had no *locus standi* to pursue the claim against Kamdar. The Court further held that only HSB had established goodwill and therefore should be the one to file the claim. The Court allowed Kamdar's appeal based on this technical point but did not overturn the other findings of the High Court.

The Federal Court's decision

Hafiz was granted leave to appeal to the Federal Court on two questions of law, but the Federal Court subsequently considered it unnecessary to answer the second leave question.

In deciding the first leave question of who has the *locus standi* to commence an action in passing off as the owner of the goodwill, the Court reiterated that goodwill is always attached to a business or trade, and, based on evidence from the earlier proceedings, agreed that there was indeed goodwill attached to "*Hafiz Hamidun*".

The Court then affirmed the principles set out in **Bollinger v Costa Brava Wine Company Ltd**[i] where it was held that if goodwill of a particular trade or goods is capable of being identified geographically, then any trade with sufficient nexus to that business is eligible to sue.

The Court then proceeded to reject Kamdar's argument to distinguish Hafiz from HSB. The Court also applied the principles in **Irvine v Talksport Ltd**[ii] when it held that the existence of goodwill attached to "*Hafiz Hamidun*" was due to Hafiz's achievements and reputation as a celebrity in the music industry.

Conclusion

While there were several other legal principles applied to the first leave question as well as to the second question, the issue of *locus standi* in passing off cases is one that is of interest. The Federal Court's decision firmly establishes a celebrity's right to goodwill where that celebrity's business is based on his or her actual or stage name.

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Please contact us for further information regarding intellectual property law matters.

Endnotes:
[1][2021] 1 LNS 590.
[2][1959] 3 All ER 800.
[3][2002] 2 All ER 414.

Tax & Revenue

Agro-Mod Industries Sdn Bhd v Goods and Services Tax Appeal Tribunal and Director General of Customs

A case note by Jeevitha Thurai Rathnam.

Introduction

Recently, the Court of Appeal ruled in Agro-Mod Industries Sdn Bhd v Goods and Services Tax Appeal Tribunal and Director General of Customs[iii] on the issue of whether the goods and services tax ("GST") was chargeable on the sale of agricultural land under a contract entered into before GST was implemented with effect from 1 April 2015 ("Effective Date").
Facts of the Case

On 1 August 2013, the purchaser, Mydin Wholesale Cash & Carry Sdn Bhd ("Mydin"), and the vendor, Agro-Mod Industries Sdn Bhd ("Agro-Mod"), entered into an agreement ("Contract") for the sale of a piece of vacant agricultural land ("Land"). Payment of the 10% deposit by Mydin and delivery of the executed memorandum of transfer ("MOT") by Agro-Mod occurred in 2013.

The Land was acquired by Mydin for the purpose of building a hypermarket. As such, the status of the Land, originally agricultural land, had to be converted to commercial land prior to its transfer to Mydin. This was one of the conditions precedent for the sale of the Land. The Agreement became unconditional in October 2014 when all conditions precedent, including conversion of the Land to commercial status, were met.

Owing to Mydin's delay, the balance of the purchase price ("Balance Purchase Price") was not paid within the agreed timeline, which had been scheduled for January 2015. As such, the Contract could not be completed prior to the Effective Date as originally intended. The Balance Purchase Price was only paid by Mydin five months later during which GST had already been implemented. Likewise, vacant possession of the Land was delivered to Mydin after GST was implemented.

Crux of the dispute

The Director General of Customs and the Royal Malaysian Customs Department (collectively "Customs") took the position that GST was chargeable on the transaction, purportedly on the basis that payment of the Balance Purchase Price

and delivery of vacant possession occurred after, and not before, the Effective Date. Customs took these events as being determinative of the "*time of supply*" for GST purposes. Agro-Mod disputed Customs' position and lodged an appeal to the Goods and Services Tax Appeal Tribunal ("the Tribunal").

Agro-Mod contended that the charging provisions of the Goods and Services Tax Act 2014 (Act 762) ("GST Act") ought not be retrospectively applied to an agreement entered 20 months before GST was implemented. Further, critical events such as payment of the deposit for the sale and the delivery of the MOT, had occurred even before GST was first announced by the then Minister of Finance during the 2014 Budget Speech.

Alternatively, even if the GST Act applied, Agro-Mod contended that no GST was chargeable as this was a supply of agricultural land. In this regard, pursuant to Paragraph 1(1) of the First Schedule to the Goods and Services Tax (Exempt Supply) Order 2014 ("Exempt Supply Order"), the supply of any land used or intended to be used for agricultural purposes would constitute an exempt supply so that no GST would be chargeable thereon.

