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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

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Allen & Gledhill LLP also publishes the monthly Financial Services Bulletin. To view the January 2009 issue, please click here.

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Budget 2009: Analysis of Major Tax Changes

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@allenangledhill.com

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

The Minister for Finance, Mr Tharman Shanmugaratnam, delivered the Budget Statement for the Financial Year 2009 on 22 January 2009.

Budget 2009 delivered a Resilience Package totalling S$20.5 billion. The Minister characterised the aim of the Package as to save jobs to the maximum extent possible, to help viable companies stay afloat, and to prepare Singapore to emerge with enhanced long-term capabilities and competitiveness when the global economy recovers.

Budget 2009 also contained a number of important tax changes, including the reduction of the corporate tax rate to 17 per cent. from Year of Assessment 2010.

Please **click here** to read the Allen & Gledhill Tax Update of 23 January 2009 which highlights and analyses a number of significant tax changes announced in Budget 2009.

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Civil Law (Amendment) Bill 2009 passed in Parliament: Lowering the age of contractual capacity from 21 years to 18 years

The Civil Law (Amendment) Bill 2009 (the "**Bill**") has been passed in Parliament on 19 January 2009 but has yet to come into operation. The Bill proposes two sets of amendments to the Civil Law Act (the "**Act**") as follows:

- Lowering of the age of contractual capacity from 21 to 18 years;
- Refining the regime applicable to claims resulting from fatal accidents.

When the Bill comes into force, changes will be made to the Act to give to contracts entered into by a minor who has attained the age of 18 years (the "**specified minor**") the same effect as if the contracts were entered into by a person of full age. A contract made by a specified minor will therefore be binding on and enforceable against him as if he were a person of full age. Such minors will also be allowed to bring certain legal proceedings or actions in their own names and without a litigation representative, as if they were of full age.

However, the following types of contracts which are entered into by a specified minor will not have effect as if the minor were of full age:

- Contracts for the sale, purchase, mortgage, assignment or settlement of any land, other than a contract for a lease of land not exceeding three years;
- Contracts for a lease of land for more than three years;
- Contracts for the sale, transfer or pledge of a minor's beneficial interest under a trust;

- Contracts for the settlement of any legal proceedings or action in respect of which the minor is, pursuant to any written law, considered to be a person under disability on account of his age, or of any claim from which any such legal proceedings or action may arise; and

- A contract for the extinguishment or variation of a trust or for the transfer of his beneficial interest under a trust to another person.

Consequential amendments will be made to the following statutes to facilitate specified minors entering into valid and binding contracts and engaging in certain commercial activities:

- **Bills of Exchange Act:** To allow for a bill of exchange that is drawn or indorsed by a specified minor to be enforced against him;

- **Companies Act:** To allow a specified minor to be a director of a company;

- **Conveyancing and Law of Property Act:** To provide that a lease not exceeding three years that is executed by a specified minor as a principal will not be deemed to be a settled estate within the Settled Estates Act;

- **Employment Act:** To clarify that a minor below the age of 18 years is competent to enter into a contract of service and to enable a contract of service to be enforced against a specified minor;

- **Limited Liability Partnerships Act:** To enable a specified minor to act as a manager of a limited liability partnership.

The Act will also be amended by expanding the scope of damages for causing death. In the Parliamentary Speech delivered at the Second Reading of the Bill, it was explained that the current method of assessment, which is based largely on the annual or monthly sum given to dependants, is inadequate where there is divergence between what the deceased actually gave and what he could afford to give, or where the deceased preferred to reinvest the moneys instead of disbursing them to his dependants. Hence, the Bill proposes to amend the Act to provide that, in computing claims filed by dependants, account should be taken of any savings or inheritance that they could have received from the deceased.

Further, the definition of "dependant" will be extended to cover a "former wife".

The Bill also proposes to amend the Act to increase the amount of damages awarded for bereavement from S$10,000 to S$15,000 in an action for a wrongful act which causes death.

Please **click here** for the full text of the Bill, which is also available on the Parliament website **www.parliament.gov.sg**

Please **click here** to read the Parliamentary Speech delivered at the second reading of the Bill, which is also available at the website of the Ministry of Law **www.minlaw.gov.sg**

For more information about the Bill when it was introduced in Parliament, please **click here** to read an article entitled "*Civil Law (Amendment) Bill 2008 tabled for first reading: Lowering the age of contractual capacity from 21 years to 18 years*" which was featured in a previous issue of the Allen & Gledhill Legal Bulletin (November 2008).

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For further information, please contact:

Lee Kim Shin
Tel: +65 6890 7699
lee.kimshin@allenandgledhill.com

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

Andrew Yeo
Tel: +65 6890 7850
andrew.yeo@allenandgledhill.com

Richard Young
Tel: +65 6890 7635
richard.young@allenandgledhill.com

Bankruptcy (Amendment) Bill 2009 passed in Parliament: Implementation of Debt Repayment Scheme

On 19 January 2009, the Bankruptcy (Amendment) Bill 2009 (the "**Bill**") was passed in Parliament but has yet to come into operation. It was introduced on 17 November 2008, following two public consultation exercises conducted by the Ministry of Law and the Insolvency & Public Trustee's Office in 2007 and 2008.

The Bill will implement a pre-bankruptcy scheme called the Debt Repayment Scheme (the "**DRS**") that affords debtors who qualify for the scheme an opportunity to avoid bankruptcy by repaying their debts in accordance with the scheme. The provisions of the Bill will come into operation only when it has been gazetted as an Act and a commencement date is fixed.

Essentially, the DRS will be applicable to debtors faced with bankruptcy proceedings with unsecured debts not exceeding S$100,000 (excluding contingent liability).

The Allen & Gledhill Legal Bulletin has been closely following the developments relating to the DRS. To read these articles, please click on the relevant titles below:

- **Ministry of Law and Insolvency & Public Trustee's Office consult on proposed debt repayment scheme** (April 2007)
- **Ministry of Law issues response to feedback received on public consultation on proposed debt repayment scheme** (February 2008)
- **MinLaw and Insolvency & Public Trustee's Office consult on draft Bankruptcy (Amendment) Bill: Introducing the Debt Repayment Scheme** (September 2008)
- **Bankruptcy (Amendment) Bill 2008 tabled for first reading: Implementation of Debt Repayment Scheme** (November 2008)

Please **click here** to read the full text of the Bill, which is also available from the Parliament website **www.parliament.gov.sg**

Further, the Ministry of Law has posted on its website **www.minlaw.gov.sg** the following documents for further reading:

- **Press release dated 19 January 2009**
- **Second Reading Speech on Bankruptcy (Amendment) Bill by Assoc Prof Ho Peng Kee**

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For further information, please contact:

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

Ashok Kumar
Tel: +65 6890 7873
ashok.kumar@allenandgledhill.com

Insurance (Amendment) Bill 2009 passed in Parliament: New statutory framework for nomination of beneficiaries under life policies

The Insurance (Amendment) Bill 2009 (the "**Bill**") was passed in Parliament on 19 January 2009 but is not yet in effect. It was read the first time on 20 October 2008.

This Bill seeks to amend the Insurance Act (the "**Act**") to introduce a new statutory framework for the nomination of beneficiaries under a life policy or accident and health policy which is effected by the policy owner on his own life (the "**relevant policy**"). This framework will give policy owners clear, simple and economical means to decide on how the proceeds from their insurance policies should be distributed. The Bill also aims to clarify the insurable interest requirement relating to life insurance policies.

Nomination of beneficiaries framework

Currently, the Act does not contain provisions for the nomination of beneficiaries. Policy owners and insurers have thus had to rely on other statutes (in particular section 73 of the Conveyancing and Law of Property Act (the "**CLPA**") and the Intestate Succession Act) as well as on common law. This has caused some confusion. In particular, there has also been concerns over the apparent ambiguity and inflexibility in the application of section 73 of the CLPA to insurance policies. For this reason, the Act will be amended with the insertion of new sections 49L to 49M to introduce a framework for nomination of beneficiaries in respect of insurance policy proceeds.

The new nomination framework gives insurance policy owners the choice of whether or not to make nominations. If they choose to nominate, they then have the option of making either a revocable or an irrevocable (trust) nomination. Nominations may be made at any time.

Only life and accident and health policies with death benefits will be eligible for nomination. This is because only such policies have a savings and investment element for which nominations will be meaningful.

The nominations framework will apply to all insurers and policy owners. However, it will not apply retrospectively, meaning that policies with existing nominations will continue to be subject to the legislation in force at the time the nomination was made. For example, policy owners will not be able to change or revoke existing nominations falling under section 73 of the CLPA.

The Parliamentary Speech delivered at the Second Reading of the Bill addressed the application of the new nomination framework in the context of certain schemes under the Central Provident Fund Act. It is stated that insurance policies purchased under the Central Provident Fund ("**CPF**") Investment Scheme and Dependants' Protection Scheme will be eligible only for revocable nominations. This is because an irrevocable nomination would cause the policy owner (CPF member) to lose control over any insurance policy proceeds paid out during his lifetime, which would not be in line with the CPF Board's policy that members must retain complete ownership of their retirement funds as long as they are alive.

Annuities purchased under the Minimum Sum Scheme will be carved-out from the nomination framework altogether to enable the CPF Board to retain full control over the disbursement of proceeds from such policies. On the

other hand, annuities purchased under the Minimum Sum Plus Scheme will be deemed no different from any other insurance policy as they are paid for with cash.

