

Legal Bulletin

A summary of developments in the law

At a glance

MOM revises obligations of employers of foreign workers: Higher insurance cover for medical costs, change in security bond conditions from 1 January 2010	4
MOF announces extension of Jobs Credit Scheme for six months	5
Parliament passes Income Tax (Amendment) (Exchange of Information) Bill 2009: Changes to implement international standard for exchange of information	6
Parliament passes International Arbitration (Amendment) Bill 2009: Provisions on curial support of arbitration proceedings	7
Parliament passes Quorums of Statutory Boards (Miscellaneous Amendments) Bill 2009: Revising quorum for board meetings of statutory boards	9
MND launches consultation paper on new regulatory framework for real estate industry	10
Singapore Court of Appeal expounds on meaning of conditional delivery of a cheque under section 21(3)(b) of Bills of Exchange Act	14
Singapore High Court orders defendants to buy out plaintiff's shares as remedy for oppressive, unfair and discriminatory conduct	18
Singapore Court of Appeal clarifies applicable law when SIAC Rules adopted	20
Singapore High Court grants taxpayer leave to apply for order to quash decision of Comptroller of Income Tax that withholding tax is applicable to swap payments made by taxpayer to its overseas subsidiaries	23
Allen & Gledhill Banking Litigation Master Class Series	27
Allen & Gledhill International Arbitration Master Class	27

[Click here for Table of Contents](#)

In this issue

Articles

- MOM revises obligations of employers of foreign workers: Higher insurance cover for medical costs, change in security bond conditions from 1 January 2010 4
- MOF announces extension of Jobs Credit Scheme for six months 5
- Parliament passes Income Tax (Amendment) (Exchange of Information) Bill 2009: Changes to implement international standard for exchange of information 6
- Parliament passes International Arbitration (Amendment) Bill 2009: Provisions on curial support of arbitration proceedings 7
- Parliament passes Quorums of Statutory Boards (Miscellaneous Amendments) Bill 2009: Revising quorum for board meetings of statutory boards 9
- MND launches consultation paper on new regulatory framework for real estate industry 10
- Parliament introduces Medical Registration (Amendment) Bill 2009: Changes in disciplinary matters 11
- Casino Control (Amendment) Bill 2009 commences operation: Changes affecting casino tax and persons excluded from casinos 12

Editorial Team

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

The contents of the Legal Bulletin are intended to provide general information. Although we endeavour to ensure that the information contained herein is accurate, we do not warrant its accuracy or completeness or accept any liability for any loss or damage arising from any reliance thereon. The information in this Legal Bulletin should not be treated as a substitute for specific legal advice concerning particular situations. If you would like to discuss the implications of these legal developments on your business or obtain advice, please do not hesitate to approach your usual contact at Allen & Gledhill LLP or the editors of the Legal Bulletin, **Margaret Chew (+65 6890 7500 or margaret.chew@allenandgledhill.com)** and **Elizabeth Wong (+65 6890 7559 or elizabeth.wong@allenandgledhill.com)**.

Cases

Banking

- Singapore Court of Appeal expounds on meaning of conditional delivery of a cheque under section 21(3)(b) of Bills of Exchange Act 14

Corporate & financial services

- Singapore High Court grants leave for action on behalf of company under section 216A of Companies Act 16
- Singapore High Court orders defendants to buy out plaintiff's shares as remedy for oppressive, unfair and discriminatory conduct 18

Dispute resolution

- Singapore Court of Appeal clarifies applicable law when SIAC Rules adopted 20

Real estate

- Singapore Court of Appeal allows owner of servient tenement to unilaterally re-align road over which dominant tenement has right of way 21

General

Tax

Singapore High Court grants taxpayer leave to apply for order to quash decision of Comptroller of Income Tax that withholding tax is applicable to swap payments made by taxpayer to its overseas subsidiaries 23

News

K-REIT Asia's one-for-one rights issue	26
Acquisition of a substantial stake in Noble Group Limited by China Investment Corp	26
SMRT Capital Pte Ltd establishes S\$1 billion multicurrency guaranteed medium term note programme	26
Establishment of Ascott REIT MTN Pte Ltd S\$1 billion multicurrency medium term note programme	27
Allen & Gledhill Banking Litigation Master Class Series	27
Allen & Gledhill International Arbitration Master Class	27

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

Articles

MOM revises obligations of employers of foreign workers: Higher insurance cover for medical costs, change in security bond conditions from 1 January 2010

On 25 September 2009, the Ministry of Manpower (the “**MOM**”) issued a press release disclosing that it has reviewed the obligations placed on employers of foreign workers and that changes to the medical insurance and security bond requirements will be made.

Increased coverage for medical costs

Employers are responsible for the cost of medical care of their foreign workers. Currently, employers are required to purchase and maintain medical insurance with a minimum coverage of S\$5,000 for S Pass and Work Permit holders employed by them.

In order to help reduce an employer’s exposure to large hospital bills, the MOM will increase the minimum insurance coverage from S\$5,000 a year to S\$15,000 a year. The new requirement will apply to new insurance policies taken up on or after 1 January 2010, or upon renewal of current insurance policies on or after 1 January 2010.

Change in security bond conditions

All employers of non-Malaysian Work Permit holders are required to furnish a S\$5,000 security bond. The MOM has reviewed the security bond conditions and they will be amended as follows:

- A new security bond condition will be introduced to require employers to pay their foreign workers’ salaries promptly. This change addresses the issue of salary arrears faced by foreign workers;
- Where the foreign worker absconds, the MOM will forfeit only half of the security bond (S\$2,500), instead of the entire bond of S\$5,000, provided the employer has made reasonable efforts to locate the worker; and
- Employers will not be liable under the security bond if the worker himself/herself violates their obligations under the work permit conditions (such as those relating to marriage with a resident or pregnancy). Employers will only be required to: (i) inform the foreign workers that they are required to comply with the Work Permit conditions; and (ii) report to the relevant authorities if they are aware that their foreign workers are not complying with Work Permit conditions. Previously, employers could lose the security deposit if his foreign worker breached the Work Permit conditions despite the employer’s efforts to manage the worker’s behaviour.

The revised security bond conditions can be found in Annex A.

The key security bond conditions slated for removal can be found in Annex B.

The new security bond conditions will apply to non-Malaysian foreign workers who have been issued with work permits on or after 1 January 2010, or are renewing work permits on or after 1 January 2010.

For further information, please contact:

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

Sophie Lim
Tel: +65 6890 7696
sophie.lim@allenandgledhill.com

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

Reference materials

Please click on the provided links to access the required information, which are posted on the MOM website www.mom.gov.sg:

- [MOM press release](#)
- [Annex A - Revised security bond conditions for employers of non-Malaysian work permit holders](#)
- [Annex B - Key security bond conditions that will be removed](#)

[Back to Contents Page](#)

MOF announces extension of Jobs Credit Scheme for six months

On 13 October 2009, the Ministry of Finance (the “**MOF**”) issued a press release stating that Prime Minister Lee Hsien Loong had announced a six-month extension to the Jobs Credit Scheme (the “**JCS**”).

