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Kraft Foods Schweiz Holding GmbH v Pendaftar Cap Dagangan

The Malaysian Law Should Recognise the Tort of Harassment

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Key Changes under The Malaysian Code On Take-Overs and Mergers 2016 and The Rules On Take-Overs, Mergers and Compulsory Acquisitions

By Mendy Tan

On 15 August 2016, the Malaysian Code on Take-overs and Mergers 2016 (the “New Code”) replaced the existing Malaysian Code on Take-overs 2010 (the “Old Code”). The Securities Commission of Malaysia (the “SC”) supplemented the New Code by introducing the Rules on Take-overs, Mergers and Compulsory Acquisitions (the “Rules”). Post 15 August 2016, the New Code streamlines and codifies the 12 general principles that shall be observed and complied by all persons engaged in any take-over or merger transaction. The operational and conduct requirements, which were previously provided under the Old Code, are now contained in the Rules.

Application of the New Code and the Rules

The Old Code would still apply to all take-over and merger transactions that have commenced before the coming into force of the New Code albeit it has been revoked. The New Code and the Rules are only applicable to all take-over and merger transactions that commence after 15 August 2016.

The New Code

The underlying principles contained in the New Code are:

1. all shareholders of an offeree of the same class shall be treated equally in relation to a take-over offer and have equal opportunities to participate in benefits accruing from the take-over offer;
2. all shareholders, particularly minority shareholders, shall not be subject to oppression or disadvantage by the treatment or conduct of the acquirer or offeror or the board of directors of the offeree;
3. an acquirer or offeror shall ensure that he is able to implement the offer in full;
4. an offeree shall, in the interests of its shareholders, appoint a competent independent adviser to provide comments, opinions, information and recommendation on the take-over offer;
5. all parties involved in a take-over or merger transaction shall make full and prompt disclosure of all relevant information;
6. the shareholders and board of directors of an offeree and the market for the shares that are the subject of a take-over offer shall be provided with relevant and sufficient information, including the identity of the acquirer or offeror, and reasonable time to consider the take-over offer;
7. any document or advertisement addressed to the shareholders containing information, opinions or recommendations from the offeror, the board of directors of an offeror or offeree or their respective advisers shall be prepared

with the same standard of care as if the document or advertisement was a prospectus;

8. an offeror, the board of directors of an offeror or offeree and other persons involved in a take-over and merger transaction are prohibited from making selective disclosure to the shareholders;
9. any guidelines and rulings issued by the SC may restrict the board of directors of an offeror or offeree and other persons involved in a take-over or merger transaction from undertaking certain actions;
10. a take-over offer shall be made to all shareholders within the same class in an offeree for all the voting shares or voting rights in the offeree;
11. the boards of directors of an offeree shall act in the interests of the shareholders as a whole and shall not deny the shareholders the opportunity to decide on the take-over offer; and
12. the period in which an offeree is subject to a take-over offer or merger shall not be longer than what is reasonable.

The Key Changes under the Rules

1. Application of the Rules

Previously, all public companies (listed or unlisted) were subject to the Old Code. Now, only unlisted

public companies with more than 50 shareholders and net assets of RM15 millions or more are subject to the New Code and the Rules. The Rules have also expanded to cover business trusts listed in Malaysia.

2. Dual jurisdiction of the offeree

The Old Code did not set out any guidance with respect to the treatment of offerees which have listings in dual jurisdiction. This is now provided under the Rules.

In situations where an offeree has a primary listing on a stock exchange in Malaysia and a stock exchange outside of Malaysia, the offeree may be subjected to the dual jurisdiction of the SC and a foreign take-over regulator. In such cases, early consultation with the SC is required so that guidance can be given on how any conflicts between the relevant rules may be resolved.

In relation to an offeree with a primary listing on a stock exchange outside of Malaysia and a secondary listing in Malaysia, the SC may consider dis-applying the Rules provided that the applicant is able to demonstrate that the relevant take-over regulation in the foreign jurisdiction accords equivalent level of protection to offeree shareholders as provided under the Rules.

3. Specification of persons acting in concert under real estate investment trust ("REIT") and business trust

The Rules now provide that the following persons are presumed to be parties acting in concert where the offeror is a REIT:-

- a. its management company;
- b. a director of the management company (together with his spouse, close relatives and related trusts);
- c. any person who owns or controls 20% of the voting shares or voting rights of the management company;
- d. any person who is related to or an associate of its management company; and
- e. its trustee.