Insurable interest requirement

A person is said to have an insurable interest in something when the occurrence of the insured event would cause that person to experience a loss, suffer a diminution of a right recognised by law or incur a legal liability. Policy owners of life insurance policies are required to have an insurable interest in the life assured as otherwise.

Currently, as a trustee is deemed not to have an insurable interest in the settlor and beneficiaries of a trust, the requirement of insurable interest prevents life insurance policies from being issued in respect of trusts. Individuals are therefore unable to include such policies in their trusts.

Hence, to facilitate the inclusion of such policies in trust structures, the Act will be amended to enable a life policy insuring the life of a settlor or beneficiary of a trust to be effected by the trustee of the trust, if certain conditions are satisfied. In this way, insurance policies will be allowed to be issued to trusts where insurable interest would have been recognised between two parties within the trust structure if not for the existence of the trust. In other words, the law will allow a "see through" of the trust to determine whether the insurable interest requirement is satisfied.

Please **click here** for the full text of the Bill which is available on the Parliament website **www.parliament.gov.sg**

Please **click here** for the Parliamentary Speech delivered at the Second Reading of the Bill, which is also available on the Monetary Authority of Singapore website **www.mas.gov.sg**

An article about the Bill when it was introduced in Parliament was featured in a previous issue of the Financial Services Bulletin (Octobe 2008). To read the article entitled "*Parliament introduces Insurance (Amendment) Bill 2008: New statutory framework for nomination of beneficiaries under life policies*", please **click here**.

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For further information, please contact:

Chan Hian Young
Tel: +65 6890 7813
chan.hianyoung@allenandgledhill.com

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

Corina Song
Tel: +65 6890 7570
corina.song@allenandgledhill.com

These recent developments were highlighted in the Allen & Gledhill KnowledgeShare Alert of 23 January 2009. If you would like to be on our financial services related or general electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

International Interests in Aircraft Equipment Bill 2009 passed in Parliament: Establishing a legal framework for international interests in aircraft objects

The International Interests in Aircraft Equipment Bill 2009 (the "**Bill**") was passed in Parliament on 19 January 2009 but has yet to come into effect. It was tabled for its first reading on 17 November 2008.

The Bill seeks to implement the Convention on International Interests in Mobile Equipment (the "**Convention**") and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the "**Protocol**").

When in force, the Bill will give the Convention and the Protocol the force of law in Singapore. The Bill also seeks to make related amendments to the Bills of Sale Act and the Companies Act to align all legislation on the governance of aircraft and aircraft equipment leasing and financing so as to avoid any conflict between the Convention and Protocol and existing laws.

The Bill provides that the Singapore High Court will be the court with jurisdiction to hear and determine all matters arising under the Bill.

Overview

The Convention and the Protocol facilitate the creation and enforcement of security interests over aircraft and aircraft equipment in the Contracting States which now share a common legal framework in this regard.

Specifically, the Convention and the Protocol seek to:

- facilitate the acquisition and financing of aircraft objects by establishing clear rules to govern such transactions;
- ensure that interests in aircraft objects are recognised and protected in all Contracting States;
- establish a legal framework for international interests in aircraft objects;
- create an international registration system for the protection of aircraft objects; and
- provide the creditor with a range of basic default and insolvency-related remedies.

The aim of the Convention and the Protocol is to overcome the problem of obtaining secure and readily enforceable rights in aircraft and aircraft equipment. These are items of high value, yet are mobile and without any fixed location. As pointed out in the Parliamentary Speech delivered at the Second Reading of the Bill on 19 January 2009, the establishment of a harmonised, transparent and efficient legal framework governing such transactions creates greater certainty amongst intending financiers as to the efficacy of their rights. This lowers risks and, consequently, the costs of lending.

Key points of the Convention and the Protocol

The Bill sets out rules governing speedy relief pending final determination of a creditor's claim and the priority of competing interests and assignments of such interests in aircraft and aircraft equipment. There are also safeguards for debtors to ensure that remedies are exercised in a commercially reasonable manner.

The Convention and the Protocol establish an electronic International Registry for the registration of international interests which gives public notice of such an interest to third parties and protects the priority of the holder of that interest in insolvency proceedings against the debtor. Interested parties will now be able to search the Registry to obtain information as to who has security interests in aircraft and aircraft equipment. The creditor with a duly registered interest is now able to preserve his priority against subsequently registered interests, unregistered interests and the debtor's insolvency administrator.

This regime will provide greater confidence for intended creditors to grant credit on highly mobile capital-intensive assets. As stated in the Second Reading speech, this regime will enhance the credit rating of equipment receivables and reduce borrowing costs to the advantage of all interested parties.

Variation of the Convention and the Protocol

Singapore has chosen to vary some key provisions of the Convention and the Protocol and will be lodging the requisite Declarations in this regard.

The Convention and the Protocol set out an array of remedies available to the creditor when a debtor defaults or in the event of debtor insolvency. The Bill dispenses with the requirement for the creditor to seek leave of court when exercising these remedies. There are safeguards, however, in the form of specific procedures which the creditor will be required to follow to prevent abuse. These are spelt out in the Convention and the Protocol and will be further expanded pursuant to subsidiary legislation issued under the Bill in due course.

Singapore will also declare that non-consensual rights or interests will have priority over any registered international rights. This is because Singapore wishes any right or interest in aircraft or aircraft equipment that is recognised and enforceable under Singapore law to have priority over a registered international interest in that same aircraft or aircraft equipment.

Useful links

- To read the full text of the Bill, please **click here**. The Bill is also available on the website of the Singapore Parliament **www.parliament.gov.sg**
- Please **click here** to read the Parliamentary Speech delivered at the Second Reading of the Bill, which is also available on the Ministry of Transport website **www.mot.gov.sg**
- To read an article entitled "*International Interests in Aircraft Equipment Bill 2008 tabled for first reading: Establishing a legal framework for international interests in aircraft objects*" featured in the November 2008 issue of the Allen & Gledhill Legal Bulletin, please **click here**.

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For further information, please contact:

Gina Lee Wan
Tel: +65 6890 7582
gina.leewan@allenandgledhill.com

Eugene Ooi
Tel: +65 6890 7708
eugene.ooi@allenandgledhill.com

Harold Or
Tel: +65 6890 7566
harold.or@allenandgledhill.com

Business Registration (Amendment) Bill 2009 passed in Parliament: Registration of professionals under Business Registration Act and facilitation of enforcement of injunctions granted under Trade Marks Act

On 19 January 2009, the Business Registration (Amendment) Bill 2009 (the "**Amendment Bill**") was passed in Parliament but has yet to come into operation.

The Amendment Bill seeks primarily to amend the Business Registration Act (the "**Act**") to:

- Empower the Minister for Finance (the "**Minister**") to register certain professionals or professional firms which are currently exempted from registration; and

- Facilitate the enforcement of injunctions granted under the Trade Marks Act.

Registration of professionals and professional firms

Currently, section 4(1)(g) of the Act exempts "any person carrying on any business consisting solely of the exercise of any profession which under the provisions of any written law can be exercised only by those who possess certain qualifications prescribed by the written law and whose names are registered or otherwise recorded in the manner prescribed by any written law" from the purview of the Act.

Hence, professional practices (e.g. of lawyers, doctors and architects) that are partnerships or sole proprietorships are not required to register with the Accounting and Corporate Regulatory Authority (the "**ACRA**"). On the other hand, professional practices which are set up as corporations or limited liability partnerships are required to register with the ACRA under the Companies Act and Limited Liability Partnerships Act respectively.

The Amendment Bill proposes to amend section 4(1)(g) to empower the Minister to prescribe the professional practices to which the exemption under section 4(1)(g) will not apply. If so prescribed by the Minister, the professional practices to which the exemption does not apply will be required to register as businesses with the ACRA. The amendment will facilitate a consistent treatment for professional practices across the various legislation.

Enforcement of injunctions under the Trade Marks Act

The Amendment Bill will also amend section 13 of the Act to empower the Registrar of Businesses to direct a person who has been registered to carry on business under a name to change that name if the use of the name has been restrained by an injunction granted under the Trade Marks Act.

Useful links

Please click on the titles of the following documents that provide details on the amendments introduced by the Amendment Bill:

- **The Amendment Bill** (which is also available on the Parliament website **www.parliament.gov.sg**)

- **The Second Reading Speech by the Senior Minister of State for Finance, Mrs Lim Hwee Hua, on the Amendment Bill** (which is also available on the Ministry of Finance's website **http://app.mof.gov.sg**)

- An article entitled "***Business Registration (Amendment) Bill 2008 tabled for first reading: Registration of professionals under Business Registration Act and facilitation of enforcement of injunctions granted under Trade Marks Act***" which was featured in November 2008 issue of the Allen & Gledhill Legal Bulletin.

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For further information, please contact:

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

Human Organ Transplant (Amendment) Bill 2009 tabled for first reading in Parliament

On 19 January 20009, the Human Organ Transplant (Amendment) Bill 2009 (the "**Bill**") was introduced in Parliament. The introduction of the Bill follows a public consultation exercise which was conducted by the Ministry of Health (the "**MOH**") in November/December 2008. Based on feedback received from the public, medical, professional and non-government organisations, it is found that Singaporeans were generally supportive of the proposed amendments set out under the Bill.

The Bill will amend the Human Organ Transplant Act to provide for the following purposes:

- The upper age limit for cadaveric organ donation will be lifted. Currently, organs may not be removed from the body of a deceased person who is above 60 years of age for the purpose of transplantation;
- Paired living donor organ transplant arrangements will be permitted;
- Comprehensive reimbursement, in money or money's worth, of costs, expenses and loss of earnings reasonably incurred by altruistic living organ donors will be allowed;
- The provision of reasonable costs or expenses of short-term or long-term medical care or insurance protection which is or may reasonably be necessary as a result of the donation of the organ by an altruistic living donor will be allowed; and
- Increasing the penalties for organ trading syndicates and middlemen. A person convicted of such offences may be liable to a maximum fine of S$100,000 or a maximum jail term of 10 years, or both.