In light of the global economic crisis, the JCS was introduced in the Singapore Budget 2009 to encourage business to preserve jobs in the downturn. Under the scheme, businesses receive a cash grant based on the Central Provident Fund (“**CPF**”) contributions they have made for their existing employees. The aim of the JCS was to provide a significant incentive for businesses to retain existing workers and, where their business warranted, to employ new ones.

The JCS has helped to ease companies’ operating costs and avoid mass lay-offs of workers in the crisis. Prime Minister Lee explained that, with the economy now having been stabilised, it was time to phase out the JCS and to adopt more targeted measures to support economic restructuring and enhance productivity. The Singapore Budget 2010 will introduce and enhance programmes to support companies’ efforts to grow, innovate and compete based on improved productivity.

Currently, all active employers are to receive a 12 per cent. cash grant on the first S\$2,500 of each month’s wages for each employee on their CPF payroll. The credit was originally to apply for one year and to be paid in four instalments in March, June, September and December 2009.

Under the six month extension, two additional payments will now be made in 2010 as follows:

- March 2010 : 6 per cent. of salary of employees on the payroll in January 2010; and
- June 2010 : 3 per cent. of salary of employees on the payroll in April 2010.

All other eligibility criteria remain the same, i.e. the payments will apply to the first S\$2,500 of salary of employees on the employers’ CPF payroll at the stated times.

Although this year’s JCS is funded from past reserves with the President’s consent, the Government has decided to fund the 2010 payments from the regular budget because the global economic outlook is no longer so grave.

For further information, please contact:

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

Sophie Lim
Tel: +65 6890 7696
sophie.lim@allenandgledhill.com

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

Reference material

Please [click here](#) to read the press release issued by the MOF. The press release is posted on the MOF website www.mof.gov.sg

[Back to Contents Page](#)

Parliament passes Income Tax (Amendment) (Exchange of Information) Bill 2009: Changes to implement international standard for exchange of information

The Income Tax (Amendment) (Exchange of Information) Bill 2009 (the “**Bill**”) was passed in Parliament on 19 October 2009.

Implementation of international standard for the exchange of information for tax purposes

Introduced in Parliament on 14 September 2009, the Bill will make changes to the Income Tax Act to enable the implementation of an international standard for the exchange of information for tax purposes (the “**Standard**”) developed by the Organisation for Economic Co-operation and Development.

The Standard gained recognition as being internationally agreed when the United Nations Committee of Experts on International Co-operation in Tax Matters endorsed it in October 2008. Following the UN Committee’s move, Singapore endorsed the Standard in March this year.

Scope of new legislation

The new legislation introduced by the Bill will enable the Inland Revenue Authority of Singapore (the “**IRAS**”) to obtain information from persons in Singapore to satisfy a request for information made by a foreign tax authority, including information that is protected from unauthorised disclosure under the Banking Act and the Trust Companies Act. The new legislation will only apply to requests made by a foreign tax authority under a double taxation agreement that has been prescribed by the Minister for Finance for the purpose of exchange of information.

Safeguards to protect taxpayers’ rights

In the Second Reading Speech, Minister for Finance, Mr Tharman Shanmugaratnam (the “**Minister**”) highlighted that the Bill contains important safeguards to protect taxpayers’ rights. Requests for information are required to be specific, detailed and relevant to the tax affairs of a given taxpayer. The IRAS will not accede to spurious or frivolous requests for information, nor “fishing expeditions”.

Jurisdictions may not take advantage of the information system of another jurisdiction if it is wider than their own system. Hence, the IRAS will only exchange information that a requesting jurisdiction would have ordinarily been able to obtain under its own laws or administrative practices, had the information resided in that jurisdiction in the first place. Jurisdictions must also have pursued all domestic means to access the requested information before putting forth a request for information.

For further information, please contact:

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

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

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

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

Clear limits will be set on the types of information that jurisdictions are obliged to exchange. Jurisdictions are not obliged to exchange trade or business secrets, or information that is subject to legal privilege. They may also decline to exchange certain information if doing so would be contrary to public policy. Some examples of such information include state secrets or information sought for the purposes of political, religious or racial persecution. However, the Minister stressed that these are serious grounds of refusal which would not be invoked under normal circumstances.

Reference materials

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

Please [click here](#) for the Second Reading Speech delivered in Parliament by Minister for Finance, Mr Tharman Shanmugaratnam, which is posted on the Ministry of Finance website www.mof.gov.sg

[Back to Contents Page](#)

Parliament passes International Arbitration (Amendment) Bill 2009: Provisions on curial support of arbitration proceedings

On 19 October 2009, the International Arbitration (Amendment) Bill 2009 (the “**Bill**”) was passed in Parliament.

In his speech before Parliament, the Minister for Law K Shanmugam (the “**Minister**”) noted that the amendments incorporated in the Bill are intended to keep the International Arbitration Act (the “**IAA**”) modern, effective and arbitration-friendly. He also noted that the amendments included in the Bill are the result of a consultation process involving both local and foreign industry experts. The current IAA incorporates the United Nations Commission on International Trade Law of 1985, commonly referred to as the UNCITRAL Model Law. The Bill takes into consideration the amendments made to the UNCITRAL Model Law in 2006 and introduces three main amendments:

- (a) Allowing court-ordered interim measures in support of foreign arbitrations.
- (b) Expanding the current definition of an arbitration agreement.
- (c) Creating an entity to authenticate “made in Singapore” awards.

Each of these amendments is briefly discussed below.

Court-ordered interim measures

The Minister referred to the decision of the Singapore Court of Appeal in *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR 629 where the court held that the IAA only allowed the Singapore courts to grant interim orders to support arbitrations conducted in Singapore and that similar orders cannot be granted for foreign arbitrations. The Bill addresses this issue in allowing the Singapore courts to grant such interim measures in respect of foreign arbitrations in addition to the existing power regarding those held in Singapore. Clause 4 of the Bill introduces a new section 12A to enable the High Court to grant interim orders in aid of arbitrations held outside

Singapore in certain circumstances, in line with the new Article 17J of the Model Law on International Commercial Arbitration which was inserted by UNCITRAL in 2006.

It should be noted that there are limitations imposed on this new power, with the Minister stating that its scope is limited to interim measures in support of arbitration and does not extend to procedural or evidential matters dealing with the actual conduct of the arbitration itself (such as, discovery).

In line with the established Singapore position of limited curial intervention in arbitration proceedings, the court can only exercise their new powers when the arbitral tribunal has no power to act or is unable to act effectively for the time being. However, if the case before it is urgent, the new section 12A empowers the High Court to make such orders as it thinks necessary for the purpose of preserving evidence or assets.

Definition of an arbitration agreement

Clause 8 of the Bill makes related amendments to section 2(1) of the IAA to redefine the term “arbitration agreement” to clarify that an arbitration agreement can be made by electronic communications and to introduce definitions of “data messages” and “electronic communications”. The definition of “arbitration agreement” used in Part III of the IAA is not affected. Part III of the IAA deals with the enforcement of foreign awards, via an international treaty, the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (the “**New York Convention**”).

Authentication of “made in Singapore” awards

Clause 5 of the Bill introduces a new section 19C into the IAA which empowers the Minister to appoint any person holding office in an arbitral institution or other organisation to authenticate any award or arbitration agreement or to certify copies thereof for the purposes of the enforcement of an award in a country which is contracting state to the New York Convention.

