

Financial Services Bulletin

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Allen & Gledhill LLP also publishes the monthly Legal Bulletin. To view the February 2010 issue, please [click here](#).

Articles

Banking

Singapore High Court considers issue of governing law in application to restrain call on an on-demand bond

Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia & Anor [2010] SGHC 2

The Singapore High Court in *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia & Anor* had to consider an application to set aside an *ex parte* injunction previously granted to the plaintiff. The court had to determine whether the matter at hand was governed by the laws of England or Singapore in relation to the grounds on which an on-demand bond can be restrained, where the law between these jurisdictions differ.

Facts

Shanghai Electric Group Co Ltd (“**Shanghai Electric**”) was hired by PT Merak Energi Indonesia (“**PT Merak**”) in relation to the design and construction of a power plant. The parties concluded a contract which provided for PT Merak to pay Shanghai Electric an advance payment. The advance payment was a condition precedent for the issuance of the notice to proceed. The contract also required Shanghai Electric to procure a bond for the sum (the “**Bond**”) in favour of PT Merak. Upon issuance of the Bond, PT Merak effected payment of the advance payment to Shanghai Electric.

Under the Bond, the substantive condition for payment was a letter by PT Merak to the issuing bank stating the amount to be paid, that this was due to PT Merak pursuant to the contract and that Shanghai Electric had been given notice of default.

PT Merak issued a “Notice of Contractor Default” to Shanghai Electric in accordance with the contract, due to alleged “little progress” having been made on PT Merak’s power plant. A series of correspondence between the parties ensued with little being achieved. PT Merak eventually delivered a notice of termination to Shanghai Electric to terminate its appointment under the contract. PT Merak then delivered a letter of demand to the Bond issuing bank calling for payment under the Bond.

Shanghai Electric filed an injunction application on an *ex parte* basis which was granted by the Singapore High Court. The current matter was an application by PT Merak to set aside that injunction.

Which law applies?

The court identified the main issue as determining the applicable law governing the restraint on the calling of an on-demand bond in this situation. The court noted that this was an important point as Singapore law and English law - the two jurisdictions at issue here - diverge on whether fraud is the only basis upon which the court would restrain a call on an on-demand bond.

The contract itself was expressly stated to be governed by English law. Section 25.1 of the contract provided for disputes to first be attempted to be resolved by good faith negotiations and if these failed, any dispute was then to be submitted to arbitration at the Singapore International Arbitration Centre (the “**SIAC**”).

The governing law of the Bond was also expressly stated to be English law, but with the Singapore courts having non-exclusive jurisdiction over any proceedings arising out of the Bond.

PT Merak submitted that, as the contract and the Bond expressly provided for English law as the governing law, the Singapore High Court should apply English law in relation to the decision whether to restrain PT Merak from making a demand under the Bond. Shanghai Electric, however, contended that notwithstanding that English law was the governing law of the Bond, the current application was governed by the procedural law of the forum and therefore Singapore law should apply.

The court noted that it is trite legal principle that procedural matters are governed by the law of the forum while substantive matters are governed by the law to which the court is directed by its choice of law rule. The question was whether the restraining of a demand on an on-demand bond in the current case was a substantive or a procedural issue.

The court noted that the right to injunction in the case of an on-demand bond pertains to a substantive right. The essence of an on-demand bond is that the issuing bank must pay according to its guarantee, on demand, without proof or conditions. Any restraint on the right of the beneficiary to receive immediate payment upon a demand on the bond would effectively deprive him of such right to immediate payment. The application by Shanghai Electric for an injunction therefore concerned a substantive right vested in PT Merak under both the contract it had with Shanghai Electric and the terms of the Bond. It followed therefore that English law governed the restraint on the calling of the Bond.

Fraud and unconscionability

The divergence between Singapore and English law was brought about by the decision of the Singapore Court of Appeal in *Bocotra Construction Pte Ltd v Attorney-General (No 2)* [1995] 2 SLR 733 where the court held that “fraud or unconscionability” was a ground on which the court would interfere and restrain the enforcement of a performance bond. English law only allows fraud as an exception to the enforcement of a performance bond. The court noted in its deliberations that when Singapore law departed from English law, it was not surprising that a party drawing a contract that called for an on-demand bond would prefer to have it governed by English law rather than Singapore law as it would be more difficult to obtain an injunction, fraud being a higher threshold to clear than unconscionability. The court admitted that it was not known whether this was a consideration in the present case but noted that there was certainly no disadvantage to PT Merak in specifying English law in the Bond even though it provided for the non-exclusive jurisdiction of the Singapore courts and arbitration under the SIAC.