Please **click here** to read the full text of the Bill, which is also available on the Parliament website **www.parliament.gov.sg**

The following documents which were released during the public consultation are available on the on the MOH website: **www.moh.gov.sg**. Please click on the relevant titles below to read:

- **Public Consultation Paper on Proposed Amendments to the Human Organ Transplant Act**
- **Draft Human Organ Transplant (Amendment) Bill 2008**
- **Press release dated 14 November 2008**

On 12 January 2009, the MOH issued the results of the public consultation. Please **click here** to read the results which are also available on the MOH website.

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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

MAS conducts consultation on proposed policy positions on the definition of a "Singapore policy" for policies purchased by individuals

From 2 to 31 January 2009, the Monetary Authority of Singapore (the "**MAS**") is conducting a public consultation on the proposed policy positions on the definition of a "Singapore policy" for policies purchased by individuals. A consultation paper was issued on 2 January 2008 for this purpose (the "**Consultation Paper**").

Under the Insurance Act, a distinction is made between "Singapore policies" and "Offshore policies". The purpose of the distinction is to provide clarity that domestic and offshore risks are classified accordingly.

Currently, a life policy or accident and health policy is considered a Singapore policy if the policy owner's address is or was an address in Singapore at the time of issuance of the policy. In the case of direct general insurance (other than short-term accident and health policies), it is a Singapore policy if the insured is a person resident in Singapore.

These definitions were crafted more than 20 years ago and the MAS is of the view that they may no longer be relevant given developments in Singapore in the last 20 years.

In the Consultation Paper, the MAS proposes to revise the definition of a "Singapore policy" for life and accident and health insurance policies as well as for personal general insurance policies sold to individuals, to address, inter alia, the following issues:

- Ambiguities relating to the classification of life or accident and health policies for regulatory purposes. This is because many residents of Singapore currently own overseas properties, and if they were to purchase a life insurance or accident and health insurance policy using their overseas address, their policies would be considered as offshore policies. Conversely, if non-residents who own properties in Singapore were to use a Singapore address in their applications for life insurance or accident and health insurance policies in Singapore, their policies would be considered Singapore policies.

- Implications of granting tax incentives for offshore insurance business since some domestic risks may be inadvertently classified as offshore risks and vice versa.

Further, as a matter of policy, the definition of "Singapore policy" in respect of insurance effected by individuals should be determined using the same criteria, whether it involves direct general insurance (other than a short-term accident and health policy), life policy or accident and health policy.

The MAS proposes to revise the definition of "Singapore policy" for all life and general policies purchased by individuals on the basis of the individual's residency status in Singapore. The MAS views all residents of Singapore as domestic risks unless there is evidence that they are not ordinarily resident in Singapore. In essence, Singaporeans, permanent residents in Singapore, holders of work passes or permits and their dependents as well as long term pass holders and their dependents should be considered as Singapore residents and

considered as domestic risks should they purchase insurance policies in Singapore. Conversely, tourists and persons in transit through Singapore should constitute offshore risks.

In addition, the reference to the issue date of the policy for the definition of "Singapore policy" will also be replaced with the date of proposal of the policy. This is consistent with the fact that the relevant time for assessment is when the policyholder took steps to buy the insurance policy and not when it is actually issued.

The MAS also proposes clarifying that the definition of "Singapore policy" in respect of the risks of marine cargo being shipped from one foreign country to another. The MAS is of the view that as the insurance risks of such marine cargo arise predominantly outside Singapore, it would be more appropriate for such risks to be classified as offshore risks. This would be the case regardless of whether (a) the policy owner is resident in Singapore or is a permanent establishment in Singapore; and (b) the marine cargo transits through Singapore.

Please **click here** to read the Consultation Paper, which is also available on the MAS website **www.mas.gov.sg**

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For further information, please contact:

Andrew Lim
Tel: +65 6890 7706
andrew.lim@allenandgledhill.com

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

Corina Song
Tel: +65 6890 7570
corina.song@allenandgledhill.com

IDA conducts public consultation on "Guidelines on Maximum Contract Term and Early Termination Charges for Telecommunication Services Offered to Consumers"

The Info-communications Development Authority of Singapore (the "**IDA**") is conducting a public consultation on "Guidelines on Maximum Contract Term and Early Termination Charges for Telecommunication Services Offered to Consumers", from 23 December 2008 to 20 January 2009. The proposed guidelines and consultation address consumers' requests for the IDA to review the current industry practice of mobile and broadband operators imposing unduly long contract terms, and fixed or high early termination charges on consumers. Consumers generally feel that they are hindered from switching operators in such cases.

The proposed guidelines will cover two main areas:

(a) Maximum length of contract

(i) The IDA proposes that the contract term for mobile, fixed-line telephone and broadband service plans should not exceed 24 months.

(b) Early termination charges

(i) The IDA proposes that the early termination charges for mobile, fixed-line telephone and broadband services contracts that are longer than three months should be gradated.

(ii) Further, the early termination charges should exclude any costs that are avoided when the operator ceases the provision of the service to the consumer.

(iii) The IDA also proposed certain guidelines on the computation of early termination charges:

- Operators may only recover the value of the discount that the consumer had enjoyed up to the point of termination;
- Operators may recover the cost of any gift provided minus the portion of the cost of the gift that the operator had been able to recover from the consumer's monthly subscription fees; and
- Operators must inform the consumer, upfront and in a transparent manner, of the costs of the gifts or discounts that it would be recovering from the consumer, as well as the method of computation to be used should the consumer terminate his contract prematurely.

The proposed guidelines would exclude mobile, fixed-line telephone and broadband services offered to business/corporate customers.

The IDA has also indicated that, instead of issuing the above as guidelines, it may, depending on the industry's response, impose the above via any other regulatory framework (e.g. via directions or codes of practice) as IDA deems necessary or appropriate .

Please **click here** for the full text of the consultation paper which is available on the IDA website **www.ida.gov.sg**

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For further information, please contact:

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

CCS issues response to submissions on changes to leniency programme

In September 2008, the Competition Commission of Singapore (the "**CCS**") conducted a public consultation on the proposed amendments to its leniency programme. The proposal is to introduce a marker system and a leniency plus system aimed at encouraging more leniency applicants to report cartel activities.

The CCS has since reviewed the feedback received on the proposed amendments, and made the appropriate changes to the CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information in Cartel Activity Cases (the "**Guidelines**"). The framework of the Guidelines remains unchanged. Please **click here** to access the Guidelines which are available on the CCS website **www.ccs.gov.sg**

The CCS has also issued a paper setting out the CCS' response to the feedback and clarifying some of the issues raised. To view the paper which is available on the CCS website, please **click here**. Set out below are extracts of some of the CCS' response:

Marker system

- The first undertaking to come forward to the CCS will be treated as first in line. An undertaking applying for leniency will not lose its place in the queue if another undertaking were to subsequently apply for a marker.

- An undertaking applying for a marker must provide its name to the CCS and sufficient information for the CCS to ascertain whether any other undertaking has applied for immunity or a reduction of up to 100 per cent., for the suspected infringement.

- The CCS will return the information submitted to CCS under the marker approach if the applicant fails to qualify for leniency. However, the CCS may obtain evidence against the cartel in question by its own independent investigations.

- A marker system will apply as long as total immunity or a reduction of up to 100 per cent. in financial penalties is available. Subsequent applicants are encouraged to gather information and approach the CCS as quickly as possible to qualify for leniency, i.e. a reduction of up to 50 per cent. of the financial penalty.

- There will be no time period for the perfection of a marker as the time required is likely to vary from case to case.

- Although the grant of a marker is discretionary, it is likely that a marker will be granted as a norm rather than an exception, once an undertaking provides the relevant information.

- Holders of subsequent markers cannot jump queue and replace the holder of the first marker.

Leniency plus system

- An applicant involved in investigations in relation to a cartel may put out anonymous "feelers" to help itself in deciding whether to come forward with information in relation to a separate cartel activity.

- An undertaking, which is already under investigation for a cartel activity, should apply as soon as possible for leniency plus if it discovers that it was also involved in a separate cartel activity.

- It is not practicable to quantify the leniency plus credit upon perfection of the marker in respect of the second cartel.

For further information, please contact:

Daren Shiau
Tel: +65 6890
daren.shiau@allenangledhill.com

An article about the CCS' public consultation in September 2008 was featured in a previous issue of the Allen & Gledhill Legal Bulletin (September 2008), please **click here** to read the article entitled "*Proposed Changes to Competition Commission of Singapore's leniency programme*".

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These recent developments were highlighted in the Allen & Gledhill KnowledgeShare Alert that was sent in January 2009. If you would like to be on our general electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

MOH and SMC propose amendments to the Medical Registration Act

The Ministry of Health (the "**MOH**") and the Singapore Medical Council (the "**SMC**") are jointly conducting a public consultation on proposed amendments to the Medical Registration Act (the "**Act**") from 14 January 2009 to 25 February 2009. The proposed amendments are set out in a draft Medical Registration Bill (the "**draft Bill**") which has been issued for the purpose of the public consultation.