Currently, the New York Convention requires a party seeking to enforce an arbitral award outside Singapore to tender before the foreign court an authenticated original award and the original arbitration agreement (or duly certified copies thereof). This can cause difficulties in enforcing Singaporean arbitration awards overseas as there is no public body that authenticates awards made in Singapore. The Bill seeks to change this with the new section 19C. The authentication process will not be mandatory and does not prevent the authentication of an award or agreement in another manner.

The Bill also deletes section 32 of the IAA. This deletion will obviate the need for the Minister to gazette States that are party to the New York Convention or to certify that a State is a Convention country. This was deemed as unnecessary as the list of New York Convention countries is now available on the official UNCITRAL website.

Reference materials

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

Please [click here](#) for the Second Reading Speech delivered in Parliament by the Minister, which is posted on the Ministry of Law website www.minlaw.gov.sg

[Back to Contents Page](#)

For further information, please contact:

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

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

Parliament passes Quorums of Statutory Boards (Miscellaneous Amendments) Bill 2009: Revising quorum for board meetings of statutory boards

Passed in Parliament on 19 October 2009, the Quorums of Statutory Boards (Miscellaneous Amendments) Bill 2009 (the “**Bill**”) will revise the quorum for board meetings stipulated in the Acts of 16 statutory boards, and in so doing, institute a formal quorum requirement for these statutory boards.

Background

In the Second Reading Speech, Minister for Finance, Mr Tharman Shanmugaratnam explained that the amendments are part of the continual effort to review and where necessary enhance governance structures and processes across the Public Service. This move comes about following the recommendation of the Auditor-General’s Office (the “**AGO**”) that the Ministry of Finance (the “**MOF**”) prescribe the quorum for board meetings that statutory boards should specify in their Acts.

Minimum quorum requirement: One-third of total number of members or three members, whichever is higher

The MOF has decided to set a quorum requirement of “one-third of the total number of members or three members, whichever is the higher” for the board meetings of all statutory boards. The aim of this quorum requirement is to ensure that Board decisions are not dominated by a very small number of individuals, but are not so onerous as to hinder the effective functioning of the statutory boards. As the new provision is a minimum requirement, those statutory boards with more stringent quorum requirements may retain their existing provisions.

Most statutory boards already comply with this new quorum requirement. Hence, the Bill will only amend the statutes of 16 statutory boards to implement this new requirement. These statutes are:

- Agency for Science, Technology and Research Act
- Building and Construction Authority Act
- Casino Control Act
- Civil Service College Act
- Defence Science and Technology Agency Act
- Economic Development Board Act
- Institute of Southeast Asian Studies
- Land Transport Authority of Singapore Act
- Maritime and Port Authority of Singapore Act
- Media Development Authority of Singapore Act
- People’s Association Act
- Public Utilities Act

For further information, please contact:

Sophie Lim
Tel: +65 6890 7696
sophie.lim@allenandgledhill.com

Jean Wan
Tel: +65 6890 7681
jean.wan@allenandgledhill.com

- Singapore Corporation of Rehabilitative Enterprises Act
- Standards, Productivity and Innovation Board Act
- Singapore Workforce Development Agency
- Urban Redevelopment Authority Act

Reference materials

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

Please [click here](#) for the Second Reading Speech delivered in Parliament by Minister for Finance, Mr Tharman Shanmugaratnam, which is posted on the Ministry of Finance website www.mof.gov.sg

[Back to Contents Page](#)

MND launches consultation paper on new regulatory framework for real estate industry

On 12 October 2009, the Ministry of National Development (the “MND”) issued a press release announcing the start of a public consultation exercise on a new regulatory framework for the real estate industry. The consultation period runs from 13 October 2009 to 17 November 2009 and comprises part of the MND’s efforts to enhance the professionalism of the real estate industry, as well as to enable consumers to better safeguard their interests. The feedback received during this public consultation exercise will be taken into consideration for the formulation of the new regulatory framework.

The objectives of this review are to enable consumers to better safeguard their interests and to increase the professionalism of the real estate industry. A key principle underpinning the new regulatory framework is that real estate agencies must take greater responsibility for the actions of their agents and measures to facilitate this are included in the consultation paper. The MND, from 10 September 2009 to 1 October 2009, conducted extensive industry consultations with various stakeholders (including industry associations, real estate agency directors and Consumers Association of Singapore) who gave their support for such a regulatory framework.

Key proposed features under the new regulatory framework include:

- **Enhanced regulatory powers:** The government will continue to license all real estate agencies, in tandem with compulsory accreditation from a recognised accreditation body. A public central registry which will be maintained by the accreditation body is proposed whereby agencies may assess the background and profile of the agents they wish to hire. There may be changes in the relationship between agencies and their agents, e.g. that agents be allowed to represent one accredited agency. The government will be increasing the levels of monitoring and enforcement through an appropriate regulatory authority which will also work with the accreditation body to establish a disciplinary framework.
- **Industry-led accreditation:** Proposed features of the accreditation scheme include requirements for agencies to adopt minimum service standards and to provide compulsory continuous professional training, agents to take industry entrance examination and adhere to a code of

conduct. Measures are also proposed to safeguard consumers' interests, e.g. establishment of a public central registry listing all accredited agents allowing consumers to ascertain that the agent they are engaging is qualified, adoption of a standard contract between agents and clients, establishment of a complaints handling process by agencies, and requirements for professional indemnity insurance.

- **Improved dispute resolution:** Agencies will also have to take greater responsibility for resolving disputes with clients. In this regard, the government is working with the industry to explore setting up an independent tribunal specialising in the real estate industry. This tribunal can offer both mediation and binding adjudication.

Transition to new framework

Key elements of the new framework are expected to be announced in December 2009 and January 2010. Legislative enactments are expected by the second half of 2010. It is expected that transition to the new framework should take place within a year from the legislative enactments in 2010.

Reference materials

Please [click here](#) to view the press release issued by the MND on 12 October 2009.

Please [click here](#) for the full text of the consultation paper.

Both documents are available on the MND website www.mnd.gov.sg

[Back to Contents Page](#)

Parliament introduces Medical Registration (Amendment) Bill 2009: Changes in disciplinary matters

On 19 October 2009, the Medical Registration (Amendment) Bill 2009 (the "**Bill**") was introduced in Parliament. The introduction of the Bill follows a public consultation on a draft version of the Bill. The public consultation was jointly conducted by the Ministry of Health (the "**MOH**") and the Singapore Medical Council (the "**SMC**") from 14 January 2009 to 25 February 2009. The MOH has since issued a response to the feedback received.

The Bill will amend the Medical Registration Act (the "**Act**") to keep it 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.
- Establishing a Specialists Accreditation Board 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 due to a medical impairment to

For further information, please contact:

Ho Kin San
Tel: +65 6890 7928
ho.kinsan@allenandgledhill.com

Ernest Teo
Tel: +65 6890 7967
ernest.teo@allenandgledhill.com

his ability to practice. The SMC may also specify requirements and impose restrictions on provisionally registered persons, where this is necessary to safeguard the public.

