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Intellectual Property and Gaming

## Online Gambling in Malaysia – not "legally" illegal?

*Public Prosecutor v Multi Electrical Supply & Services & 105 Others*

### Introduction

Online gambling has been increasing in popularity over the past few years in Malaysia, especially during and after the pandemic. Despite the then Home Minister Ahmad Zahid Hamidi's promise to table amendments to the Common Gaming Houses Act 1953 ("**CGHA**") in 2017, the then Home Minister Tan Sri Muhyiddin Yassin's statement in Dewan Rakyat back in 2019 that the government intends to amend gambling laws to include provisions which deal with online gambling, and the government's abhorrence of online gambling, to date, the status of online gambling remains a grey area in Malaysia. Laws such as the CGHA and the Betting Act 1953 ("**BA**") have not caught up with the times and have not been updated to include express provisions to define and regulate online gambling in Malaysia. There is a need for the CGHA and the BA, which were enacted in 1953, to be reviewed and revised to keep up with the times and to close the loopholes.

It is understood that representatives from the Finance Ministry, Malaysian Communications and Multimedia Commission, Bank Negara Malaysia and police have met since 2017 to discuss the framework for regulatory overhaul of the relevant laws relating to gambling. Still, work on the proposal has been put on the back burner. During a televised interview in July 2020, the Deputy Minister of the Communications and Multimedia Ministry ("**Minister**") said that there are ongoing discussions for the legalisation of online gambling in the country, albeit only for non-Muslim citizens. The Minister has noted the fact that Malaysia has experienced a significant spike in online gambling because of the pandemic, and this needs to be controlled. According to the Minister, a far better choice would be to tax gambling activities instead of attempting to prohibit them at any cost. Besides, the most notable and recent initiative is a Memorandum of Agreement addressed to the Philippine Amusement and Gaming Corporation ("**PAGCOR**") to offer PAGCOR-licensed offshore online gambling operators a 10-year licence to legally operate in the country, with the condition that they will only accept non-Muslim citizens as customers and that at least 30% of the online casino's workforce are Malaysian citizens.

It is worth noting that the recent High Court decision in *Public Prosecutor v Multi Electrical Supply & Services & 105 Others* appears to suggest that online gambling is not illegal in Malaysia, due to the absence of express provisions or laws regulating online gambling in Malaysia. The Court refused to read into section 4B of the CGHA anything which would suggest that it can be used to establish the

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offence of online gambling. The Court further stated that it is not the duty of the court to fill in the blanks in the law when the legislators have yet to rise to the task.

### Facts

The Public Prosecutor ("**Applicant**") filed an application under section 56(1) of the Anti-Money Laundering, Anti-Terrorism and Proceeds of Unlawful Activities Act 2001 ("**AMLATFA**") by way of a Notice of Motion, praying for an order under section 56(2) of AMLATFA for the forfeiture of monies in bank accounts, and certain movable and immovable properties belonging to various respective Respondents ("**Application**").

The Application was premised on the grounds that:

- (a) each of the Respondents had committed the predicate offence of participating in, receiving proceeds from, and making payments for, an unlawful activity of online gambling under section 4B of the CGHA;
- (b) the Respondents' bank accounts were used to receive unlawful proceeds arising from that unlawful activity and further, that the bank accounts and the properties (where it applied) were used as instrumentalities of an offence as provided under section 56(1) of the AMLATFA; and
- (c) the said unlawful activity and the instrumentalities of offence are also subject matter or evidence relating to the commission of the offence of money laundering under section 4(1) of the AMLATFA.

The Applicant took the position and asserted its intention to rely on limb (d) of section 56(1) of the AMLATFA (discussed below) to forfeit all the bank accounts (not just monies in the bank accounts) belonging to each of the Disputing Respondents and Non-Disputing Respondents ("**Bank Accounts**") and the property belonging to Respondent 102 ("**Property**") as being instrumentalities in the commission of the predicate offence under section 4B of the CGHA. Respondent 102 was contended to have had the benefit of releasing the Property from a loan using unlawful proceeds from online gambling originating from Respondents 1, 83 and 91. Those monies and Property constituted proceeds of unlawful activity as defined under section 3 of the AMLATFA.

The common issues of contention raised by all the Disputing Respondents were that:

- (a) the Applicant failed to prove the predicate offence against all the Disputing Respondents; and
- (b) the Applicant failed to prove that the monies in the Bank Accounts and the Property were used as instrumentalities of an offence.

