

Legal Bulletin

A summary of developments in the law

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Editorial Team

Margaret Chew
Elizabeth Wong
Soo Seong Theng
Hong Farn Ling
Anitha Rajaram
Natalie McGibbon

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Allen & Gledhill LLP also publishes the monthly Financial Services Bulletin. To view the August 2009 issue, please [click here](#).

Articles

Securities and Futures (Amendment) Act (Commencement) (No. 2) Notification 2009: Changes to Securities and Futures Act affecting securities offerings and market misconduct enforcement implemented

On 29 July 2009, changes to the Securities and Futures Act (the “SFA”) governing the offering of securities and market misconduct enforcement came into effect.

Changes to SFA in force from 29 July 2009

Highlights of the changes are as follows:

- Under the SFA, an accredited investor or institutional investor who acquires shares, debentures or business trust units under an exemption is prohibited from reselling the securities for six months from the date of acquisition of the securities, except to another accredited or institutional investor (the “**six-month resale restriction**”). The six-month resale restriction no longer applies if the issuer of the securities launches a public offering of securities of the same class with a prospectus and lists the securities during the six-month period;
- It is clarified that where convertible bonds or units of shares or debentures, that were initially acquired by an accredited or institutional investor under an exemption, are converted into shares or debentures, those shares or debentures are subject to the six-month resale restriction;
- The requirement for a prescribed information memorandum accompanying an offer of collective investment schemes made in reliance on the restricted offer exemption is removed;
- The audit requirement for half-year financial statements for debentures issuers is removed;
- The exclusions from advertisement restrictions are extended to a disclosure, notice or report required by an overseas securities exchange;
- The following new condition for invoking small offers, private placement and restricted offer exemptions for offers of shares, debentures, collective investment schemes or business trusts (“**Securities**”) is imposed:
 - there must not be any prospectus registered in respect of the Securities, or
 - if a prospectus has been registered, then either the prospectus must have expired or the offeror must have informed the Monetary Authority of Singapore (the “**MAS**”) of its intention to make the offer in reliance on the small offers, private placement or restricted offer exemptions;

For further information, please contact:

Capital markets licensing and business conduct

Francis Mok
Tel: +65 6890 7786
francis.mok@allenandgledhill.com

Market misconduct enforcement

Francis Mok
Tel: +65 6890 7786
francis.mok@allenandgledhill.com

Andy Yeo
Tel: +65 6890 7833
andy.yeo@allenandgledhill.com

Notification of changes in substantial shareholdings and directors' interests

Christine Chan
Tel: +65 6890 7647
christine.chan@allenandgledhill.com

Christina Ong
Tel: +65 6890 7700
christina.ong@allenandgledhill.com

Lucien Wong
Tel: +65 6890 7702
lucien.wong@allenandgledhill.com

Yap Lune Teng
Tel: +65 6890 7665
yap.luneteng@allenandgledhill.com

Offers of investments
(Collective investment schemes)

Long Jek Aun
Tel: +65 6890 7714
long.jekaun@allenandgledhill.com

Danny Tan
Tel: +65 6890 7738
danny.tan@allenandgledhill.com

Tan Sai Hong
Tel: +65 6890 7788
tan.saihong@allenandgledhill.com

Offers of investments
(Debt capital markets)

Au Huey Ling
Tel: +65 6890 7749
au.hueyling@allenandgledhill.com

Margaret Chin
Tel: +65 6890 7718
margaret.chin@allenandgledhill.com

Offers of investments
(Equity capital markets)

Leonard Ching
Tel: +65 6890 7730
leonard.ching@allenandgledhill.com

Tan Tze Gay
Tel: +65 6890 7712
tan.tzegay@allenandgledhill.com

– in the case of the private placement and restricted offer exemptions, the offeror must also have taken reasonable steps to inform the offerees in writing that the offer is made in reliance on the relevant exemption;

- New provisions are introduced to allow and facilitate the transfer of evidence from the investigating authorities in criminal proceedings to the MAS and *vice versa*;
- The SFA now provides that a criminal proceeding cannot be instituted against the offender when the offender has reached an out-of-court civil penalty settlement with the MAS.

Key changes to SFA that are not yet in force

The changes highlighted above are part of the changes to the SFA that were approved by Parliament on 19 January 2009. The changes to the SFA are expected to be implemented in phases by the end of 2009 and those which are not yet in force include:

- (i) revising the current exemption for an offer of securities at a consideration of not less than S\$200,000 for each transaction, so that the threshold is lowered to S\$100,000;
- (ii) establishing a new recognition regime to enable foreign business trusts (“**BTs**”) that are not registered under the Business Trusts Act to offer their units to retail investors in Singapore;
- (iii) revising the current regime for the distribution of research reports;
- (iv) introducing a continuing licensing regime for capital markets services (“**CMS**”) licence holders;
- (v) introducing a new representative notification framework for representatives of CMS licence holders and exempt CMS licence holders;
- (vi) imposing a requirement for prior MAS approval for take-overs of CMS licence holders;
- (vii) migrating the notification regime for substantial shareholders of a listed company under the Companies Act to the SFA;
- (viii) regulating the disclosure regime for interests of directors and CEOs of a listed company under the SFA;
- (ix) introducing a new concept of attributing liability for market misconduct offences committed by an employee to his employer under the SFA;
- (x) providing a new provision under the SFA to make innocent third parties to a market misconduct offence disgorge the gains which they have made from the offence;
- (xi) introducing a regime for the compulsory acquisition of minority unitholdings in a Real Estate Investment Trust (“**REIT**”) or a registered BT; and
- (xii) empowering a unitholder of a REIT to seek judicial redress on the ground of minority oppression.

REITs / BTs

Chua Bor Jern
Tel: +65 6890 7772
chua.borjern@allenandgledhill.com

Jerry Koh
Tel: +65 6890 7770
jerry.koh@allenandgledhill.com

To read more about these pending changes, please click on the titles of the following articles featured in the Allen & Gledhill Financial Services Bulletin and Allen & Gledhill Legal Bulletin which track the developments with regard to the changes to the SFA:

- (i) [MAS consults on draft Regulations supplementing changes to licensing and business conduct requirements under SFA and FAA \(July 2009\)](#);
- (ii) [Partial commencement of Securities and Futures \(Amendment\) Act 2009 on 20 April 2009](#) (April 2009); and
- (iii) [Securities and Futures \(Amendment\) Bill 2009 and Financial Advisers \(Amendment\) Bill 2009 passed in Parliament on 19 January 2009](#) (January 2009).

Reference materials

Please [click here](#) for a copy of the commencement notification for the above changes to the SFA which is available on the MAS website at www.mas.gov.sg

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SGX conducts public consultation on proposed rules for listing of early stage mineral, oil and gas companies on Catalist

The Singapore Exchange Limited (the “**SGX**”) conducted a public consultation between 11 August and 31 August 2009 inviting comments on proposed amendments to the Rules of Catalist (the “**proposed Catalist Rules**”) for the listing of early stage mineral, oil and gas (“**MOG**”) companies on the Singapore Exchange Catalist (“**Catalist**”).

Catalist is the SGX’s sponsor-supervised listing platform for companies which do not meet the quantitative listing criteria for the Mainboard of the Singapore Exchange Securities Trading Limited (the “**Mainboard**”) but have good prospects for growth and profitability.

Proposed listing of early stage MOG companies

MOG companies that are in commercial production with on-going revenue streams can list on the Mainboard. The proposed Catalist Rules will allow MOG companies that are involved in the exploration and extraction of minerals and fossil fuels to list on Catalist. However, as such early stage MOG companies are of higher investment risks, the SGX proposes to introduce additional listing criteria and continuing listing obligations for such companies. The SGX is seeking views on whether the proposed requirements are practicable.

This article provides a summary of the proposed Catalist Rules.

Initial listing criteria

A MOG company seeking a listing on Catalist must show that it has an adequate deposit of a mineral, oil and gas in such form, quality and quantity that there are reasonable prospects for economic extraction. The existence

of such deposit must be certified by an independent qualified technical expert (defined in the proposed Catalist Rules as a “**qualified person**”) in accordance with internationally recognised standards.

Responsibilities of sponsors of MOG companies

Among other things, the sponsor of a MOG company will be required to have and maintain access to appropriate technical expertise relevant to the business and products of the company to enable it to properly discharge its responsibilities. Such expertise can be from a third-party expert or an internal resource of equivalent standards within the sponsor.

Continuing listing obligations

- **Announcement of specific information:** A MOG company listed on Catalist will be required to make immediate announcement of material changes to its reserves or resources together with a qualified person’s report on such changes. Where the announcement involves the reporting of new material reserves or resources, or a 100 per cent. change or more in existing reserves or resources, the qualified person’s report must be signed off by an independent qualified person.
- **Periodic reports:** A MOG company will be required to:
 - make a quarterly announcement on the use of funds for the quarter and a projection on the use of funds for the next immediate quarter; and
 - provide an update on its reserves and resources in its quarterly announcement and financial statements for the full financial year.

Helping investors to understand reports and announcement of MOG companies

A new Appendix 7E and Practice Note 4D will be introduced to the Catalist Rules to provide guidance to MOG companies in disclosing technical information relating to their businesses and operations in an investor-friendly manner:

- Appendix 7E aims to standardise the presentation of quantitative information in relation to the mineral, oil or gas reserves and resources of such companies in summary form;
- Practice Note 4D sets out specific disclosure requirements for MOG companies, in particular when such disclosures relate to statements of reserves and resources as well as exploratory updates. It also sets out the minimum requirements on the contents and format of a qualified person’s report.

Reference materials

For details of the proposed Catalist Rules, [click here](#) to view the full text of the consultation paper. Please also [click here](#) to read the news release issued by the SGX on 11 August 2009 covering this development.

Both resources can be found on the SGX website www.sgx.com under “SGX Corporate Home”.