- A doctor's name will be removed from a register if he has not renewed his practising certificate for a continuous period of two years (currently five years) and he cannot be contacted.
- A new "voluntary insight" mechanism will be introduced to facilitate negotiation and the taking of constructive remedial action, enabling the SMC to resolve certain matters by consent without the need to resort to formal disciplinary proceedings. A registered medical practitioner, who believes that his ability to practise is affected by his physical or mental health or other reasons, may ask the SMC to remove his name from any register, suspend his registration, impose appropriate conditions or restrictions on his registration, or suspend or cancel his practising certificate.
- 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, senior registered medical practitioner, 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.
- It may be a requirement to obtain professional indemnity insurance or cover for registered medical practitioners 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

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

[Back to Contents Page](#)

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

In October 2009, the Casino Control Act (the "Act") was amended. At the same time, a new set of regulations relating to anti-money laundering and countering of terrorism financing were issued by the Casino Regulatory Authority of Singapore (the "Authority"). Set out below is a summary of the developments.

Effective from 15 October 2009: New provisions relating to persons excluded from casinos

On 15 October 2009, the provisions in the Casino Control (Amendment) Act 2009 (the "Amendment Act") relating to exclusion orders and persons to be excluded from a casino came into effect. These provisions are intended to

address the issue of social safeguards on casino gambling. For instance, the Amendment Act sets out the categories of persons who are to be excluded from casinos as follows:

- (a) a person on social assistance funded by the government or a statutory body;
- (b) an undischarged bankrupt;
- (c) a person who voluntarily applies to the National Council on Problem Gambling to be excluded.

Further, there will be a simplified and shorter exclusion process so as to more efficiently and effectively protect those who are vulnerable to problem gambling.

Effective from 21 October 2009: New regulations relating to anti-money laundering and countering of terrorism financing

The Authority issued new regulations on the prevention of money laundering and countering of terrorism financing. The Casino Control (Prevention of Money Laundering and Terrorism Financing) Regulations 2009 came into operation on 21 October 2009. These regulations impose additional obligations on the casino operator to take steps to detect and prevent money laundering and financing of terrorism. Casino operators are required to consider matters relating to customer due diligence measures, proper record keeping, development and implementation of internal policies, procedures and controls, as well as training for employees.

Effective from 22 October 2009: New provisions relating to casino tax

On 22 October 2009, the provisions in the Amendment Act relating to casino tax came into effect. These provisions aim to align the administrative powers granted to the Inland Revenue Authority of Singapore under the Act with those granted under the Income Tax Act, the Goods and Services Tax Act and other tax statutes. The casino tax related amendments relate to various purposes including the following:

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

Background

As a matter of background, the Act was passed in Parliament on 14 February 2006. It was introduced on 16 January 2006 following a public

For further information, please contact:

Casino control

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

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

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

Tax

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

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

consultation in October/November 2005. However, none of the provisions of the Act were in force until 1 June 2006, when section 2 of the Act became effective. Section 2 provides for the interpretation of words and phrases used in the Act. The remaining provisions of the Act came into force in two tranches on 2 April 2008 and 1 July 2008.

The Amendment Act was introduced in Parliament on 8 August 2009 and passed on 15 September 2009.

[Back to Contents Page](#)

Cases

Banking

Singapore Court of Appeal expounds on meaning of conditional delivery of a cheque under section 21(3)(b) of Bills of Exchange Act

Yeow Chern Lean v Neo Kok Eng & Anor [2009] 3 SLR 1131

The Singapore Court of Appeal in *Yeow Chern Lean v Neo Kok Eng & Anor* explains that conditional delivery of a cheque for the purpose of section 21(3)(b) of the Bills of Exchange Act relates to conditions pertaining to the delivery of the cheque and not the use of its proceeds.

Neo Kok Eng (“**Neo**”) was the managing director and majority shareholder of the holding company of Chip Hup Hup Kee Construction Pte Ltd (the “**Company**”). Yeow Chern Lean (“**Yeow**”) was the general manager of the Company and Yeow took instructions from Lim Leong Huat (“**Lim**”), another general manager of the Company. Neo discovered that three personal cheques which he had handed over to Lim for the purposes of the Company had never been utilised for the benefit of the Company. Two of them were cashed by Yeow and the third one was handed over to a company owned by Lim as part payment for the construction of a house which was registered in Yeow’s name. All the three cheques were bearer cheques as the word “bearer” appearing on the cheques was not crossed out.

Neo commence an action in court against Yeow (“**Suit 136**”) based on conversion and, in the alternative, for moneys had and received, to recover the total proceeds of the three cheques. In addition, Neo sought a declaration that the sale proceeds of the house was held by Yeow on trust for Neo and Yeow in the proportion of their contributions towards the purchase price of the house.

The Company had also commenced a separate action against Yeow based on other causes of action and the action was heard together with Suit 136 by the High Court. The High Court held in favour of the Company and Neo in both actions and Yeow filed the present appeal against the High Court’s decisions. This case summary only discusses the issues pertaining to the merits of the High Court Judge’s decision on Suit 136.

Is Neo the proper party to bring the action to recover the proceeds of three cheques?

The Court of Appeal held that the primary issue with regard to the appeal concerning Suit 136 was whether Neo was the proper party to bring an

action for conversion, and alternatively, for moneys had and received, in respect of the three cheques.

To succeed in his claim in conversion, Neo had to establish that he had, at the time of the conversion, either actual possession of, or the immediate right to possess, the three cheques.

On the facts, the Court of Appeal held that Neo did not have the title or right to possess the three cheques at the time of the conversion. As Neo had argued that the cheques were made for the purpose of the Company and had therefore issued the cheques as loans to the Company, Neo had given up his immediate right to possession of the cheques after he had passed them over to Lim who received the cheques as the Company's agent. As an agent of the Company, Lim entered into a loan agreement with Neo on behalf of the Company. What Neo received in return for relinquishing his title to the cheques was a contractual right to recover the loan amount from the Company. Accordingly, the Company was the proper party to bring an action for conversion of the cheques. What Neo retained was the right to sue the Company for repayment of the loan.

To get around this problem, Neo's counsel argued that Neo had retained a right of possession to the cheques because the delivery of the cheques was conditional pursuant to section 21(3)(b) of the Bills of Exchange Act (the "**BEA**"). Section 21 of the BEA provides that a bill is incomplete and revocable, until delivery of the instrument in order to give effect thereto and it is further provided in section 21(3)(b) of the BEA that the delivery of a bill "*may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill*".

Relying on section 21(3)(b), Neo's counsel sought to argue that the delivery of the cheques was conditional on Lim using the cheque proceeds for the Company's benefit. He submitted that, because Lim had failed to do so, Neo still retained title and thus the right of possession to the cheques.

Elaborating on the effect of section 21(3)(b) of the BEA, the Court of Appeal held that this provision is only concerned with conditions pertaining to the *delivery* of the cheque and not the *use of its proceeds*. The delivery of a cheque is conditional only if the transferor intends its delivery to remain inchoate until a certain condition is satisfied or if the delivery was made for some purpose other than that of transferring the title to the cheque to the transferee and makes this intention clear to the transferee. Conditions specifying the manner in which the proceeds are to be used are different, for they do not relate to the delivery of the cheque. In fact, they presuppose good delivery for only if delivery was good and the cheque effective, could the proceeds be withdrawn in the first place to be used in the manner specified by the condition.