The proposed amendments are intended to ensure that the Act continues to remain relevant to new developments in the practice of medicine. Some of the key amendments which have been proposed are as follows:

- A Register of Family Physicians and a Family Physicians Accreditation Board will be set up to raise the overall standard of family medicine practice in Singapore.
- The Specialists Accreditation Board will be allowed to define appropriate sub-specialties in medicine.
- The current medical registration process will be further improved. For instance, the SMC may refuse an application for medical registration if the applicant is unfit to practice medicine because his ability to practice has been medically impaired, and also specify requirements and impose restrictions on conditionally registered doctors, where this is necessary to safeguard the public. A doctor's name will be removed if he has not renewed his practising certificate for a continuous period of two years (currently five years) and he cannot be contacted.
- Doctors who have insight of their own professional competency issues, or who acknowledge that they have medical problems that make them unfit to practise medicine, will be allowed to constructively discuss these issues with the regulator and find appropriate ways of restricting their practice.
- The powers of the Complaints Committee will be enhanced to facilitate the just and effective disposal of complaints.
- The Disciplinary Committee, which is the SMC's formal disciplinary body, will be renamed the Disciplinary Tribunal. The Disciplinary Tribunal may be chaired by a judge, legal officer or senior lawyer as disciplinary proceedings tend to involve legal issues, both procedural and substantive.
- The maximum financial penalty which can be imposed on a medical practitioner convicted of professional misconduct would be increased from S$10,000 to S$100,000.
- The practice of a doctor who has been convicted of professional misconduct may be restricted for a period longer than the current maximum period of three years. The same proposal applies to doctors whose fitness to practice is medically impaired, if this is imperative for patient protection.
- There will be a requirement to obtain professional indemnity insurance or cover for doctors applying for practising certificates.

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

- Doctors who intend to obtain or renew their practising certificates must declare whether they have been charged or convicted in court or have health conditions that would have a serious adverse impact on their practice.

Please **click here** to access the MOH announcement dated 14 January 2009 which is available on the MOH website **www.moh.gov.sg**. Please **click here** to access the draft Bill which is also available on the MOH website.

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Cases

Corporate & financial services

English Court of Appeal holds that accountant for valuation of shares should have been appointed by engagement letter pursuant to poorly drafted articles of association

Cream Holdings Ltd & Ors v Davenport
[2008] EWCA Civ 1363

The English Court of Appeal in *Cream Holdings Ltd & Ors v Davenport* held that the compulsory transfer provisions in the articles of association of a company which provided that a Third Party Accountant may be "chosen" by the parties in dispute should be construed as requiring the parties to appoint the accountant formally by signing the accountant's engagement letter. The slack drafting and the omission of any express requirement of a formal appointment of the accountant in the relevant provision were blamed for creating the uncertainty in the construction of the provision which resulted in the present dispute.

Mr Davenport was the shareholder, director and employee in Cream Holdings Limited (the "**Company**"). He was removed as a director of the Company. His removal triggered the share transfer and valuation provisions in the articles of association of the Company (the "**Articles**") which mandated him to sell his shares to the other members of the Company at a "fair value" of the shares.

No agreement was reached on what was a "fair value" of Mr Davenport's shares. So, the Company wrote to Mr Davenport informing him that it would proceed with the appointment of the "Third Party Accountant" (the "**TPA**") to value the shares in accordance with the Articles. Article 2.1 of the Articles defined "Third Party Accountant" as:

> "*An independent firm of accountants **chosen** by the Transferor and the Board or failing agreement on such **appointment** within 7 days as **chosen** by the president from time to time of the Institute of Chartered Accountants.*"
> (emphasis added)

The Company decided on one of the accounting firms, BDO, suggested by Mr Davenport and told Mr Davenport that he would be notified when the appointment of BDO as the TPA had been made in due course.

The Company signed BDO's engagement letter as the TPA. However, following some disputes, Mr Davenport refused to sign the engagement letter. Despite his express reservations about appointing BDO as the TPA, BDO proceeded to fix a "fair value" on Mr Davenport's shares upon the Company's instructions. Mr Davenport considered that his shares were worth very much more than the amount fixed by BDO. The Company insisted that Mr Davenport was bound to transfer his shares based on BDO's valuation as BDO was duly appointed as the TPA pursuant to the Articles.

The issue before the court was whether BDO was duly appointed as the TPA in accordance with the Articles.

The judge at first instance concluded that it was not sufficient, for the purposes of constituting a TPA, for the two parties merely to identify a valuer. They must go further and enter into a tripartite agreement as to the valuer's appointment. There must have been a formal offer and acceptance by the valuer of the role of TPA. As Mr Davenport had never agreed to the terms of BDO's appointment, BDO was never validly appointed as TPA and its valuation did not bind him.

The Company appealed on the ground that the judge at first instance erred in concluding that "chosen" in Article 2.1 meant "appoint". The Company argued that as soon as the parties had "chosen" a valuer in the sense of agreeing who it should be, there was a TPA for the purposes of the Articles. It was then open to one of the parties to proceed unilaterally to agree and sign the terms of engagement with the valuer. The Company submitted that such was the commercial and reasonable construction of Article 2.1 which was drafted to provide a workable, quick and effective expert determination procedure and to avoid litigation.

The Court of Appeal held that in construing the disputed definition of the TPA in the Articles, it would take into account the language chosen to express the parties' intentions, the intended purpose of the provision and its overall context. The object of the exercise was to end up, if possible, with a reasonable result within the ambit of the parties' probable intentions.

The Court of Appeal was of the view that the Company's construction of Article 2.1 to mean that Mr Davenport was bound by the valuation of a TPA who had been "chosen" by him was not convincing and could not have produced the consequences within the contemplation of the parties to the Articles. In reaching this view, the Court of Appeal took into account the importance and significance of the TPA's role in handing out decisions that would be binding on the Company and Mr Davenport as to their liabilities and value of their shares.

Accordingly, the Court of Appeal dismissed the Company's appeal, holding that BDO could not have become the TPA solely as a result of nomination by the parties and without any agreement by both parties and BDO on the terms of engagement as the TPA. The constituting of the TPA, whether characterised in the Articles as being "chosen" or as "agreement on such appointment", was more realistically analysed as a process than as an event, such as nomination. Hence, the TPA process was not complete unless and until all parties and the accountants had reached an agreement on the TPA's terms of engagement.

The Court of Appeal made further comments which should be noted by lawyers drafting compulsory transfer provisions in the articles of association for a company. First, the Court of Appeal highlighted that the dispute whether BDO was the duly appointed TPA would not have arisen if the Articles had contained the provision, commonly found in articles of association in the

context of invoking the compulsory transfer provisions, that the value of the shares are to be determined by the auditors of the company who are already in office.

Secondly, the Court of Appeal emphasised that the present dispute could have been avoided if consistent wording was used in the drafting of the definition of the TPA in the Articles. The court noted that the slack drafting and the omission of any express requirement of a formal appointment of the TPA had contributed to the uncertainty that bred contention on a matter in which certainty was highly desirable and could easily be achieved by stipulating elementary formalities. The definition of the TPA in the Articles referred to the TPA being "chosen" by the parties without elaborating on the procedures for appointing the TPA.

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

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

English High Court holds director has no authority to act for improper purpose

Magical Marking Ltd v Holly & Ors
[2008] EWHC (Ch) 2428

In *Magical Marking Ltd v Holly & Ors*, the English High Court had to determine the issue, among others, of whether a director of a company had the actual or ostensible authority to appoint a third party to copy the company's electronic business records, remove its latest data back up tape and disable its computer system by the insertion of passwords which were not provided to the company's staff. The court held that the director had no authority to do so and the company was not prevented from asserting that just because it had held him out to be a director. The court found that the making of copies of the company's essential business information was not prepared in the interest of the company and was in pursuit of the director's own personal interest. As such, the director was not acting *bona fide* in the interest of the company and was using his powers for an improper purpose.

The background

The company operated a playground painting business which was heavily dependent upon computers. It was started by a Mrs P who was a director and shareholder of the company. Later, when the business of the company expanded, Mrs P required business development services and retained Mr H to be the consultant. Subsequently, Mr H became a director and company secretary of the company. However, Mr H retained the consultancy agreement with the company and was never the company's employee. Mr H was also given a 25 per cent. shareholding in the company. Mrs P remained as the other director of the company, holding 75 per cent. of its shares. Mr H's role as company secretary appeared to be purely a formal one with no executive role.

Following a dispute, Mr H indicated that he wished to leave and he ceased to be involved in the operations of the company. Mrs P tried to change Mr H's mind but to no avail. Mr H wanted to be bought out and Mrs P agreed. Mrs P then took steps to conduct a valuation exercise of the business. Mrs P informed Mr H that she had communicated to the staff of the company that he was still the director and shareholder of the company, but with a non-operational role.

Dissatisfied with the pace of the valuation process, Mr H wanted to resume a proactive operational involvement in the company's affairs and proceeded to visit the company's premises. The disruptive nature of the visit prompted Mrs P to write Mr H a letter asking him not to make any further visits although he would still be invited to a directors' meeting. However, Mr H appeared to have made another visit to the company's premises at a time when he knew Mrs P was not there and to have sought information from the staff in such a way that Mrs P felt that he was not working in unison with herself or other members of the management team. This chain of events prompted Mrs P to require Mr H's immediate exclusion from the company's premises because his presence was not in the best interest of the company. She then gave notice of an extraordinary general meeting (the "**EGM**") of the company to remove Mr H as a director and secretary of the company.

