COMPETITION ACT 2010

IN THE COMPETITION APPEAL TRIBUNAL AT PUTRAJAYA IN THE STATE OF FEDERAL TERRITORY OF PUTRAJAYA, MALAYSIA

APPEAL NO.1 OF 2021

Before:

DATO' ASMABI BINTI MOHAMAD
Chairman

DATUK DR. MOHD GAZALI BIN ABAS

TUAN MOHD RAFEE BIN MOHAMED

BETWEEN

DAGANG NET TECHNOLOGIES SDN. BHD.
(COMPANY No.: 117974-T)
(APPELLANT)

AND

COMPETITION COMMISSION
(RESPONDENT)

Appearances:

Brian Foong Mun Loong/Eolanda Yeo Jin Huay/ Muhammad Hiqmar Danial For the Appellant
(Messrs CCA @ Loke Mansion, 39 Court @ Loke Mansion, 273A, Jalan Medan Tuanku, 50300 Kuala Lumpur)

Kwan Will Sen/Muayyad Bin Khairulmaini for the Respondent
(Messrs Lim Chee Wee Partnership, No. 12-1, Lorong Dungun, Damansara Heights, 50490 Kuala Lumpur)

Date:11 January 2022

GROUNDS OF DECISION

(An interlocutory decision in reference to the stay application filed by the Appellant)

INTRODUCTION

[1] This is the written grounds of a unanimous decision of the Competition Appeal Tribunal (**"the CAT"**) which was delivered on 11th January 2022 in relation to an interlocutory application dated 17.3.2021 (**"the Stay Application"**) filed by the Appellant to stay the decision of the Competition Commission (**"the MyCC"**) dated 16.2.2021 (**"the Decision"**).

[2] In its Decision, MyCC found the Appellant had infringed Section 10(1) of the Competition Act 2010 (**"the Act"**) by engaging in exclusive dealing through the imposition of an exclusivity clause in the MyChannel Partnership Agreement (**"MCPA"**) agreements between Dagang Net Technologies Sdn Bhd **("Dagang Net")** and the software providers in the year 2015 to 2016. Pursuant to Section 40(1) of the Act, MyCC imposed the following directions against the Appellant:

(a) To cease and desist, and to refrain from taking any measure having the same object or effect as to the previous exclusivity clause that may disrupt competition in the provision of trade facilitation services (**"the Cease and Desist Orders"**);

(b) to enrol directors and senior management executives of the Appellant into a competition law compliance program and training at their own expense within three (3) months of the issuance of the Decision. The Appellant is further required to submit the monthly progress of the enrolment (**"the Compliance Program Directive"**); and

(c) The imposition of financial penalty against the Appellant in the sum of RM10, 302, 475.98 to be paid in equal monthly instalments for up to six (6) months to be calculated from the date of the service of the Decision (**"the Financial Penalty"**).

[3] The Appellant had filed an appeal to the CAT pursuant to Section 51(1) of the Act on 17.3. 2021 (**"the Notice of Appeal"**). On the same day the Appellant had filed an application for a stay of the Decision pursuant to section 53(2) of the Act pending the disposal of its appeal (**"the Stay Application"**). The Appellant raised the following arguments in its Stay Application:

(a) There is no necessity for the Cease and Desist Order as the said order is *"too vague and/or too wide, and hence is prejudicial towards the Appellant"*;

(b) The Cease and Desist Order did not take into account potential *"technical and security risks"* that may hamper Dagang Net's ability to operate the National Single Window system (**"the NSW"**) efficiently;

(c) The costs and time incurred in complying with the Compliance Program Directive cannot be recovered should Dagang Net succeed in its appeal; and

(d) The balance of convenience lies in the favour of this Honourable Tribunal staying the imposition of the Financial Penalty.

THE COMPLAINTS

[4] The Decision stemmed from two official complaints lodged by the Rank Alpha Technologies Sdn Bhd (**"Rank Alpha"**) dated 2.12.2015 and

Titimas Logistics Sdn Bhd (**"Titimas Logistics"**) dated 4.1.2017 respectively.

[5] The first complainant is Rank Alpha, which is a private limited company and is principally engaged in the provision of software services and sales of computers and peripherals. In essence Rank Alpha complained that Dagang Net had engaged in conduct which amount to an abuse of its dominant position as the government appointed sole operator of the NSW in relation to electronic trade facilitation data transmission by end users to the Royal Malaysian Customs (**the "RMC"**).

[6] The second complainant, Titimas Logistics is a private limited company and is principally engaged in the provision of forwarding and cargo handling services. Titimas Logistics complained that Dagang Net had engaged in a conduct that amount to an abuse of its dominant position as the government appointed sole operator of the NSW in relation to electronic trade facilitation data transmission by end users to the RMC.

[7] After inquiring into the complaint by Rank Alpha, MyCC had identified the conduct by Dagang Net in imposing an exclusive dealing arrangement and its refusal to supply the electronic mailboxes amount to abuse of its dominant position.

[8] With regards to the second complaint lodged by Titimas Logistics, MyCC had identified the refusal by Dagang Net to supply the electronic mailboxes to Titimas Logistics amount to an abuse of its dominant position.

[9] After taking into consideration the facts that were presented before it, MyCC found that there was no sufficient evidence to show that the refusal by Dagang Net to supply the electronic mailboxes had caused significant harm to competition in the market for trade facilitation. As such MyCC concluded that there was no infringement under Section 10(2) (c) of the Act for the refusal to supply the electronics mailboxes to Rank Alpha and Titimas Logistics respectively.

[10] Therefore, the Stay Application before us was only concerned with the complaint from Rank Alpha for the imposition of an exclusivity clause in the MCPA agreements between Dagang Net and the software providers in the year 2015 to 2016.

PARTIES TO THE APPEAL

[11] Dagang Net is a private limited company which carries out commercial activities relating to, amongst others, the provision of

business-to-government e-commerce services and computerised transaction facilitation services.

[12] MyCC is a statutory body established under Section 3 of the Act. The functions of MyCC are as provided under Section 16 of the Act which includes the implementation and enforcement of the competition laws.

BACKGROUND FACTS

[13] The background of the case was as stated in Parts C and D of the Decision. These facts had been well illustrated by both parties in their respective submissions. For ease of convenience, the common facts which had been highlighted by both parties either in the submissions and/or in the respective documents filed herein are extracted and adopted herein, wherever possible, with some modifications.

The History of Sistem Maklumat Kastam ("SMK")

[14] In order to facilitate trading and enhance its tax collection system, the Government of Malaysia ("**GOM**") decided that Custom declarations are to be submitted electronically through its Sistem Maklumat Kastam ("**SMK**"). The trade facilitation involves a range of activities which are

aimed at lowering the transaction costs for the companies. These costs are connected to and include the price of moving freight from one destination to another.

[15] In 1992, the RMC issued an invitation to tender for the development and maintenance of the SMK. Edaran IT Services Sdn Bhd was awarded the tender and had since developed the SMK for the RMC. At the same time, Edaran IT Services has been maintaining the provision of the back-end services of the said system.

The History of The National Single Window ("NSW")

[16] On 1.3.2005, the GOM had granted to the National Chamber of Commerce and Industry Malaysia (**"the NCCIM"**) the sole and exclusive right to undertake the organisation, development and implementation of trade documentation system. NCCIM had appointed Dagang Net (previously known as Electronic Data Interchange (M) Sdn Bhd) to undertake the development and production of all aspects of trade documentation system and the provision of services that facilitated the trading and finance communities in exchange of data, submission of documents and transmission of messages electronically using the United

Nations' Electronic Data Interchange for Administration, Commerce and Transport (**"the UN/EDIFACT"**) between themselves and the RMC.