The Court of Appeal held that in this matter, Neo had imposed a condition on the use of the cheque proceeds and not on the delivery of the cheques. Neo could not succeed in arguing that the cheques should only be credited into an account of the Company only because this was inconsistent with the fact that the cheques were left as "bearer" cheques. By not crossing out the "bearer" status of the cheques, the court inferred that Neo had intended that the Company could endorse them over to whomsoever it deemed fit. The Court of Appeal concluded that Neo had contemplated at all times to pass property of the cheques to Lim as agent for the Company. Therefore, it was held that the Company had title to the cheques and was the proper party to commence the present claim in conversion.

After ruling that Neo's claim in conversion failed, the Court of Appeal held that Neo's alternative claim for moneys had and received had also failed as

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

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

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

the latter was contingent on Neo proving his claim in conversion. Neo's alternative claim in restitution (for moneys had and received) was premised on a "waiver of the tort" and the "waiver" was really an election to take a gain-based rather than loss-based award for the tort of conversion. Since Neo's claim for conversion was unsustainable, it followed that his claim for restitution of the tort also failed. The Court of Appeal further commented that as the cheques were issued as loans to the Company, if any loss was suffered, it was on the part of the Company, and not on Neo.

For the foregoing reasons, the Court of Appeal allowed Yeow's appeal on the merits of Suit 136.

[Back to Contents Page](#)

Corporate & financial services

Singapore High Court grants leave for action on behalf of company under section 216A of Companies Act

Law Chin Eng & Anor v Hiap Seng & Co Pte Ltd [2009] SGHC 223

In *Law Chin Eng & Anor v Hiap Seng & Co Pte Ltd*, the Singapore High Court was asked, pursuant to section 216A of the Companies Act (the "**Act**"), to grant leave to bring an action in the name of the company against three directors/shareholders of the company. The decision is instructive for the court's explanation of the requirements of section 216A, in particular, the requirement for the application to be brought in good faith.

Facts

The plaintiffs were directors/shareholders of Hiap Seng & Co Pte Ltd (the "**company**") as were the proposed defendants. All the parties were members of the same family and the company in question was a family business.

The plaintiffs sought a derivative action pursuant to the proposed defendants' alleged breach of their fiduciary duties to the company, owed in their capacity as directors of that company. The actions stated in support of the plaintiffs' application were plentiful and encompassed the following:

- (i) Fictitious transactions with a company called Hawker Enterprise Ltd ("**Hawker**") which included improperly providing monies to Hawker by the proposed defendants, without shareholder approval and for purposes not part of the ordinary business of the company. The details of this allegation include substantial misuse of the company's overdraft facility without the approval of the other directors or shareholders ever being sought. The transactions and payments involved were only discovered during an inspection of the accounts conducted three years after the events occurred. The second defendant subsequently admitted that Hawker was an entity used for the purposes of tax evasion.
- (ii) Irregular and/or unauthorised payments and/or withdrawals were made by the proposed defendants from the company's accounts. The amount of S\$487,405.99 was withdrawn and dispersed among the proposed defendants. Another S\$2 million of the company's monies was withdrawn by a proposed defendant and used to buy property which was subsequently sold. These payments/withdrawals were only discovered much later during an inspection of the company accounts.

- (iii) The proposed defendants generated fraudulent and/or fictitious transactions with a company called Drilbo World Trade Sdn Bhd, including obtaining forged signatures of a director of the company in order to so support such transactions. These fictitious transactions were thereafter included in the company's accounts to create the illusion of genuine commercial sales.
- (iv) The proposed defendants generated fictitious trades between the company and other companies - Manfield Company, incorporated in Hong Kong and Aichi & Co Pte Ltd. Directors of the latter company were relatives of the proposed defendants.
- (v) There were also allegations of numerous other improper and/or irregular transactions, acts and/or accounting of the company's assets carried out by the proposed defendants in the course of managing and/or operating the company's business or affairs.

The proposed defendants opposed the plaintiffs' application on the ground that the application was not made in good faith, the proposed action was not in the interests of the company and that winding up the company was an appropriate remedy to the grievances above. The first two grounds stated here directly challenge requirements set out in section 216A(3) of the Act.

Section 216A(3)(b): Good faith requirement

Section 216A(3)(b) of the Act requires the court to be satisfied that the application for leave to bring an action in the name of a company be brought in good faith.

The court noted here that it was clear that the parties had a decade long history of serious disagreements, culminating in a strong degree of distrust and personal hostility. The court went on to say, however, that such sentiments did not constitute bad faith. The purpose of a derivative action is to promote the interest of the company and therefore personal feelings, no matter how hostile, will not defeat the application if the application is in the interests of the company.

The court looked into the legislative history of the derivative action provisions in the Act, noting that they are modeled on the Canada Business Corporations Act. The court thought it would be useful to take into account how the Canadian courts had interpreted and applied the derivative action provisions in their law. In *Primex Investments Ltd v Northwest Sports Enterprises Ltd* [1996] 4 WWR 54, the British Columbia Supreme Court held that in a situation where an applicant for seeking a derivative action in the name of a company was acting out of self-interest, and that self-interest coincided with the interests of the company, the applicant's self-interest did not mean his application was made in bad faith.

Here, there was a history of hostility between the parties but the court did not think that the plaintiffs' application was motivated out of that hostility. The court noted that the company would no doubt benefit should the proposed action succeed.

Section 216A(3)(c): Interests of the company requirement

Section 216A(3)(c) of the Act requires that the court be satisfied that it appears to be *prima facie* in the interests of the company that the action be brought, prosecuted, defended or discontinued.

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

Loong Tse Chuan
Tel: +65 6890 7836
loong.tsechuan@allenandgledhill.com

William Ong
Tel: +65 6890 7894
william.ong@allenandgledhill.com

The court stated that a derivative action is in the interests of the company when it is prosecuted for the benefit of the company and that benefit is real - monetarily or otherwise. An applicant should, therefore, identify causes of action, set out the alleged breaches, *and* demonstrate that the company had sustained or may sustain real loss or damage as a result of these failures and that there is some prospect of obtaining relief or redress through the derivative action.

In considering whether this arm of section 216A had been satisfied, the court considered each and every complaint as set out by the plaintiffs and found that a majority would be in the interest of the company to pursue.

Alternative remedy of winding up the company

The proposed defendants did not state in their affidavits that they intended to wind up the company, nor did they state that winding up was an appropriate solution to the disputes between the parties. None of the parties asserted that the company was in deadlock or insolvent; nor did they depose that it had ceased to trade or that it may not be able to continue to trade. Therefore, the court found that the winding up of the company was not preferable to the prosecution of a derivative action in the present case.

Decision

The court granted leave to the plaintiffs to bring an action on behalf of the company against the proposed defendants on the complaints the court found were in the interests of the company to pursue.