On the day of the EGM, Mr H visited the company's premises, together with a group of individuals which included his solicitor, two security men and two computer professionals. Mr H instructed one of the computer professionals, Mr C, to copy the company's electronic business records, remove its latest data back up tape and disable its computer system by the insertion of passwords. The company alleged that its staff was threatened and told not to use their computers and mobile telephones during that visit.

The action

The company initiated the present action alleging, among other things, that there was infringement of intellectual property rights under the relevant statutes. Mr H, Mr C, and Mr C's company were three of the seven defendants named in the action. One of the issues which the court had to examine was whether Mr H had the company's authority to commission Mr C to undertake the work on its servers. Mr C raised this issue in defence.

Actual authority

It was argued on behalf of Mr H that he had actual authority to retain Mr C as an IT consultant to upgrade the security on the company's system and to take a copy of its records for security purposes. Reliance was placed on Regulation 70 of Table A of the UK Companies Act (corresponding to Regulation 73 of Table A of the Singapore Companies Act). This provided that (subject to immaterial qualifications) "the business of the company shall be managed by the directors who may exercise all the powers of the company". It was submitted that the plural "directors" should be taken to include the singular "director" so that any individual director could exercise all of the powers of the company. The court rejected the submission and held that Regulation 70 conferred the power of management upon "the directors", i.e. the entire board. As such, Mr H had no authority under the company's articles of association to exercise sole management and control of the business of the company, that power being vested in the Board.

The next argument which was tendered on behalf of Mr H was that he had actual authority because that was a correlative of the duties which he owed as director. Accordingly, case law has established that "each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them" and that "where there is suspicion and lack of cooperation, a director is all the more entitled, perhaps even obliged, to inspect company accounts to protect the interests of the company and its shareholders. The right is not only to be exercised or the duty imposed where there is harmony within the company". It was then further argued that the dispute between Mrs P and Mr H imposed on Mr H the obligation to protect the interests of the company and its shareholders and the authority to do whatever he thought fit in performance of those duties (including the authority to instruct Mr C to protect the company's computer

system and the integrity of its data). The court rejected this submission and found that the creation of copies of the company's essential business information were not prepared in the interests of the company but in pursuit of Mr H's personal interests because he was dissatisfied with the pace at which the valuation of his shareholding was proceeding and because he wished to assert his part ownership of the company's business. Mr H was not acting *bona fide* in the interests of the company and was using his powers as director for improper purposes. That could never be within his actual authority.

Implied actual authority

The court was then asked to consider whether Mr H was acting within the scope of his implied actual authority because he was a director and an operational one. The court found that Mr H was purporting to take control of the company and (without apparent reference to anyone else) to create a duplicate of its records for himself. Mr H's operational responsibilities had ended and the staff had been told that he was no longer an operational director and he had been requested not to attend the premises. Whatever implied actual authority he may have had was expressly terminated. His unilateral announcement that he intended to resume a proactive role could not re-clothe him with the authority which he had renounced (and which renunciation the company had accepted).

The court also rejected the argument that Mr H had the actual authority to commission Mr C because he was company secretary. As company secretary, Mr H had never exercised any executive authority.

Ostensible authority

Next, it was argued that Mr H had ostensible authority to act as he did. The company would be prevented from asserting that Mr H had no authority if they had represented that he did have authority. From the facts, the court found that the company made no representation at all to Mr C, and the only representation made by the company to the world at large was that Mr H was a director. If the company was to be prevented from denying Mr H's authority it ought to be on the basis of clear representations by it and its ostensible agent. The court did not find that the company had placed Mr H in a position where he could hold himself out to third parties as their agent and then acquiesced in his activities by allowing the representations to continue and by accepting the contracts he entered.

Conclusion

In the circumstances, the court found that Mr H had no actual or ostensible authority to instruct Mr C to copy the company's electronic business records, remove its latest data back up tape and disable its computer system by the insertion of passwords.

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

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

Dispute resolution

Singapore Court of Appeal considers the factors in allowing or disallowing the registration of a foreign judgment under RECJA

Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)
[2008] SGCA 48

The Singapore Court of Appeal in *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)* considered an application to disallow the registration and enforcement of an English judgment under the Reciprocal Enforcement of Commonwealth Judgments Act (the "**RECJA**"). After considering the facts of the case, the Court of Appeal allowed the registration of the English judgment even though there was a lapse of approximately six years and seven months from the date of the English judgment before the appellant applied to have that judgment registered in Singapore. Among other things, the court took into account the fact that the respondent had obstructed enforcement of the judgment.

In August 1995, the appellant commenced proceedings in England under section 26 of the UK Arbitration Act 1950 and section 3 of the UK Arbitration Act 1975 for leave to enforce an award made in its favour by the International Chamber of Commerce in 1994. A common law action on the award itself was also commenced in April 1996 (both actions were eventually consolidated). In December 1997, the English High Court ruled in favour of the appellant and judgment was entered in favour of the appellant against the respondent in the sum of £41,584,488.86 (the "**English judgment**").

It had previously been determined by the Singapore courts that the English judgment at issue here was registrable under RECJA as it was still registrable in England. The issue before the Singapore Court of Appeal in the present proceedings was whether there was any basis for the court to interfere with the High Court judge's exercise of his discretion to set aside the registration of that judgment.

Question of interference with a judge's discretion

The Court of Appeal set out the relevant principles in relation to interfering with the High Court judge's exercise of his discretion. The court quoted the decision of the Singapore Court of Appeal in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 2 SLR 233:

> "*It is trite law that an appeal against the exercise of a judge's discretion will not be entertained unless it be shown that he exercised his discretion under a mistake of law, in disregard of principle, under a misapprehension as to the facts, or that he took account of irrelevant matters, or [that] the decision reached was 'outside the generous ambit within which a reasonable disagreement is possible*'".

The law governing RECJA applications

Keeping in mind the established law relating to judge's discretion, the Court of Appeal considered the principles which Singapore courts ought to apply in the exercise of their discretion as to whether or not to allow a Commonwealth judgment to be registered in Singapore.

Under the framework of the RECJA, in determining whether to allow a RECJA application, the court must consider "all the circumstances of the case" as required by section 3(1) of the RECJA and should permit registration of a Commonwealth judgment only if "it is just and convenient that the judgment should be enforced in Singapore".

The court considered whether it would be just and convenient to allow a Commonwealth judgment to be enforced in Singapore in this specific scenario where a RECJA application is made more than 12 months after the date of the judgment. The court was of the view that when faced with a late RECJA application involving a delay which is not insubstantial (in the present case, there was a lapse of approximately six years and seven months from the date of the English judgment before the appellant applied to have that judgment registered in Singapore), it was incumbent on the court to consider all the circumstances of the case, as mandated by section 3(1) of the RECJA, in determining whether it would be just and convenient to enforce the Commonwealth judgment in Singapore.

The court set out the factors courts should take into account and considered them in the context of the present case:

(a) whether the judgment creditor could give a reasonable explanation for its delay in applying to register the Commonwealth judgment;

(b) whether the judgment creditor had been reasonably diligent in seeking to enforce the Commonwealth judgment;

(c) whether the judgment debtor had been obstructive; and

(d) whether the delay caused the judgment debtor prejudice.

The case for the appellant vis-*à*-vis registration of the English judgment in Singapore was that:

(i) its delay in applying for registration was due to a number of factors which were not within its control;

(ii) it had exercised reasonable diligence in seeking out the assets of the respondent for the purposes of enforcing the English judgment; and

(iii) when assessed in the light of the respondent's conduct, which had prevented the appellant from uncovering the respondent's assets in Singapore earlier, justice and convenience were on the appellant's side.

The respondent asserted that it would be prejudiced if the registration of the English judgment under the RECJA was permitted to stand. It argued that the English judgment was no longer enforceable in England by way of a writ of execution unless the leave of the court was obtained.

Decision

With regard to the delay in the application, the court agreed to take into account the political turmoil and instability in Serbia from 1997 to 2002 and how this contributed to the delay. The appellant was also able to demonstrate to the court's satisfaction that it had been continuously engaged in enforcement-related proceedings in England against the respondent from 1999 to 2004.

In terms of diligence in seeking to enforce the English judgment, the court found that this condition was easily satisfied when the full catalogue of activities undertaken by the appellant was considered. It was clearly shown

that the appellant had been continuously engaged in enforcement-related proceedings in England against the respondent from 1999 to 2004. The court noted that the High Court did not pay enough attention to the efforts made by the appellant in this regard.

The court considered that the respondent had obstructed enforcement of the judgment as not only did the respondent not seek out the appellant to pay the amount awarded under the English judgment, but it also deliberately gave a selective and incomplete picture to the English court about its assets for the purposes of stay proceedings in the UK.

In the court's view, the issue of whether the court has the power to impose restrictions on the manner of enforcing a registered Commonwealth judgment was irrelevant to the question of whether a RECJA application should be allowed or dismissed. Before a Commonwealth judgment can be registered under the RECJA, it must be enforceable in the jurisdiction in which the judgment was obtained. Here, the English judgment was not immediately enforceable in England by way of writ of execution because of the lapse of time. However, in England, different procedural rules apply to different methods of enforcement. The court concluded that since the English judgment was enforceable in some manner in England, it followed that the judgment fulfilled the threshold requirement of registrability under the RECJA.

The last issue the court considered was whether it was just and convenient to enforce the English judgment in Singapore in the circumstances of this case. The court stated that it was in this context that the issue of relative prejudice to the appellant and respondent respectively arose. The court found that there was no issue of prejudice in relation to the threshold issue of enforceability of the English judgment in England - that was simply a legal requirement which must be satisfied before the English judgment could be registered under the RECJA.