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For further information, please contact:

Bin Wern Sern
Tel: +65 6890 7624
bin.wernsern@allenandgledhill.com

Shawn Chen
Tel: +65 6890 7896
shawn.chen@allenandgledhill.com

Leonard Ching
Tel: +65 6890 7730
leonard.ching@allenandgledhill.com

These recent developments were highlighted in the Allen & Gledhill Arbitration Alert of 31 July 2009. If you would like to be on our arbitration related electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

MinLaw proposes changes to enhance the legislative infrastructure for Singapore's international arbitration regime

The Ministry of Law is proposing amendments to the International Arbitration Act following a review of the 2006 amendments to the 1985 UNCITRAL Model Law on International Commercial Arbitration and in consultation with arbitration industry experts. The Ministry of Law released a consultation paper on 27 July 2009 and sought feedback from the public on the proposed changes. The consultation exercise was open for feedback until 17 August 2009.

Key amendments

In sum, the proposed amendments cover the following three key areas:

- **Granting of interim relief**

Under the proposed amendments, the Singapore courts will be empowered to grant interim orders in aid of arbitrations held outside of Singapore, such as the discovery of documents during the course of the proceedings as well as orders to freeze assets of parties. This move is in line with legislation in other countries such as the United Kingdom and New Zealand, and represents a shift in the position previously articulated in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 where the Court of Appeal decided that the Singapore courts did not have statutory power to grant interim orders or relief to assist arbitrations abroad.

Nonetheless, the proposed amendments provide that the Singapore courts may decline to make an interim order if the fact that the place of arbitration is outside Singapore or likely to be outside Singapore makes it inappropriate to make such an order.

Further, regardless of whether the arbitration in question is in Singapore or overseas, the Singapore court may only grant an order to the extent that the arbitral tribunal hearing the matter had no power or was unable for the time being to act effectively. The court's order will, however, cease to have effect in whole or in part if the arbitral tribunal has power to act in relation to the subject matter of the order and expressly makes an order which relates to a part of or the entire order.

- **Designation of authenticating bodies**

The proposed amendments seek to empower the Minister for Law to designate entities to authenticate, on a non-mandatory basis, arbitration awards rendered in Singapore. This measure aims to facilitate the enforcement of such awards in countries which are party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) as the Convention requires the party seeking enforcement before the foreign courts to tender a duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. This move comes about as the Ministry of Law has received feedback that parties faced difficulties enforcing arbitration awards in foreign courts because of authentication issues.

For further information, please contact:

Dinesh Dhillon
Tel: +65 6890 7822
dinesh.dhillon@allenandgledhill.com

Edwin Tong
Tel: +65 6890 7867
edwin.tong@allenandgledhill.com

- **Definition of arbitration agreement**

The proposed amendments also seek to modernise the current definition of an arbitration agreement to make it clear that Singapore recognises that an arbitration agreement can be contained in electronic communications such as electronic e-mail or electronic data exchange.

Reference materials

Please click on the following links to access the required information:

- [Press release issued by the Ministry of Law on 27 July 2009](#)
- [Background brief on international arbitration in Singapore](#)
- [Public consultation paper](#)
- [Draft International Arbitration \(Amendment\) Bill](#)

These resources are available from the Ministry of Law website www.minlaw.gov.sg

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MOH issues Advisory on Influenza A (H1N1-2009) for Workplaces (Sustained Community Transmission)

The Ministry of Health (the “MOH”) has issued Health Advisory 2/2009 - Advice on Influenza A (H1N1-2009) for Workplaces (Sustained Community Transmission) (the “Advisory”) dated 22 July 2009.

Slowing spread of infection

With sustained community transmission of the Influenza A (H1N1-2009) virus, the objectives are to:

- slow the spread of the infection;
- reduce casualties from the infection; and
- minimise disruption to essential services.

The Advisory provides advice on the measures and practices that can be implemented at the workplace (including places of mass gathering). However, as these are general guidelines, the MOH advises individual organisations to assess their own situations and adopt the various measures as appropriate.

Advice on measures and practices

The key measures and practices highlighted in the Advisory are as follows:

- **Personal hygiene and social responsibility:** Individuals are advised to practise good personal hygiene at all times and exercise social responsibility. Those who are not well should seek immediate medical

attention and rest at home. Surgical masks should be used if close contact with high-risk groups is unavoidable.

- **Social distancing:** Organisations are advised to institute measures, where practicable, to increase the social space between co-workers and with visitors, e.g. allowing staff to telecommute. At meetings, crowding should be avoided through, for example, the use of a larger meeting room, if available.
- **Environmental cleanliness:** To minimise indirect transmission through contaminated surfaces, floors and other surfaces (e.g. door handles, switches, tables) should be cleaned at least once daily.
- **Temperature screening:** There is no recommendation for routine screening of staff and visitors for temperature and flu symptoms, although organisations are advised to display conspicuous signages at building entrances to remind staff and visitors to be socially responsible and to alert them not to enter the building if they have flu symptoms. However, an organisation may implement temperature screening at its discretion based on its assessment of the risk level by considering factors such as (a) involvement of high-risk groups, (b) high population density, and/or (c) sustained contact, e.g. for more than one hour.
- **Protection of frontline staff:** In general, frontline staff need not wear surgical masks, although depending on the situation, an organisation may at its discretion require the wearing of masks after considering factors such as (a) volume of human traffic, (b) types of persons served by frontline staff, and (c) distance and duration of contact.
- **Managing staff who develop flu symptoms:** Such staff should use surgical masks and seek medical attention immediately. If possible, public transport should be avoided. Tests to confirm the diagnosis of Influenza A (H1N1-2009) infection are generally not required unless clinically indicated or for public health reasons as assessed by the attending doctor. Staff issued with medical certificates (“MC”) should be allowed to rest at home and stay away from the workplace for the entire duration of the MC.
- **Contact tracing and home quarantine order:** Contact tracing and home quarantine orders are generally no longer required.
- **Managing staff who are close contacts with confirmed cases:** Staff members who are in contact with confirmed cases should monitor their own conditions closely for the duration that the confirmed case is unwell, plus seven days after recovery. If symptoms develop, a surgical mask should be used and medical attention sought.
- **Overseas travel:** Travel advisories are not recommended since H1N1 is now a global pandemic.
- **Business continuity plan and communications:** Organisations are encouraged to appoint “flu managers” to manage H1N1-related matters, and should be prepared for high staff absenteeism.

Reference materials

Please [click here](#) to read the full text of the Advisory, which is posted on www.crisis.gov.sg

For further information, please contact:

Ho Chien Mien
Tel: +65 6890 7502
ho.chienmien@allenandgledhill.com

Suresh Nair
Tel: +65 6890 7897
suresh.nair@allenandgledhill.com

Vemala Raja
Tel: +65 6890 7645
vemala.raja@allenandgledhill.com

The Allen & Gledhill Legal Bulletin has previously featured articles about advisories for Influenza A (H1N1-2009) issued by the Ministry of Manpower (the “**MOM**”). For more information, please click on the relevant titles:

- [MOM issues advisories for Influenza A \(H1N1-2009\)](#) (June 2009)
- [MOM issues Third Tripartite Advisory and Workplace Checklist to mitigate spread of Influenza A \(H1N1-2009\)](#) (July 2009)

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National Registry of Diseases Act in force on 1 August 2009: Establishment of National Registry of Diseases

The National Registry of Diseases Act 2007 (the “**Act**”) will come into force on **1 August 2009**. It has been almost two years since it was passed by Parliament on 12 November 2007. It was introduced in Parliament on 22 October 2007 following a public consultation by the Ministry of Health (the “**MOH**”) from July 2007 till September 2007.

Establishment of the National Registry of Diseases under the Act

The Act establishes the National Registry of Diseases (the “**NRD**”) and provides for the compilation of information on the incidence of certain diseases for use as a basis for the direction of programmes for disease prevention and control.

Manager of healthcare institution must give notification of reportable disease - Cancer

More significantly, it will be compulsory for the manager of a healthcare institution to notify the Registrar of the NRD (the “**Registrar**”) of reportable diseases which comes to the attention of the healthcare institution when a person is diagnosed with or undergoes treatment for a reportable disease at the healthcare institution. A breach of the compulsory requirement will be an offence punishable with a fine not exceeding S\$2,000. The only reportable disease scheduled in the Act for now is cancer.

Who is a manager of a healthcare institution

The Act provides that a manager of a healthcare institution is a person having the management or control of a healthcare institution which includes any private hospital, medical clinic, clinical laboratory or healthcare establishment licensed under the Private Hospitals and Medical Clinics Act.

Confidentiality and disclosure of individually-identifiable information

In recognition of the need to ensure privacy protection and data security, Part IV of the Act sets out the provisions relating to the confidentiality and disclosure of the information collected. Some of the key features of this aspect of the Act are as follows:

- The Registrar, NRD officer or agent, or any other person acting under the direction of the Director of Medical Services (the “**Director**”) or the Registrar shall not, except for the prosecution of an offence under the Act, be compellable to give evidence in respect of any individually-

identifiable information collected under the Act. Further, they shall not disclose the contents of any register or individually-identifiable information which may have come to their knowledge in the course of performing any duty or function under the Act. Non-compliance with this confidentiality requirement under the Act will be an offence punishable with a fine not exceeding S\$10,000, and/or imprisonment for a term not exceeding 12 months.