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It was the position taken by the Applicant that it intended to pursue the forfeiture of the Bank Accounts specifically (with the exception of Respondent 102 where the forfeiture was against the Property) because those accounts served as the instrumentalities of the predicate offence of online gambling under section 4B of the CGHA. As submitted by the Deputy Public Prosecutor, the forfeiture was aimed at affirmatively deterring the public from participating in illegal online gambling which has become very rampant. By forfeiting the Bank Accounts, the Applicant would not only be successful in forfeiting the monies, but would also be able to close all the Bank Accounts and deprive the respondents from further using the Bank Accounts in the commission of an unlawful activity.

The issues to be determined are summarised as follows:

- (a) whether a bank account is an instrumentality of an offence under section 3 that can be the subject of a forfeiture under section 56(1)(d) of the AMLATFA;
- (b) whether section 4B of the CGHA establishes the offence of online gambling;
- (c) whether the Applicant can rely on section 4B of the CGHA in proving the predicate offence of online gambling;
- (d) whether the Property is an instrumentality of an offence; and
- (e) whether the Applicant succeeded, on the balance of probabilities, in proving its case under this Application against all the Disputing Respondents and Non Disputing Respondents, which would warrant the exercise of this Court's powers under section 56(2) of the AMLATFA to grant the order of forfeiture against the Bank Accounts and the Property.

## Decision

The Court found on the balance of probabilities that the Applicant had failed to prove its case against each of the Disputing Respondents and Non-Disputing Respondents that would warrant the exercise of the Court's powers under section 56(2) of the AMLATFA. The Court denied the application for an order for forfeiture under section 56(1)(d) of the AMLATFA against: (i) all the Disputing Respondents' Bank Accounts and in any case, all monies in those Bank Accounts; and (ii) the Property. The application for an order for forfeiture against all the Non-Disputing Respondents' Bank Accounts, and in any case, all monies in those Bank Accounts under section 56(1)(d) of AMLATFA, was also denied.

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The Court further ordered that all the seizure orders against all monies in each of the bank accounts held under the names of the respective Disputing Respondents and Non-Disputing Respondents in the relevant financial institutions be immediately revoked. Consequently, the Court ordered that access to each of those accounts be immediately given to the respective account holders. It was also ordered that the seizure order against the Property be immediately revoked and released to Respondent 102.

### **What is the unlawful activity that would trigger the application of the AMLATFA?**

Section 56(1)(d) of the AMLATFA provides that a property may be forfeited when:

- (a) the property is an instrumentality of an offence; and
- (b) when that instrumentality is used in, or in connection with, the commission of an unlawful activity.

Therefore, the burden was on the Applicant to prove, on the balance of probabilities, that the Disputing Respondents had committed an unlawful activity, and in committing that unlawful activity, the property which is the subject of the forfeiture application was the instrumentality used in the commission of the offence. That unlawful activity serves as the predicate offence upon which the application for forfeiture rests.

"Unlawful activity" is defined under section 3 of the AMLATFA to mean, *inter alia*, "any activity which constitutes any serious offence". The term "serious offence" refers to all those offences specified under the Second Schedule of the AMLATFA which includes section 4, 4A and 4B of the CGHA.

#### *Section 4B of the CGHA*

It was the Applicant's contention that the constituent predicate offence committed by each of the Disputing Respondents related to online gambling under section 4B of the CHGA where they had monies relating to online gambling paid into and paid out from the Bank Accounts. With regards to Respondent 102 specifically, it was contended that Respondent 102 had the benefit of releasing the Property from a loan using unlawful proceeds from online gambling originating from Respondent 1, 83 and 91. It was submitted that online gambling is an unlawful activity and those monies and Property constituted "proceeds of unlawful activity" as defined under section 3 of the AMLATFA.

The Court took judicial notice that section 4B of the CGHA has been consistently used by the authorities in arresting suspects allegedly involved in illegal online gambling. However, a careful reading and consideration of section 4B of the CGHA led the Court to question the legal basis for using section 4B in establishing the offence of online gambling.

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Section 4B refers to gaming machines and the offence of dealing with and transacting in gaming machines. CGHA does not have any specific provision on online gambling and because of that, the term "online gambling" is not defined. This led the Federal Court in *Lei Meng v Inspector Wayandiana Abdullah & others* [2022] 1 MLJU 141 / [2022] 3 CLJ to express a definition to that term to mean something that:

*"envisages a gambling service accessed remotely ie, online, through the internet where the participants gamble by depositing funds and playing games of chance, like sports betting, online poker, etc".*

The Court said that it is quite obvious that despite the Government's ongoing war against illegal gambling, both the CGHA and the BA have not caught up with the times and they have not been updated to include express provisions for making online gambling illegal. The various reports in public media show that the authorities have been consistently using the provisions of the CGHA to charge the architects and members of online gambling syndicates. The Court took judicial notice that based on the reports in the public media, the authorities have relied on section 4(1)(a), (b), (c) and/or (g) of CGHA in investigating and filing charges against members of online gambling syndicates.