Given all of the above, the Court of Appeal found it to be just and convenient that the English judgment be enforced in Singapore and the appeal was allowed here so that the judgment could be registered in Singapore under the RECJA.

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

Dinesh Dhillon
Tel: +65 890 7822
dinesh.dhillon@allenandgledhill.com

Intellectual property & technology

Singapore High Court holds "LOVE" mark not inherently distinctive

Love & Co Pte Ltd v The Carat Club Pte Ltd [2008] SGHC 158

On 22 September 2008, the Singapore High Court decided that a word mark comprising the word "LOVE" should be invalidated because it was not inherently distinctive, and was descriptive of one of the intended purposes of the goods. In doing so, it considered the use of the "LOVE" mark, and concluded that the use made of it had been insufficient to show acquired distinctiveness.

The court also decided, in the alternative, that the "LOVE" mark should be revoked for non-use.

Background to the dispute

Both the plaintiff and defendant were in the jewellery business.

Pursuant to a letter of demand from the defendant to the plaintiff's related Malaysian company alleging passing off and infringement of the defendant's Malaysian trade mark for the "LOVE Diamond ( )" in Class 14, the plaintiff discovered that the defendant owned a registration of the simple word mark, "LOVE", in Class 14. The plaintiff applied to court to invalidate and/or revoke the defendant's registered "LOVE" mark.

Invalidation for lack of distinctiveness

As mentioned above, the court decided that the word mark comprising the word "LOVE" should be invalidated because it was not inherently distinctive. The court's decision in this respect is interesting because it provided a useful summary of the law in this area, categorising trade marks into three categories for the purposes of a distinctiveness analysis. These three categories were:

- Category (a): Immediately registrable trade marks with distinctive character in the form of inherent distinctiveness;
- Category (b): Immediately registrable trade marks with distinctive character in the form of *de facto* distinctiveness; and
- Category (c): Not immediately registrable trade marks because they have not attained a distinctive character through use.

The court explained that Category (a) marks must convey the trade origin message immediately when first encountered, even before the public is educated that it is to be used as a trade mark. In particular, it must be assessed on its appearance as a whole, to the average discerning consumer, in the context of the particular market place or environment in which the goods are dealt with and where the services are provided to the consumer. Ultimately, Category (a) marks will stand out as badges of commercial origin for the goods or services of the promoter of the marks, without considering any prior use.

As regards Category (b) marks, the court considered that such marks have distinctive character acquired through use or nurture by the promoter of the mark in relation to the particular goods or services of his. By virtue of this *de facto* distinctiveness, the average discerning consumer immediately and readily perceives, recognises or identifies the goods or services in question to originate from a particular trader and from no other.

Category (c) marks are those which are not immediately registrable for lack of attaining a distinctive character at the relevant date through use, but are yet not incapable of distinguishing altogether. They are potentially registrable trade marks. As such, the boundary between Categories (b) and (c) is not impermeable and immutable.

At the outset, the court decided that the word "LOVE" satisfies the definition of a trade mark in that it is capable of being represented graphically, and has the capacity to distinguish (as opposed to words like "JEWELLERY", "GOLD" and "DIAMOND") when considered in the context of the goods (i.e. jewellery). Upon consideration of the jewellery industry, the court was swayed by the fact that the word "LOVE" is an ordinary word with a well known meaning expressing admiration, adulation, adoration, devotion, etc. for a person, thing, place or service. The court also noted that many jewellers

capitalise on the meaning of the word “LOVE”, using it to name their jewellery collections, in advertising slogans, and in special names given to specific items of jewellery (e.g. Love Rings, Love Pendant, etc.). Accordingly, the court thought that it would be difficult for members of the public to realise or expect the ordinary looking “LOVE” mark to distinguish the defendant’s jewellery from other traders’.

The court further considered the issue of descriptiveness of the “LOVE” mark in relation to intended purpose of the defendant’s goods. Ordinarily, a trade mark that is descriptive of any of the characteristics of the goods it designates is not registrable. In this case, the pertinent characteristic of the goods was the intended purpose of the goods.

The interesting question that arose in this regard was this: from whose perspective is the court to evaluate the intended purpose of the goods? The trader who intends to sell the goods? The purchaser of the goods? Or the recipients of the goods as gifts, where it is customary for that sort of goods to be given away as presents or gifts? Here, the court decided that it was the intended purpose of the ordinary discerning purchaser that mattered, and not that of the trader or recipient. Nevertheless, the court did recognise that the purchaser’s perspective of the intended purpose of the goods might well be moulded by the marketing strategies of the trader. Further, the intended purpose of the goods described by the mark need not be commercially essential for it to run afoul of the non-descriptiveness requirement; it could be merely ancillary.

Overall, the court held that there was sufficient evidence to establish that an intended purpose of jewellery was to be an expression of love. As such, the “LOVE” mark was descriptive of the defendant’s goods, and not inherently registrable.

The defendant then sought to argue that the “LOVE” mark had acquired a distinctive character by reason of the use made of it after registration. Whilst the court agreed that for the purposes of an invalidation query, post-registration use could be taken into account to assess acquired distinctiveness, there was simply insufficient evidence of this. There was barely any education of the public and the consumers in the form of advertisements and promotions that the simple “LOVE” mark was a badge of origin. The use and promotion that the defendant had undertaken pointed to a focus on its other marks, including the “LOVE Diamond” mark, and a decorated variation of the “LOVE” mark ( ), but not the simple “LOVE” mark itself.

Revocation for non-use

If a mark has not been put to genuine use for a continuous period of five years after it has been registered, it is vulnerable to cancellation on the basis of non-use. The onus is on the registered proprietor to show what genuine use has been made of the mark.

In the instant case, there was no evidence of use of the “LOVE” mark in the form it was registered. Even where the word “LOVE” was used in promotion of the defendant’s goods, it was used in a decorative form, with the image of a diamond replacing the letter “O”. Despite evidence of use of the “LOVE Diamond” mark, the court thought that this could not be considered simultaneous use of the simple “LOVE” mark just because it was embedded and subsumed within the “LOVE Diamond” mark. In order for the “LOVE” mark to be validly and genuinely used in the course of trade as a trade mark, it must be used substantially standing by itself as a clear, distinct and separate badge of origin of the defendant’s goods.

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

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

Therefore, the "LOVE" mark was also removed on the alternative ground that it had not been put to genuine use.

Commentary

It is unfortunate that the defendant, in attempting to prevent a third party from using a mark similar to its registered mark, ended up with its registered mark being removed from the Register instead.

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Real Estate

Singapore High Court allows plaintiff's claim for adverse possession

City Developments Ltd v Estate of Syed Allowee Bin Ally Aljunied, Deceased [2008] SGHC 237

The primary question before the Singapore High Court in *City Developments Ltd v Estate of Syed Allowee Bin Ally Aljunied, Deceased* [2008] SGHC 237 was whether the plaintiff had made out its claim for adverse possession of a piece of unregistered land. The court ruled that adverse possession of the land in question had been established as the plaintiff succeeded in showing that it and its predecessors had been in adverse possession of the plot for 12 years prior to 1 March 1994. Hence, its possessory title was preserved under section 177(3) of the Land Titles Act 1993. Adverse possession had been established even though the plaintiff did not realise that it was trespassing on another's land.

The plaintiff purchased a property (the "**property**") from Kerr Leong Heng Private Limited ("**KLH**") in 1999 for the purposes of redeveloping the property. KLH had been in possession of the property since 1981 and it built the existing block of apartments on the property.

Unknown to KLH and the plaintiff at the time when it purchased the property, the land occupied by KLH included a piece of neighbouring land (the "**plot**"), and subsequently the plaintiff enclosed both the property and the plot by a chain link fence. The plaintiff sought a declaration that it was entitled to the land and that it be vested with the legal possessory title to the land.

With the enactment of the Land Titles Act 1993 (No 27 of 1993) (the "**1993 LTA**") which came into effect on 1 March 1994, adverse possession in Singapore was abolished such that no land, registered or unregistered, may be acquired by way of adverse possession save under transitional statutory provisions.

In the present case, the plot in question, as of 1 March 1994 and as at the date of judgment, was unregistered land. Adverse possession of unregistered land is governed by the Limitation Act as amended by section 177 of the 1993 LTA. Section 177(1) of the 1993 LTA amended section 9 of the Limitation Act thereby abolishing claims by way of adverse possession but, at the same time, section 177(3) preserved rights that had accrued as of 1 March 1994.

If the plaintiff succeeded in showing that it and/or its predecessors had been in adverse possession of the plot for 12 years prior to 1 March 1994, its possessory title would be preserved under section 177(3) of the 1993 LTA and it would be entitled to the plot.

In considering what adverse possession entailed, the court explained that essentially, adverse possession is made out when the adverse possessor is in physical and/or factual possession of the land as if he was the true owner with the intention to possess and exclude all others, including the owner with the paper title. Further, the 12-year period necessary to establish title by adverse possession can constituted by the aggregate of separate but continuous periods of adverse possession by different people.

After considering the evidence, the court found that the plaintiff, on a balance of probabilities, had made out a case of adverse possession, having established both physical possession as well as the intention to possess for the requisite 12-year period. The facts on the whole suggested that the plaintiff as well as its predecessors did not know that the plot was actually a separate piece of land from the property and that they had all along treated the plot as part of the property to the exclusion of all others. The evidence also showed that the plaintiff and/or its predecessors had maintained the fence in the present position over the years. The court pointed out that the requisite intention for adverse intention is an intention to possess the land and not an intention to dispossess an owner of his land and thus this requisite intention can still be established even if the adverse possessor did not realise that he was trespassing on another's land. The fact that different people took adverse possession of the plot at different times does not mean that the requisite 12-year period for adverse possession is broken. So long as the adverse possession by different people is continuous, adverse possession can still be made out.