Where the offeror is a business trust, the following persons are presumed to be parties acting in concert:-

- a. its trustee-manager including the agent;
- b. a director of the trustee-manager (together with his spouse, close relatives and related trusts);
- c. any person who owns or controls 20% of the voting shares or voting rights of the trustee-manager; and
- d. any person who is related to or an associate of the trustee-manager.

4. Determination of persons acting in concert arrangements

The Old Code laid down 3 circumstances in which the SC would take into account when considering if an arrangement or agreement constitutes a person acting in concert arrangement. The Rules have retained and made some minor amendments to the 3 circumstances.

The Rules now provide that the action of shareholders voting together on resolutions at 1 general meeting will not be regarded as a person acting in concert arrangement. A voting pattern at more than 1 general meeting may, however, be taken into account as an indication that the shareholders are acting in concert.

The Rules further provide for a new presumption that shareholders who requisition or threaten to requisition for a board control-seeking proposal in a general meeting, together with their supporters as at the date of requisition or threat, are acting in concert with each other once an agreement and understanding is reached in respect of a board control-seeking proposal.

Other than the abovementioned amendments, the Rules also introduce a new circumstance where

agreements to restrict the shareholder or the directors from either offering for, or accepting an offer for, the shares of the company or from increasing or reducing shareholdings may also constitute a person acting in concert arrangement.

5. Acquisition of a company through upstream entity

Under the Old Code, a mandatory offer obligation would apply if a person or group of persons acting in concert acquires more than 33% of voting shares and voting rights in an upstream entity which holds or controls more than 33% of voting shares and voting rights in a downstream entity and has significant degree of influence in the downstream entity.

Now, under the Rules, the test to determine “significant degree of influence” has been removed and a mandatory offer obligation will only apply to upstream acquisitions where a person or group of persons acting in concert acquires more than 50% in an upstream entity (which need not be a company to which the Rules and the New Code apply) which holds or controls more than 33% of voting rights and voting shares in a downstream entity.

6. Options and derivatives

The acquisition of any option or derivative by a person may also give rise to a mandatory offer obligation. Any person who would acquire control or trigger the creeping threshold as a result of acquiring such options or derivatives, or acquiring securities underlying options and derivatives when already holding such options or derivatives, must consult the SC to determine if an offer is required.

7. Offer price

The Rules now set out the minimum offer prices for mandatory and voluntary take-over. These were not specified in the Old Code previously.

For a mandatory take-over offer, the offer price must not be less than the highest price paid or agreed to be paid by the offeror or persons acting in concert during the offer period and within six months prior to the beginning of the offer period.

Where a mandatory take-over offer arises from an arrangement, agreement or understanding to control, the offer price shall be the higher of:

- a. the highest price paid by the offeror or persons acting in concert in the six months prior to the triggering of the mandatory offer obligation; or

- b. the volume weighted average traded price of the offeree for the 20 market days prior to the triggering of the mandatory offer obligation.

The discretion of the SC to disregard any unusually high or low traded prices within the relevant period is also provided under the Rules.

The offer price in a voluntary take-over offer must not be less than the highest price paid or agreed by the offeror or persons acting in concert during the offer period and within 3 month prior to the beginning of the offer period.

8. Take-over schemes

The Old Code required any person intending to initiate scheme of arrangement, compromise, amalgamations and selective capital reduction to hold at least 50% of voting shares or voting rights in the offeree. This requirement has now been removed.

9. Announcements and notices

The Old Code previously required the board of offeree to confirm in the initial announcement upon receipt of an offer, as to whether it is seeking a competing offer. This confirmation is no longer required under the Rules.

The Rules further introduce a new requirement which provides that an offer must be put forward to the board of offeree before the offer is announced to the public.

There is also another new requirement under the Rules that an offeror who has firm intention to make a

take-over offer shall make an immediate announcement regarding the offer and the announcement should be made within 1 hour of incurring an obligation or to revise an offer already made.

10. Timing and contents of documents

The SC's consent was previously required for the issuance of independent advice circular under the Old Code. This is no longer required and the Rules provide that the independent advice circular can be issued after the SC has notified that it has no further comments on the circular.

The Rules have more stringent disclosure requirements to protect the shareholders of the offeree. For instance, the Rules require the disclosure of all the substantial shareholders and the ultimate controlling shareholders.

11. Duration of take-over offer

The Rules have extended the period of acceptance of a voluntary take-over offer from 74 days to 95 days from the dispatch of the offer document.