[17] On 1.3.2005, Dagang Net's provision and scope of front-end services were further extended via an agreement entered into between the GOM and Dagang Net. Pursuant to the agreement, Dagang Net was allowed the right to operate a trade documentation system connected to the SMK to facilitate data exchange, submission of trade documentation system, such as the Customs Declarations, Cargo Manifests, several other related documents and the transmission of messages electronically using the UN/EDIFACT standard. This trade facilitation is known as the National Single Window (**"NSW"**).

[18] Pursuant to an agreement dated 19.11.2009, Dagang Net was appointed to be the provider to design, develop, operate and maintain the NSW services for a term of 5 years from 2009 to 2014. No other enterprise was appointed by the GOM to participate in the said system. Dagang Net, therefore was the sole provider for the NSW system.

[19] Dagang Net's agreement had been renewed for another 4 years by the GOM via a Supplemental Agreement dated 24.10.2014 and a letter

dated 19.9.2016. The appointment of Dagang Net was further extended to 31.8.2019 via a letter dated 20.12.2017.

[20] Up to the time the Decision was made Dagang Net's appointment had been extended to 31.8.2021. The CAT was informed via the Appellant's submission, Dagang Net's appointment was extended to 31.8.2024 by the GOM.

Parties Involved in NSW

[21] The parties involved under this trade facilitation system are known as the trading communities which consist of manufacturers, importers, exporters, freight forwarders and shipping agents (**"the end users"**). The regulatory authorities comprise of the RMC, terminal and port operators, port authorities, banks and permit issuing agencies such as the Ministry of International Trade (**"MITI"**), Ministry of Agriculture (**"MOA"**) and SIRIM Berhad (**"SIRIM"**).

Services Provided by Dagang Net in NSW

[22] Dagang Net as the sole service provider provides the following essential services to the end user in their import and export activities:

(a) Customs Declarations – this enables the end users to submit customs declarations forms to RMC for its approval before the goods can reach the respective ports;

(b) Customs Duty Payment – this enables the end users to pay their duties and tax to the RMC, permits fees to permit issuing authorities, and bills to Dagang Net;

(c) Preparation of Permits for Approval – this enables the end users to obtain the permits from the permit issuing authorities electronically;

(d) Preparation of Permits under the Strategic Trade Act 2010 – this enables the end users to obtain the permit from the issuing authorities electronically;

(e) Preferential Certificate of Origin – this enables the end users to obtain the permits from the permit issuing authorities electronically; and

(f) Electronic Manifest System – this enables the end users to submit their cargo manifest and vessel information to the relevant port authorities for their approval.

[23] The NSW allows the end users to be connected to the relevant regulatory authorities when carrying out trading activities. This process enables the end users to transmit the relevant information to the regulatory authorities and the process flow is then reversed from the regulatory authorities to the end users. The whole process had been well illustrated by MyCC via Diagram 1 (Please see Annexure A (page 23) of MyCC's Main Submission).

How to Utilize the NSW

[24] In order to utilize the services of Customs Declaration, the end users may use any of the following methods:

(a) eDeclare which is Dagang Net's own online portal;

(b) Enterprise Application Interface ("**EAI**"), the end users' back-end software; and

(c) Software from the software providers as listed in paragraph [26] below.

The Software Providers in the NSW

[25] There are 8 software providers as follows:

(a) Rank Alpha Technologies Sdn Bhd (**"Rank Alpha"**);

(b) Wynet Computer Sdn Bhd (**"Wynet"**);

(c) Mobile-Force Software (M) Sdn Bhd (**"Mobile-Force"**);

(d) Buttonwood smartLogistics Sdn Bhd (**"Buttonwood"**):

(e) Crimsonlogic Etrade Services Pte Ltd (**"Crimsonlogic"**);

(f) DNeXPORT Sdn Bhd (**"DNeXPORT"**);

(g) Digital System (Malaysia) Sdn Bhd (**"DSM"**); and

(h) MCDS Software (M) Sdn Bhd (**"MCDS"**).

[26] From the above listed software providers, Rank Alpha and Wynet seem to be the more mature players familiar to the end users as compared to Buttonwood and the DSM which were considered fringe players in the market.

[27] In utilizing the software, the end users may purchase the software from the companies listed in paragraph 26 above. This software will have to be connected to an electronic mailbox to enable it transmit the trade

facilitation data. Without the mailbox, the end users will not be able to use the software. Dagang Net is the sole generator of the electronic mailbox.

[28] Each software is hardcoded with the electronic mailbox's identification number as well as the end user's username and password. Therefore, one electronic mailbox can be used for one software.

[29] The end users will be able to submit the Customs Declarations forms, once the end users obtain the software and mailbox. The following will illustrate the process flow for the submission of the Customs Declarations by the end users:

(a) The required data (customs related data) will be entered by the end users into the software and the same will be transmitted using the electronic mailbox to Dagang Net's gateway platform under the NSW.

(b) Once received Dagang Net will convert the data into UN/EDIFACT standard and transmit them via the same electronic mailbox to RMC under SMK.

(c) The data will be reviewed and acknowledged by RMC or the RMC will notify the end users of any errors in the said Customs Declaration, if any, via a reversed process flow (please see Diagram 2 as shown in Annexure A (page 26) of MyCC's Main Submission).

Costs to be Borne by the End users

[30] The end users will be charged a one-time registration fee. For the corporate users the fees of RM500.00 will be charged and for the SME users the fees of RM200.00 will be charged respectively. In addition to that, a monthly charge as well as transaction charges will be imposed according to the amount of the data transmitted monthly by the end users for the use of the electronic mailbox. For the mailbox used by the corporate users, the fees of RM160.00 will be imposed and for the SME users the fees of RM90.00 will be imposed respectively. The transaction charges across the board will be RM0.80 per kilobyte.

[31] The software providers will charge the end users a one-time payment for the purchase of the software and an annual maintenance charge for every year thereafter the software is subscribed.

Access to NSW/SMK by the End users

[32] In order to submit customs related documents and to make transactions in the NSW/SMK, the end users are required to obtain a Customs Agent Licence from the RMC. The issuance of such licence had been frozen in 2007 due to large inactive licences in the logistics market, except for those with the International Integrated Logistics Services (**"IILS"**) status.

[33] New companies which desire to be part of the trading communities must apply for IILS status from the Malaysian Investment Development Authority (**"MIDA"**) and once the same had been obtained these companies may apply to RMC for the Customs Agent Licence.

[34] As of August 2017, 102 enterprises have been granted by IILS status by MIDA since its initial issuance in 2008.

THE UBIQUITOUS CUSTOMS SYSTEM

[35] The Ubiquitous Customs (**"uCustoms"**) system was mooted by the GOM in 2013 and was expected to be launched in 2016. This new system is a merger of the NSW and the SMK which will see the provision of a

one-stop centre for the electronic trade facilitation, providing end to end services for the end users to be operated by the RMC. The trade facilitation will be somewhat similar but a more sophisticated and advanced system than the NSW/SMK.

[36] A Request for Proposal (**"the RFP"**) was issued by RMC on 24.1.2015 for *"Tawaran Merekabentuk, Membangun, Memasang, Mengkonfigurasi, Menguji, Mentauliah, dan Menyelenggara Sistem Service Provider untuk National Single Window"*.

[37] On 23.11.2015, the GOM, through RMC announced the appointment of Dagang Net and Edaran Trade Network Sdn Bhd ("**Edaran Trade**") as National Single Window Service Providers to the relevant stakeholders via a Circular.

[38] Edaran Trade is a private limited company established on 25.8.2015 and is principally engaged in providing technology information services activities, NEC computer training and wholesaling of computer hardware, software and peripherals. It is a NSW service provider for the uCustoms project.

[39] Edaran Trade Bhd. was appointed as the service provider for the uCustoms system on condition that it formed a joint venture with Rank Alpha for the whole duration of Edaran Trade's appointment as a service provider in the uCustoms system. This is to provide more value-added services to the end users.