Allen & Gledhill LLP represented the successful plaintiff.

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

Andrew Yeo
Tel: +65 890 7850
andrew.yeo@allenandgledhill.com

In brief

Securities and Futures (Amendment) Bill 2009 and Financial Advisers (Amendment) Bill 2009 passed in Parliament on 19 January 2009

On 19 January 2009, the following Bills that will introduce substantial changes to the Securities and Futures Act and the Financial Advisers Act were passed in Parliament:

- The Securities and Futures (Amendment) Bill 2009; and
- The Financial Advisers (Amendment) Bill 2009.

Please **click here** to read an article about this development in the January 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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SGX introduces measures to facilitate equity fund raising through rights issues

On 12 January 2009, the Singapore Exchange Limited (the "**SGX**"), in consultation with the Monetary Authority of Singapore, announced new measures to allow listed issuers greater flexibility in raising funds through the rights issue framework. These measures are a follow-up to the first equity fund raising announcement issued by the SGX on 19 December 2008.

Please **click here** to read an article about this development in the January 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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MAS announces completion of Singapore dollar sovereign-rated sukuk and *Murabaha* inter-bank placement and *Ijara Wa Igtina* transactions allowed

On 19 January 2009, the Monetary Authority of Singapore issued a press release announcing the completion of its sukuk issuance facility to provide *Sharia'a*-compliant regulatory assets.

Please **click here** to read an article about this development in the January 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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MAS issues circular to clarify treatment of refinancing under the aggregate leverage limit

The Monetary Authority of Singapore issued a circular to all managers and trustees of real estate investment trusts approved under section 289 of the Securities and Futures Act on 9 January 2009 to clarify how refinancing would be treated under the borrowing limits in the Property Fund Guidelines in Appendix 2 of the Code on Collective Investment Schemes.

Please **click here** to read an article about this development in the January 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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SGX reschedules launch of Extended Settlement contracts from 23 January 2009 to 20 February 2009

On 16 January 2009, the Singapore Exchange Limited issued a news release announcing that the launch of Extended Settlement contracts will be rescheduled from 23 January 2009 to 20 February 2009.

Please **click here** to read an article about this development in the January 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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SGX member firms implement robust business continuity arrangements by 2010

On 21 January 2009, the Singapore Exchanges (the "**SGX**") issued a news release announcing the introduction of new rules requiring SGX members firms to develop robust business continuity management arrangements. This follows a public consultation in May 2008 where the SGX sought comments on the proposed amendments to the Singapore Exchange Securities Trading Limited Rules, the Futures Trading Rules, the Central Depository (Pte) Limited Clearing Rules and the Singapore Exchange Derivatives Clearing Limited Clearing Rules to implement the BCM arrangements.

Please **click here** to read an article about this development in the January 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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SGX issues consultation paper on revised requirements for direct business trades

From 20 January 2009 to 6 February 2009, the Singapore Exchange Limited (the "**SGX**") is conducting a public consultation and inviting public comments on proposed revisions to the requirements for direct business trades (married trades). The SGX has issued a consultation paper which explains the rationale and proposed amendments in more detail.

Please **click here** to read an article about this development in the January 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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SGX issues consultation paper on proposed launch of SGX options on MSCI Singapore Index Futures Contract

From 29 December 2008 to 8 January 2009, the Singapore Exchange Limited (the "**SGX**") conducted a public consultation seeking comments on a proposal to introduce a new options contract, the SGX Options on MSCI Singapore Index Futures contract.

Please **click here** to read an article about this development in the January 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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News

DBS Group Holdings Ltd's Rights Issue

DBS Group Holdings Ltd ("**DBS**") is offering a one-for-two rights issue ("**Rights Issue**") to raise net proceeds of approximately S$4 billion. Pursuant to the Rights Issue, 760,480,229 Rights Shares will be offered at S$5.42 per Rights Shares. Temasek Holdings (Private) Limited ("**Temasek**"), DBS' largest shareholder, holds directly and through its wholly-owned subsidiary, Maju Holdings Pte Ltd ("**Maju**"), approximately 27.6 per cent. of the issued share capital of DBS in aggregate. In support of the Rights Issue, Temasek, through its wholly-owned subsidiary, Temasek Capital (Private) Limited, has provided an irrevocable undertaking that Temasek and Maju will subscribe for their respective *pro rata* 27.6 per cent. entitlements under the Rights Issue in full ("***Pro Rata* Shares**"). Temasek has, through its wholly-owned subsidiary Ixora Investments Pte Ltd ("**Ixora**"), also entered into a sub-underwriting agreement with the underwriters (Citigroup Global Markets Singapore Pte Ltd, Goldman Sachs (Singapore) Pte, J.P. Morgan (S.E.A.) Limited, Morgan Stanley Asia (Singapore) Pte and UBS AG, acting through its business division, UBS Investment Bank), pursuant to which Ixora has agreed to subscribe for up to 33.3 per cent. of the Rights Issue to the extent that such Rights Shares are not validly subscribed for under the Rights Issue less the number of *Pro Rata* Shares which Temasek and Maju would have subscribed for under the Rights Issue. This is the largest ever Singapore capital markets transaction.

Allen & Gledhill LLP are advising each of DBS and Temasek. The team comprising Partners Prawiro Widjaja, Bin Wern Sern, Senior Associates Howe Pin Yit, Bernie Lee and Associates Tan Se Lene, Rachel Koh and Tabitha Saw is advising DBS. The team comprising Partners Lim Mei and Lee Kee Yeng is advising Temasek.

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First Islamic Trust Certificate Issuance Programme established by a statutory board in Singapore

The Monetary Authority of Singapore ("**MAS**") has established through its subsidiary, Singapore Sukuk Pte Ltd, a S$200 million Islamic Trust Certificate ("**Sukuk**") Issuance Programme with the aim of facilitating and promoting Islamic banking and finance. This is a ground-breaking transaction in many respects. It is the first reverse inquiry *Ijara* based Sukuk from such a high quality issuer in the world. It is also the first Sukuk programme to be established by a statutory board in Singapore and the first local currency Sukuk to be established by a central bank of a non-Muslim majority jurisdiction. The joint arrangers of the Sukuk programme are Standard Chartered Bank and The Islamic Bank of Asia and the co-trustee is The Bank of New York Mellon.

Allen & Gledhill LLP advised the joint arrangers and the co-trustee. The team comprising Partners Yeo Wico, Eugene Ooi, Lim Teong Sit, Andrew Chan, Lyn Wee, Chew Mei Choo, Sunit Chabbra, Tang Siau Yan, Glenn Foo, Magdalene Leong, Senior Associates Serena Choo, Suhaimi Zainul-Abidin, Ong Kangxin and Associates Yu Hanwen and Delphie Ann-Gomez advised the joint arrangers. The team comprising Au Huey Ling and Lam See Wai advised the co-trustee.

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Acquisition of ProLogis' property fund interests in Japan and China operations

Reco China Logistics Pte Ltd ("**RCL**"), through its affiliates, is acquiring ProLogis' property fund interests in Japan and China for a total cash consideration of US$1.3 billion.

Advising RCL, an affiliate of the Government of Singapore Investment Corporation (Realty) Pte Ltd are Allen & Gledhill LLP Partners Richard Young, Andrew Chan, Daena Goh, Tang Siau Yan and Christian Chin, Senior Associates Sonita Jeyapathy, Chua Pei Hui and Alexander Yap and Associates Jennifer Lee and Danielle Wu.

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Appointment of Ang Cheng Hock as Senior Counsel

We are pleased to announce that our Litigation & Dispute Resolution Partner, Ang Cheng Hock, has been appointed as Senior Counsel on 3 January 2009 at the opening of the legal year. The appointment of Senior Counsel is given to those with outstanding ability as advocates, extensive knowledge of law and high professional standing. Cheng Hock's areas of practice include corporate litigation, such as shareholders' disputes and breaches of directors' duties, securities-related litigation and banking litigation. He also advises on claims in defamation and professional negligence. Cheng Hock graduated with a First Class Honours from the National University of Singapore and has a Masters in Law from Yale Law School. He has been recommended in various international legal publications for his expertise in commercial litigation and dispute resolution.

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New Partners

Allen & Gledhill LLP is pleased to announce the appointment of 13 new Partners with effect from 1 January 2009. To view the announcement, please **click here**.