- Any person may request the Registrar to disclose or publish any anonymised information held by the NRD, subject to the payment of a prescribed fee and other conditions which the Registrar may impose. A failure to comply with any conditions imposed by the Registrar will be an offence under the Act punishable with a maximum fine of S\$5,000, or imprisonment for a term not exceeding six months, or both.
- For the purpose of national public health programmes relating to a reportable disease, the Registrar may disclose individually-identifiable information, subject to the approval by the Director who must be satisfied that the programmes cannot be carried out with anonymised information.
- For the purpose of medical treatment of a particular person suffering from a reportable disease, the Registrar may, if he thinks fit, disclose any individually-identifiable information relating to that person, to the medical practitioner responsible for his treatment and care. The disclosure must be necessary for the proper treatment of that person and the requisite consent must have been obtained.
- A researcher may apply to the Registrar in the prescribed form for the disclosure of individually-identifiable information for the purpose of public health research. Before allowing any disclosure of such information, the Registrar must be satisfied, among other factors, that the research cannot be conducted with anonymised information and the requisite consent has been obtained.

Reference materials

The Allen & Gledhill Legal Bulletin has been following closely the legislative development of the Act. For more information, please click on the relevant titles:

- [“MOH conducts public consultation on draft National Registry of Diseases Bill”](#) (August 2007)
- [“Parliament introduces National Registry of Diseases Bill 2007”](#) (October 2007)
- [“Parliament passes National Registry of Diseases Bill 2007 on 12 November 2007”](#) (November 2007)

[Back to Contents Page](#)

For further information, please contact:

Mak Wei Munn
Tel: +65 6890 7885
mak.weimunn@allenandgledhill.com

Tham Hsu Hsien
Tel: +65 6890 7820
tham.hsuhsien@allenandgledhill.com

Edwin Tong
Tel: +65 6890 7867
edwin.tong@allenandgledhill.com

Parliament passes Goods and Services Tax (Amendment) Bill 2009: Implementing Budget 2009 changes

On 18 August 2009, Parliament passed the Goods and Services Tax (Amendment) Bill 2009 (the “**Bill**”). The Bill was introduced on 20 July 2009 following a public consultation conducted by the Ministry of Finance (the “**MOF**”) in June 2009 on a draft version of the Bill.

Changes to be effected by Bill

When in force, the Bill will amend the Goods and Services Tax Act (the “**Act**”) to give legislative effect to the goods and services tax (“**GST**”) initiatives announced in the Budget Statement 2009, as well as effect amendments arising from an ongoing review of the GST system. The changes are as follows:

- To support the growth of the aircraft maintenance, repair and overhaul (MRO) industry in Singapore, zero-rating treatment will be given to all aircraft, including private aircraft, used wholly for international transportation as well as the sale and lease of qualifying aircraft parts;
- To encourage the growth of the auction and exhibition industry as well as specialised storage facilities in Singapore, the Act will be amended to provide for the temporary removal of goods, without payment of GST, from a warehouse outside the free trade zone for the purpose of an auction, an exhibition or other similar event involving the display of goods;
- Allowing a trust to be registered in its own name, while continuing to make the trustees liable for compliance with the Act. This is similar to how the Act presently allows partnerships and limited partnerships to be registered in the name of the partnership, while holding their partners liable for the GST matters of the partnerships;
- Extending to electronic vouchers the current practice of accounting for GST on physical vouchers at the point where the physical vouchers are redeemed for goods and services. The GST (General) Regulations will be amended to implement this change; and
- Requiring taxpayers to state precisely their grounds of objection when applying for a review or revision of a decision made by the Comptroller of GST. This will align the Act with requirements under the Income Tax Act and Property Tax Act.

MOF response to feedback received from public consultation

On 13 August 2009, the MOF issued its response to feedback from the public consultation on a draft version of the Bill in June 2009. The following is some of the response of the MOF to the feedback received:

- **Zero-rating treatment for all aircrafts used wholly for international travel as well as the sale and lease of aircraft parts forming part of qualifying aircraft:** In response to a comment that it would be equitable to extend the zero-rating relief to cover sales and lease of vessel parts that are designed and built for exclusive use on a ship, the MOF disclosed that the Inland Revenue Authority of Singapore will be studying

For further information, please contact:

Sunit Chhabra
Tel: +65 6890 7735
sunit.chhabra@allenandgledhill.com

Nand Singh Gandhi
Tel: +65 6890 7838
nand.gandhi@allenandgledhill.com

Lim Pek Bur
Tel: +65 6890 7096
lim.pekbur@allenandgledhill.com

Tang Siau Yan
Tel: +65 6890 7799
tang.siauyan@allenandgledhill.com

the shipping industry as part of its continuing review of the GST system, and will consider if there is similar scope to extend the treatment to ships in subsequent amendments of the Act.

- **GST suspension for goods temporarily removed from zero-GST or licensed warehouses for auctions and exhibitions:** Pursuant to comments that the use of terms of “first warehouse” and “second warehouse” in the draft Bill would be confusing, the MOF stated that the relevant provisions have been re-drafted to provide clarity that goods removed from a zero-GST or licensed warehouse have to be returned to the same warehouse or any other zero-GST or licensed warehouse.

Reference materials

Please [click here](#) for the full text of the Bill, which is posted on the Singapore Parliament website www.parliament.gov.sg

Please [click here](#) to read the Second Reading Speech by Minister in Prime Minister’s Office, Second Minister for Finance and Transport, Mrs Lim Hwee Hua which is available on the MOF website app.mof.gov.sg

Please [click here](#) for the full text of the MOF Response, which is posted on the website www.mof.gov.sg

An article about the Bill was featured in a previous issue of the Allen & Gledhill Legal Bulletin (July 2009). To read the article entitled “*Parliament introduces Goods and Services Tax (Amendment) Bill 2009: Implementing Budget 2009 changes*”, please [click here](#).

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MOF issues response to feedback received on draft Income Tax (Amendment) Bill 2009

The Ministry of Finance (the “**MOF**”) conducted a public consultation on a draft Income Tax (Amendment) Bill 2009 (the “**draft Bill**”) from 22 June 2009 to 14 July 2009. On 21 August 2009, the MOF issued its response to the feedback received from the public consultation (the “**MOF Response**”). The draft Bill contains proposed amendments to the Income Tax Act which are principally to cater for the tax changes announced in Budget Statement 2009 (the “**Budget 2009 tax changes**”), as well as other changes arising from a periodic review of the income tax system (the “**non-Budget 2009 tax changes**”).

More than half of the suggestions received following the public consultation concerned the proposed legislative amendments to provide certainty of non-taxation of income from the disposal of property derived by individuals who sell their properties infrequently. The Government has decided not to proceed with these amendments.

The following are some of the areas where the MOF has issued its response.

Budget 2009 tax changes

- New tax framework for facilitating corporate amalgamations taking place on or after 22 January 2009:

- The MOF rejected a recommendation that an amalgamated company should be allowed a tax deduction for interest and related borrowing costs if the borrowings are taken by one amalgamating company to acquire shares in the other, and the companies concerned are subsequently amalgamated. The MOF is of the view that interest and the related borrowing costs relating to loans taken by a Singapore company to acquire shares in another Singapore company do not have deduction value against the one-tier exempt dividend derived for the acquiring company. For consistency, the same treatment should also apply in the case of amalgamation of companies.
- The draft Bill proposed requiring the amalgamated company to elect for tax treatment under the corporate amalgamation framework within 30 days after the date of amalgamation. Recognising that companies may have difficulties in meeting the 30-day time limit, the time limit will be extended to 90 days.
- Enhancing fund management incentives for promoting fund management in Singapore by introducing an enhanced tier to the existing fund management incentives for funds with a minimum fund size of S\$50 million at the point of application among other conditions, with effect from 1 April 2009 to 31 March 2014 (both dates inclusive):
 - The MOF rejected a suggestion to allow funds under the enhanced tier of the fund management tax incentives that fail to meet the conditions under the enhanced tier for any basis period, to automatically qualify for tax exemptions under the standard tier of the fund management tax incentives for the same basis period, provided the conditions under the standard tier are satisfied.
 - The MOF explained that the enhanced tier and the standard tier fund management incentives are separate schemes that target funds with different groups of investors. Hence, they have different sets of administrative conditions and qualifying criteria. In general, the MOF's approach is not to allow entities that fail to qualify under their incentive awards for a given year to qualify for another tax incentive for the same activity in the same year. Entities choose which incentive schemes they wish to apply for, and if awarded, will be governed by the terms and conditions of the award for its tenure.

Non-Budget tax changes

- Providing for the “arm’s length principle”. A new provision will be introduced in the Income Tax Act to provide for the avoidance of doubt that all types of related party transactions are subject to arm’s length principle and that the Comptroller of Income Tax may make adjustments if a transaction between related parties has been made on terms which differ from those which would be made between independent persons:
 - The MOF rejected a suggestion to provide for corresponding adjustments to be made if the person has been the subject of a transfer pricing adjustment in Singapore or elsewhere. The MOF highlighted that as Singapore has Avoidance of Double Taxation Agreements (DTAs) with most of its major trading partners, taxpayers can seek alleviation of double taxation resulting from corresponding transfer pricing adjustments through the Mutual Agreement Procedure provisions.

- There was also feedback that the provisions pertaining to transfer pricing should be more detailed. The MOF accepted this suggestion and stated it will continue to review if more details need to be included in the relevant legislation or circulars issued by the Inland Revenue Authority of Singapore (the “IRAS”).
- Disregarding for tax purposes, certain gains and losses arising from disposal of real properties:
 - As the Government is not proceeding with these amendments, the MOF has decided that it is best to retain the current framework of income tax treatment for individuals who sell their properties. With this decision, the IRAS will continue to consider the facts and circumstances of each disposal to determine if the individual owner concerned should be subject to income tax on the property disposal gains. The facts and circumstances that the IRAS will take into consideration include the situation leading to the sale, how long the individual has held the property, and how frequently he has been selling properties.
 - The MOF Response on this issue is contained in a separate response entitled “No change to income tax treatment for individuals who sell their properties”.

Other issues addressed by the MOF Response

The MOF Response also addressed feedback on the following matters:

- temporary liberalisation of tax exemption for foreign-sourced income;
- tax treatment of management fees; and
- tax framework for public private partnerships (PPP).