[Back to Contents Page](#)

Singapore High Court orders defendants to buy out plaintiff's shares as remedy for oppressive, unfair and discriminatory conduct

Eng Gee Seng v Quek Choon Teck & Ors [2009] SGHC 205

In *Eng Gee Seng v Quek Choon Teck & Ors*, the Singapore High Court ordered the defendants to buy out the plaintiff's shares in the company they had formed together because they had acted in a manner which was unfairly discriminatory, oppressive and in total disregard of the plaintiff's rights as a shareholder.

The claim

The plaintiff and the first and second defendants (together the "**defendants**") formed a company ("**DA**") to establish and run a duck abattoir. As a minority shareholder in DA, the plaintiff brought a claim under section 216 of the Companies Act against the oppressive conduct of the defendants, who were together the majority shareholders of DA.

Background

DA was established in the early 1990s and the plaintiff argued that it had been incorporated with the mutual understanding that all three parties (i.e. the plaintiff and the defendants) were to:

- Have equal shareholding and ownership of DA;

- Have equal rights of management of DA;
- Have equal share in the revenue of DA, to be distributed by way of directors' fees, dividends and/or loans; and
- Pay the same slaughtering fees per duck irrespective of the number of ducks they sent to the abattoir.

The plaintiff claimed that, in breach of this understanding, he was removed as a director and excluded from the management of DA. Despite the fact that he was still contributing to the revenue of DA in the same manner following this removal, he received little or no directors' fees or dividends and a greatly reduced salary. Conversely, the defendants received company loans on favourable terms at low interest rates and large directors' fees and salaries, regardless of the fact that the directors' fees paid to the three parties had always been equal in the past. Furthermore, the fee structure changed so that the slaughtering fee was no longer a flat rate but one which disadvantaged the plaintiff.

Section 216 fairness test

The High Court emphasised the settled law that the test under section 216 is one of fairness. Whether conduct is fair or unfair will depend upon the facts in question. There are no specific criteria to follow and the courts have a wide jurisdiction to do what is just and equitable in the circumstances. The High Court stressed, however, that the principle of fairness must be applied judicially and be based upon rational principles. Such principles are found in the law of contract, as complemented by the principles of equity, and apply to reflect the fact that promises should be kept and agreements honoured.

The High Court therefore held that unfair conduct can be established by showing that:

- There are certain expectations between shareholders; and
- The conduct complained of is contrary to or has departed from such expectations to the extent that it has become unfair.

The courts may therefore look into shareholders' interests and expectations to determine if, and to what extent, the standards of fair dealing and conditions of fair play have been departed from.

Quasi-partnerships

The High Court further held that quasi-partnerships are formed based on mutual trust and confidence and, as such, their controllers ought to govern with a certain degree of integrity. The law therefore requires controllers of quasi-partnerships to demonstrate a higher level of governance than those of ordinary companies. In this case the High Court agreed with the plaintiff's contention that DA was a quasi-partnership.

Decision

The defendants submitted that they had "no case to answer" and therefore did not adduce any evidence to contradict that of the plaintiff.

The High Court was unable to find any good reason that justified the defendants removal of the plaintiff as a director. In removing him they had failed to act with the high standard of corporate governance expected of them as majority shareholders. Instead, they had acted unfairly and with a

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

Ang Cheng Hock SC
Tel: +65 6890 7832
ang.chenghock@allenandgledhill.com

This recent development was highlighted in the Allen & Gledhill Arbitration Alert of 13 October 2009. If you would like to be on our arbitration related electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

lack of probity. The substantive effect of the action taken following the plaintiff's removal was that the defendants were keeping DA's profits for their own benefit, whilst denying the plaintiff his fair share of the same. In the High Court's view, this was grossly inequitable to the plaintiff as an equal partner in DA and was in breach of the partners' mutual understanding that they would all share equally in DA's profits.

Order to purchase plaintiff's shares

The High Court ordered the defendants to purchase the plaintiff's shares in DA at a price determined by an independent valuer to be appointed by agreement between the plaintiff and the defendants. When determining the price, the valuer was to be instructed to ascertain a fair value as at the date of the judgment. He was also to include all sums paid by the defendants to themselves in directors' fees and salaries in excess of any directors' fees and salary paid to the plaintiff from the date of the plaintiff's removal as a director.

The successful plaintiff was represented by Allen & Gledhill LLP.

[Back to Contents Page](#)

Dispute resolution

Singapore Court of Appeal clarifies applicable law when SIAC Rules adopted

Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd [2009] SGCA 45

The Singapore Court of Appeal in *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2009] SGCA 45 recently clarified whether adopting the Singapore International Arbitration Centre (SIAC) Rules in an arbitration agreement meant that the parties intended to apply the International Arbitration Act ("IAA"). In addition, the court also dealt with the issue of whether pre-action interrogatories and/or discovery could be ordered in arbitration proceedings.

Facts

Navigator Investment Services Ltd ("**Navigator**") entered into a Distributorship Agreement with Acclaim Insurance Brokers Pte Ltd ("**Acclaim**"), whereby Acclaim was appointed as a distributor of Navigator's investment products. This agreement contained an arbitration clause providing that any arbitration would be resolved in accordance with the "Arbitration Rules of the [SIAC] for the time being in force". Subsequently, Acclaim sought pre-action discovery of certain documents, as well as pre-action interrogatories of certain information from Navigator, in order to assess whether it had a viable claim in conspiracy against Navigator and other individuals, and to determine who the conspirators were. Navigator in turn sought, *inter alia*, a declaration that Acclaim should arbitrate the dispute and the application for pre-action discovery and pre-action interrogatories. Navigator also later commenced arbitration proceedings seeking declarations to the same effect.

IAA to be used

As a starting point, the Court of Appeal referred to Rule 32 of the SIAC Rules 2007 which states that the "law of the arbitration shall be the [IAA]". In the

court's view, the reference to the SIAC Rules meant that the parties had agreed to the application of the IAA to their dispute.

Pre-action discovery allowed

The court rejected Navigator's application for a declaration that Acclaim should arbitrate the dispute and the application for pre-action discovery and pre-action interrogatories. As Acclaim's action was made in the context of multi-party proceedings, there appeared to be

“... no reason why the court's power to grant pre-action discovery or pre-action interrogatories should be curtailed, although this power will be exercised sparingly and only (we hasten to add) where valid reasons can be shown”.

In this connection, the court opined that pre-action discovery may be important in helping a party determine whether it has a viable cause of action against the other party to the arbitration agreement, or against a third party.

Facilitation of arbitration

The Court of Appeal was quick to add, however, that this did not mean that Acclaim's application for pre-action discovery and interrogatories would be granted - Acclaim still needed to satisfy the requisite thresholds in order for its application to succeed. In addition, it was noted that the approach of the courts was to facilitate and promote arbitration wherever possible between commercial parties. Any application (including an application for pre-action discovery and/or pre-action interrogatories) would be carefully scrutinised to ensure that the arbitration process was not being circumvented or otherwise undermined.

Comment

This decision demonstrates that whilst the policy of the Singapore courts is to promote arbitration whenever possible, this does not deter the courts from granting applications for pre-action discovery and interrogatories even if an arbitration agreement exists between the parties. However, as the Court of Appeal opined, the Singapore courts will scrutinise such applications carefully to ensure that the arbitration process is not being circumvented or undermined.