Shanghai Electric contended that PT Merak acted fraudulently and/or unconscionably in making the demand. While noting that English law governed the restraint on the calling of the Bond, leaving only fraud as a possible ground of restraint, the court decided to consider unconscionability for the sake of completeness.

In both Singapore and England, for fraud to be established the party who is applying for the injunction must show that the party who made the call (that is, the beneficiary) had presented a claim which he knows at the time to be an invalid claim, representing to the issuing bank that he believes it to be a valid claim or that the beneficiary has no honest belief in the validity of the call on the performance guarantee. For the fraud exception to be established, it must be shown that the beneficiary was privy to the fraud. The standard of proof that Shanghai Electric must meet was therefore a high one.

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It is settled law in Singapore that in addition to fraud, a bond injunction may be granted on the ground of unconscionability. The difficulty is what constitutes “unconscionability”. There is no simple formula that would enable a court to ascertain whether a party had acted unconscionably in making a call on an on-demand bond. Whether or not unconscionability has been made out is largely dependent on the facts of each case though the court here noted that in every case where unconscionability is made out, there would always be an element of unfairness or some form of conduct which appears to be performed in bad faith. A mere breach of contract, by itself, is insufficient to constitute unconscionability. It is also significant to note that where there are genuine disputes between the plaintiff and the defendant, a call on the bond cannot be termed as abusive as the defendant is entitled to protect their own interest.

The court applied the above reasoning to the facts of the present case and, while noting that this case should go to arbitration, went on to observe that here PT Merak had alleged that Shanghai Electronic was unable to perform despite having been provided the finance. The court said that it did not seem that it would be unconscionable for PT Merak to make a call on the Bond under these circumstances. Indeed, it would appear to be unconscionable to restrain PT Merak from doing so.

Conclusion

Having found that any restraint on an on-demand bond should be subject to the governing law - here, English law - with its high fraud threshold, the court here set aside the *ex parte* injunction.

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Corporate

MAS establishes Corporate Governance Council

In November 2009, the Monetary Authority of Singapore (the “**MAS**”) revealed that it would establish a Corporate Governance Council (the “**Council**”) which aims to promote a high standard of corporate governance in companies listed in Singapore so as to maintain and enhance investors’ confidence.

On 4 February 2010, the MAS announced the composition of the newly established Council which is made up of members from the business community and stakeholder groups (please [click here](#) for a list of the members of the Council). Representatives from the MAS, the Accounting and Corporate Regulatory Authority (the “**ACRA**”) and Singapore Exchange Limited (the “**SGX**”) will be appointed to the Council on an ex-officio basis. The Council may also draw on the assistance of other individuals in the course of its work.

The Council also plays an advisory role to the MAS, the ACRA and the SGX on matters relating to corporate governance, such as the Code of Corporate Governance and relevant rules and regulations pertaining to companies listed in Singapore. According to the MAS, the first mission of the Council is to conduct a review of the Code of Corporate Governance.

Please [click here](#) to view the MAS press release dated 4 February 2010 in relation to the above development. The MAS press release is posted on the MAS website www.mas.gov.sg

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Singapore High Court finds director breached fiduciary duties by diverting commission due to company

Seaspan Agencies Pte Ltd v Chin Siew Seng (Ho Syn Ngan Joanne and another, third parties) and another suit [2010] SGHC 38

In *Seaspan Agencies Pte Ltd v Chin Siew Seng (Ho Syn Ngan Joanne and another, third parties) and another suit*, the Singapore High Court found the defendant in breach of his director's duties for diverting commissions due to the company of which he was a director, as well as arranging for commissions to be paid to a third party without the other directors' knowledge.