Reference materials

Please click on the following links for the required information:

- [MOF Response](#)
- [MOF separate response on the proposal of disregarding certain gains and losses arising from disposal of real properties](#)
- [MOF press release](#)

These resources are available from the MOF website www.mof.gov.sg. An article about the MOF public consultation was featured in a previous issue of the Allen & Gledhill Legal Bulletin (June 2009). To read the article entitled “*MOF conducts public consultation on draft Income Tax (Amendment) Bill 2009: Implementing Budget 2009 changes*”, please [click here](#).

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For further information, please contact:

Sunit Chhabra
Tel: +65 6890 7735
sunit.chhabra@allenandgledhill.com

Nand Singh Gandhi
Tel: +65 6890 7838
nand.gandhi@allenandgledhill.com

Lim Pek Bur
Tel: +65 6890 7096
lim.pekbur@allenandgledhill.com

Tang Siau Yan
Tel: +65 6890 7799
tang.siauyan@allenandgledhill.com

MOM conducts public consultation on proposed Workplace Safety and Health (Safety & Health Management System & Auditing) Regulations

From 29 July 2009 to 19 August 2009, the Ministry of Manpower (the “**MOM**”) conducted a public consultation and sought feedback from members of the public on the proposed Workplace Safety and Health (Safety and Health Management System and Auditing) Regulations (the “**draft Regulations**”). The draft Regulations are intended to enhance the implementation of the safety and health management system (“**SHMS**”) at workplaces and strengthen the workplace safety and health (“**WSH**”) auditing regime.

Key changes

Under existing legislative provision, factories operating in higher risk industries are required to establish and implement a SHMS at their workplaces to ensure the safety and health of persons at work. These requirements are found in various sectoral regulations, namely the Workplace Safety and Health (Construction) Regulations, the Workplace Safety and Health (Shipbuilding and Ship-repairing) Regulations and the Workplace Safety and Health (General Provisions) Regulations. The draft Regulations seek to consolidate these various regulatory requirements on SHMS into a single set of regulations.

Further, the draft Regulations aim to strengthen the auditing of the SHMS in order to enhance the effective implementation of SHMS at workplaces. The draft Regulations propose several enhancements to the WSH auditing regime, including:

- Expanding the scope of audits to include risk assessments, work processes and the workplace itself; and
- Specifying the statutory duties of the WSH auditors to raise professionalism and standards of ethical practices.

Application of draft Regulations

When in force, the provisions of the draft Regulations will apply to all workplaces within the classes or description specified in the First Schedule to the Workplace Safety and Health Act.

The following are the key elements of the proposed draft Regulations:

- Approval to be a WSH auditor;
- Powers and duties of a WSH auditor;
- Implementation of SHMS; and
- WSH audit.

Reference materials

Please [click here](#) to read the full text of the consultation paper, which is posted at the Reach Portal <http://app.reach.gov.sg>

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For further information, please contact:

Ho Chien Mien
Tel: +65 6890 7502
ho.chienmien@allenandgledhill.com

Sophie Lim
Tel: +65 890 7696
sophie.lim@allenandgledhill.com

Sanjiv Rajan
Tel: +65 6890 7800
sanjiv.rajan@allenandgledhill.com

MinLaw announces establishment of Singapore Office of WIPO Arbitration and Mediation Center in January 2010

On 28 July 2009, the Ministry of Law (the “**MinLaw**”) announced that the Singapore office of the World Intellectual Property Organization (the “**WIPO**”) Arbitration and Mediation Center (the “**WIPO Center**”) will be officially opened in January 2010. It will be located at Maxwell Chambers (www.maxwell-chambers.com) which is Singapore's international dispute resolution centre.

As the only WIPO Center in the region, the Singapore office will focus on promoting alternative dispute resolution (“**ADR**”) services in the Asia Pacific region, providing training and advice on procedures such as arbitration, mediation and expert determination. It will administer and facilitate hearings in cases conducted under the WIPO Rules in Singapore. The Singapore office of the WIPO Center will offer companies and other parties in the region a cost-effective dispute resolution option.

WIPO Film ADR Scheme

In the same announcement, the MinLaw also mentioned that the WIPO and Singapore are cooperating to establish an international WIPO Mediation and Arbitration Scheme for Film Related Disputes (the “**WIPO Film ADR Scheme**”). The WIPO Center will work with Singapore's Media Development Authority to develop the WIPO Film ADR Scheme. The WIPO Film ADR Scheme is expected to be launched in Singapore in late 2009.

Reference materials

Please click on the relevant titles for the required information:

- [News Release](#)
- [Fact sheet on the WIPO Arbitration and Mediation Center](#)

These resources are available from the MinLaw website www.minlaw.gov.sg

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Parliament introduces Copyright (Amendment) Bill 2009: Changes to the jurisdiction and operational aspects of the Copyright Tribunal

On 18 August 2009, the Copyright (Amendment) Bill 2009 (the “**Bill**”) was introduced in Parliament. When in force, the Copyright Act (the “**Act**”) will be amended in relation to the jurisdictional and operational aspects of the Copyright Tribunal (the “**Tribunal**”).

Jurisdictional aspects

The Bill seeks to broaden the definition of the term “licence” in Part VII of the Act to enable the Tribunal to hear and determine disputes in connection with licences to do any act comprised in the copyright in any work or other subject-matter, and narrow the definition of the term “licensor” to exclude

For further information, please contact:

Stanley Lai
Tel: +65 6890 7883
stanley.lai@allenandgledhill.com

Low Pei Lin
Tel: +65 6890 7516
low.peilin@allenandgledhill.com

Moi Sok Ling
Tel: +65 6890 7538
moi.sokling@allenandgledhill.com

Isaac Tung
Tel: +65 6890 7522
isaac.tung@allenandgledhill.com

individual copyright owners and cover collecting societies only. The objective of these amendments is to expand the jurisdiction of the Tribunal to include licences for all uses of all works and other subject matter.

Presently, the Tribunal has jurisdiction to hear disputes involving a narrow range of licence schemes due to the narrow definition of “licence”, which only covers:

- a licence granted by a copyright owner for the performance, broadcast, making of a sound recording or film, or the inclusion in a cable programme service, of a literary, dramatic or musical work (or their respective adaptations); or
- a licence granted by a copyright owner to enter into a commercial rental arrangement for a computer program or a sound recording.

Operational aspects

The Bill will introduce a new section to the Act to provide for the establishment of one or more Tribunals. There are other related provisions concerning matters such as the appointment of the president, deputy president and members of the Tribunal and remuneration and allowances.

Background

As a matter of background, the Intellectual Property of Singapore (the “IPOS”) conducted a public consultation to seek feedback on the proposed changes to the jurisdiction and operational aspects of the Tribunal in February / March 2008. An article entitled “*IPOS conducts public consultation on changes to the jurisdiction and operational aspects of the Copyright Tribunal*” was featured in a previous issue of the Allen & Gledhill Legal Bulletin (February 2008). To read the article, please [click here](#).

Reference materials

To read the full text of the Bill on the Parliament website www.parliament.gov.sg, please [click here](#).

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IPOS invites feedback on proposed changes to Singapore’s patent system: Closing date for feedback extended to 4 September 2009

Since 3 July 2009, the Intellectual Property Office of Singapore (the “IPOS”) has been conducting a public consultation on proposed changes to the Singapore patent system. Initially the deadline to submit feedback was 14 August 2009. However, the IPOS has extended the submission deadline to **4 September 2009**.

The IPOS reviews the patents legislation regularly to update the patents legislation with Singapore’s economic development and trends in patent protection. The principal statute governing patents in Singapore is the Patents Act. The IPOS would like to obtain comments and suggestions from the public on the following aspects of Singapore’s patent system:

For further information, please contact:

Stanley Lai
Tel: +65 6890 7883
stanley.lai@allenandgledhill.com

Low Pei Lin
Tel: +65 6890 7516
low.peilin@allenandgledhill.com

Moi Sok Ling
Tel: +65 6890 7538
moi.sokling@allenandgledhill.com

Isaac Tung
Tel: +65 6890 7522
isaac.tung@allenandgledhill.com

For further information, please contact:

Stanley Lai
Tel: +65 6890 7883
stanley.lai@allenandgledhill.com

Low Pei Lin
Tel: +65 6890 7516
low.peilin@allenandgledhill.com

Moi Sok Ling
Tel: +65 6890 7538
moi.sokling@allenandgledhill.com

Isaac Tung
Tel: +65 6890 7522
isaac.tung@allenandgledhill.com

- Self-assessment regime
- Patent application process
- Extension of time
- Restoration
- Renewal reminder
- Second or subsequent new medical use claims

For more information about this development, please refer to an article featured in a previous issue of the Allen & Gledhill Legal Bulletin (July 2009) about the public consultation. To read the article entitled "*IPOS invites feedback on proposed changes to Singapore's patent system*", please [click here](#).

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Parliament introduces Casino Control (Amendment) Bill 2009: Changes affecting casino tax and persons excluded from casinos

On 18 August 2009, the Casino Control (Amendment) Bill 2009 (the "**Bill**") was introduced in Parliament. Principally, the Bill will amend the Casino Control Act (the "**Act**") with regard to matters concerning casino tax and persons to be excluded from casinos.

Casino tax related changes

The casino tax related amendments are for the following purposes:

- to clarify the computation of gross gaming revenue for different types of games. The definition of "gross gaming revenue" will be amended.
- to provide for procedural matters in relation to the assessment of casino tax or revision of tax returns by the Comptroller of Income Tax (the "**Comptroller**"), objections and appeals to be made against the Comptroller's assessment or decision and the recovery of casino tax. For instance, the Comptroller may make an assessment where returns are not furnished, are incomplete or incorrect or where in his opinion, there is fraud or wilful default. Further, casino tax is payable notwithstanding any objection or appeal.
- to empower the Comptroller to remit late payment penalty and the Minister for Finance to remit casino tax.
- to penalise the making of an incorrect casino tax return and to provide for that offence to be compoundable.