The Tribunal and the High Court

The Tribunal dismissed Agro-Mod's appeal, ruling that GST was chargeable on the sale of the Land. This was affirmed by the High Court on appeal, on the following grounds:

- there was no issue of retrospectivity as the transitional provisions under section 188(1) of the GST Act[iv] specifically caters for agreements entered before the Effective Date with progressive or periodic supplies made after the Effective Date, which is similar to Agro-Mod's transaction;
- the "*time of supply*" occurred when vacant possession was delivered to Mydin and the Balance Purchase Price paid by Mydin after the Effective Data, when all Agro-Mod's obligations were completed under the Contract and indefeasible title obtained; and
- the Land was not agricultural land and therefore the supply is not an "*exempt supply*".

Court of Appeal

The Court of Appeal overturned the High Court's decision and unanimously held that GST was not chargeable on the supply/sale of the Land under the Contract.

In handing down its decision, the Court of Appeal held that the Land was supplied before GST was implemented, as the Land was "*made available*" to Mydin when the MOT was delivered to Mydin. Contrary to Customs' contention, the time of

supply of the Land had occurred before, and not after, the Effective Date. In so ruling, this would also mean that section 188(1) of the GST Act has no relevance for the instant case, as no progressive or periodic supplies were made in a sale of a merely vacant piece of land.

The Court of Appeal also agreed with Agro-Mod's alternative contention that the supply in question was for agricultural, and not commercial, land. As such, this was an exempt supply within the meaning of Paragraph 1(1) of the First Schedule to the Exempt Supply Order so that no GST was chargeable in any event.

There is no further appeal against the Court of Appeal's decision, which is final and binding.

Conclusion

There are numerous uncertainties on the applicability of GST to agreements entered into prior to the Effective Date. This decision would have a significant impact on such agreements, particularly the sale of land where no progressive or periodic supplies are involved. In accordance with the trite principle of tax law, such ambiguities ought to be read in favour of the taxpayer, and not against it.

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Please contact us for further information regarding tax & revenue matters.

Endnotes:

[1] Civil Appeal No. W-01(A)-564-09/2019.

[2] Section 188(1) of the GST Act provides that "*where any supply is made under an agreement for a period or progressively over a period whether or not at regular intervals and that period begins before the effective date and ends on or after the effective date, the proportion of the supply which is attributed to the part of the period on or after the effective date shall be chargeable to tax*".

Employment & Administrative Law

Case Update on the Acceptance of Covert Recording as Evidence in an Employment Dispute

A case note by Jamie Goh Moon Hoong

Introduction

In the Industrial Court Award of **Kavitha Chakravarthy v Malayan Banking Berhad**[1], the Industrial Court allowed a secret recording to be admitted as evidence as it was relevant for the Court to determine the facts in dispute between the parties.

Facts

The claimant, Kavitha Chakravarthy ("Kavitha"), was employed by Malayan Banking Berhad ("Bank") as an Executive, Data & System Analytics from Risk Management. In April 2019, the Bank received a complaint that Kavitha had allegedly raised her voice at her Line Manager whilst making disparaging, derogatory, degrading as well as threatening remarks with vulgar words.

This led to her Line Manager initiating a Conversation Log in the MyHR2U System to capture/document their discussion where Kavitha was briefed on her responsibilities to adhere to the "*Business As Usual*" schedule, additional project (global rates book) and annual leave planning.

To determine the veracity of the matter, the Bank commenced investigations into the alleged misconduct. The Bank's investigations revealed that Kavitha had indeed hurled disparaging, derogatory, degrading as well as threatening remarks with vulgar words at her Line Manager in the presence of her colleagues.

During the first investigative interview, Kavitha denied uttering any vulgar words or the word "*F****" at her Line Manager. However, Kavitha subsequently admitted that she uttered the vulgar words at her Line Manager when the recording of the conversation between her and her Line Manager was played back to her during the second investigative interview.

Industrial Court decision

Apart from referring to the verbatim transcript of the audio recording, the Industrial Court also considered the tone of Kavitha's voice in the audio recording. The Industrial Court ruled that the vulgarity and incessant belittling and berating of Kavitha's Line Manager by Kavitha was quite intolerable by any standard. This was exacerbated by the fact that Kavitha had verbally attacked her Line Manager in full view of her co-workers. The Industrial Court accordingly rejected Kavitha's evidence that it was a mere outburst.

The Industrial Court further considered the way in which Kavitha provided her answers during the first investigative interview. Upon perusing the first investigative interview records, the Court found that Kavitha had been forceful in giving answers which were markedly different from what had transpired.

The Court found that Kavitha's Line Manager was consistent in his testimony as to why he had taken the decision to record their conversation without Kavitha's knowledge through its analysis of the Bank's investigative interviews with Kavitha.