Background facts

The defendant, Chin Siew Seng ("**Chin**"), along with three others, was a founding director of Seaspan Agencies Pte Ltd (the "**Plaintiff**"). The Plaintiff was in the ship agency business for which it received agency fees. The four also established Seaspan Chartering Pte Ltd ("**Seaspan Chartering**"), which was in the ship-brokering business. In 2003, Seaspan Chartering ceased trading and Chin transferred the ship-brokering business to the Plaintiff. In connection with this the Plaintiff arranged fixtures between shipowners, charterers and/or cargo owners in return for commission.

The relationship between Chin and another of the Plaintiff's directors deteriorated in 2005 when it became clear that Chin had passed on a proportion of the commissions received by the Plaintiff for ship-brokering transactions to unknown third parties. Chin indicated that he would resign as a director of the Plaintiff. He did not actually formally do so until February 2006 but in October 2005 he formed Seaspan Singapore Pte Ltd ("**Seaspan Singapore**") to carry on the ship-brokering business in competition with Seaspan Chartering.

The issues

The High Court found that the case raised four issues. The two of most interest were as follows:

- Did Chin breach his director's duties by diverting commission due to the Plaintiff and the ship-brokering business to Seaspan Singapore?
- Did Chin breach his directors' duties by paying commissions to certain third parties?

Diversion of commission due to Plaintiff

The High Court stated that, as a director of the Plaintiff, Chin was obliged under common law and section 157(1) of the Companies Act to act honestly in the Plaintiff's best interests and not to place himself in a position where his duty to the Plaintiff conflicted with his duty to another principal.

The High Court found that Chin had breached both of these duties. If he had resigned as a director of the Plaintiff in October 2005 he would have been able to establish a new ship-brokering business. However, whilst remaining a director of the Plaintiff, he was not entitled to form Seaspan Singapore in direct competition with the Plaintiff's business.

As a director of the Plaintiff, Chin was obliged to "preserve and promote" its business and he failed to do so by diverting both the ship-brokering business and commissions due to the Plaintiff, under contracts entered into in its name, to Seaspan Singapore.

As an additional point, although the matter did not arise for decision in the case, the High Court expressed its view that “if the courts were to recognise that directors could be absolved from liability by the shareholders having knowledge of the breach and informally assenting to release a director from liability, such knowledge had to be very specific knowledge of the nature and extent of the breach and such assent had to be clear and unequivocal”.

Payment of commission to third parties

Chin had paid a third party commission, out of the Plaintiff’s funds, for any referrals provided by the third party that led to business for the Plaintiff. The High Court stated that this common industry practice of providing referrals in return for commission on completion of a successful transaction is not in itself unlawful. However, the High Court found that what was unlawful in this case was Chin’s lie about the identity of the recipient of the commission. By failing to reveal this and agreeing to a “confidential” deal with the third party, “Chin had acted outside the bounds of accountability” and could not be found to have acted in the Plaintiff’s best interests.

In addition, Chin could not rely on section 391 of the Companies Act, i.e. that he should be relieved from breach of his director’s duties because he had acted honestly and reasonably at all times, because the High Court felt that his actions had been neither honest nor reasonable.

Decision

The High Court therefore found in favour of the Plaintiff and awarded judgment against Chin for the breach of his director’s duties by diverting commission due to the Plaintiff and ship-brokering business to Seaspan Singapore and making payments out of the Plaintiff’s commission to third parties. A fellow director of Chin’s was also found to be in breach of her director’s duties and liable to the extent of her involvement in the diversion of commission and ship-brokering business to Seaspan Singapore.

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Moneylenders

Moneylenders Act amended with effect from 11 February 2010: Enhancing enforcement measures against unlicensed moneylenders

On 11 February 2010, the Moneylenders (Amendment) Act 2010 (the “**Amendment Act**”) came into force, amending the Moneylenders Act 2008 to introduce, among other things, the following changes to enhance enforcement measures against unlicensed moneylenders:

- Empower the Minister for Law to issue an order to freeze the dealing of any property or any funds in any bank account that has been identified as proceeds of unlicensed moneylending;
- Empower the Public Prosecutor to order the inspection of documents of a bank which contain bank customer information if he considers that these documents contain any evidence of the commission of an offence of unlicensed moneylending or harassment or intimidation of any borrower or surety;

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- Impose stiff penalties including mandatory jail terms, hefty fines and caning on adults who use youngsters under 16 to run loan-sharking operations or harass debtors; and
- Increase the penalties for the offence of unlicensed moneylending and harassment or intimidation of any borrower or surety.