Persons excluded from casinos

The Bill also provides for other amendments including those relating to persons to be excluded from casinos. A person on social assistance funded by the government or a statutory body, an undischarged bankrupt or a

For further information, please contact:

Casino control

Christian Chin
Tel: +65 6890 7616
christian.chin@allenandgledhill.com

Tan Wee Meng
Tel: +65 6890 7518
tan.weemeng@allenandgledhill.com

Tax issues

Sunit Chhabra
Tel: +65 6890 7735
sunit.chhabra@allenandgledhill.com

Tang Siau Yan
Tel: +65 6890 7799
tang.siauyan@allenandgledhill.com

person who voluntarily applies to the National Council on Problem Gambling will be excluded from entering, remaining in and gaming in a casino.

Further, the Bill clarifies that a family member may apply for confirmation, variation or revocation only of a family exclusion order, and not other types of exclusion orders.

Background

As a matter of background, the Act was passed in Parliament on 14 February 2006, following its introduction on 16 January 2006 and after a public consultation conducted in October / November 2005. However, none of the provisions of the Act were in force until 1 June 2006, when section 2 of the Act became effective. Section 2 provides for the interpretation of words and phrases used in the Act. The remaining provisions of the Act came into force in two tranches on 2 April 2008 and 1 July 2008.

Reference materials

To read the full text of the Bill on the Parliament website www.parliament.gov.sg, please [click here](#).

To read articles about the Casino Control Act featured in previous issues of the Allen & Gledhill Legal Bulletin, please click on the relevant titles below:

- [Casino Control Act: Remaining provisions in force from 1 July 2008](#) (July 2008)
- [Casino Control Act: Casino Regulatory Authority of Singapore operational on 2 April 2008](#) (April 2008)
- [Parliament passes Casino Control Bill 2006](#) (February 2006)
- [Casino Control Bill 2006 introduced for first reading](#) (January 2006)

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Cases

Corporate & financial services

Singapore Court of Appeal considers factors relating to issuance of conversion bonds and conversion shares

Auston International Group Ltd & Anor v Ng Swee Hua [2009] SGCA 36

The case of *Auston International Group Ltd & Anor v Ng Swee Hua* is instructive for the Court of Appeal's consideration of various issues relating to the issuance of conversion bonds and conversion shares. Among other things, the court found that a shareholders' resolution authorising the directors of a company to issue shares pursuant to section 161 of the Companies Act was sufficiently broad to authorise the directors to issue convertible bonds with a conversion date after the expiry of the general mandate. The Court of Appeal also explained that the requirement for shareholders' approval under Rules 804 and 812 of the Singapore Exchange Listing Manual have no application when a person who is holding convertible bonds is appointed to the board of directors and subsequently exercises his

right of conversion. These rules only contemplate shareholders' approval for the issue of convertible securities, and not their conversion, as the right to convert would already be vested in the holder before he became a director.

The case was an appeal from the decision of a High Court judge (the "**Judge**") in holding that the appellants, Auston International Group Ltd ("**Auston**") and Auston Institute of Management & Technology Pte Ltd ("**AIMT**") (collectively, the "**appellants**"), were in breach of contract under an investment agreement with one Ng Swee Hua (the "**respondent**").

Facts

Auston was a company listed on the Singapore Exchange (the "**SGX**") and AIMT was, at the material time, a wholly-owned subsidiary of Auston. The managing director of Auston in 2005 sought a loan of S\$200,000 on behalf of Auston from the respondent and the loan was given. The respondent, Auston and AIMT subsequently entered into an investment agreement (the "**investment agreement**") whereby the parties agreed that the respondent would subscribe for convertible bonds of an aggregate principal of S\$200,000 (the "**convertible bonds**"). These bonds were convertible into either Auston or AIMT shares or a combination of both. The investment agreement also provided that the respondent's existing loan of S\$200,000 would be utilised as consideration for the bonds and the respondent would also have the option to subscribe for a further S\$400,000 worth of bonds within six months of completion of the investment agreement.

Clauses 3.1 and 3.3 of the investment agreement provided for AIMT to deliver the bond certificates to the respondent on the completion date and further specified that the completion date was the day falling on seven days after the execution of the investment agreement or on such other date as the parties might agree in writing. The investment agreement also provided that the agreement could be rescinded in the event of non-delivery of the bond certificates.

In November 2006, the respondent sent a conversion notice (the "**conversion notice**") to the appellants directing them to procure the issuance of five million ordinary shares of Auston (the "**conversion shares**"). Auston instructed its solicitors to draft a shareholders' circular to seek shareholders' approval to issue the conversion shares on the basis that approval was required by the SGX as the respondent was then a director of the company. The draft circular was not finalised.

In January 2007, the respondent resigned as a director in the appellants and commenced the present action in March 2007 claiming specific performance for the issuance of the conversion shares or damages.

High Court decision

The respondent contended before the High Court that AIMT was in breach of its obligations under the investment agreement in failing to issue the convertible bond certificates and that he was therefore entitled to damages on the basis of the loss of a real and substantial chance of converting the bonds into the conversion shares. The respondent also claimed separately that Auston was in breach of its contractual obligations in failing to issue the conversion shares and ensure that AIMT would issue the convertible bonds.

The appellants denied liability on the grounds that the investment agreement had been rescinded or, in the alternative, if the agreement was not rescinded, the conditions precedent had not been fulfilled as shareholder approval was required by the SGX.

The High Court found that the convertible bonds had been issued, that Auston was in breach of the investment agreement and that damages ought to be assessed on the basis of the loss of chance to convert the convertible bonds into conversion shares.

Grounds for appeal

The appellants' principal complaint against the High Court decision was that in entering judgment on liability in favour of the respondent, the High Court had gone beyond the parties' written pleadings and oral submissions that the convertible bonds had not been issued. The appellants contended that both parties had proceeded before the High Court on the basis that the respondent had amended his pleadings to agree with the appellants' defence that the convertible bonds had not been issued, and not simply that the related bond certificates had not been issued. However, the judge in the High Court had refused to accept the parties' pleaded case and made her finding on what she considered to be the true facts, i.e. the convertible bonds had been issued, and that counsel for both parties had confused the issue of the said bonds with the issue of the bond certificates. In her view, the true dispute between the parties was simply whether the appellants were in breach of their obligations, notwithstanding the non-issuance of the bond certificates, to issue the conversion shares upon receipt of the conversion notice. The appellants contended before the Court of Appeal that the High Court judge was wrong in law to go beyond the pleaded issues.

Decision of the Court of Appeal

Had the convertible bonds been issued?

The appellants' pleaded defence was that as the bond certificates had not been issued, the transaction was incomplete and therefore the convertible bonds were not issued. The appellants appeared to equate the failure to issue the certificates with a failure to complete the purchase of the bonds.

The Court of Appeal found that the High Court judge was fully entitled, as a matter of law, to find that the convertible bonds had been issued. The Court of Appeal was of the view that the High Court judge was also correct in stating that the absence of the bond certificates did not detract from the legal position that Auston had recognised the respondent as the owner of the convertible bonds and that the function of the certificates was one of convenience. The failure of the appellants to procure the issuance of the bond certificates could not be a ground for depriving the respondent of ownership of the convertible bonds.

General mandate to issue shares

The appellants' had contended that it was under an obligation as set out in the SGX Listing Manual to obtain shareholder approval prior to the issuance of the certificates and, as this was not obtained, it was not in a position to effect the conversion of the bonds into conversion shares. The High Court had rejected this argument as being irrelevant to Auston's liability as the onus was on Auston to obtain its shareholders' approval. The Court of Appeal agreed with this decision.

The High Court accepted that there had been a general mandate empowering the directors of Auston to issue shares in December 2005 (when the convertible bonds were issued) but that in November 2006 (when the conversion notice was issued) the general mandate had lapsed and the respondent had failed to show that the mandate had been renewed. The Court of Appeal disagreed, noting that while this point was not necessary to the disposition of the appeal, it might have significance for investors

generally. The court stated in this regard that it appeared to be contrary to commercial practice for a person in the respondent's position to have agreed to subscribe for the convertible bonds without an assurance of the tradability of the conversion shares on the SGX without any further approval by Auston. Otherwise, the respondent would have assumed the risk of the convertible bonds being unilaterally rendered "unconvertible" by Auston.

The Court of Appeal noted that in 2005 a shareholders' resolution was passed providing authorisation to the directors of Auston to issue shares pursuant to section 161 of the Companies Act. The court went on to state that this resolution was sufficiently broad to authorise the directors of Auston to issue the convertible bonds with a conversion date after the expiry of the general mandate to the respondent.

Compliance with Rules 804 and 812 of the SGX Listing Manual

The High Court judge stated that shareholders' approval was required for the conversion of the convertible bonds, in order to comply with Rules 804 and 812 of the SGX Listing Manual, as the respondent was a director of Auston at the time he elected to convert his bonds.

The Court of Appeal disagreed and stated that Rules 804 and 812 have no application when a person who is holding convertible bonds is appointed to the board of directors and subsequently exercises his right of conversion. These rules only, in the court's opinion, contemplate shareholders' approval for the issue of convertible securities, and not their conversion, as the right to convert would already be vested in the holder before he became a director.

The court held that the appellants were clearly in breach of their obligations in failing to issue and credit the conversion shares into the securities account designated by the respondent. Accordingly, the appeal was dismissed.

Assessment of damages: Doctrine of loss of chance inapplicable

In finding against the appellants, the High Court ordered that damages be assessed on the basis of the loss of chance to convert the convertible bonds into the conversion shares. The Court of Appeal disagreed with the use of the doctrine of loss of chance as a basis to assess damages. The Court of Appeal explained that under the doctrine, where the loss of chance caused by the defendant's default is dependent upon the action of an independent third party, a plaintiff might not be required to show on a balance of probabilities that the chance would have come to fruition. Damages would be assessed so long as the chance is a real or substantial one, as opposed to a speculative one. If there is no third party involved, a plaintiff must prove on a balance of probabilities what he would have done if there had been no breach.