Based on the Court's analysis of the investigative interviews, the Court ruled that Kavitha had the propensity to say one thing and then deny ever saying it. As such, the Court held that the recording was relevant for it to determine the facts in dispute between the parties.

The Industrial Court further ruled that based on the audio recording, the actions of Kavitha were not only an act of insubordination but was in defiance of a superior officer with intent to cause humiliation to her superior.

Conclusion

This case is in line with the general principle that illegally or improperly obtained evidence remains admissible in law if it is relevant. The test to be applied in considering whether such evidence is admissible is not the method in which the evidence was obtained but whether it is relevant to the matters in issue.

The Bank in the present matter was represented by Mr. N. Sivabalah (Partner) and Ms. Jamie Goh (Senior Associate) of our firm's Employment & Administrative Law Practice Group.

JAMIE GOH MOON HOONG
EMPLOYMENT & ADMINISTRATIVE LAW PRACTICE GROUP

Please contact us for further information on employment & administrative law matters.

Endnotes:
[1] [2021] 1 ILR 112.

Dispute Resolution

Clarity on Show Cause Notice(s) Prior To Party-Initiated Committal Proceedings

A case note by Sharon Jessy.

Introduction

On 18 February 2021, the Federal Court delivered its decision in **Tan Poh Lee v Tan Boon Thien**[1]. The Federal Court had previously granted leave on 18 August 2020 for two questions raised by the Appellant (translated verbatim from Bahasa Malaysia):

- Whether the true interpretation of Order 52 Rule 2B, Rules of Court 2012, is that prior Notice to Show Cause is required to be given to the proposed contemnor before the filing of an *ex parte* application for leave pursuant to Order 52 Rule 3, Rules of Court 2012 ("First Leave Question").
- Whether based on the true interpretation Order 52 Rule 2B, Rules of Court 2012, the notice to show cause referred to in Order 52 Rule 2B, Rules of Court 2012 means documents referring to that in Order 52 Rule 4(3), Rules of Court 2012 ("Second Leave Question").

Brief facts

Arising from a filial dispute concerning the deceased's estate, the first appellant ("Tan Poh Lee") applied and obtained an *ex parte* Leave Order to commit the first respondent ("Tan Boon Thein") for breach of a stay order which sought to preserve the status quo of the KL probate action (an order for the interim preservation of the identified assets was also granted)

This was done pending disposal of the appeal to the Court of Appeal (against the granting of an order appointing an administrator *pendente lite* to administer the deceased's estate in the KL probate action) by reason that Tan Boon Thien's actions, by filing subsequent suits against HSBC Trustees International Limited ("HSBC") (custodian of the monies held in trust) for declarations that the trust had terminated and an *ex parte* injunction, were a clear breach of the stay order and also an interference with the due administration of justice

The proposed contemnor, Tan Boon Thein, applied to set aside the *ex parte* Leave Order ("Setting Aside Application") on the basis of procedural irregularity — the primary issue was whether service of a notice to show cause under Order

52 Rule 2B of the ROC 2012 ("ROC 2012") on the proposed contemnor was mandatory before any *ex parte* application for leave under Order 52 Rule 3, ROC 2012 could be properly made.

Findings of the High Court and the Court of Appeal

The High Court dismissed the Setting Aside Application ("High Court Order"). Tan Boon Thein lodged an appeal to the Court of Appeal against the High Court Order.

The Court of Appeal took an opposing view, ruling that service of a notice to show cause under Order 52 Rule 2B, ROC 2012 on a proposed contemnor was mandatory before an *ex parte* application for an order of committal against him could be made ("Court of Appeal Order"). The Court of Appeal set aside the High Court Order and dismissed the *ex parte* Leave Order.

The Federal Court's decision

The Federal Court answered the First Leave Question in the negative and the Second Leave Question in the affirmative and thereby set aside the Court of Appeal Order with costs of RM50,000 in favour of Tan Poh Lee.
In deciding the First Leave Question, the Federal Court in their brief oral Grounds of Judgment held that:

- Order 52 Rule 2B, ROC 2012 is not a pre-requisite for a party-initiated committal proceeding — the Notice to Show Cause referred to therein is to be issued at the behest of the Court (which presumably refers to committal proceedings initiated by the Court's own motion pursuant to Order 52 Rule 2A, ROC 2012); and
- "notice" to in Order 52 Rule 2B, ROC 2012 refers to the "notice" stipulated under Order 52 4(3), ROC 2012 (which is read to be the notice of application).

The full/complete Grounds of Judgment of the Federal Court are not available as at the publication of this newsletter.

Conclusion

The position on the necessity of issuing a notice to show cause prior to commencing committal proceedings is now settled following this Federal Court ruling.

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Please contact us for further information regarding dispute resolution matters.

Endnotes:
[1] Civil Appeal No.: 02(i)-45-09/2020(W).

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