12. Competitive situation

There is a new provision under the Rules that deals with the situation where a competing take-over offer continues to exist in the later stages of the offer period. In such situation, the SC will require revised offers to be announced in accordance with an auction procedure. The SC may also consider applying any alternative procedure as agreed between competing offerors and the offeree.

Conclusion

In conclusion, the implementation of the New Code and the Rules will facilitate the take-over and mergers framework in Malaysia and provide greater protection to shareholders.



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KRAFT FOODS SCHWEIZ HOLDING GMBH v PENDAFTAR CAP DAGANGAN

By Shawn Voon


3D TRADE MARKS IN MALAYSIA

In Malaysia, the shape of a product is generally not acceptable as a trade mark. Nonetheless, although some forms of non-traditional trade marks such as color and shape are not specifically included and acknowledged in the definition provided in the Trade Marks Act 1976 (“TMA”), 3D trade marks have been accepted by the Registrar of Trade Mark (“Registrar”) in the past and those marks are generally accepted only when the Applicant is able to produce evidence of use to prove that those marks have acquired sufficient distinctiveness through use in Malaysia.

In a recent decision in *Kraft Foods Schweiz Holding GmbH v Pendaftar Cap Dagangan*¹, the High Court made obiter statements that a 3D mark is a mark which falls within the meaning of a “mark” under section 3(1) of the TMA.

¹[2016] 11 MLJ 702, HC

FACTS OF THE CASE

In Kraft Foods Schweiz Holding GmbH, the plaintiff applied to register the trade mark “”, a 3D prism-shape in reddish brown colour, described as “Toblerone Chocolate Teeth 3D in colour” for goods in Class 30 (“the proposed trade mark”). The plaintiff’s application was objected to by the Registrar on the ground that the proposed trade mark is not distinctive within the meaning of section 10(1)(e) of the TMA because it was not capable of distinguishing the plaintiff’s goods in the course of trade. The plaintiff’s trade mark agent appeared before the Registrar to appeal against the objection but the application was eventually refused by the Registrar on ground that, inter alia, the proposed trade mark did not fall within the definitions of “mark” and “trade mark” under section 3(1) of the TMA. The plaintiff upon receiving the written grounds for the refusal, applied to the Registrar for an extension of time to appeal to the High Court against the Registrar’s refusal and subsequently filed the appeal 7 days after the expiry of the Registrar’s extension.

The Court held that the appeal should be dismissed on the ground that the appeal was time-barred as there was neither an application nor an affidavit from the plaintiff to apply for the second extension of time to file the appeal. Nevertheless, the appeal proceeded on the assumption that the appeal was not time-barred.

WHETHER A 3D MARK FALLS WITHIN THE DEFINITION OF A MARK UNDER THE TMA

Section 3(1) of the TMA defines a mark to include “a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof”. The plaintiff contended that the proposed trade mark falls within the meaning of “device” and:-

1. the plaintiff relied on the English cases of *Smith Kline and French Laboratories Ltd v Sterling-Winthrop Group Ltd*², *Blue Paraffin Trade Mark*³ and *Re Coca-Cola Co’s Applications*⁴;
2. the plaintiff cited para 12.221 of the Trade Mark Manual and alleged that the Registrar had previously accepted and registered shape marks;
3. the plaintiff referred to the opinion of Dr Ida Madieha bt Abdul Ghani Azmi (“Dr Ida”) in “Trade Marks Law in Malaysia” (2003) at p 18, which stated that in practice, representation of a 3D mark has been accepted by the Malaysian trade mark registrar;

4. section 10(1)(d) of the TMA does not apply to the proposed trade mark as the proposed trademark is a figurative mark and is not made up of any word;
5. the proposed trademark is distinctive;
6. the Registrar had exercised his discretion unlawfully;
7. the proposed trademark is merely an extension of the plaintiff’s 2 earlier registered trade marks which are a combination of the word “TOBLERONE” and a 3D shape and a prism shape mark with the word “TOBLERONE”;
8. the trademarks legislation in the United Kingdom (“UK”), Australia and Singapore, have recognised the registration of 3D marks; and
9. referred to Article 15(1) of the TRIPS agreement where it provides a wide definition of a trade mark as any “sign, or any combination of signs, capable of distinguishing the goods or services of 1 undertaking from those of other undertakings, shall be capable of constituting a trade-mark”.

As to the reference made by the plaintiff to the Registrar’s Manual and the TRIPS agreement, the Court held that the Registrar’s Manual is not written law within the meaning of the Interpretation Act and the Federal Constitution and this is clearly stated at para 1.3 of the Registrar’s Manual that the manual is intended primarily for the guidance and instruction of the staff of the Registry of Trade Marks. On the effect of an international treaty or agreement, the Court held that such treaties would only be enforceable in Malaysia if Parliament has passed legislation to give effect to such treaty or agreement.