The court found that the doctrine of loss of chance did not apply to the present case as the respondent's loss had nothing to do with a third party. The present case was simply a breach of contract for failing to deliver shares.

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If you would like to discuss the impact of this case on your business, please contact:

Aaron Lee
Tel: +65 6890 7852
aaron.lee@allenandgedhill.com

Suresh Nair
Tel: +65 6890 7897
suresh.nair@allenandgedhill.com

English High Court upholds deprivation provision in trust deed for credit linked notes in structured finance transaction

Perpetual Trustee & Belmont v BNY & Lehman Brothers Special Financing [2009] EWHC 1912 (Ch)

The English High Court in *Perpetual Trustee & Belmont v BNY & Lehman Brothers Special Financing* [2009] EWHC 1912 (Ch) upheld the validity of a provision in a trust deed for credit linked notes which had the effect of subordinating a party's right to security created in its favour upon its insolvency.

The credit linked notes in this case were issued pursuant to a structured finance transaction established to provide for credit insurance and the collateral was held by the trustee of the notes to secure the issuer's obligations to pay the counterparty in a swap agreement and the noteholders, respectively. The provision in question provided that, among other things, upon the insolvency of the counterparty, the counterparty's right to the collateral would be subordinated to the noteholders. The insolvent counterparty then challenged the validity of the provision on the ground that it purported to avoid the *pari passu* rule (which provides that the property of an insolvent company must be applied in settlement of its liabilities proportionally and without preference among its creditors of the same category) and was therefore unenforceable under the insolvency law.

Facts

The present matter arose from a multi-issuer secured obligation programme (the "**Dante Programme**") which was established by Lehman Brothers International (Europe) ("**LBIE**") to provide a form of credit insurance in respect of loans or other obligations owed to LBIE or corporations in its group (a "**Lehman company**") by their debtors.

Under the Dante Programme, special purpose vehicles (the "**Issuers**") were established to issue credit linked notes to investors (the "**Noteholders**"). Money subscribed by the Noteholders was used by the Issuers to purchase notes of government bonds or other secure investments (the "**Collateral**").

The Collateral was in turn charged by the Issuers in favour of a trust corporation, in the present matter, BNY Corporate Trustee Services Ltd (the "**Trustee**") as trustee for the Noteholders, to secure the Issuers' obligation to repay the Noteholders. The same Collateral is also used to secure the Issuers' obligation to pay a Lehman company pursuant to a swap agreement.

Such a swap agreement was entered between the Issuers and a Lehman company, in the present matter, Lehman Brothers Special Financing Inc ("**Lehman BSF**"), providing for Lehman BSF to pay the Issuers the amounts due by the Issuers to the Noteholders in exchange for sums equal to the yield on the Collateral. The amount by which the sum payable under the swap agreement by Lehman BSF exceeded the yield on the Collateral represented the premium for the credit insurance provided by the Noteholders. On the other hand, the amount payable by Lehman BSF to the Issuers on the maturity of the notes (or on early redemption or termination) was the amount invested by the Noteholders less amounts calculated by reference to events defined as credit events occurring during a specified period by reference to one or more debtors, thereby giving effect to the effective insurance aspect of the Dante programme.

The trust deed under which the credit linked notes were issued (the “**Trust Deed**”) contained a clause (“**Clause 5.5**”) which provides that:

“The Trustee shall apply all moneys received by it under this Deed in connection with the realisation or enforcement of the Mortgaged Property as follows:

Swap Counterparty Priority unless (i) an Event of Default (as defined in the Swap Agreement) occurs under the Swap Agreement and the Swap Counterparty is the Defaulting Party, (as defined in the Swap Agreement) or in which case Noteholder Priority shall apply.”

Under the Trust Deed, “Swap Counterparty Priority” meant claims of swap counterparty (in this case, Lehman BSF) were payable in priority to the claims of the Noteholders and “Noteholder Priority” meant claims of the Noteholders were payable in priority to the claims of the swap counterparty.

The present action

Subsequently, Lehman Brothers Holdings Inc, the parent company of the Lehman Brothers Group, and Lehman BSF applied for protection under Chapter 11 US Bankruptcy Code in the United States. When the periodic payments due by the Issuers to the Noteholders and by Lehman BSF to the Issuers were not made, the claimants (the Noteholders or those representing the Noteholders under the Dante Programme, collectively referred to as the “**Claimants**”) commenced the present actions against the Trustee to procure the realisation of the Collateral and the application of the proceeds in favour of the Noteholders in priority to any claim of Lehman BSF.

The Claimants relied on Clause 5.5 and submitted that the insolvency of Lehman BSF and its parent was an “Event Default” under Clause 5.5, thereby conferring priority for claims against the Collateral on the Noteholders. Lehman BSF did not agree that the Noteholders were entitled to the priority they claimed and contended that Clause 5.5 was invalid under English law. Therefore, Lehman BSF intervened in the present actions and had been joined as the second defendant and had applied for the actions to be stayed pending the resolution of the proceedings between Lehman BSF and the Trustee in the United States.

Issues before the English High Court: Validity of Clause 5.5

There were three main issues before the English High Court. This case summary focuses on the crux of these issues that concerned the validity of Clause 5.5.

Lehman BSF challenged the validity of Clause 5.5 by reference to the principles recognised by the House of Lords in *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 (the “**Anti-deprivation Principle**”).

It is an established principle in English as well as Singapore insolvency law that the property of an insolvent company must be applied in settlement of its liabilities *pari passu*, namely, proportionally and without preference among its creditors of the same category (subject to the rights of secured creditors and preferential creditors provided for in the insolvency legislation). The Anti-deprivation Principle provides that any contract made by a company which provides for a distribution of any of its property for the benefit of one or more

of its unsecured creditors which runs counter to or seeks to vary the *pari passu* rule is contrary to public policy, and therefore invalid. The Singapore courts have adopted the Anti-deprivation Principle (see *Joo Yee Construction Pte Ltd v Diethelm Industries Pte Ltd* [1990] SLR 78).

In considering Lehman BSF's argument, the English High Court agreed and accepted that the Anti-deprivation Principle is entrenched and outlined in its judgment the provisions which the courts have held previously to have fallen foul of the Anti-deprivation Principle. With reference to the authorities to which it had referred to, the English High Court also held that there was an established exception to the Anti-deprivation Principle for the grant of an interest in property determinable on the insolvency of the grantee, but not of the grantor (for example, leases with provisos for re-entry in the event of insolvency of the lessee). However, the English High Court acknowledged that between these two extreme scenarios, there exists an uncertain area.

Agreeing with the views recorded in an earlier English High Court judgment, the English High Court in the present case held that it was not possible to discern a coherent set of rules to enable one to assess in any particular case whether a provision (a "**deprivation provision**") fell foul of the Anti-deprivation Principle. The English High Court was of the view that it was necessary to construe the relevant documents in the light of the decided cases to ascertain whether a transaction fell into the first category of clauses which had already been held as breaching the Anti-deprivation Principle or the second category of clauses which belonged to the exception described above.

Taking into account the facts of the present case, the English High Court held that Clause 5.5 was not contrary to public policy for the following reasons:

- Considering the structure of the Dante Programme as a whole, the court was of the view that the Collateral could not be said to be property derived directly or indirectly from Lehman BSF as the swap counterparty because the security conferred by Clause 5.5 was in respect of the Collateral and the Collateral was bought by the Issuer with the money subscribed by the Noteholders;
- On general principles, the English High Court noted that it should be astute to interpret commercial transactions so as not to invalidate them, particularly when consequential doubt might be cast on other long-standing commercial arrangements;
- It was plain that the intention of all parties to the Dante Programme was that the priority afforded to Lehman BSF in respect of the Collateral was conditional on Lehman BSF continuing to perform its obligations under the swap agreement. As Lehman BSF was no longer performing its obligations under the swap agreement, it was not appropriate for Lehman BSF to have security for the obligations of the Issuer as the other party to the swap agreement in priority to security in respect of the Issuer's obligations to the Noteholders under the Trust Deed and the terms and conditions of the credit linked notes;
- The priority of Lehman BSF never extended to a time after the event of default, in respect of which it was the defaulting party, had occurred. It followed that such beneficial interest by way of security as Lehman BSF had in the Collateral was, as to its priority, always limited and conditional. As such it never could have passed to a liquidator or trustee in bankruptcy free from those limitations and conditions as to its priority.

If you would like to discuss the impact of this case on your business, please contact:

Andrew Chan
Tel: +65 6890 7556
andrew.chan@allenandgledhill.com

Desmond Ho
Tel: +65 6890 7554
desmond.ho@allenandgledhill.com

The English High Court also held that, with reference to all the authorities to which it was referred, Clause 5.5 was not similar in nature to any of the clauses which had been held as falling foul of the Anti-deprivation Principle.

Accordingly, the English High Court held that Clause 5.5 was valid under English law.

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Dispute resolution

Singapore High Court considers what constitutes a “without prejudice” communication

Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd
[2009] SGHC 177

In *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd*, the Singapore High Court discussed at length the law surrounding “without prejudice” communications, effect of an acknowledgement of debt for the purposes of extending the statutory limitation period and the equitable doctrine of laches.

Facts

APP Chemicals International (Mau) Ltd (the “**defendant**”) was a Mauritian entity which had purchased products from Cytec Industries Pte Ltd (the “**plaintiff**”), a Singapore company. The defendant did not make the required payments to the plaintiff, resulting in a debt of US\$1,626,494.89 (the “**debt**”).

The defendant was owned by Asia Pulp & Paper Company Ltd (“**APP Singapore**”) which had guaranteed the defendant’s payment obligations to the plaintiff. The plaintiff had, in separate proceedings, obtained judgment against APP Singapore in relation to the debt. APP Singapore had not disputed the debt in those proceedings.