In addition, the Moneylenders Act 2008 is extended to a person who carries on, from a place outside Singapore, the business of moneylending in Singapore. Such person is treated as having carried on that business in Singapore and, accordingly, is subject to the Moneylenders Act 2008 and its sanctions.

Reference Materials

We have been covering the major events leading to the commencement of the Amendment Act in the following articles featured in the previous issues of the Allen & Gledhill Financial Services Bulletin:

- [Parliament introduces changes to Moneylenders Act 2008 to enhance enforcement measures against unlicensed moneylenders](#) (November 2009).
- [Parliament passes Moneylenders \(Amendment\) Bill 2009: Enhancing enforcement measures against unlicensed moneylenders](#) (January 2010); and

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Securities & Futures

Proposals for new regulatory regime for unlisted investment products to be revised and extended to listed investment products

The Monetary Authority of Singapore (the “**MAS**”) is conducting a public consultation from 28 January 2010 to 12 March 2010 (the “**present Consultation Paper**”) on a revised package of proposals for a new regulatory regime governing the sale and marketing of unlisted and listed investment products. These proposals take into account the feedback received on an earlier consultation paper released in March 2009 and are aimed at enhancing the safeguards for retail customers.

The key proposals in the present Consultation Paper include:

- The proposed new regulatory regime will apply to all listed and unlisted investment products except certain specified established products in the market (the “**non-excluded investment products**”).
- Financial advisors (“**FAs**”) will be required to have formal policies and procedures to be approved by their board and senior management which set out the circumstances under which the FAs would or would not permit the sale to a retail customer of an investment product they have assessed as unsuitable for the customer.
- Intermediaries will be required to conduct a Customer Knowledge Assessment on all retail customers before selling any unlisted non-

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excluded investment products to them. It is proposed that the Customer Knowledge Assessment be performed or approved by a person independent of the financial advisory function.

- Intermediaries will be required to conduct a Customer Account Review to ascertain whether a retail customer who wants to trade listed non-excluded investment products has the relevant knowledge or experience to understand the risks and features of derivatives, before approving the customer's account for the trading of such products. It is proposed that the approval of all accounts to trade listed non-excluded investment products be granted by at least one senior management staff member of the intermediary who is independent of sales or dealing, or one senior management staff member of a related corporation of the intermediary designated with the account approval function.
- The MAS will require representatives who wish to sell non-excluded investment products to pass a new Capital Markets and Financial Advisory Services ("**CMFAS**") module which will be expanded to include product knowledge in respect of such products.
- A Product Highlights Sheet will be required for all debentures in the form of asset-backed securities and structured notes (including exchange-traded notes), collective investment schemes (including exchange-traded funds) and sub-funds of investment-linked life insurance policies, for which the offer requires a prospectus to be issued.

Full text of MAS Consultation Paper

Please [click here](#) to access the present Consultation Paper which is available on the MAS website www.mas.gov.sg

Reference Materials

Please refer to the following articles featured in the previous issues of the Allen & Gledhill Financial Services Bulletin to find out more about the earlier consultation paper released by the MAS in March 2009 and the MAS' first response to the feedback received on the consultation:

- [MAS consults on proposals to strengthen the regulation of the sale and marketing of unlisted investment products](#) (March 2009);
- [MAS responds to feedback on proposals to enhance regulatory framework for unlisted investment products](#) (September 2009).

On 28 January 2010, the MAS issued the second part of its response to the feedback received on the March 2009 consultation. A summary of the MAS' second response is discussed in an article entitled "*MAS issues second part of response to feedback on earlier consultation on unlisted investment products*" in this issue of the Allen & Gledhill Financial Services Bulletin.

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MAS issues second part of response to feedback on earlier consultation on unlisted investment products

On 28 January 2010, the Monetary Authority of Singapore (the “**MAS**”) issued Part II of its response to the feedback received on the consultation paper on measures to enhance the regulatory framework for unlisted investment products, which was published on 12 March 2009 (the “**Consultation Paper**”).

Part I of the MAS’ response to the feedback received on the Consultation Paper was released on 8 September 2009.