Section 4B criminalises any act of, *inter alia*, dealing with, transacting in, importing, manufacturing, selling, servicing and repairing gaming machines, or any combination thereof. What is plainly clear is that section 4B only deals with the subject of dealing with or transacting in gaming machines and nowhere does it refer to online gambling. To put it simply, it does not provide for the offence of online gambling.

It is the Court's view that neither section 4B(a) nor (b) can be legitimately used to establish the offence of online gambling. The language used in that provision is so plain and clear that it is incapable of conveying any other meaning beyond what it provides. *Black's Law Dictionary, 11th edition* defines "deal" to mean "an act of buying and selling; an arrangement for mutual advantage; to distribute something; to transact business with; to conspire with", whilst the word "transact" is defined as "to carry on or conduct negotiations or business to a conclusion". Thus the words "deals with" and "transacts in" in section 4B must refer only to acts concerned with the business of trading in or servicing the machine or instrument used in gaming but not the act of gaming.

To conclude the discussion on this point, the Court found that sections 4B(a) and (b) of the CGHA are not provisions of the law that establish the offence of online gambling and a reliance on the same for that purpose would be misconceived, a misapplication of the law and hence, illegal. It follows also that section 4B cannot be used to establish any offence related to receipt of or paying out any monies arising from online gambling.

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### *Section 4 of the CGHA*

Other than section 4B, another key provision in the CGHA is section 4. Section 4(1)(a) to (g) of the CGHA provides that a person who is the owner of a premise or manages the premise which is being run as a common gaming house would be liable for an offence. Owners and tenants found to have allowed their premises to be used for gambling activities can be found liable for an offence under section 4. The provisions of the CGHA clearly intend to target operations of gambling syndicates in physical locations, while the act of online gambling is "online", operators of the syndicate need to operate from a physical location to keep the online gambling website up and running. Hence, it is submitted that enforcement agencies may also rely on these provisions to arrest and prosecute online gambling operators.

### *The Court did not consider the BA*

It is worth noting that the Court here did not consider the BA, which is another important piece of legislation that deals with gambling, specifically betting. This is due to the fact that the Applicant did not raise or rely on the BA when establishing the predicate offence. The question arises as to whether the police may rely upon provisions within the BA to deal with all forms of betting including online betting. Section 4(c) of the BA provides that any person who cares or manages a place purposed to function as a common betting house or betting information centre will be found liable. The interpretation of this provision should be combined with a reading of the definition of "betting information centre" in section 2(1) of the BA which is worded in a way that it could be widely interpreted to outlaw online gambling.

Section 6(1) of the BA also provides that any person who bets or wagers in a common betting house, or with a bookmaker on any premises **or by any means**, shall be guilty of an offence. It is submitted that "by any means" could be interpreted to include all other forms of betting, including online betting. It is also provided that any person who acts as a bookmaker **in any place** shall be guilty of an offence under section 6(3) of BA. As defined under section 2 of BA, "place" includes any house, office, room or building, and any place or spot, whether open or enclosed. Read together with the definition of "bookmaker" under section 2, section 6(3) could be widely interpreted to include an online bookmaker who receives or negotiates bets or wagers online, in physical premises.

### **Consideration of the predicate offence and the evidence**

Moving on to the crux of the Application, the Court was of the view that none of those facts disclosed any offence committed by the Respondent 5, 6 and Kor Kah Ho (a person who is not a Respondent in the Application but was responsible in supervising Respondent 5 and 6) under section 4B of the CGHA. In fact, Kor Kah Ho was not even charged under section 4B of the CGHA.

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Therefore, the Court was constrained to state that the Applicant had failed to apply the correct law in proving the predicate offence that was to serve as the basis for the Application. Whilst the Court shared the Applicant's and the Government's abhorrence of online gambling as the new evil that the Malaysian society will have to constantly battle, the law as it stands currently does not provide the authorities with the correct legislative tools to battle online gambling. Section 4B of the CGHA is legally inapplicable and irrelevant to serve as the penal provision on online gambling. The use of that provision to support any persecution and any proceedings under the AMLATFA and other laws such as the Prevention of Crime Act 1959 ("**POCA**") for alleged offences of online gambling is misconceived, a misapplication and an abuse of the law. On equal footing, limb (b) to the definition of "unlawful activity" under section 3(1) of the AMLATFA cannot assist the Applicant in proving the existence of the offence, since there is no offence against online gambling under section 4B nor other parts of section 4 of the CGHA.