[40] The end users will have two options in submitting or preparing the trade facilitation documents. Firstly, the end users may submit directly or prepare the trade facilitation documents using the uCustoms online web-based portal free of charge. Alternatively, the end users may require the services of the software providers in the uCustoms system for more value-added services. The environment of the upcoming uCustoms is as shown in Diagram 3 in Annexure A (page 32) of MyCC's Main Submission.

[41] Due to some technical glitches on the development of the uCustoms system and its complexity the uCustom system had been delayed in its launching. The said system was said to be progressing rather satisfactorily and the pilot and simulation with the relevant companies based in West Port and Klang Port had been scheduled to 17.12. 2018.

[42] According to MyCC, as at the time of the Decision on 16.2.2021, the operating environment of the uCustoms has yet to be finalised by RMC and is still subject to change before it could be implemented.

THE SALIENT EVENTS

[43] Some of the salient events extracted from the submissions as well as the Appeal Records filed herein are highlighted below for better understanding of facts which led to the Decision by MyCC:

(a) On 15.4.2008, Dagang Net entered into an agreement known as "Master Solution Partner Agreement" (**"the MSPA"**) with Mobile-Force for a term of 5 years.

(b) On 17.2.2009, Dagang Net entered into similar MSPA agreement with Rank Alpha for a term of 5 years.

(c) On 17.4.2009, Dagang Net entered into the same MSPA agreement with Wynet for a term of 5 years.

[44] For the above agreements entered into between Dagang Net and the three service providers there was no mention of the exclusivity clause.

[45] On 14.3.2014 and 24.9.2014, Dagang Net issued letters to Rank Alpha relating to the extension of the MSPA. Via these letters Rank Alpha was informed that a new agreement was set to be until 31.3.2015. Dagang Net had also informed that there would be a new agreement to be executed by the respective parties which is pending finalisation of the terms and conditions.

[46] The new agreement mentioned in the above paragraph did not contain any exclusivity clause.

[47] On 19.11. 2009 Dagang Net was appointed by the GOM to be the provider to design, develop, operate and maintain the NSW system.

[48] The uCustoms System was envisioned by the GOM in 2013, with a view to be launched in 2016. The uCustom would see a merger of the NSW with the SMK as one-stop centre for trade facilitation providing end to end services of obtaining or submitting the relevant trade facilitation documents from/to the relevant government agencies and/or RMC.

[49] Dagang Net issued letters to Rank Alpha between 14.3.2014 to 24.9.2014 on the extension of the MSPA until 31.3.2015. The agreement did not contain any exclusivity clause.

[50] On 25.3.2015, Dagang Net issued an invitation letter to Rank Alpha to participate as a partner in a new partnership agreement, the Master Charter Partnership Agreement (**"the MCPA"**). The terms and conditions of the MCPA included the exclusivity clause which stipulated that Rank Alpha shall not engage with other service providers, appointed by RMC under the uCustoms Service Provider Program to provide similar services to the end users.

[51] On 14.8.2015 Edaran Trade Network and Dagang Net were appointed as service providers for the uCustoms.

[52] On 5.10.2015, Mobile-Force signed the MCPA containing the exclusivity clause with Dagang Net.

[53] On 30.10.2015 DNeXPORT signed the MCPA containing the exclusivity clause with Dagang Net.

[54] On 23.11.2015 the RMC announced the appointment of Dagang Net and Edaran Trade as NSW service providers to all relevant parties via a Circular.

[55] On 2.12.2015 Rank Alpha lodged a complaint to MyCC pertaining to the exclusivity arrangement by Dagang Net.

[56] On 4.12.2015 Buttonwood signed the MCPA containing the exclusive clause with Dagang Net.

[57] On 22.1.2016 Crimsonlogic signed the MCPA containing the exclusivity clause with Dagang Net.

[58] On 21.6.2016 MyCC commenced investigation on the complaint lodged by Rank Alpha.

[59] On 4.1.2017 Titimas Logistics lodged a complaint to MyCC. The crux of the complaint was Dagang Net's refusal to supply electronic mailboxes to the end user.

[60] On 1.8.2018 Wynet signed the MCPA with Dagang Net without the exclusivity clause.

[61] On 30.10.2017 GeTs Asia Pte Ltd (previously known as Crimsonlogic) signed a supplemental agreement to remove the exclusivity clause in the MCPA.

[62] On 2.11.2016 Buttonwood and MCDS signed the supplemental agreement to remove the exclusivity clause in the MCPA.

[63] On 15. 11. 2017 DNeXPORT signed a supplemental agreement to remove the exclusivity in the MCPA.

[64] On 30.11.2017 Dagang Net informed the MyCC of the removal of the exclusivity clause in the MCPA.

THE LAW ON THE STAY APPLICATION

[65] Section 53 of the Act states as follows:

> "53(1) Pending the decision of an appeal by the Competition Appeal Tribunal, a decision of the Commission shall be valid, binding and enforceable except where a stay of the decision of the

Commission has been applied for by the appellant and granted by the Competition Appeal Tribunal.

(2) An application for a stay of decision shall be in writing and shall be made to the Competition Appeal Tribunal on or after the day on which the notice of appeal has been filed with the Competition Appeal Tribunal."

[66] The Act is silent on what are the factors to be considered by the CAT in determining a stay application of the decision of MyCC pending the disposal of an appeal. In the foreign jurisdictions such the European Union, United Kingdom and Singapore there are express statutory provisions in the respective laws to guide the competition tribunals on the principles to be followed in determining a stay application. Examples of these provisions are Article 278 of the Treaty on the Functioning of the European Union, Rule 24 of the United Kingdom Competition Appeal Tribunal Rules 2015 (S.I No 1648) and Section 33 of the Singapore Competition (Appeals) Regulations 2006.

[67] In their respective submissions before us, both the learned counsels for the Appellant and MyCC were in agreement that the test to be applied

in a stay application under Section 53 of the Act is the "special circumstances" test as enunciated by the Malaysian Federal Court case of ***Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd*** [2004] 1 MLJ 257 ***("Kosma Palm Oil")*** which was adopted by the CAT in the recent case of ***Chubb Insurance (Malaysia) Bhd & Ors v the Competition Commission*** [2021] MLJU 472 ***("Chubb Insurance")***. However, in resolving the issues presented before it, the CAT in the Chubb Insurance went further to consider the principles enunciated by the High Court case of ***Godfrey Philips (M) Sdn. Bhd. v Timbalan Ketua Pengarah Kesihatan, Kementerian Kesihatan, Malaysia*** [2011] 9 CLJ 670 ***("Godfrey Philips")***.

[68] For completeness, we will highlight the law and principles applicable in a stay application and apply the law and principles to the case at hand.

[69] It is trite law that the principles governing the granting or otherwise of a stay is whether or not there are special circumstances warranting the court's exercising of its discretionary powers to grant a stay (See **Kosma Palm Oil**).

[70] The merit of a case is not a relevant consideration in granting of stay (See **Kosma Palm Oil** and the cases at paras 19-20 of page 268).

[71] The essence of what the "special circumstances" test is can be found in the following paragraphs of the judgment (See **Kosma Palm Oil**):

> "[13] ...An appreciation of the meaning of the phrase 'special circumstances' may resolve the confusion. As Ian Chin JC (as he then was) said in *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514 at p 521:
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> An attempt was made to define special circumstances by Raja Azlan Shah (as His Majesty then was) in the case of *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86, viz:
>
> > 'Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.'
>
> The definition only serves to emphasize the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts.

I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about.