Separate MAS consultation on regulatory regime governing both listed and unlisted investment products

In place of the proposals in the Consultation Paper relating to complex investment products, the MAS has decided to issue a revised package of proposals that aim to enhance safeguards for retail customers of both listed and unlisted investment products. The MAS is consulting separately on these proposals in the “*Consultation Paper on Regulatory Regime for Listed and Unlisted Investment Products*” released on 28 January 2010 (the “**New Consultation Paper**”).

For further details about the New Consultation Paper, please refer to the article entitled “*Proposals for new regulatory regime for unlisted investment products to be revised and extended to listed investment products*” which is featured in this issue of the Allen & Gledhill Financial Services Bulletin.

Summary of Part II of MAS Response

In summary, the MAS proposes to implement the following measures in the Consultation Paper:

- requirement for an issuer of unlisted debentures to appoint a trustee where the offer requires a prospectus to be issued. This will also apply to listed debentures;
- extending the applicability of civil liability to more provisions in Part III of the Financial Advisers Act (the “**FAA**”) including the provision that requires financial advisors (“**FAs**”) to furnish product information to investors, and those provisions relating to false or misleading statements;
- enhancing remedies in the Securities and Futures Act (the “**SFA**”) for false or misleading statements in marketing and advertising materials; and
- amending the FAA to provide more comprehensive powers to the MAS to apply to court for certain orders and injunctions, and to include offences for false or misleading statements made in relation to a wider range of issues.

Full text of MAS Response

Please click on the provided links to access the required information from the MAS website www.mas.gov.sg:

- [Part II of MAS Response](#) (28 January 2010)
- [Press release relating to Part II of MAS Response](#) (28 January 2010)
- [Part I of MAS Response](#) (8 September 2009)

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- [Consultation paper](#) (12 March 2009)

Reference materials

To find out more about the Consultation Paper and Part I of the MAS Response, please refer to the following articles featured in previous issues of the Allen & Gledhill Financial Services Bulletin:

- [MAS consults on proposals to strengthen the regulation of the sale and marketing of unlisted investment products](#) (March 2009);
- [MAS responds to feedback on proposals to enhance regulatory framework for unlisted investment products](#) (September 2009).

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Singapore District Court imposes hefty fine on remisier for allowing client to trade under another person's account

Public Prosecutor v Chui Siew Pun [2009] SGDC 293

In *Public Prosecutor v Chui Siew Pun*, the Singapore District Court slapped the accused with a fine of S\$70,000. This was for his role in assisting the co-accused conduct insider trading using the securities trading accounts of third parties so as to hide the co-accused's insider trading activities from the authorities. In return for his assistance, the accused received S\$1,398.26 from the co-accused. This matter is currently on appeal to the High Court.

Facts

The accused was a remisier at Westcomb Securities Pte Ltd ("**Westcomb**"). The co-accused, Desai Praful Jayantilal ("**Desai**") had inside information about Lindeteves-Jacoberg Ltd ("**LJ**"), a company listed on the Singapore Exchange Securities Trading Limited (the "**SGX-ST**"), and was looking to profit from insider trading in LJ shares without being discovered by the authorities. The accused conspired with Desai to trade in LJ shares using the securities trading accounts of the accused's wife and mother in Westcomb and CIMB-GK Securities Pte Ltd ("**CIMB-GK**"). The accused received S\$1,398.26 from Desai for his assistance in this regard.

There was no written authorisation from the accused's wife and mother to allow the accused to place orders in their securities trading accounts. In addition, the accused did not notify CIMB-GK or Westcomb in writing or seek their prior permission before using his wife's or mother's securities trading accounts to trade in LJ shares for Desai's benefit.

The offence

Pursuant to the Notice on Prevention of Money Laundering for Holders of Capital Markets Licence (Notice No. SFA04-N02) issued by the Monetary Authority of Singapore, Westcomb and CIMB-GK were required to know the identities of the beneficial owners of any nominee accounts as part of their "know-your-customer" obligations. By conducting trades that were beneficially owned by Desai in the accounts of the accused's wife and mother, without the written authorisation of the wife and mother or the permission of Westcomb and CIMB-GK, the accused had deceived the two securities firms as to the beneficial owner of the LJ trades in his wife's and mother's accounts.