²[1975] 2 All ER 578

³[1977] RPC 473

⁴[1986] 2 All ER 274

The Court was of the view that a 3D mark is a mark within the definition of section 3 of the TMA for the following reasons:-

1. in *Smith Kline and French Laboratories Ltd (supra)*, the House of Lords held that a “mark” must be something that can be represented visually and may be something that can be applied to the surface of the goods (“use upon”) and incorporated in the structure of the goods (“use in relation thereto”) and there is nothing that requires one to exclude from the definition of “trade mark” a mark which covers the whole of the visible surface of the goods to which it applied. The House of Lords allowed registration of 3D marks with distinctive colour combinations in the pharmaceutical field.
2. a 3D mark may be a “device” within the definition of section 3(1) of the TMA because a 3D mark falls within the dictionary meaning of the word “device”.
3. the definition of a “mark” in section 3(1) of the TMA is not exhaustive by reason of the word “includes”.
4. the Court noted that the application to register the shape of a Coca-Cola bottle in the *Coca Cola* case was refused on the ground that although the 3D shape is a distinctive shape, there was an insufficient basis for trade mark registration. However, the Court in applying the reasoning in *Smith Kline* held that (i) 3D marks fall within the meaning of “mark” in section 3(1) of the TMA, and (ii) 3D shape marks may be registered as a trade mark upon the fulfilment of all the conditions, namely:-

- a) the applicant is the bona fide proprietor of the 3D mark;
- b) the 3D shape mark is distinctive of the applicant’s goods; and
- c) the registration of the 3D mark is not prohibited by other provisions of the TMA (e.g., the mark does not cause confusion and / or deception to the consumer).



Although the Court took the view that a 3D mark is a “mark” within the meaning of section 3(1) of the TMA, the Court concluded that the proposed trade mark was not a “trade mark” because it failed to indicate a connection in the course of trade between the plaintiff’s goods and the plaintiff nor did it have any distinctive feature which enabled it to distinguish the plaintiff’s goods from the goods of other traders. Thus, the proposed trade mark was not inherently distinctive of the plaintiff’s goods under sections 10(1)(e), (2A), (2B)(a) and (b) of the TMA.

Conclusion

Despite the Court’s willingness in the case *Kraft Foods Schweiz Holding GmbH* to accept a 3D mark as a “mark” within the meaning of the TMA, it ultimately ruled that a 3D mark is only registrable if it is able to indicate a connection in the course of trade with the applicant’s goods or services. In short, a 3D mark is registrable if it is distinctive and / or has acquired sufficient distinctiveness and it is the discretion of the Registrar in deciding whether or not to accept a trade mark for registration, subject to the provisions of the TMA.



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The Malaysian Law Should Recognise the

Tort of

HARASSMENT

by Lincoln Seow

The concept of harassment is very wide and it comes in different forms, such as sexual harassment, physical harassment, disability harassment, gender harassment, religious harassment and so on.

The tort of harassment has been recognised under common law and led to statutory recognition in England, i.e. Protection from Harassment Act 1997. The courts in the United Kingdom, Singapore and Hong Kong had also developed the area of tort of harassment under common law system to afford a civil remedy and relief to the victims of harassment.

In Malaysia, the victims of harassment are desperate to seek protection against the acts of harassment under common law because there is no existing legislation that can fully protect the victims from harassment in Malaysia¹.

Actionable Torts

Harassment per se does not constitute an actionable tort². Under common law, victims of harassment could only bring a civil action against the perpetrator if the act falls within other established torts, such as assault, battery, or nuisance. The problem in relying on other forms of torts to claim against harassment is that these torts are often unable to cover the different types of harassment which exist in today's world.

The common law torts which offer protection for harassment are tort of assault, battery and nuisance. Given the inadequacies of the existing torts in protecting the victims of harassment, Malaysian courts should follow the footsteps of other jurisdictions in recognising the tort of harassment as part of.

Singapore

In *Malcomson Nicholas Hugh Betram v Naresh Kumar Metha* [2001] 3 SLR(R) 379, the High Court of Singapore held that it was impossible to fit the Plaintiff's claim against the Defendant's acts of harassment (who had persistently made telephone calls, sent faxes and flowers, trespassed the Plaintiffs' premises, procured third party to make phone calls and etc) in any established tort. However, the High Court overcame various legal hurdles and recognised a new tort of intentional harassment. The recognition of the tort of harassment in Singapore was further strengthened by the Singapore Court of Appeal in *Tee Yok Kiat v Pang Min Seng* [2013] SGCA 9.