In applying for recovery of the debt, the plaintiff sought to rely on correspondence between its credit re-insurers and the defendant. It was contended that in such correspondence, the defendant had acknowledged the debt which under the Limitation Act (the “**Act**”) meant that the statutory six-year limitation period was extended from the time of such acknowledgment. These communications were however marked “without prejudice” and the defendant contended that they were privileged and inadmissible and correspondingly sought for portions of the plaintiff’s affidavit referring to those communications to be struck out. The Assistant Registrar dismissed the defendant’s application and granted judgment for the plaintiff with respect to part of the alleged debt, giving the defendant conditional leave to defend in respect of the remainder of the debt. The defendant appealed.

High Court proceedings

Before the High Court, the defendant did not admit the debt though it did not dispute its existence. The defendant also pleaded the defence of laches, arguing that it would be inequitable for the plaintiff to claim the debt after such a long period of time. The plaintiff commenced proceedings for the recovery of the debt in March 2007 which was more than six years after 11 of

the total 16 unpaid invoices had fallen due. The defendant also argued before the High Court that, in the alternative, the amounts due in 11 of the 16 unpaid invoices were time-barred under section 6(1)(a) of the Act.

The plaintiff sought to rely on two pieces of correspondence between the defendant and the plaintiff's credit re-insurers: the first was a July 2001 letter from the re-insurers (the "**re-insurers' letter**") to an employee of the defendant ("**Dr Liu**") and the other was an e-mail sent in August 2001 from Dr Liu to the re-insurers ("**Dr Liu's e-mail**"). Both pieces of correspondence were marked "without prejudice".

The issues raised for the court's determination were as follows:

- (a) Whether the correspondence was subject to "without prejudice" privilege;
- (b) Whether the plaintiff had made out a *prima facie* case as to the defendant's liability for the debt;
- (c) Whether the plaintiff's claim was time-barred; and
- (d) Whether the defence of laches was applicable.

"Without prejudice" privilege

The defendant's position was that the re-insurers' letter and Dr Liu's e-mail attracted "without prejudice" privilege as they were expressly labelled as such and were part of negotiations aimed at the settlement of the dispute concerning the debt. The defendant contended that the "without prejudice" privilege is not limited to negotiations at resolving legal issues but includes negotiations genuinely aimed at the avoidance of litigation. The plaintiff relied on the decision of *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 ("**Bradford & Bingley**") which was applied in a Singapore case.

The court briefly considered the law on "without prejudice" privilege, stating at the outset that the law is well-settled that communications in the course of negotiations which are genuinely aimed at dispute settlement are protected by the "without prejudice" privilege. The privilege is justified to encourage parties to settle their dispute out of court if possible. To do this would necessarily entail the parties being able to fully and frankly discuss their grievances without the fear of possible repercussions during future litigation.

The court emphasised, however, that labelling a document "without prejudice" does not automatically attract the protection of the "without prejudice" privilege. It is for the court to determine the true nature of the allegedly privileged document by construing the document as a whole in the context of the factual circumstances.

In the present instance, the court found that Dr Liu's e-mail, read with the re-insurers letter, contained an implied admission as to the existence of the debt and liability for it. There was no ongoing dispute as to liability or quantum that would attract the application of "without prejudice" privilege. The court found that all the correspondence did was discuss how payment of the undisputed debt was to be made. In this regard, the court noted that from the use of phrases such as "overdues" and "overdue payment" in Dr Liu's e-mail to the re-insurers, it may be inferred that the defendant was not disputing the existence of the debt.

With regard to the labelling of the correspondence as being "without prejudice", the court was of the view that it was used by the parties not to indicate an agreement as to inadmissibility but was introduced by the

re-insurers out of caution to deprive its proposal for settlement of legal effect. There was no reason for the plaintiff or the re-insurers to preclude the use of the re-insurers letter in court as it did not contain a proposal for settlement, that is, it was not sent for the purpose of avoiding a legal dispute. It was instead a demand for payment. The court went on to state that the label of “without prejudice” in the defendant’s response to the re-insurers letter, Dr Liu’s e-mail, was perhaps because the re-insurers letter had been labelled as such. The parties had not, in the court’s opinion, demonstrated an intention for their discussions to be regarded as being without prejudice.

Acknowledgment of the debt and time bars

The court noted that the purpose of section 26(2) of the Act, which uses the phrase “acknowledges the debt”, is to set time running afresh for a creditor to bring an action to recover a debt. The court found that Dr Liu’s e-mail contained an acknowledgment of the debt within the meaning of section 26(2) of the Act as the defendant inferentially admitted that the debt was remaining due, when read in the context of the re-insurers letter. The court was of the opinion that it would be unfair to deprive the plaintiff of the opportunity to recover its debt based on the technical challenge of the time-bar when the defendant had, in Dr Liu’s e-mail, acknowledged the debt and bought for itself time to repay the debt. Applying the dicta of Lord Hoffmann and Lord Hope in *Bradford & Bingley* on this point, the court here found that Dr Liu’s e-mail was either admissible in court for the purposes of proving the acknowledgment or the implied admission that the debt was still owing was a statement of fact and did not form a part of an offer to compromise as there was no evidence of a dispute on the existence or quantum of the debt. In the latter case, the e-mail would similarly be admissible as it would not attract “without prejudice” privilege.

Due to the above finding concerning an acknowledgment of the debt, the court then noted that time began to run from 2 August 2001 (the date of Dr Liu’s e-mail) and this brought the plaintiff’s claim within the six-year limit imposed by section 6(1) of the Act. A defence of time bar would therefore not be allowed.

Defence of laches

The defendant also argued that the principle of laches applied equally to equitable and legal rights. This argument was made as the defendant sought to contend that, considering the period of delay in bringing the suit and the extent to which the defendant’s position had been prejudiced, it was inequitable for the plaintiff to bring the claim because it had not provided any explanation for the delay of about six years and this had caused hardship to the defendant as it could not locate relevant documents or personnel.

The plaintiff argued that laches was an equitable defence and was not applicable in the current context where the claimant was asserting rights at law - the claim for the debt was a legal, not an equitable, right. The plaintiff also argued that no triable issue had been raised because there was no evidence that the delay in bringing the claim had prejudiced the defendant and that the defendant was merely trying to avoid paying the debt. The court agreed with the plaintiff and also found that the defendant had not shown that there was a fair and reasonable probability that it had a real or *bona fide* defence of laches in any case.

For the reasons discussed above, the High Court dismissed the appeal.

Allen & Gledhill LLP represented the successful plaintiff in this case.

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If you would like to discuss the impact of this case on your business, please contact:

Yap Yin Soon
Tel: +65 6890 7598
yap.yinsoon@allenandgledhill.com

General

Medical negligence

Singapore High Court decision involving first donor death following kidney transplant surgery in Singapore

Surender Singh s/o Jagdish Singh & Anor (administrators of the estate of Narindar Kaur d/o Sarwan Singh) v Li Man Kay & Ors [2009] SGHC 168

The case of *Surender Singh s/o Jagdish Singh & Anor (administrators of the estate of Narindar Kaur d/o Sarwan Singh) v Li Man Kay & Ors* arose from the first donor death following a kidney transplant surgery in Singapore. The High Court awarded interlocutory judgment to the plaintiffs in respect of their claim against the National University Hospital (“**NUH**”), the third defendant, for failing to properly monitor the deceased after surgery, but dismissed with costs the plaintiffs’ claim against the two surgeons - Dr Li and Dr Consigliere, the first and second defendants respectively, who performed the transplant surgery. As the trial was concerned with ascertaining liability, the damages to be awarded to the plaintiffs will be assessed at a later date.

Facts

This action arose from the death of the deceased, five hours after the Left Hand Assisted Laparoscopic Donor Nephrectomy (“**HALDN**”) to remove her left kidney for transplantation in her husband, the first plaintiff, who was suffering from end-stage renal failure. The second plaintiff was the deceased’s mother and the co-administrator of the deceased’s estate.

HALDN was performed by Dr Li, assisted by Dr Consigliere. During the removal of her left kidney, hem-o-lock clips (“**clips**”) were used to secure dissected blood vessels to prevent bleeding. HALDN proceeded uneventfully and upon completion of the surgery, the deceased was transferred to the recovery room for continuous monitoring. She was later transferred to the general ward at 1430 hours. Instructions for hourly monitoring of vital parameters in the general ward were given.

Some time between 1600 hours to 1615 hours, the deceased was noted to be unresponsive and emergency resuscitation failed to revive her.

At autopsy, the deceased’s left renal artery (one of the blood vessels that was dissected) was noted to have been wide open (i.e. not secured) and four clips were noted to be attached to the soft tissues at its periphery. The plaintiffs’ expert opined that four clips were used to secure the renal artery and the pressure of applying four clips had resulted in the apparent dislodgment of the clips, resulting in the deceased’s death. The defendants and their experts maintained that two clips were used, and that international medical literature and practice supported the use of these clips alone for securing blood vessels in HALDN.

Subsequent to the deceased’s death, the manufacturer of the clips issued an advisory contraindicating the clips for use (without an additional securing device) in donor nephrectomy.

Issues for decision

Broadly, the main issues for the High Court’s consideration were:

- Whether the HALDN was conducted in accordance with the applicable standard of care; and
- Whether the post-operative care of the deceased in the general ward was in question.