In interpreting and applying the laws as they stand, the Court highlighted that it is not its function and duty to fill in the blanks in the law when the legislators who have the power to do so have yet to rise to the task. The Court took judicial notice that despite the announcement by the then Deputy Prime Minister Datuk Seri Zahid Hamidi back in 2017 that amendments to the CGHA had been drafted and would be tabled in Parliament in the month of March that year, no further developments took place. Then, in 2019, the then Home Minister Tan Sri Muhyiddin Yassin informed the *Dewan Rakyat* that laws on online gambling were being reviewed to make it more current and effective. Two years later, there was an apparent change in position when it was reported that the Government was considering the idea of legalising online gambling. Such is the current state of affairs on the CGHA and online gambling.

## Conclusion

In the era of technological advancement, online gambling has become more easily accessible and widespread. The existing legislation which deal with gambling in Malaysia were drafted ages ago during the era when there was no internet, before online gambling was a thing. Hence, there are no provisions that specifically touch on online gambling. The CGHA and the BA do not explicitly mention anything about or expressly ban online gambling. The gambling laws in Malaysia are long outdated, and no relevant amendments have been made so far. The online market therefore remains largely unregulated as of today. With the recent High Court decision in *Public Prosecutor v Multi Electrical Supply & Services & 105 Others* as a precedent, it is unlikely that the enforcement agencies can still continue using the existing CGHA provisions to combat online gambling activities and apprehend individuals involved therein.



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As the provisions of the existing laws are not sufficient in controlling/regulating online gambling, there needs to be a wider and more thorough debate on whether online gambling ought to be banned altogether in Malaysia, or whether it can be legalised and regulated. At the very least, something needs to be done by the legislators to update the existing legislation to deal with online gambling and its facets and to tackle the problems/challenges arising therefrom, either by way of major amendments to the various gambling statutes, or the enactment of a new standalone legislation which deals with online gambling specifically. Regulating online gambling will allow the Government to exercise greater control over such activities, with consequential benefits such as the raising of revenue from license fees and taxes, as well as the strengthening of anti-money laundering measures in respect of the proceeds of online gambling. Having clear online gambling laws and restricting legalized online gambling to a limited number of licensees will also function as an effective counter against illegal underground online gambling syndicates, and safeguard the interests of individuals in Malaysia by requiring the licensees to comply with a responsible gambling framework. Much can and remains to be done in Malaysia in this regard.



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## Contacts



**Sri Sarguna Raj**  
Partner  
Head of Intellectual Property,  
Sports & Gaming  
Christopher & Lee Ong

T +60 3 2273 1919  
D +60 3 2267 2737  
[sri.sarguna.raj@christopherleeong.com](mailto:sri.sarguna.raj@christopherleeong.com)



**Lau Kok Keng**  
Partner  
Head of Intellectual Property,  
Sports & Gaming  
Rajah & Tann Singapore

T +65 6535 3600  
D +65 6232 0765  
[kok.keng.lau@rajahtann.com](mailto:kok.keng.lau@rajahtann.com)

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## Contribution Notes

This Client Update is contributed by the Contact Partners listed above with the assistance of **Soo An Qi** (Associate, Christopher & Lee Ong) and **Loh Yan Shuang** (Pupil, Christopher & Lee Ong) .