[Back to Contents Page](#)

Real estate

Singapore Court of Appeal allows owner of servient tenement to unilaterally re-align road over which dominant tenement has right of way

Yickvi Realty Pte Ltd v Pacific Rover Pte Ltd [2009] SGCA 44

In *Yickvi Realty Pte Ltd v Pacific Rover Pte Ltd* [2009] SGCA 44, the Singapore Court of Appeal took into account elements of public interest and allowed a land owner to unilaterally re-align a road despite the objections of another land owner who had a right of way over the road. The elements of public interest which the court took into account were scarcity of land and avoidance of litigation.

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

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

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

Facts

The appellant, Yickvi Realty Pte Ltd (“**Yickvi**”) and the respondents, Pacific Rover Pte Ltd (“**PR**”) were the owners of the dominant tenement (the “**Dominant Land**”) and the servient tenement (the “**Servient Land**”) respectively. A road (the “**original road**”) divided the Servient Land into two parts. As the owner of the Dominant Land, Yickvi was entitled to the enjoyment of a right of way over the original road. The road provided access to both the Dominant Land and the Servient Land from Newton Road. Yickvi’s subterranean service installations were located beneath the original road.

To maximise the plot ratio and the use of the Servient Land, PR proposed to realign the original road. Yickvi sought an injunction to restrain PR from realigning the original road.

Yickvi’s application rejected in High Court

Yickvi’s application was rejected in the High Court. The High Court held that Yickvi was not entitled to injunctive relief to prevent PR from realigning the original road as it was not right to deny PR the full use of the Servient Land just because of Yickvi’s right of way when an alternative route, which did not substantially affect the enjoyment of the right of way, was available. The High Court was of the view that Yickvi’s real concern was that the route of its right of way together with the location of its subterranean service installations should remain unaltered for convenience of maintenance and repair. This concern was met by PR’s agreement that Yickvi would be allowed reasonable access to maintain such subterranean services.

In arriving at its decision, the High Court relied on the English decision of *Greenwich Healthcare National Health Service Trust v London and Quadrant Housing Trust* [1998] 1 WLR 1749 (“**Greenwich**”).

Yickvi’s arguments before Court of Appeal

Yickvi argued that PR had no unilateral right to alter the route of Yickvi’s right of way, and that PR’s proposal to do so would amount to an actionable interference with the right of way for which Yickvi was entitled to an injunction.

Yickvi sought to distinguish *Greenwich* on the ground that it was decided primarily on the basis that there was a public interest in *Greenwich* in not preventing the realignment in order to facilitate the building of a hospital. Yickvi argued that there was no public interest element in the present case as the realignment was only for the convenience of PR even though Yickvi might not be inconvenienced.

Elements of public interest: Scarcity of land and avoidance of more litigation

The Court of Appeal disagreed with Yickvi’s argument that there was no element of public interest in the present case. In the court’s view, there were two elements of public interest in the present case.

Scarcity of land

The court explained that, because of the scarcity of land in Singapore, land should be allowed to be developed to its optimal potential as permitted by planning law and if the claimant suffers no injury or inconvenience as a result. In the present case, the competent authority had already given PR permission to realign the original road and, in the court’s view, it was not reasonable on the part of Yickvi to deny PR the opportunity to do so when it would not suffer inconvenience from the realignment of the original road.

Yickvi would continue to enjoy a right of way over the realigned road. In fact, Yickvi would stand to benefit from the realignment as it would be getting a right of way over a *new* road leading to Newton Road. Otherwise, Yickvi would have to incur more expenditure in having to redevelop the original road to cater to the needs of the occupiers of its new development that might arise from the substantially increased usage as a result of the new development on its plot.

Avoidance of more litigation

The second public interest element was the avoidance of more litigation over Yickvi's right to enjoy the right of way that might arise should the injunction be granted. The circumstances in which the right of way was granted to Yickvi's predecessors in title have changed dramatically since 1903 when it was first granted and this might affect the degree to which it could be enjoyed by the purchasers or occupiers of the apartments under construction by Yickvi. The right of way was granted *only* for the enjoyment of the occupiers of *one* residential house on the Servient Land. But, with the completion of Yickvi's development, at least 10 households (as compared with the original single household) would now be entitled to enjoy the right of way. This could constitute excessive use of the right of way not contemplated by the grant and might lead PR, by way of retaliation, to commence proceedings to restrain Yickvi and its purchasers and/or occupiers from such excessive use. Another consideration was that PR might be legally entitled to stop Yickvi from locating its subterranean service installations under the original road, unless Yickvi was given the right to do so by the relevant planning laws. At common law, a right of way over a road does not entitle the dominant tenant to use the road other than as a means of overland access. There was therefore a possibility that PR might be able to retaliate against Yickvi's obstructive actions, by seeking injunctive relief to restrain Yickvi.

For the above reasons, the Court of Appeal affirmed the decision of the judge in the High Court. The court also required PR to give an undertaking to Yickvi allowing the latter immediate access, whenever reasonably required, to maintain and repair the subterranean service installations running under the original road.

[Back to Contents Page](#)

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

Loong Tse Chuan
Tel: +65 6890 7836
loong.tsechuan@allenandgledhill.com

Edward Tiong
Tel: +65 6890 7887
edward.tiong@allenandgledhill.com

General

Tax

Singapore High Court grants taxpayer leave to apply for order to quash decision of Comptroller of Income Tax that withholding tax is applicable to swap payments made by taxpayer to its overseas subsidiaries

ACC v CIT [2009] SGHC 211

In *ACC v CIT*, the Singapore High Court granted leave to a taxpayer to seek a quashing order against the decision of the Comptroller of Income Tax (the "Comptroller") that withholding tax was applicable to swap payments made by the taxpayer to its overseas subsidiaries. In the course of its decision, the court held that there was an arguable case that the swap payments did not fall within the meaning of the words "interest ... or any other payment in

connection with any loan or indebtedness or with any arrangement, management, guarantee, or service relating to any loan or indebtedness” in section 12(6)(a) of the Income Tax Act (the “**ITA**”).

Facts

The taxpayer (the “**applicant**”) was a company incorporated in Singapore. The taxpayer and its subsidiaries were in the business of leasing certain machinery. Most of the subsidiaries were offshore special purpose companies (“**SPCs**”). Each SPC was used to own only one machine. Each SPC also entered into a separate loan agreement with one or more offshore banks to finance the purchase of its machine.

The leases entered into by the SPCs with lessees either came with a floating rate rent or a fixed rate rent. When the lease was at a fixed rate rent, the SPC would be exposed to interest rate fluctuations if the financing were at a floating rate since the rent was fixed while the interest payment fluctuated with the prevailing interest rate. In order to minimise its exposure, the SPC would hedge the interest rate exposure on its floating interest rate loan. This was done through an interest rate swap agreement whereby (a) the SPC would stream to the counterparty fixed rate periodic payments computed as a fixed percentage of a notional amount, and (b) in exchange the counterparty would pay to the SPC floating rate percentages of the same notional amount.