Accordingly, the accused had contravened section 201(b) of the Securities and Futures Act (the “SFA”) which prohibits the use of deceptive and fraudulent devices in the purchase or sale of securities. Section 201(b) of the SFA states that:

“No person shall, directly or indirectly, in connection with the subscription, purchase or sale of any securities engage in an act, practice or course of business which operates as a fraud or deception, or is likely to operate as a fraud or deception, upon any person.”

Referring to a previous Singapore District Court’s decision, *Ng Geok Eng v Public Prosecutor* [2006] SGHC 232 which also dealt with the offences of engaging in practices that operated as a deceit upon certain securities trading firms under section 201(b) of the SFA, the court commented that the offences under section 201(b) of the SFA were often referred to as “unauthorised” share trading cases. It was held that, the term “unauthorised” could refer to the lack of consent on the part of the account owner or the securities trading firm with whom the account was opened.

Sentence

Although custodial sentences had generally been imposed in “unauthorised” share trading offences under section 201(b) of the SFA, after considering the facts of the present case, the Singapore District Court was of the view that a custodial sentence was not appropriate. Instead, the court imposed a substantial fine of S\$70,000 on the accused, which the court said was at the “higher end of the scale”.

Comment

This may be an example of how an arrangement crafted between an insider and his remisier that was geared to specifically avoid the detection of insider trading activity was exposed by market surveillance conducted by the regulators. Stock indicators such as sudden surges (“spikes”) in volatility, volume and price may lead investigators to check further into the background of some trades. Likewise, it is also probable that the investigators’ attention would be drawn to an “illiquid” counter which experiences a hike in trading volume due to two related parties acquiring large volumes of shares in the counter over a short period of time, supported by the fact that the related parties have had no previous transactions in that particular counter. It would not have been too long before further investigations revealed that the holders of the two trading accounts had no knowledge of the relevant trades and hence, brought the remisier’s conduct into serious question. It is interesting to note that no custodial sentence was passed even though there was an aggravating factor, i.e. the scheme was specially crafted to conceal the trades.

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Singapore Exchange

SGX provides guidance on proposals for restructuring or spin-offs

In response to the number of proposals recently received from listed companies on the restructuring of assets or spin-off of existing businesses for separate listing, the Singapore Exchange (the “**SGX**”) provided guidance on 3 February 2010 on the key areas it will consider when reviewing such proposals.

Key considerations

The SGX’s key concerns are whether the proposal is consistent with its objective of preserving the integrity and quality of the market place, and ensuring that shareholders’ interests are not prejudiced. Some key considerations are:

- (i) whether the proposal complies with the chain listing principle set out in the Listing Manual;
- (ii) whether the entities seeking a separate listing have clearly differentiated businesses and assets that are independently managed; and
- (iii) whether the remaining businesses of the listed entities are viable, profitable and continue to comply with the Mainboard admission criteria. In this regard, the revised Mainboard criteria, issued by the SGX for public consultation on 6 January 2010, may need to be taken into consideration (an article about this development was featured in a previous issue of the Financial Services Bulletin (January 2010). To read the article entitled “*SGX proposes new Mainboard listing criteria and introduction of SPACs*”, please [click here](#).

SGX retains discretion

In its guidance, the SGX highlighted that it retains the discretion to reject unsuitable proposals or subject proposals to specific conditions to uphold its listing requirements and standards. Accordingly, due to the complexity of business restructuring proposals and their varying circumstances, listed companies and their professional advisers should consult the SGX early for regulatory clearance. Care should also be taken to maintain the confidentiality of any proposals under consideration.

Reference material

Please [click here](#) to access the SGX guidance which is available on the SGX website www.sgx.com under “SGX Corporate Home”.

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Tax

Singapore implements international standard for exchange of information for tax purposes on 9 February 2010

The Income Tax Act has been amended with effect from 9 February 2010 to implement the Organisation for Economic Co-operation and Development's (the "OECD") international standard for the exchange of information for tax purposes (the "EOI Standard").

Overview

Broadly, the new legislation 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 ("**Protected Information**"). The new legislation only applies 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.