[14] The resultant matter for determination are the factors or reasons that may constitute special circumstances. Generally stated, they are circumstances which go to the enforcement of the judgment (see *Sarwani a/p Ainuddin v Abdul Aziz a/l Ainuddin* [2000] 5 MLJ 391). With regard to the specific factors that constitute special circumstances, I refer again to *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* where Ian Chin JC (as he then was) said at pp 520-521:

What, then, constitute special circumstances? It was said in Mohamad Mustafa v Kandasami (No. 2) [1979] 2 MLJ 126, at p 127, that:

'One of the determining factors that calls for consideration is whether by not making an order of stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.'

[18] ...It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstance is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus, they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related...As nugatoriness is a species of special circumstances, a mere reference to it is sufficient to convey the correct legal impression. Any attempt to restrict the grant of a stay to nugatoriness, quite

apart from its impropriety, will severely restrict the grounds on which an application may rely...."

[72] From the above illustration, it is apparent that the list of categories that may constitute special circumstances is not closed. The courts had acknowledged that there many circumstances which could constitute special circumstances including whether or not a successful appeal would be rendered nugatory if stay was refused. Special circumstances will include, amongst others, circumstances 'where execution would destroy the subject-matter of the action or deprive the appellant of the means of prosecuting the appeal (see *Smith, Hogg & Co Ltd v The Black Sea and Baltic General Insurance Co Ltd* 162 LTR 11); if the judgment was to be enforced and money has been paid, the appellant would have difficulties recovering the money if the appeal was allowed (see *Rosengrens Ltd v Safe Deposit Centres Ltd* (unreported, 19th July 1984, CA, Lexis Nexis)); or if payment of a judgment sum was made would destroy the substratum of the appeal (see *Metropolitan Real and General Property Trust Ltd v Slaters and Bodega Ltd [1941] 1 All ER 310*).

[73] In Kosma Palm Oil, the apex court had emphasised on "circumstances which go to the enforcement of the judgment". In other

words, if the judgment were to be enforced, would that enforcement impact a court decision that is later reversed on appeal.

[74] In resolving the issue whether "special circumstances" exist within the facts in Chubb Insurance, the CAT had referred to Godfrey Philips where the High Court states as follows:

> "[28] It must be noted that a stay of the proceedings as in a suspension of a unilateral *ex-parte* decision of an administrative decision maker is drastically different thing from a stay of execution of a judgment of a court of law after a full blown trial and a determination on the merits have been made *inter partes*. An attempt to equate the two processes would be inappropriate."

[75] Godfrey Philips was a judicial review case, where the applicant had sought for certiorari and mandamus orders to quash a decision of the respondent in refusing to accept or approve the applicant's declaration of the retail selling price of its new tobacco product. In the same application, the applicant had also applied for a stay and/or prohibition orders against the decision of the respondent pending disposal of the judicial review application. The High Court held as follows:

"[29] The court is of the considered opinion that in order to obtain stay and to restrain and/or prohibit the 1st respondent from acting on the Impugned Decision dated 21 January 2010, the applicant must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of stay and/or prohibition order, that the balance of equities tips in its favour, and that a stay and/or prohibition order is in the public interest. In exercising its discretion, the court should pay particular regard to the public consequences in granting the orders sought by the applicant."

[76] The principles of law were discussed in Godfrey Philips but based on the facts that were presented before it, the High Court granted leave for the judicial review application, but refused to grant a stay of the impugned decision as the applicant had failed to satisfy the considerations as mentioned above.

[77] It is interesting to note that in Godfrey Philips, the High Court had made a distinction between an administrative decision and a decision of the court of law. The High Court ruled that, the considerations for a stay

of these two types of decisions would be distinct from each other. In conclusion the High Court stated its decision was based on the consideration of special circumstances test for the stay application.

[78] In Kosma Palm Oil, the Federal Court held that merits of the case are not a relevant consideration in granting of stay (See the cases cited in paragraph 19-20 at page 268 of Kosma Palm Oil). The emphasis on whether to grant a stay application or not for a decision of the court is mounted on the "*circumstances which go to the enforcement of the judgment*". In short if the judgment were to be enforced, would that enforcement impact a court decision that is later reversed on appeal. Should this Tribunal, a quasi-judicial body, adopt the court's approach in deciding to grant a stay of the Decision?

[79] In Godfrey Philips, it was observed that the emphasis was mounted not on the "*circumstances which go to the enforcement of the judgment*", but rather the appellant's interests as against the public interest. The considerations are the applicant's chances of success based on the merits in the appeal, and that the applicant is likely to suffer irreparable harm in the absence of stay order, and that the balance of equities tips in the applicant's favour, and that a stay order is in the public interest.

[80] The High Court decision emphasised that such a discretion could also be extended to the applicant's interest when a stay is in relation to a decision made in an administrative process. The court went further to rule that the above-mentioned considerations could be part of the myriad circumstances that constitute special circumstances, when considering a stay of a decision of an administrative body or an enforcement agency, like the MyCC.

[81] In the Chubb Insurance, the CAT had also made references to the statutory positions in foreign jurisdictions such as Singapore and England.

[82] Regulation 33 of the Competition (Appeals) Regulations 2006 which is applicable to Singapore, state as follows:

> "33 (1) The Board may, on the application of a party or of its own initiative, make an order on an interim basis—
>
> (a) Suspending in whole or part the effect of any decision which is the subject matter of the appeal proceedings before it; or

(b) Granting any remedy which the Board would have the power to grant in its final decision.

(2) Without prejudice to the generality of paragraph (1), if the Board considers that it is necessary as a matter of urgency for the purpose of—

(a) preventing serious, irreparable damage to a particular person or class of persons; or

(b) protecting the public interest,

the Board may give such directions as it considers appropriate for that purpose.

(3) The board shall exercise its power under this regulation taking into account all the relevant circumstances, including—

(a) the urgency of the matter;

(b) the effect on the party making the request if the relief sought is not granted; and

(c) the effect on competition if the relief is granted.

(4) Any order or direction under this regulation is subject to the Board's further order, direction or final decision."

[83] Rule 24 of the Competition Appeal Tribunal Rules 2015 applicable to England has a provision similar to Singapore's Regulation 33 of the Competition (Appeals) Regulations 2006 was also considered. In England, the consideration is "*preventing significant damage to a particular person or category of person*," instead of "*preventing serious, irreparable damage to a particular person or class of persons.*" Clearly, 3rd party interest is also included for consideration.

[84] The CAT had also referred to a decision of the Appeal Board under the Town and Country Planning Act 1976 for a stay of the planning permission in ***Ang Sue Khoon v Majlis Bandaraya Pulau Pinang*** [2015] MLJU 1866 ("**Ang Sue Khoon**") which stated as follows:

"[48] From the above analysis, I would summarise the law applicable to the stay of the implementation or execution of a planning permission, as follows:

(a) An appeal from the local authority to the Appeal Board does not operate as a stay.

(b) To grant or refuse a stay is a matter of discretion, which must be exercised judiciously and in accordance with established principles. Principally, a stay can be granted only if there are special circumstances sufficient to tilt the scale of justice in favour of the stay-applicant.

(c) Special circumstances are circumstances that are not ordinary, or not common; and that are usually "a combination of certain determining factors ... to persuade the court [or the Board] that it is a just and appropriate case to grant a stay" [see *Jaya Harta*; op. cit.]. Merits in an appeal are not special

circumstances; but absence-of-merit could operate against the stay applicant.

(d) The types of special circumstances are, for good reasons, not closed. Examples of special circumstances include where an appeal would be rendered nugatory if a stay is not granted, where the substratum of an appeal will be destroyed if a stay is refused [see *Kosma*, op. cit.], where the integrity of an appeal needs to be maintained [see Tan Tien Seng, supra], or where serious injury may befall the stay-applicant if a stay is refused [see *Siglin v Choules*, supra]....

(e) In considering where the balance of justice lies, competing interest of the parties must be weighed against each other, and (in planning cases) public interest should also be taken into account. Some questions which may be properly asked when undertaking this exercise are set out in paragraph 38 above.