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New Partner in Roosdiono & Partners

Allen & Gledhill LLP is pleased to announce the admission of Dini Shanti Purwono as Partner of Roosdiono & Partners, Jakarta, Indonesia, with effect from 1 January 2009. Roosdiono & Partners is a member of the Allen & Gledhill Zaid Ibrahim alliance. Dini specialises in capital markets and securities transactions, advising on initial public offerings, dual-listings, private placements, rights issues, venture capital and private equity issues. She also advises on foreign and domestic M&A transactions, financial institutions and banks in loan restructurings, the establishment and restructuring of foreign capital investment companies, and the sale of strategic stakes of public and private companies to foreign investors. More information on Roosdiono & Partners may be found on its website **roosdionolawfirm.co.id**

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Allen & Gledhill
ADVOCATES & SOLICITORS

Contact Partners

Managing Partner	Lucien Wong	6890 7702	lucien.wong@allenandgledhill.com
Corporate & Commercial	Christine Chan	6890 7647	christine.chan@allenandgledhill.com
	Daena Goh	6890 7587	daena.goh@allenandgledhill.com
	Lee Kim Shin	6890 7699	lee.kimshin@allenandgledhill.com
	Sophie Lim	6890 7696	sophie.lim@allenandgledhill.com
	Vemala Rajamanickam	6890 7645	vemala.raja@allenandgledhill.com
	Patricia Seet	6890 7650	patricia.seet@allenandgledhill.com
	Daren Shiau	6890 7612	daren.shiau@allenandgledhill.com
	Tan Wee Meng	6890 7518	tan.weemeng@allenandgledhill.com
	Melissa Anne Teo	6890 7608	melissaanne.teo@allenandgledhill.com
	Tham Kok Leong	6890 7526	tham.kokleong@allenandgledhill.com
	Jean Wan	6890 7681	jean.wan@allenandgledhill.com
	Kelvin Wong	6890 7644	kelvin.wong@allenandgledhill.com
	Yap Lune Teng	6890 7665	yap.luneteng@allenandgledhill.com
Corporate Mergers & Acquisitions	Christian Chin	6890 7616	christian.chin@allenandgledhill.com
	Sharmini Chitran	6890 7600	sharmini.chitran@allenandgledhill.com
	Michele Foo	6890 7614	michele.foo@allenandgledhill.com
	Christopher Koh	6890 7768	christopher.koh@allenandgledhill.com
	Lee Kee Yeng	6890 7783	lee.keeyeng@allenandgledhill.com
	Andrew M. Lim	6890 7706	andrew.lim@allenandgledhill.com
	Lim Chong Ying	6890 7633	lim.chongying@allenandgledhill.com
	Lim Mei	6890 7732	lim.mei@allenandgledhill.com
	Lim Teong Sit	6890 7787	lim.teongsit@allenandgledhill.com
	Hilary Low	6890 7739	hilary.low@allenandgledhill.com
	Steven Lo	6890 7756	steven.lo@allenandgledhill.com
	Pauline Ng	6890 7641	pauline.ng@allenandgledhill.com
	Oh Hsiu Hau	6890 7637	oh.hsiuhau@allenandgledhill.com
	Christopher Ong	6890 7728	christopher.ong@allenandgledhill.com
	Regina See	6890 7682	regina.see@allenandgledhill.com
	Steven Seow	6890 7610	steven.seow@allenandgledhill.com
	Song Su-Min	6890 7667	song.sumin@allenandgledhill.com
	Tan Su May	6890 7606	tan.sumay@allenandgledhill.com
	Prawiro Widjaja	6890 7717	prawiro@allenandgledhill.com
	Richard Young	6890 7635	richard.young@allenandgledhill.com
Corporate Real Estate	Chew Mei Choo	6890 7961	chew.meichoo@allenandgledhill.com
	Fock Kah Yan	6890 7926	fock.kahyan@allenandgledhill.com
	Penny Goh	6890 7901	penny.goh@allenandgledhill.com
	Ho Kin San	6890 7928	ho.kinsan@allenandgledhill.com
	Hoo Sheau Farn	6890 7941	hoo.sheaufarn@allenandgledhill.com
	Margaret Soh	6890 7912	margaret.soh@allenandgledhill.com
	Eudora Tan	6890 7971	eudora.tan@allenandgledhill.com
	Tan Boon Wah	6890 7916	tan.boonwah@allenandgledhill.com
	Tan Yah Piang	6890 7921	tan.yahpiang@allenandgledhill.com
	Wendy Tan	6890 7931	wendy.tan@allenandgledhill.com
	Ernest Teo	6890 7967	ernest.teo@allenandgledhill.com
	Lyn Wee	6890 7919	lyn.wee@allenandgledhill.com
Financial Services	Au Huey Ling	6890 7749	au.hueyling@allenandgledhill.com
	Bin Wern Sern	6890 7624	bin.wernsern@allenandgledhill.com
	Cara Chan	6890 7736	cara.chan@allenandgledhill.com
	Shawn Chen	6890 7896	shawn.chen@allenandgledhill.com
	Sunit Chhabra	6890 7735	sunit.chhabra@allenandgledhill.com
	Margaret Chin	6890 7718	margaret.chin@allenandgledhill.com
	Leonard Ching	6890 7730	leonard.ching@allenandgledhill.com
	Chua Bor Jern	6890 7772	chua.borjern@allenandgledhill.com
	Glenn David Foo	6890 7417	glenn.foo@allenandgledhill.com
	Foong Yuen Ping	6890 7622	foong.yuenping@allenandgledhill.com
	Nand Singh Gandhi	6890 7838	nand.gandhi@allenandgledhill.com
	Rhys Goh	6890 7106	rhys.goh@allenandgledhill.com
	Mark Hudspeth	6890 7722	mark.hudspeth@allenandgledhill.com
	Jerry Koh	6890 7770	jerry.koh@allenandgledhill.com
	Kok Chee Wai	6890 7724	kok.cheewai@allenandgledhill.com
	Gina Lee-Wan	6890 7582	gina.leewan@allenandgledhill.com
	Magdalene Leong	6890 7416	magdalene.leong@allenandgledhill.com
	Lim Pek Bur	6890 7096	lim.pekbur@allenandgledhill.com
	Lim Wei Ting	6890 7102	lim.weiting@allenandgledhill.com

Financial Services	Long Jek Aun	6890 7714	long.jekaun@allenandgledhill.com
	Francis Mok	6890 7786	francis.mok@allenandgledhill.com
	Jafe Ng	6890 7731	jafe.ng@allenandgledhill.com
	Christina Ong	6890 7700	christina.ong@allenandgledhill.com
	Eugene Ooi	6890 7708	eugene.ooi@allenandgledhill.com
	Harold Or	6890 7566	harold.or@allenandgledhill.com
	Julie Sim	6890 7748	julie.sim@allenandgledhill.com
	Danny Tan	6890 7738	danny.tan@allenandgledhill.com
	Tan Sai Hong	6890 7788	tan.saihong@allenandgledhill.com
	Tan Tze Gay	6890 7712	tan.tzegay@allenandgledhill.com
	Ellis Tang	6890 7083	ellis.tang@allenandgledhill.com
	Tang Siau Yan	6890 7799	tang.siauyan@allenandgledhill.com
	Vincent Teh	6890 7834	vincent.teh@allenandgledhill.com
	Sarah Teo	6890 7743	sarah.teo@allenandgledhill.com
	Karen Tiah	6890 7741	karen.tiah@allenandgledhill.com
	Sharon Wee	6890 7089	sharon.wee@allenandgledhill.com
	Lucien Wong	6890 7702	lucien.wong@allenandgledhill.com
	Wong Sook Ping	6890 7794	wong.sookping@allenandgledhill.com
	Yeo Wico	6890 7775	yeo.wico@allenandgledhill.com
Intellectual Property & Technology	Stanley Lai	6890 7883	stanley.lai@allenandgledhill.com
	Low Pei Lin	6890 7516	low.peilin@allenandgledhill.com
	Moi Sok Ling	6890 7538	moi.sokling@allenandgledhill.com
	Isaac Tung	6890 7522	isaac.tung@allenandgledhill.com
Litigation & Dispute Resolution	Ang Cheng Hock, SC	6890 7832	ang.chenghock@allenandgledhill.com
	Vivian Ang	6890 7564	vivian.ang@allenandgledhill.com
	Andrew Chan	6890 7556	andrew.chan@allenandgledhill.com
	Chan Hian Young	6890 7813	chan.hianyoung@allenandgledhill.com
	Dinesh Dhillon	6890 7822	dinesh.dhillon@allenandgledhill.com
	Ho Chien Mien	6890 7502	ho.chienmien@allenandgledhill.com
	Desmond Ho	6890 7554	desmond.ho@allenandgledhill.com
	Ashok Kumar	6890 7873	ashok.kumar@allenandgledhill.com
	Aaron Lee	6890 7852	aaron.lee@allenandgledhill.com
	Bernice Loo	6890 7868	bernice.loo@allenandgledhill.com
	Loong Tse Chuan	6890 7836	loong.tsechuan@allenandgledhill.com
	Mak Wei Munn	6890 7885	mak.weimunn@allenandgledhill.com
	Suresh Sukumaran Nair	6890 7897	suresh.nair@allenandgledhill.com
	William Ong	6890 7894	william.ong@allenandgledhill.com
	Kenneth Pereira	6890 7815	kenneth@allenandgledhill.com
	Ronnie Quek	6890 7639	ronnie.quek@allenandgledhill.com
	Sanjiv Rajan	6890 7800	sanjiv.rajan@allenandgledhill.com
	J. Sathia	6890 7886	sathia@allenandgledhill.com
	Corina Song	6890 7570	corina.song@allenandgledhill.com
	Tham Hsu Hsien	6890 7820	tham.hsuhsien@allenandgledhill.com
	Eugene Thuraisingam	6890 7824	eugene.thuraisingam@allenandgledhill.com
	Edward Tiong	6890 7887	edward.tiong@allenandgledhill.com
	Edwin Tong	6890 7867	edwin.tong@allenandgledhill.com
	Leona Wong	6890 7849	leona.wong@allenandgledhill.com
	Kenny Yap	6890 7572	kenny.yap@allenandgledhill.com
	Yap Yin Soon	6890 7598	yap.yinsoon@allenandgledhill.com
	Andrew Yeo	6890 7850	andrew.yeo@allenandgledhill.com
	Andy Yeo	6890 7833	andy.yeo@allenandgledhill.com
Knowledge Management	Margaret Chew	6890 7500	margaret.chew@allenandgledhill.com

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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