To date, Singapore has signed (but not ratified) 17 double taxation agreements implementing the EOI Standard. Singapore joined the OECD's "white list" of countries that have substantially implemented the EOI Standard on 13 November 2009 and will be hosting the Global Forum on Transparency and Exchange of Information for Tax Purposes from 30 September 2010 to 1 October 2010. The event will focus on assessing and monitoring the effective implementation of the EOI Standard and will be attended by participants from over 90 jurisdictions.

Current agreements implementing the EOI Standard

Singapore has signed (but not ratified) agreements implementing the EOI Standard with the following countries:

- Australia
- Austria
- Bahrain
- Belgium
- Brunei
- Denmark
- Finland
- France
- Georgia
- Malta
- Mexico
- Netherlands
- New Zealand
- Norway
- Qatar
- Slovenia
- United Kingdom

The full text of these agreements is available on the IRAS website www.iras.gov.sg. To view the relevant page, please [click here](#).

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Income Tax (Amendment) Act 2009 in force from various dates: Implementing Budget 2009 changes

The Income Tax (Amendment) Act 2009 (the “**Amendment Act**”) has been gazetted and the changes it makes will come into force on various dates as set out in section 1 of the Amendment Act.

The Income Tax Act is amended to implement the tax changes announced in the Government’s 2009 Budget Statement as well as other amendments. These include:

- Tax exemption of foreign sourced income
- Tax exemption of income of approved entity from funds managed by prescribed fund manager
- Tax treatment for amalgamating companies
- Clarification of arm’s length principle
- Reduction of tax upon companies from 18 per cent. to 17 per cent.
- The distribution by a trustee of a real estate investment trust to be made in the form of units of the trust instead of in cash

Reference materials

An article about the Amendment Act when it was passed was featured in a previous issue of the Allen & Gledhill Financial Services Bulletin (November 2009). To read the article entitled “*Parliament passes Income Tax (Amendment) Bill 2009: Implementing Budget 2009 changes and other changes*”, please [click here](#).

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General

Singapore High Court holds action for agreed sum defeated by failure to perform

Indulge Food Pte Ltd v Torabi Marashi Bahram [2010] SGHC 22

In *Indulge Food Pte Ltd v Torabi Marashi Bahram*, the Singapore High Court considered a claim for an agreed sum and found that a contract party cannot seek performance of its counterparty’s obligations if it has not, or is unwilling, to perform its own obligations.

Background facts

On 2 March 2006, the plaintiff, Indulge Foods Pte Ltd (“**Indulge**”) entered into a share subscription agreement (the “**Agreement**”) with the defendant, Torabi Marashi Bahram (“**Marashi**”) and Eurooro International Pte Ltd (“**Eurooro**”). Marashi was Eurooro’s founder and managing director. Under the Agreement, Indulge was to invest S\$1 million, in four tranches of S\$250,000, in Eurooro for 50 per cent. of Eurooro’s shares plus one share. In addition, Indulge, Marashi and Eurooro were to work together to expand Eurooro’s business both inside and outside Singapore.

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Indulge paid the first two tranches but did not pay the third and fourth because it argued that Marashi and Euroro had not complied with the conditions precedent to payment of the third tranche (the “CPs”). Such a breach would also allow Indulge to terminate the Agreement and recover the first two tranches paid to Euroro from Marashi. Marashi denied any breach and brought a counterclaim for payment of the third and fourth tranches to Euroro.

During the trial it became clear that Indulge’s real issue related to Marashi’s management of Euroro, which ceased business in August 2008. On the facts, the High Court found that Marashi was not in breach of the CPs and dismissed Indulge’s claim for repayment of the first and second tranches.

The counterclaim

The High Court stressed that the dismissal of Indulge’s claim did not automatically lead to judgment in favour of Marashi’s counterclaim. As a matter of procedure the High Court took the view that, to recover the third and fourth tranches, Euroro should have claimed in its own right and Marashi’s counterclaim on behalf of Euroro was therefore legally unsustainable. However, even if Euroro had been a party to the proceedings, due to a failure of reciprocity (discussed below), the High Court would have held that it was unable to obtain the third and fourth tranches from Indulge.