(f) .....

[49] It is likely that, in the majority of cases, how the discretion to either grant or refuse to stay ought to be exercised will have become clear after applying the principles similar to those employed in deciding the stay of execution of a court judgment, without having to resort to the 3 additional factors peculiar to planning cases originating from a local planning authority. However, in borderline cases, they could make a difference, and could assist in arriving at a decision as to what is the fairer order to make."

[85] With regards to borderline cases where one cannot with confidence ascertain on which side of the line the circumstances fall and which would open to reasonable persons to arrive at a different conclusion, the Appeal Board said:

"[31] Looking at it through the broad lens of justice, special circumstances become often easy to recognise, though remaining difficult to define or describe with precision (perhaps for the better). There are a variety of situations which a reasonable and objective observer will quickly recognise as 'special circumstances'; and others at the

opposite end of the spectrum which are easily identified as falling short of being special circumstances. A judge or adjudicator faced with either of these categories of circumstances will have little difficulty in reaching a decision to either grant or refuse a stay.

[32] Then there will be grey areas where it is harder to say with confidence on which side of the line their circumstances fall, and with respect to which reasonable persons may come to different conclusions. In such situation, the exercise of balancing the interests of the respective parties will become much more challenging. I will refer to these situation as "borderline cases"."

[86] In Chubb Insurance, the CAT stated that from the decision of Ang Sue Khoon, the Appeal Board, a quasi-judicial body like the CAT, has subscribed to the special circumstances test in deciding a stay application pending disposal of an appeal to the Appeal Board. The Appeal Board reiterated that the application of special circumstances test by recognizing that a decision of a court of law does not share the same platform with a decision made by public / governmental bodies. A decision of the court is "*mostly concerned with in personam disputes between individual parties*,"

whereas, a decision made by public / governmental bodies often involves element of public interest. Hence, *"the exercise in the balancing of interests will usually have to include public interest, in addition to the competing interests of the parties themselves."*

[87] Based on the above analysis, the High Court in Godfrey Philips has incorporated the considerations of the applicant's chances of success based on the merits in the appeal, and that the applicant is likely to suffer irreparable harm in the absence of a stay order, and that the balance of equities tips in the applicant's favour, and that a stay order is in the public interest in deciding a stay application of a decision made by a public / governmental body. In Ang Sue Khoon, the Appeal Board, a quasi-judicial body, applied the special circumstances test to a stay application.

[88] The CAT in Chubb Insurance held that *"it is clear that the test for a stay application, whether in the court process or in a quasi-judicial process, is the special circumstances test" and that the CAT was not ready to depart from this established position of law."*

[89] The CAT went further to rule that, notwithstanding the decision in Kosma Palm Oil, it was ready and willing to consider public interest element against the Applicant's interest in view of the legal proposition enunciated in Godfrey Philips.

[90] The CAT ruled that in applying the "special circumstances" test, the High Court in Godfrey Philips had considered whether *"the applicant is likely to suffer irreparable harm in the absence of a stay order"* and that *"a stay order is in the public interest in deciding a stay application of a decision made by a public/government body"*.

[91] Based on the discussion of the Malaysian cases above, the law in Malaysia is clear that the test for a stay application, whether in the court process or in a quasi-judicial process, is the special circumstances test. Like the CAT in Chubb Insurance, this Tribunal is of the view that the issues at hand will be resolved with the guidance of the principles enunciated above.

[92] In summary, the guiding principles in determining a Stay Application under Section 53 of the Act are as follows:

(a) The applicable test is the special circumstances test;

(b) The Cat may consider whether the absence of the stay order may result in the applicant suffering irreparable harm (as decided in Godfrey Philips); and

(c) The Cat may consider the impact of the Decision on public interest if the stay order is not granted.

[93] The legal burden to show any special circumstances to justify for a stay of the Decision rests on the Appellant and the grounds raised must relate to the execution of the Decision. The special circumstances to justify a stay of execution must be deposed in the affidavit filed in support of the stay application (See ***Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd*** [2008] 2 MLJ 137 ***("Asean Security Paper Mill")*** (paragraph 6 at page 142) and ***Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor*** [2015] 7 MLJ 305 **("Universal Trustee (M) Bhd")** (See paragraph 28(b)) (cases cited by MYCC's in its Bundle of Authorities (1)).

[94] The CAT will have to examine the affidavit filed herein to see if the Appellant was able to prove ***that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of the stay prohibition order, that the balance of equities tips in its favour, and a stay and or prohibition order is in the public interest*** as enunciated in Godfrey Philips.

GROUNDS RAISED BY THE APPELLANT

First Ground - Interest of the Appellant and public are affected as there is risk of disruption of the NSW

[95] The Appellant raised the issue that the Decision especially "***to refrain from taking any measure having the same object or effect*** *as to the previous exclusivity clause that may disrupt competition in the provision of trade facilitation services"* ("**Impugned Order**") is too vague and too wide, and is prejudicial towards the Appellant and the public interest at large. The Appellant said that if the Impugned Order is to be analysed, it would show that the Appellant is prohibited from taking any measure with the same effect of the Clause, that is, to safeguard the technical and/or security risk of the NSW. The Clause was never included

with the object of affecting competition *"in the provision of trade facilitation services."*

[96] Their obligations in managing the NSW are as stated in the Agreement and/or the Supplemental Agreement. As the sole concessionaire of the NSW, the Appellant is expected to operate continuously 24 hours a day, 7 days' week and the whole year round. The Appellant is required to address all possible security breaches and to comply with the downtime. The Appellant emphasised they are expected to strictly comply with the conditions as set by the GOM especially, Clauses 7, 17, 20 and 17.4 otherwise they will be accountable and/or penalised with compensation.

[97] The public at large and the GOM itself will be prejudiced, should there be any breaches and/or disruption in the downtime of the NSW. This will potentially disrupt the end users from accessing and utilising the NSW resulting in the loss of revenue to the GOM from the usage of the NSW. Currently there are 6,400,000 transactions monthly which will translate to 213.333 transactions per day and an average of 8,888 transactions per hour. The public and the end users of the NSW will potentially face disruption if the Appellant is not allowed to take the necessary measures to ensure the smooth operation of the NSW.

[98] The end users have to utilise the Customs Declarations using the three (3) platforms provided under the NSW. They must first subscribe and register with the Appellant to obtain the electronic mailbox. The end users must purchase the software of any of the software providers before they can obtain the electronic mailbox from the Appellant. The software providers will operate as a platform to connect the end users' electronic mailbox to enable them to transmit the trade facilitation data. The end users will have to use the electronic mailbox which will be given a unique identification number directly by the RMC through the Appellant.

[99] The software provider will need authorization before it can be considered as the Appellant's authorised business partner through an agreement to be executed by the Appellant and the respective software provider. The software providers must pass the Acceptance Test before they can be considered as business partners. The requirement of the certification is stringent. If the certified software is updated or modified and/or enhanced it will lose its certification automatically. These updated, modified and/or enhanced software has to be re-certified within a reasonable time.

[100] The software providers have to go through the stringent authorization and they have to execute the NSW Agreement and/or

Supplementary Agreement with Dagang Net. This is to ensure that they maintain the services and meet with the standards imposed by GOM and/or NSW Agreement and/or Supplemental Agreement. The business partner will be required to indemnify the Appellant if there is a breach of Agreement leading to penalty to be imposed by the GOM.

[101] The Appellant is uncertain if the uCustoms would operate and be implemented. As such it is necessary for the Appellant to take all precautions to ensure that the NSW will not be affected should there be an overlap between the systems especially during the transaction period.

[102] According to the Appellant if the uCustoms is to function during the lifespan of the NSW, the Appellant will have to determine the requirements under the uCustoms environment before it can re-certify the Front-End-Software by the software providers to be connected to UCustoms.