## Our Regional Contacts

### RAJAH & TANN | *Singapore*

**Rajah & Tann Singapore LLP**

T +65 6535 3600  
sg.rajahtannasia.com

### R&T SOK & HENG | *Cambodia*

**R&T Sok & Heng Law Office**

T +855 23 963 112 / 113  
F +855 23 963 116  
kh.rajahtannasia.com

### RAJAH & TANN 立杰上海

SHANGHAI REPRESENTATIVE OFFICE | *China*

**Rajah & Tann Singapore LLP  
Shanghai Representative Office**

T +86 21 6120 8818  
F +86 21 6120 8820  
cn.rajahtannasia.com

### ASSEGAF HAMZAH & PARTNERS | *Indonesia*

**Assegaf Hamzah & Partners**

**Jakarta Office**

T +62 21 2555 7800  
F +62 21 2555 7899

**Surabaya Office**

T +62 31 5116 4550  
F +62 31 5116 4560  
www.ahp.co.id

### RAJAH & TANN | *Lao PDR*

**Rajah & Tann (Laos) Co., Ltd.**

T +856 21 454 239  
F +856 21 285 261  
la.rajahtannasia.com

### CHRISTOPHER & LEE ONG | *Malaysia*

**Christopher & Lee Ong**

T +60 3 2273 1919  
F +60 3 2273 8310  
www.christopherleeong.com

### RAJAH & TANN | *Myanmar*

**Rajah & Tann Myanmar Company Limited**

T +95 1 9345 343 / +95 1 9345 346  
F +95 1 9345 348  
mm.rajahtannasia.com

### GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

**Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)**

T +632 8894 0377 to 79 / +632 8894 4931 to 32  
F +632 8552 1977 to 78  
www.cagatlaw.com

### RAJAH & TANN | *Thailand*

**R&T Asia (Thailand) Limited**

T +66 2 656 1991  
F +66 2 656 0833  
th.rajahtannasia.com

### RAJAH & TANN LCT LAWYERS | *Vietnam*

**Rajah & Tann LCT Lawyers**

**Ho Chi Minh City Office**

T +84 28 3821 2382 / +84 28 3821 2673  
F +84 28 3520 8206

**Hanoi Office**

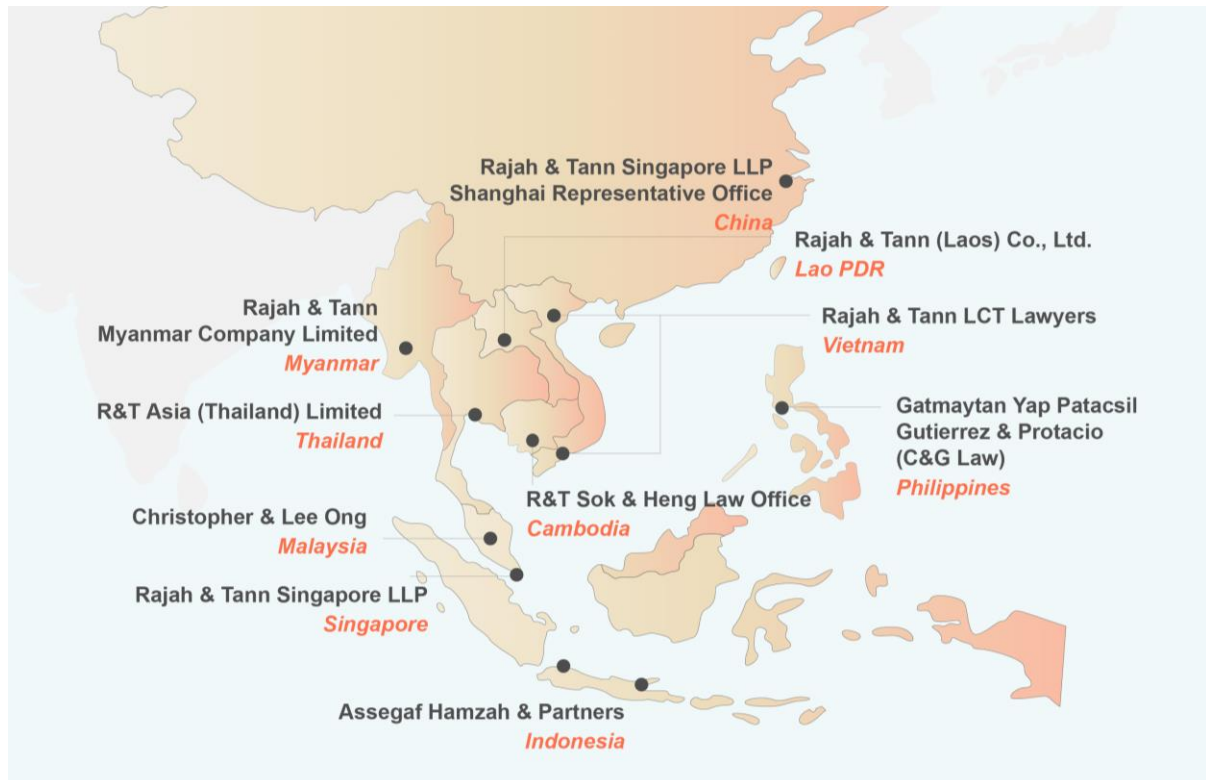
T +84 24 3267 6127  
F +84 24 3267 6128  
www.rajahtannlct.com

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