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Nuts and bolts of bike-sharing deposits

Are these deposits debts or funds held in trust for users? The legal nature matters. Clearer regulation can help protect such funds in future.

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For The Straits Times

No one likes to look at contracts, not even lawyers, and certainly not those who want to rent a bicycle for a quick ride. When things are going well, all that matters is that one can rent a bicycle with a push of a button. However, contracts and their terms may soon become an area of concern for the bicycle-sharing scene in Singapore.

On Monday, Singapore-based bicycle-sharing company oBike announced that it was pulling out of the Singapore market, citing new regulations imposed by the Land Transport Authority (LTA) that, in its opinion, had implications for the viability of its business model.

Since then, frustrated oBike users have been trying to get refunds of their deposits. The LTA advised affected users facing issues with obtaining a refund of their deposits to bring the matter up with the Consumers Association of Singapore.

On Tuesday, talk of oBike's liquidation was in the news. oBike's co-founder Edward Chen was quoted as saying that he has left matters to the "local team and also the legal team and the liquidation agent".

Lawyers have also commented that oBike users, as unsecured creditors ranking last in the distribution of a liquidated entity's assets, may not get their deposits back.

However, a question that seems to have gone unasked is this: What exactly is the legal nature of the deposits placed with oBike and other bicycle-sharing companies? Are the depositors really unsecured creditors? If the depositors have property rights in their deposits, in the sense that the deposits are held in trust for them, then these property rights must be respected by the liquidators in the insolvency of the operator. Second, there is the question of how regulation may pre-empt future incidents.

DEPOSITS

Some bike-sharing companies like oBike require users to make a deposit before they can use the shared bikes. Others, like ofo, do not.

Generally, these deposits are separate from the fees that users are charged for using the bicycles.

Both laypersons and lawyers use the word "deposit" in many ways, and some confusion may be avoided if we are clear about what kind of deposit we are concerned with here.

Money in a bank account, which some call a bank deposit, is a debt that the bank owes the customer.

There is also a deposit in the sense of "earnest money" – this generally shows the vendor that the purchaser is serious about the purchase and serves to filter out purchasers who are not serious. Think of a deposit to buy a big-ticket item like a car.

Lastly, there are what we might call "security deposits" – taken to provide a guarantee against damage to property or other liabilities that the customer might incur against the service provider. One example is the kind of deposit that landlords typically take from their tenants.

Based on this rough taxonomy, it does seem that when bicycle-sharing firms take deposits, it might be reasonable to think that these are similar to security deposits, taken to safeguard against damage that users might cause to the bicycles, for example.

But this does not settle all the issues. Ultimately, what users would want to know from their lawyers (should they engage legal representation) is whether they can get their money back. This will depend on what legal relationship is created when users place deposits with bicycle-sharing firms.

There are two possibilities.

The first is a simple debt relationship. This means that the money has become the bike company's property, and users are promised to be repaid an equivalent sum on demand or in accordance with certain conditions. In this situation, the users are unsecured creditors.

The second possibility is that the deposits are held in trust, in which case the users would have property rights in their deposits. They would then be protected from the insolvency of the company (assuming, of course, that the deposits have not already been used by the company, in which case the situation becomes more complicated).

Of course, a conclusive characterisation would depend on a close examination of the relevant contract terms and the commercial context, including the reasons why these deposits are taken.

It has been said that part of the business model of bicycle-sharing companies are the deposits themselves – these deposits form a significant sum of capital that can generate returns for the company in the international money markets or elsewhere. This may be a factor that points towards the conclusion that the deposits have become the money of the company to use as it sees fit, and all the users have is a debt claim.

However, it is impossible to generalise, and much would depend on an analysis of the nitty-gritty of the relevant contracts.

One factor that may be relevant is if the relevant contract provides that the deposits are not to form part of the general assets of the company available to its creditors, or that the deposits are to be kept separate from the other funds of the company.

REGULATION OF DEPOSITS

Some users of oBike who have been unable to get their deposits refunded have expressed the hope that the Government will do something about it. Users of other bicycle-sharing services would also welcome appropriate government intervention in the market.

But what kind of intervention?

One example of regulation in the bicycle-sharing space is what the city of Sydney has done, with its recently released guidelines for bike-share operators. These guidelines were devised by six Sydney councils, and set out minimum standards and expectations relating to, among other things, customer safety, safe bicycle placement and data sharing. Nothing much is said about the fee structures and the practice of taking deposits, which one might argue is a private contractual affair between the user and the operator.

The larger issue here is really this: Is bike sharing part of our public transportation ecosystem?

If it is, then arguably it should attract a comparable level of regulation when it comes to fees and service standards, which would reasonably include consumer protection in the area of refundable deposits.

As early as 2013, Chicago's transportation commissioner Gabe Klein was saying that one "shouldn't count out bike-share as mass transit". Of course, such regulation would probably not amount to the level of regulation that the Public Transport Council manages for bus and train fares, but it is hard to argue that the public interest involved in bike sharing should be any different in kind.

Let us assume that we do want to regulate bike sharing, to avoid future incidents where users have a hard time getting back their deposits. If so, the upcoming licensing framework that the LTA is about to implement seems like a good opportunity to address concerns about the money that users put into these bicycle-sharing arrangements.

The LTA has indicated that it will consider several factors when assessing applications for a licence by operators, including fleet utilisation rate and the ability to manage indiscriminate parking.

The LTA may also wish to consider the operator's ability to safeguard users' interests, especially through the implementation of appropriate protections for their deposits, if the operators choose to take such deposits.

One option to consider could be a requirement for bicycle-sharing companies to place users' deposits in segregated bank accounts. Historically, this has been a relevant factor in construing whether a trust relationship exists. This could take the form of requiring these operators to amend their standard form contracts to provide for such an obligation on the part of the operators.

The LTA has indicated that it will take regulatory action against operators for breaches of licence conditions and standards, which includes penalties such as a reduction of fleet size, financial penalties for each instance of non-compliance, and suspension or revocation of licence. Such penalties may serve as a sufficient incentive for companies to put adequate consumer protection mechanisms in place.

Such stronger regulation will likely have an impact on the business model of bicycle-sharing companies, specifically their ability to invest such deposits. This is clearly something that the regulator will have to take forward with the relevant stakeholders.

In a statement issued yesterday evening, LTA indicated that its licensing of bicycle-sharing operators (BSOs) is meant to allow "only BSOs with a responsible and sustainable bicycle management plan to operate in our local context". It added: "The licensing of BSOs is not intended to address non-parking issues such as service standards and user deposits. Users can choose from the different business models offered by the BSOs including those that do not require user deposits. Over-regulation could lead to higher compliance costs for operators which could in turn be passed on to users, and stifle innovation."

Indeed, balancing consumer protection with the legitimate business interests of operators will be a tricky business. But neither is caveat emptor – or buyer beware – a completely satisfactory solution.

It may also be argued that the LTA is not the appropriate government body to regulate how operators treat their users' deposits. But as the regulator of public transport operators, LTA can adopt a broader perspective of safeguarding public transport commuters, and work with the relevant regulatory authority to do so.

How the bicycle-sharing sector will evolve remains to be seen. For now, oBike's exit from the market provides a good opportunity for Singapore to improve its management of this new area.

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