[103] The Appellant further submitted that if there is one software provider connected to two service providers at the same time this may cause security and integrity issues. The RMC may not be able to differentiate the origin of the message if there are messages from two service providers via the same mailbox. That is why the Appellant has inserted the Clause to encapsulate and address the technical and security

concern of the Appellant involving the transmissions through the mailboxes in the uCustoms environment.

[104] The Appellant contended that the inclusion of the said Clause is to address *'downtime'*, and/or *'technical'* and/or, *'security risk'* provided for in the NSW Agreement and/or Supplemental Agreement. This is to ensure that the end users will be connected and the security of the transaction in the NSW will not be compromised.

[105] According to the Appellant the Impugned Order impedes and/or restrains the Appellant from taking measure to address the *'downtime'*, and/or *'technical'* and/or *'security risks'* that may be posed to the NSW. The Appellant further contended that the Impugned Order is subjective and open to interpretation by MyCC who is the judge, jury and executioner.

[106] Therefore, the Appellant is put in a difficult position whether to comply with the Impugned Order or take steps to avoid security risks as required under the NSW Agreement and/or Supplementary Agreement. The Appellant urged the CAT to consider that the Appellant should be allowed to take all the necessary steps to ensure the smooth running of the NSW pursuant to the Agreement and/or Supplementary Agreement.

Otherwise, the whole system will be disrupted and the end users and/or public will not be able to utilise the NSW for their trade facilitation. This will cause the entire NSW system in Malaysia will be at risk.

Second Ground - The Appellant's Appeal will be Rendered Illusory if a Stay is Refused

[107] The Appellant submitted that if the CAT does not grant a stay of the Cease and Desist Order they will be denied of the full benefit of a successful challenge of the Decision either before the CAT and/or subsequently before the courts, as MyCC will enforce the Decision before the determination of the appeal. This will render the Appellant's appeal illusory. The Appellant cited the ***R v. Secretary of State for Education and Science, ex parte Avon County Council*** [1991] 1 All ER 282 and ***R(H) v. Ashworth Hospital Authority*** [2003] 1 WLR 127 where the courts have decided where case is opened to challenge by way of a judicial review, the decision ought to be stayed pending the determination of the challenge in order to maintain the status quo of the decision by preserving such decision pending the appeal.

Third Ground - The Compliance Program Order

[108] The Appellant submitted that the imposition of a direction for the Appellant to enrol its directors and senior management executives into a competition law compliance program and training at their own expense within three (3) months of the issuance of the Decision too ought to be stayed. According to the Appellant, such program and training are, in fact, rehabilitation and correctional programs and are meant to correct the *'wrong attitudes'* and *'incorrect behavior'* for individual who have faulted the law. Such program is penal in nature and can be equated with the punishment meted by the court against the guilty party.

[109] There will be stigmas of guilt attached to the Appellant's officers and executives and this will create a negative impression on such officers and the Appellant. This stigma will stay with the officers or the Appellant for a long time even if the appeal is allowed either by the CAT or by the courts. This will result the Appellant's officers and executives to suffer public odium and will be chastise, which cannot be reversed, quantified and recoverable by any means. If the stay is refused prior to the disposal of the appeal, a wrong signal will be sent to the public as it impedes a litigant from the benefit of the appeal. The Appellant contended that stay

of the Decision is only temporary in nature until the appeal is being determined by the CAT or by the court.

[110] The MyCC's decision are very much disputed and this issue are to be addressed before the CAT. Further the expenditure of human resources, time and effort in complying with the Compliance Order cannot be reversed.

Fourth Ground - Implementation of financial penalty will result in a financial hardship

[111] As regards the financial penalty against the Appellant in the sum of RM10,302.475.98, the Appellant submitted that such amount is a substantial amount and will result in the Appellant facing financial hardship. The Appellant disagreed that financial hardship does not constitute special circumstances. The Appellant quoted, amongst others, the High Court case of ***Setia Indah Sdn v. Pengarah Hasil Dalam Negeri*** [MLJU] 2021 at page 1230 where Her Ladyship Noorin Badaruddin, had ruled that the huge financial penalty faced by the respondent, like in the current case, are examples of special circumstances within the perimeter set by the judicial principles.

[112] The Appellant contended that the CAT should take judicial notice of the global pandemic which had caused financial burden across the globe and that the Appellant too is severely affected.

[113] The Appellant further stated as the correctness of the decision is seriously disputed it is therefore just and prudent to stay the Decision pending the disposal of the appeal.

Fifth Ground - No Prejudice occasioned to MyCC

[114] Under this heading, the Appellant submitted that the balance of convenience tilts in favour of the Appellant as MyCC will not be prejudiced if the stay is allowed.

[115] The Appellant submitted that there is no urgency for MyCC to execute the Decision as the subject matter will remain intact pending the appeal. Further the MyCC has not shown that it is prejudiced.

Sixth Ground - Special Circumstances cannot be limited to irreparable harm

[116] It was submitted by the Appellant that what constitute special circumstances cannot be limited to whether the Appellant would suffer irreparable harm or otherwise. In doing so, MyCC is closing the category of what constitute special circumstances and this is a fetter on the discretion of the CAT.

[117] According to the Appellant what is special circumstances is non-exhaustive and ought to be interpreted flexibly base on the facts of each case.

GROUNDS RAISED BY THE RESPONDENT

First Ground - The Cease and Desist Order is Unequivocally clear

[118] With regards to the contention of the Appellant that the Cease and Desist Order *"is too vague and/or too wide"*, the MyCC said "*A forensic analysis of the wording of the directive would prove otherwise*". MyCC said the relevant direction has clearly stated that that Dagang Net is to "*Cease and Desist, and to refrain* ***from taking any measure having the same***

object or effect as to the previous exclusivity clause *that may disrupt competition in the provision of trade facilitation services*".

[119] The language of Clause 4 of the MCPA is as follows:

> ***"During the "Contract Period or extended tenure, the Channel Partner shall not enter into any agreements, contract or arrangement with any other party or service provider to be appointed by the Royal Customs of Malaysia under the uCustoms Service Provider Program and providing similar servicers to the end user".***

[120] MyCC contended that the language of Clause 4 is so transparent and clear and there are no two ways of reading the said Clause. The Cease and Desist Order seeks to restrain Dagang Net from adopting any measure which has the same object or effect as the exclusivity clause which prevents relevant service providers such as, Rank Alpha, Buttonwood, Wynet and DNeXPORT, from entering into any arrangements with any other service provider under the uCustoms System.

Second Ground - The Cease and Desist Order is Necessary to Prevent Disruption of the Competition

[121] As shown in the facts disclose to the CAT, the exclusivity clauses have been removed by Dagang Net in all the MCPA agreements, Dagang Net acknowledges that the MyCC's direction include a direction for Dagang Net *"to refrain from taking any measure having the same object or effect as to the previous exclusivity clause"*. This direction is made pursuant to Section 40(b) of the Act which provides for MyCC to put an end to the infringement upon a finding of infringement of a prohibition.

[122] MyCC submitted that the direction to prohibit Dagang Net from adopting anti-competitive clauses and agreements similar to the exclusivity clause is necessary to ensure that competition is not distorted. Such clause is to bind business partners to Dagang Net in the uCustoms operating environment upon its implementation.

[123] If the application is allowed by the CAT, Dagang Net will be free to negotiate and lock in software providers to Dagang Net at the expense of other service providers in the uCustoms market. Such action will distort competition by hampering Edaran Trade to have access to the software providers in the uCustoms market. This will result in Dagang Net's to

strengthen their position in the uCustoms. Therefore, the Cease and Desist Order is necessary to safeguard the competition process and prevent Dagang Net from adopting measures which are detrimental to its competitors.