Ordinarily, each SPC would enter into interest swap arrangements directly with banks as counterparties. However, for administrative and costs reasons, the applicant and its subsidiaries came to an arrangement whereby the former would enter into interest rate swap agreements with Singapore banks or Singapore branches of foreign banks (the “**onshore banks**”) on behalf of the latter in order to hedge the latter’s exposure to floating interest rates (the “**Onshore Swaps Setup**”).

So that the benefit of the Onshore Swaps Setup would flow through to the respective SPCs, the applicant would enter into swap agreements with each relevant SPC mirroring those which the applicant entered into on such SPC’s behalf (the “**Offshore Swaps Agreements**”).

The Comptroller took the position that the payments made by the applicant to its subsidiaries pursuant to the Offshore Swaps Agreement (the “**swap payments**”) fell within the ambit of section 12(6) of the ITA and that the withholding tax requirements under section 45 of the ITA applied. As the applicant had not complied with the relevant withholding tax requirements with respect to the swap payments, the applicant was required to account to the Comptroller for the amount of tax which should have been withheld.

Decision

On the facts and the materials placed before the court, the High Court was of the view that there was an arguable case that the swap payments did not fall within the definition of “interest” and that it could not be said that the applicant *prima facie* had no arguable case.

The crux of the case turned on the construction of the deemed source provision in section 12(6)(a) of the ITA. The issue was whether the swap payments fell within the meaning of the words “interest ... or any other payment in connection with any loan or indebtedness or with any arrangement, management, guarantee, or service relating to any loan or indebtedness” in section 12(6)(a).

Whether swap payments were “interest”

In arriving at the view that there was an arguable case that the swap payments did not fall within the definition of “interest”, the court noted that neither party to a swap transaction makes any loan to the other so as to give rise to an obligation on the part of the other to pay interest. Rather, the quantum of the periodic payments each has to make to the other can only be arrived at in the same way that interest is computed, i.e. as the product of a principal amount, an applicable rate and a time period.

In theory, the effect of the swap arrangement was that the SPC would receive from its counterparty a stream of floating rate swap payments with which it would make its floating rate interest payments to the offshore bank. In practice, the fixed rate and floating rate swap amounts payable by the SPC and the counterparty to each other were set off against each other so that on each payment date, only the difference was paid.

Hence, the court was of the view that an interest rate swap agreement does not give rise to a payment of “interest” from one party to another as there is no underlying loan or indebtedness between the parties. Therefore, the swap payments were not interest paid in connection with any loan or indebtedness, but rather a swapping of anticipated cash flows. Neither did such interest payments appear to be in connection any arrangement, management, guarantee, or service relating to any loan or indebtedness.

Whether swap payments were “any other payment”

As to whether the swap payments could fall within the expression “any other payment”, the court adopted a plain reading of section 12(6)(a) and noted that for the swap payments to qualify as “any other payment”, they had to be made in connection with either “any loan or indebtedness”, or “with any arrangement, management, guarantee or service relating to any loan or indebtedness”.

Following from the court’s view that the swap payments did not arise from a loan or indebtedness but was a contractual swapping of cash flows, the court held that the payments were not made in connection with any loan or indebtedness but for the purpose of hedging risks. Neither did such payments appear to be connected to any “arrangement, management, guarantee or service relating to any loan or indebtedness”.

For these reasons, the court granted the applicant leave to seek a quashing order.

[Back to Contents Page](#)

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

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

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

News

K-REIT Asia's one-for-one rights issue

K-REIT Asia Management Limited, as manager of K-REIT Asia (the "**Manager**") has announced the proposed underwritten renounceable one-for-one rights issue of approximately 666.7 million new units in K-REIT Asia to raise gross proceeds of approximately S\$620 million. Keppel Corporation Limited and Keppel Land Limited have each provided an irrevocable undertaking to the Manager and BNP Paribas, Singapore Branch to subscribe for their and their respective wholly-owned subsidiaries' total provisional allotments of rights units, with BNP Paribas, Singapore Branch underwriting the remaining balance of the rights units.

Advising the Manager are Allen & Gledhill LLP Partners Jerry Koh and Chua Bor Jern, Senior Associates Long Pee Hua and Teh Hoe Yue and Associate Chong Ying Chiang.

[Back to Contents Page](#)

Acquisition of a substantial stake in Noble Group Limited by China Investment Corp

China Investment Corp ("**CIC**"), a Chinese sovereign wealth fund, has entered into agreements to acquire 573 million shares in Noble Group Limited ("**Noble Group**"). The shares to be acquired include 438 million new shares in the capital of Noble Group which are to be placed to CIC for an aggregate sum of approximately S\$925.8 million. The remaining 135 million shares will be acquired from Noble Temple Trading Inc., a substantial shareholder of Noble Group.

Advising Noble Group and Noble Temple Trading Inc are Allen & Gledhill LLP Partners Lim Mei, Leonard Ching and Lee Kee Yeng and Associate Nicholas Chee.

[Back to Contents Page](#)

SMRT Capital Pte Ltd establishes S\$1 billion multicurrency guaranteed medium term note programme

SMRT Capital Pte Ltd (the "**Issuer**"), a wholly-owned subsidiary of SMRT Corporation Ltd (the "**Guarantor**"), has established a S\$1 billion multicurrency guaranteed medium term note programme guaranteed by the Guarantor.

Advising the Issuer are Allen & Gledhill LLP Partner Margaret Chin and Senior Associate Tan Ngee Hao.

[Back to Contents Page](#)

Establishment of Ascott REIT MTN Pte Ltd S\$1 billion multicurrency medium term note programme

Ascott REIT MTN Pte Ltd has established a S\$1 billion multicurrency medium term note programme. All sums payable in respect of the notes issued under the programme are unconditionally and irrevocably guaranteed by DBS Trustee Limited in its capacity as trustee of Ascott Residence Trust.

Advising DBS Bank Ltd (as Arranger) and The Bank of New York Mellon (as Trustee) are Allen & Gledhill LLP Partner Margaret Chin and Senior Associate Daselin Ang.

[Back to Contents Page](#)

Allen & Gledhill Banking Litigation Master Class Series

In November 2009, Allen & Gledhill LLP will be launching the Banking Litigation Master Class Series comprising four focused sessions which will explore bank strategies, obligations and rights in a fundamentally changed and dynamic environment.

For further details, please contact Hasnorimah at +65 6890 7953 or e-mail to masterclass@allenandgledhill.com

[Back to Contents Page](#)

Allen & Gledhill International Arbitration Master Class

The International Arbitration Practice of Allen & Gledhill LLP will be holding a special master class seminar on 19 November 2009. The seminar will be led by our Litigation & Dispute Resolution Partners who will cover arbitration topics including the pros and cons of arbitration, the process of arbitration, drafting an effective arbitration clause and enforcement of arbitration awards.

For further details, please contact Jane Lee at +65 6890 7599 or e-mail to arbitrationevents@allenandgledhill.com

[Back to Contents Page](#)

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

Allen & Gledhill LLP (UEN/Registration No. T07LL0925F) is registered in Singapore under the Limited Liability Partnerships Act (Chapter 163A) with limited liability. A list of the Partners and their professional qualifications may be inspected at the address specified above. Contact particulars of the Partners may be found on the Allen & Gledhill website www.allenandgledhill.com