Realising the need of codifying the law of tort of harassment, the Singapore Parliament finally passed the Protection from Harassment Act 2014 to afford a statutory recognition of the tort of harassment.

Hong Kong

Hong Kong also recognised the tort of harassment in the case of *Lam Tat Wai v Yip Lai Kuen Joey* [2013] HKCFI 639. In this case, the defendant was upset at the plaintiff for wanting to end a relationship with her. As such, the defendant performed various acts to annoy the plaintiff, such as sending malicious e-mails to the plaintiff, his friends and colleagues. The defendant also made false advertisements causing nuisance to the plaintiff's employer. In recognising the tort of harassment, the High Court of Hong Kong held that there was no reason why there should not be a tort of harassment to protect the people of Hong Kong who live in a small place and in a world where technological advances occur in leaps and bounds.

¹A limited form of harassment, i.e. sexual harassment at workplace, was introduced by the Malaysian Code of Practice on the Prevention and Education of Sexual Harassment in the Workplace 1999 and the Employment (Amendment) Act 2012. However, neither of them addresses the rights and liabilities of the victims of harassment and their harassers.

²*Patel v Patel* [1988] 2 FLR 179, CA.

Malaysia

Recent judicial decisions in Malaysia have started to give recognition to the tort of harassment.

In *Vivamall Sdn Bhd & Ors v TDC Construction Sdn Bhd & Ors* [2013] 8 MLJ 1, the defendants created nuisance and harassed the plaintiff to make the plaintiff pay for the alleged debt. The defendants also presented themselves at 1 of the plaintiff's house and later at the office of the plaintiff.

“ The High Court held that the numerous telephone calls and SMSes from the defendants amounted to a continuing harassment. ”

In *Desiree Couture Sdn Bhd & Ors v Anne F Co. Ltd & Ors* [2016] 2 CLJ 942, our clients, the defendants, had appointed a debt collector to recover some outstanding debt from the plaintiffs. The 2nd plaintiff claimed that the debt collector had harassed her, her employees and her sister through visits, text messages and expletive-ridden telephone calls to such an extent that she had to change her home and business telephone numbers. She also alleged that certain

emails from our clients over the course of a period of approximately 1 year amounted to harassment. The plaintiffs' counsel urged the High Court to recognise the existence of tort of harassment as part of the common law in Malaysia and to follow the decision in *Vivamall Sdn Bhd & Ors*.

“ Although the High Court recognised the necessity for the tort of harassment to be introduced under the common law in Malaysia, we have successfully fenced off the attempt by the plaintiffs. ”

Based on the facts of this case, the High Court held that the plaintiffs' claim for harassment failed for two reasons:-

- a. as far as the acts purportedly carried out by the debt collector are concerned, the debt collector was an independent contractor of our clients, and our clients are not vicariously liable for the actions of the debt collector; and
- b. the alleged emails from our clients were simply emails given to the plaintiffs to update them on the status of the amount that our clients regarded as being owed to our clients.

Conclusion

The recent judicial decisions in Malaysia have started to recognise the tort of harassment as part of the common law in Malaysia³.

It is arguable that the tort of harassment should not exist because certain individuals may have different degree of sensitivity towards certain behaviours. It may also be abused by people who have abnormal degree of sensitivity and cannot withstand ordinary actions that take place in everyday life.

However, this should not deter the establishment of the tort of harassment. Safeguards should be put in place to prevent vexatious or frivolous claims by people with abnormal degree of sensitivity. Perhaps, the principle of tort of harassment can be assessed based on an objective test, i.e. whether a reasonable person on the street would deem such actions as harassment. If the alleged actions fall short of a certain threshold, no action can be founded on the tort of harassment.

It is not desirable to leave the development of the law of tort of harassment solely in the hands of the judges, as they may only decide a case based on the facts presented before them. The Parliament of Malaysia should take one step further to introduce a statute to legislate on the law of tort of harassment to provide civil remedies for the victims of harassment and criminal sanctions against the harassers. This will fully protect the public from all forms of harassment, be it sexual harassment, physical harassment, disability harassment, gender harassment, religious harassment and so on.

³ See *Mohd Ridzuan Abdul Razak v Asmah Hj Mohd Nor* [2016] 6 CLJ 346, a case on sexual harassment at workplace.



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