Third Ground - No Special Circumstances and/or Irreparable Harm Arising from the Cease and Desist Order

[124] MyCC submitted that the assertions by Dagang Net that the Cease and Desist Order may impact its ability to address any technical and security risks that may be faced by Dagang Net in the NSW are unfounded and unsubstantiated. As a matter of law, Dagang Net has failed to prove that they will suffer irreparable harm in the event the Stay Application is dismissed by the CAT. Dagang Net has not adduced evidence to show why the adoption "*any measure having the same object or effect as to the previous exclusivity clause*" would allow Dagang Net to ensure the NSW operates smoothly. It had failed to show a causal link between the alleged impact of the Cease and Desist Order and that of any alleged technical and/or security issues.

[125] The facts showed that all previous agreements (MSPA) entered into between Dagang Net and the service providers did not have the

exclusivity clause. The removal of the exclusivity clauses in the MPCA showed that it is not crucial to Dagang Net's duty to ensure the smooth operation of the NSW. Further, Dagang Net failed to show that the GOM has filed claims for compensation due to the breaches of the NSW pursuant to the Concession Agreement.

[126] Dagang Net's argument is only speculative and is not supported by clear evidence of special circumstances to justify the CAT to grant a stay of the Decision as shown in ***Kerajaan Malaysia v Tangkas Properties Sdn Bhd & Ors*** [2021] MLJU 1470 ***("Tangkas Properties")***.

[127] MyCC quoted cases from the European Union (EU) and United Kingdom (UK) although these cases are not binding on CAT to illustrate how other jurisdictions deal the issue of "*serious irreparable damage*".

[128] The first case was an EU case of ***T-201/04R, Microsoft v Commission ECLI:*** EU: T:2004:372 (***"Microsoft"***) which dealt with an application for suspension of directions imposed by the EU Commission after Microsoft was found to have abused its dominant position. In this case, The President of General Court has dismissed Microsoft's application because it has failed to show serious irreparable damage in event the stay application of the directions imposed by the EU

Commission is not suspended. The CAT court ruled that the applicant must prove the facts forming the basis of the supposed damage and further, to emphasise that the allege damage "*must be certain or at least established with sufficient probability*".

[129] The second case was ***Flynn Pharma Ltd and another v Competition and Market Authority*** [2017] CAT 1 (**"Flynn"**) which was also a case of abuse of its dominant position, where the UK CAT noted with significance level of scrutiny required to be placed on the harm alleged. The CAT in Flynn said "***In my view, an applicant must provide plausible explanation as to how that risk will become real***. *The applicant's argument must allude to facts and matters which if shown to be correct at a hearing on the merits would explain how the risk would materialise."* According to Flynn the CAT found the facts and matters placed before the CAT were insufficient to reach the view that Flynn's argument pertaining to the risk of irreversibility is not entirely ungrounded.

[130] MyCC said Dagang Net has not provided any evidence as to why the adoption of "*any measure having the same object or effect as to the previous exclusivity clause*" would allow Dagang Net to ensure the smooth operation of the NSW. Dagang Net is not able to show the causal nexus

between the necessity of adopting exclusivity clause (or other similar measures) and any of the said issues.

[131] As evidenced before the CAT, Dagang Net has in fact removed all exclusivity clauses in the MCPAs prove that it is not crucial for Dagang Net to ensure the smooth operation of the NSW. In all the previous agreements between Dagang Net and the soft-ware providers there was no exclusivity clauses incorporated. Dagang Net had not even shown that there were claims filed against them by the GOM for any breaches of the agreement. This proved that the exclusivity clauses were unnecessary to address the technical and /or security issues. Therefore, Dagang Net's claim of harm and prejudice is merely speculative in nature.

Fourth Ground - No Grounds to Stay the Imposition of Financial Penalties

[132] As regards to the financial penalty in the sum of RM10,302.475.98 imposed by MyCC, which the Appellant claim will cause great financial hardship to the Appellant, MyCC emphasised that it is trite that an application for stay of payment of a monetary sum is not easily to be granted by the court unless there are evidence that MyCC is not in a financial position to repay the Appellant (See ***Ming Ann Holdings v***

Danaharta Urus Sdn Bhd [2002] 3 MLJ 49) (**"Ming Ann Holdings"**) (MyCC's Bundle of Authority (1)).

[133] MyCC urged the CAT not to entertain arguments relating to any *"financial hardship"* as such considerations are irrelevant to the present determination. MyCC quoted ***T-54/14 Goldfish BV etc. v Commision EU: T: 2016: 255*** (**"Goldfish BV**), although not binding, will be a useful guide to the CAT, to illustrate that "***mere finding that the undertaking concerned is in adverse or loss-making financial situation is not a sufficient basis for a request seeking to have the Commission take account of the undertaking's inability to pay in order to grant a reduction of the fine.***"

[134] MyCC further submitted that the obligation to pay the financial penalty should not be stayed simply because an infringing party may be faced with financial hardship. There is no irreparable harm to Dagang Net as MyCC can only impose 10% of Dagang Net's worldwide turnover over the period during which the infringement took place. MyCC had already taken into consideration the mitigating factors and granted 25% reduction to the financial penalty. On the top of that MyCC had granted 20% reduction to the financial penalty in view of the ongoing pandemic. Dagang Net was also given the allowance to pay the financial penalty in 6 monthly

instalments. Lastly, Dagang Net had also not shown the reason they will not be able to recover the financial penalty from MyCC in the event the appeal is allowed.

[135] In conclusion, MyCC submitted based on the above-stated reason that Dagang Net has not shown that there are special circumstances to warrant a stay of the financial penalty and/or Dagang Net will be irreparably damaged if the stay is not allowed by CAT. The courts have time and again established that payment of monetary sums does not qualify as special circumstances which warrant a stay of the Decision. It had been held in Chubb Insurance, that the payment of financial penalty *"could not constitute a special circumstance"*. It was acknowledged in the Chubb Insurance that global pandemic as an unusual phenomenon, it too "*could not constitute a special circumstance*".

Fifth Ground - No Special Circumstances to warrant a stay of the Compliance Program Directive

[136] Dagang Net's assertion that the cost and time incurred for the purpose of the Compliance Program Directive cannot be recovered should Dagang Net succeed in the appeal is unfounded because such cost can be quantified and is recoverable in the event appeal is successful. MyCC

referred to the case of ***Tropiland Sdn Bhd v DCB Bank Bhd & Ors*** [2000] 2 MLJ 65 **("Tropiland")** to support its argument.

[137] Further Dagang Net has not provided any justification that the cost is unquantifiable and unrecoverable.

[138] Dagang Net cannot argue that the Compliance Program Directive is against public interest because of the potential benefit their officers and executives may gain if they are exposed to the competition law regime. This will enhance their knowledge on various aspects of competition and prepare them to face the challenges in the management of the NSW and subsequently the uCustoms.

DECISION OF THE TRIBUNAL

[139] The principles applicable for a stay application are as discussed under the heading "The Law on Stay Application". In order to succeed in such application, the Appellant must show there are special circumstances to warrant a stay of the Decision as reflected in **Universal Trustee (M) Bhd) and Asean Security Paper Mills Sdn Bhd**. A stay should be granted only where there is "***clear evidence of special circumstances***" (**"Tangkas Properties"**).

[140] This same approach is also adopted by the foreign jurisdictions like the EU and UK. These authorities are not binding on the CAT, but it would be useful for the CAT to look across the globe for guidance to see how these types of cases are being approached by other jurisdictions. The EU case of **Microsoft** and the UK case of **Flynn,** respectively, established the principle that the evidence to suspense a decision of the Commission "***must be certain or at least established with sufficient probability***" and that "***the Applicant's argument must provide a plausible explanation as to how that risk will become real***".

[141] In short, the Appellant must demonstrate to the CAT that there are special circumstances and/or clear evidence of special circumstances in the documents filed herein. These special circumstances must relate to the enforcement of the Decision.