Applicable law in relation to medical negligence issues

The High Court determined that the applicable law in relation to liability in medical negligence issues was the Singapore Court of Appeal decision of *Dr Khoo James & Anor v Gunapathy d/o Muniandy* [2002] 2 SLR 414 (“**Gunapathy**”) which held that:

- A doctor will not be found negligent as long as there is a respectable body of medical opinion, logically held, that supports his actions;
- However, an expert view has to satisfy the threshold test of logic before it may be regarded as being representative of a “responsible” body of medical opinion. This threshold test of logic entails a two-stage inquiry as follows:
 - Whether the expert had directed his mind at all to the comparative risks and benefits relating to the matter; and
 - Whether the expert had arrived at a “defensible conclusion” (this opinion must be internally consistent and should not fly in the face of proven extrinsic facts relevant to the matter) as a result of the balancing process.

Conduct of the HALDN

As the plaintiffs had no issue with the performance of the HALDN if only two clips were applied to the deceased’s left renal artery, the court was of the view that the plaintiffs’ entire case hinged on whether two or four clips were applied to the deceased’s left renal artery.

The court rejected the plaintiffs’ expert’s evidence that four clips were used as his evidence did not comport with the requirements of expert evidence as laid down in *Gunapathy* in the following respects:

- His evidence was a hypothesis which was based on unreliable and inconclusive evidence (*viz*, the findings in the autopsy report and the two autopsy photos) and unwarranted extrapolation from the said evidence; and
- He failed to take into account evidence which showed that only two clips were applied to the deceased’s left renal artery.

On the evidence, the court found that only two clips were applied to the deceased’s left renal artery and that this was well within the standard of care owed by the two surgeons to the deceased. Accordingly, there was no breach of duty of care on the surgeons’ part in the performance of the HALDN.

Post-operative care

In relation to post-operative care of the deceased, there were three sub-issues which had to be determined:

- Whether it was reasonable for the deceased to have been placed on hourly monitoring in the general ward;
- Whether NUH actually monitored the deceased at hourly intervals in the general ward; and
- Whether NUH's failure to monitor the deceased caused her death.

Whether reasonable for deceased to have been placed on hourly monitoring in general ward

The court held that hourly monitoring was a reasonable and acceptable practice as the defendants' experts had given evidence that this was the practice locally (as practiced in Singapore General Hospital) and in Australia. Although initially contesting the point, the plaintiffs' expert subsequently agreed that hourly monitoring was the minimum standard of care.

Whether NUH actually monitored deceased at hourly intervals in general ward

NUH did not dispute that the deceased's vital parameters were not recorded from 1430 hours to 1600 hours. Its case was that it was entirely acceptable that hourly monitoring need not be conducted on the dot at 1530 hours. Therefore, based on the deceased's sister-in-law's evidence that no one had attended to the deceased, the court was satisfied that a *prima facie* case that the deceased was not monitored before and at around 1600 hours was established.

Accordingly, pursuant to section 108 of the Evidence Act, the burden shifted to NUH to prove that the deceased was adequately and appropriately monitored. However, NUH did not adduce any evidence showing any form of monitoring between 1430 hours and 1600 hours. Hence, as NUH failed to discharge its burden under section 108 of the Evidence Act, the court found that NUH was negligent and had breached its duty in failing to monitor the deceased during the period between 1430 hours and 1600 hours.

Whether NUH's failure to monitor deceased caused her death

As there was uncertainty as to how the deceased had bled to death, the court did not find it appropriate to accept the theories of either the plaintiffs or NUH on this issue. Nonetheless, the court applied the decision of *McGhee v National Coal Board* [1973] 1 WLR 1 where it was held that in the absence of complete medical knowledge of the material factors relating to the injury, there is no substantial difference between materially increasing the risk of injury and making a material contribution to the injury). Accordingly, the court held that it was sufficient for the plaintiffs to show that NUH's failure to monitor the deceased in the general ward after 1430 hrs made the risk of death to the deceased more probable. Therefore, the court held that NUH's failure to monitor the deceased after 1430 hours materially increased the risk of injury to her.

Sanderson order for costs

As the plaintiffs had to bring proceedings against all three defendants as they could not know which of the defendants were responsible or partly responsible for the deceased's demise, the court was of the view that the costs incurred by the plaintiffs against the two surgeons were reasonably and properly incurred as between themselves and NUH. Accordingly, the court ordered NUH to pay the costs of the two surgeons awarded to them against the plaintiffs.

If you would like to discuss the impact of this case on your business, please contact:

Mak Wei Munn
Tel: +65 6890 7885
mak.weimunn@allenandgledhill.com

Edwin Tong
Tel: +65 6890 7867
edwin.tong@allenandgledhill.com

Allen & Gledhill LLP represented the first and second defendants who were the surgeons that performed the transplant surgery and in relation to whom the court found that there was no breach of duty of care.

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News

CapitaLand's S\$1.1 billion 2.875 per cent. convertible bonds due 2016

CapitaLand Limited ("**CapitaLand**") has announced a proposed issue (the "**Issue**") of S\$1.1 billion 2.875 per cent. convertible bonds due 2016 ("**Convertible Bonds**") convertible into new ordinary shares in the capital of CapitaLand. The Convertible Bonds have been fully placed to institutional and sophisticated investors. Credit Suisse (Singapore) Limited ("**Credit Suisse**") is the sole bookrunner, lead manager and underwriter of the Issue and has an option exercisable by 29 August 2009 to increase the size of the Issue by up to S\$100 million, to S\$1.2 billion.

Advising Credit Suisse as to Singapore law are Allen & Gledhill LLP Partners Lim Mei and Hilary Low, and Associate Sabrina Chia.

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Ascendas Real Estate Investment Trust's private placement

Ascendas Funds Management (S) Limited (the "**Manager**"), as manager of Ascendas Real Estate Investment Trust ("**A-REIT**"), announced the private placement of 185,000,000 new units in A-REIT to raise gross proceeds of approximately S\$301.6 million to fund the development of the high-tech built-to-suit facility for Singapore Telecommunications Limited and partly or wholly fund the potential acquisition of income-producing properties and built-to-suit development opportunities with the balance of the proceeds, if any, to be used for general corporate and working capital purposes. This is the first equity fund raising done by a real estate investment trust ("**REIT**") in Singapore in 2009 whereby the issue of new units will not result in a dilution of the net asset value per unit in the REIT.

Allen & Gledhill LLP Partners Jerry Koh and Foong Yuen Ping, Senior Associate Teh Hoe Yue, and Associates Louis Lim and Chong Ying Chiang acted as transaction counsel and legal advisor to the Manager.

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Cambridge Industrial Trust's Private Placement

Cambridge Industrial Trust Management Limited (the "**Manager**"), as manager of Cambridge Industrial Trust, has announced the private placement of 71,140,000 new units of Cambridge Industrial Trust to raise gross proceeds of approximately S\$28 million (the "**Private Placement**") for asset enhancement initiatives as well as for general working capital

purposes. The units were placed to a group of sophisticated investors (including the shareholders of the Manager) identified by the Manager and by DMG Securities Pte Ltd as the placement agent for the Private Placement.

Allen & Gledhill LLP Partners Jerry Koh and Chua Bor Jern and Associate Melissa Chong acted as transaction counsel and legal advisors to the Manager.

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ST Engineering Financial I Ltd issues Fixed Rate Notes

Singapore Technologies Engineering Ltd ("**ST Engineering**") has announced that its wholly-owned subsidiary, ST Engineering Financial I Ltd ("**STEF-1**"), has issued US\$500 million 4.8 per cent. Notes due 2019 under its US\$1.2 billion Multicurrency Medium Term Note Programme. The Notes are unconditionally and irrevocably guaranteed by ST Engineering.

Advising STEF-1 and ST Engineering as to Singapore law on the establishment of the Programme and the issue of the Notes are Allen & Gledhill LLP Partners Tan Tze Gay and Glenn Foo, Senior Associate Bernie Lee and Associates Lu Zhu An and Wu Zhaoqi.

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Pacific Andes (Holdings) Limited's rights issue

Pacific Andes (Holdings) Limited has completed a renounceable underwritten rights issue ("**Rights Issue**") which raised approximately S\$208.7 million. The rights issue comprised an issue of 1,391,189,163 new ordinary shares ("**Rights Shares**") at an issue price of S\$0.15 for each Rights Share, with 278,237,699 free detachable warrants ("**Warrants**"), each Warrant carrying the right to subscribe for one new ordinary share ("**New Share**") at an exercise price of S\$0.23 for each New Share, on the basis of one Rights Share for every one existing ordinary share held by entitled shareholders as at 29 June 2009, and one Warrant for every five Rights Shares subscribed. The Rights Issue was coordinated in tandem with a rights issue in Hong Kong undertaken by Pacific Andes International Holdings Limited, a deemed controlling shareholder of Pacific Andes (Holdings) Limited. Cazenove & Co. (Singapore) Pte Limited ("**Cazenove Singapore**") and The Hongkong and Shanghai Banking Corporation Limited ("**HSBC**") were the joint lead managers and joint underwriters of the Rights Issue.

Advising Cazenove Singapore and HSBC were Allen & Gledhill LLP Partners Leonard Ching and Shawn Chen, Senior Associate Jane Wong and Associate Alvin Zhuang.

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Oiltanking Odfjell Terminal Singapore Pte Ltd's S\$200 million syndicated term loan facility

Oiltanking Odfjell Terminal Singapore Pte Ltd (“**OOTS**”) signed a S\$200 million syndicated term loan facility with DBS Bank Ltd, Calyon and Oversea-Chinese Banking Corporation Limited as original lenders and mandated lead arrangers on 22 June 2009. Proceeds from the six-year facility will be used to refinance existing loans and to finance the construction and development of OOTS' expansion project on Jurong Island.

Advising OOTS are Allen & Gledhill LLP Partners Julie Sim and Tan Yah Piang and Associates Tan Hian Zee, Lamond Tay and Melanie Tan.

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Allen & Gledhill LLP
One Marina Boulevard #28-00
Singapore 018989

Telephone	+65 6890 7188
Facsimile	+65 6327 3800
EFS mailbox Id	ale7001
	ale7003
E-mail	inquiries@allenandgledhill.com
Website	www.allenandgledhill.com

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