[142] Reference is also made to **Godfrey Philips**, where it was demonstrated that the Appellant must establish factors such as, they are likely to succeed on the merits, they are likely to suffer irreparable harm in the absence of the stay, that the balance of equity tips in the Appellant favour and that a stay order is in the public interest.

[143] Based on the above principles in mind, we have perused the relevant submissions filed herein, heard the extensive arguments of the learned counsels, considered all the relevant documents filed before us, our findings are as follows.

First Ground – Stay of the Cease and Desist Order

[144] We are satisfied that Dagang Net had failed to prove the causal nexus between the Cease and Desist Order and the alleged security and or technical risks. It is the contention of Dagang Net that "***the rationale behind the inclusion of the said Clause was to mitigate***" such risks but the facts before us, showed that Dagang Net does not need such clause in the operation of the NSW. The exclusivity clause only binds software providers to Dagang Net under the uCustoms environment. Further Dagang Net had removed the exclusivity clauses in the MCPA agreements. This clearly indicates that it is not essential to the NSW.

[145] Dagang Net has not adduced evidence to show that there has been any downtime, technical or security issues during the operation of the NSW which requires the imposition of the exclusivity clause. Dagang Net

had not shown by way of evidence that they face risk of being sued by the GOM for breaches of the terms of the MCPA Agreements.

[146] Dagang Net's assertion of security and technical risks are, in fact, speculative and not supported by cogent evidence. Therefore, such assertion "***is not special under the circumstances***" or one which can be ***"distinguished from ordinary circumstances***" or "***something exceptional in character***" or "***something that exceeds or excels in some way which is usual or common***" for the CAT to consider (See "***Kosma Palm Oil, Leong Poh Shee v Ng Kat Chong*** [1966] 1 MLJ 86 and ***Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and Anor application*** [1993] 3 MLJ 514").

[147] Dagang Net had also failed to prove their case falls under any of the principles enunciated in Godfrey Philips.

Second Ground - The Appeal will be rendered illusory if a stay is refused

[148] As regards to Dagang Net's submission that its appeal will be nugatory and the Cease and Desist Order ought to be stayed to maintain the status quo, we are of the view there is no merits in this argument as

prior to the issuance of the said Decision, Dagang Net has already removed the exclusivity clauses from the MCPA Agreements. By their conduct they have acknowledged the immateriality of the exclusivity clause.

[149] In view of the above, we are satisfied, Dagang Net's argument that the appeal will be rendered nugatory cannot be sustained.

Third Ground - Stay of the Compliance Program Directive

[150] We agree with the submissions of MyCC that Dagang Net's assertion that the cost and time incurred for the purpose of the Compliance Program Directive cannot be recovered should Dagang Net succeed in the appeal, is unfounded, because such cost can be quantified and is recoverable in the event appeal is successful.

[151] Dagang Net has not provided any justification that the cost is unquantifiable and unrecoverable. We are guided by the principle enunciated in **Tropiland** which dismissed a stay application as the loss incurred by the applicant can be quantified and recoverable in event the appeal is successful.

[152] We also agree with MyCC's submission that such Compliance Program Directive does not offend public interest. We are of the view that such program will be more beneficial to these directors and senior management executives of Dagang Net who are running the day to day management of the company. This program will be good and in the interest of the public. By attending the Compliance Program, these directors and senior management executives will be more equipped with the knowledge to help them appreciate the various aspects of competition and prepare them to face the challenges in the management of the NSW and subsequently the uCustoms.

[153] These directors and senior management executives will be exposed to the competitive environment when the uCustoms system becomes operational, as such, it will be useful for them to attend the Compliance Program to enable them to appreciate issues pertaining to competition law and regime. For the reasons stated herein, we disagree with the Appellant that the Compliance Program which allows directors and senior management executives to acquire knowledge pertaining to the competition law and regime is penal in nature, be equated to a punishment by the court and will lead to odium and chastity as submitted.

[154] With regards to the Appellant's submission that such program and training are, in fact, rehabilitation and correctional programs and are penal in nature and that there will be stigmas of guilt attached to the Appellant's officers and executives and this will create a negative impression on such officers and the Appellant, for the reasons illustrated above, we find that these too fall short of the requisite threshold required to warrant a stay of the Decision. This does not constitute special circumstances to justify a stay of the Compliance Program Directive.

[155] With regard to the claim of reputational harm arising from the enforcement of the Cease and Desist Order, the CAT is of the view it cannot constitute special circumstances. As have been illustrated by MyCC, the Malaysian Courts have held that "loss of reputation argument" does not fall within the realms of special circumstances. Hence, the CAT could not see that if a stay was not granted it would cause any irreparable harm to the Appellant.

Fourth Ground - Implementation of Financial Penalty Will Result in a Financial Hardship

[156] The CAT agrees with the submission of the MyCC's counsel that the need to make payment of the financial penalty pending appeal cannot constitute special circumstances. There are high authorities on this point (See "**Ming Ann Holdings** and "***Layar Baiduri Sdn Bgd v Ketua Pengarah Hasil Dalam Negeri*** [2020] 8 MLJ 643").

[157] With regard to the reliance on the factor of the weak economy as a result of the worldwide pandemic of Covid-19, although this is a very unusual phenomenon suffered by all levels of society, this cannot constitute a special circumstance. Although MyCC has taken into account the economy situation when it granted Dagang Net the allowance to pay the financial penalty by six (6) monthly instalment, this could not be a reason for the CAT to accept weak economy as special circumstance. The granting of payment by way of instalment on the financial penalty is at the discretion of the MyCC. The exercise of the discretion is the prerogative of the MyCC. It is not for this Tribunal to grant a stay just because MyCC had elected to exercise its discretion in view of the global pandemic.

Fifth Ground - No Special Circumstances and/or Irreparable Harm Arising from the Cease and Desist Order

[158] We agree with MyCC's submission that the assertions by Dagang Net that the Cease and Desist Order may impact its ability to address any technical and security risks that may be faced by Dagang Net in the NSW are unfounded and unsubstantiated. Dagang Net has failed to prove that they will suffer irreparable harm in the event the Stay Application is dismissed by the CAT. Dagang Net has not adduced evidence to show why the adoption "*any measure having the same object or effect as to the previous exclusivity clause*" will allow Dagang Net to ensure the NSW operates smoothly. It has failed to show a causal link between the alleged impact of the Cease and Desist Order and that of any alleged technical and/or security issues. MyCC's argument are adopted herein.

[159] We disagree with the submission of the learned counsel of the Appellant that what constitute special circumstances cannot be limited to whether the Appellant would suffer irreparable harm or otherwise. The authorities cited before us show otherwise. The Appellant must not be allowed to blow hot and cold on this issue.

Sixth Ground – Balance of Equities

[160] We have perused the submission of the Appellant as discussed and we find that for the reasons stated above, there is no reason for the CAT to tilt the scale of justice in favour of the Appellant.

Seventh Ground - Merits of the Appeal

[161] This Tribunal has also considered the merits of the appeal, not on whether the appellants will or will not succeed, but rather whether there is any merit at all. Merit in a stay application may not be a determining factor (see **Ming Ann Holdings**) but the absence of merit (on the face it) in an appeal would mean that the stay application is futile.

CONCLUSION

[162] For the reasons stated above, the CAT unanimously finds that the Appellant has not met with the threshold set by the law to justify the stay of the Decision. Therefore, the Stay Application is hereby dismissed.

[163] The CAT also decides that there will be no order as to costs.

[164] We thank all the learned counsels in their dedication and professionalism in handling the case before us.

The Presiding Members of the Competition Appeal Tribunal

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(DATO' ASMABI BINTI MOHAMAD)

CHAIRMAN

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(DATUK DR. MOHD GAZALI BIN ABAS)

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(TUAN MOHD RAFEE BIN MOHAMED)