Reciprocity

In the High Court’s view a contractual promise to pay money is not automatically enforceable once its conditions precedent have been satisfied. Regard must be had to the rest of the contract. The High Court used the term “reciprocity” to refer to the “mutual and dependant” nature of the obligations that form a contract. The High Court then found that, as a principle of contract law, the requirement of reciprocity “recognises that, when the several obligations of a contract are *on their true construction* part of one indivisible bargain, a party cannot expect to enforce his counterparty’s obligations when he himself did not, cannot, or is unwilling or able to, perform his own obligations”.

The High Court also stated that the rationale behind the reciprocity requirement can be met through the use of two possible remedies:

- A counterclaim against the counterparty for the appropriate remedy; or
- If a counterclaim would be inadequate, a defence to non-performance of one’s obligations if one has not received what one bargained for.

Exceptions to reciprocity

The High Court also discussed the situations where the reciprocity requirement will not apply. It only relates to situations where each party has breached the contract and/or has outstanding obligations to perform. It will not arise in the situation where a contract has been fully performed on one side. In addition the High Court provided two exceptions to the requirement as follows:

- A defendant cannot insist on reciprocity if he has actually caused the lack of reciprocity; and
- A breach which does not go to the root of the contract *may* not constitute sufficient grounds for resistance of performance.

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Decision

The High Court held that if Euroro had brought a claim it would not have been successful because it was in breach of the Agreement for failing to expand its business as required. As such there was a failure of reciprocity by Euroro, which could not be adequately remedied by a counterclaim because Indulge would be unable to obtain specific performance of Euroro's obligation, not least because it had gone out of business. The breach went to the root of the Agreement and was not caused by Indulge's non-payment of the third and fourth tranches. Euroro could not therefore obtain payment of the third and fourth tranches due to its failure to perform its continuing obligations under the Agreement.

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In brief

Employer succeeds against former sales manager in Singapore High Court for breach of duty of fidelity and good faith

Baldor Electric (Asia) Pte Ltd v Liew Chin Choy & Ors [2010] SGHC 32

In *Baldor Electric (Asia) Pte Ltd v Liew Chin Choy & Ors*, the Singapore High Court found that an employee who had preferred his own interests over those of his employer's, had breached his duties of fidelity and good faith which he owed to his employer as its Sales Manager.

Please [click here](#) to read an article about this case in the February 2010 issue of the Allen & Gledhill Legal Bulletin.

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News

Acquisition of Northpoint 2 and YewTee Point by Frasers Centrepoint Asset Management Ltd

Frasers Centrepoint Asset Management Ltd ("FCAML"), as manager of Frasers Centrepoint Trust ("FCT"), has announced the proposed acquisitions of Northpoint 2 and YewTee Point for approximately S\$290.2 million and a private placement of 137,000,000 new units in FCT to raise gross proceeds of approximately S\$191.4 million. The proceeds from the private placement will be used to part finance the acquisition of Northpoint 2 and YewTee Point, with the balance to be funded by borrowings.

Acting as transaction counsel and counsel to FCAML, as manager of FCT, are Allen & Gledhill LLP Partners Jerry Koh, Margaret Soh and Chua Bor Jern, Senior Associates Rajmohan and Louis Lim and Associate Chong Ying Chiang.

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The Public Utilities Board's S\$250 million notes issue

The Public Utilities Board (“**PUB**”) has issued S\$250 million 2.42 per cent. notes due 2016. The notes are listed on the Singapore Exchange Securities Trading Limited. Oversea-Chinese Banking Corporation Limited and Standard Chartered Bank acted as the joint lead managers for the issue. DBS Trustee Limited is the trustee and DBS Bank Ltd is the paying agent for the issue.

Advising PUB as to Singapore law are Allen & Gledhill LLP Partner Margaret Chin, Senior Associate Daselin Ang and Associate Gillian Cheong. Advising the joint lead managers, the trustee and the paying agent as to Singapore law are Allen & Gledhill LLP Partner Au Huey Ling and Associate Lam See Wai.

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The initial public offering of shares in Tiger Airways Holdings Limited

Tiger Airways Holdings Limited (“**Tiger Airways**”) has successfully completed its initial public offering (“**IPO**”) and listing on the Mainboard of the Singapore Exchange Securities Trading Limited. (the “**SGX-ST**”). The IPO raised total proceeds of approximately S\$247.7 million. If the over-allotment option granted by Ryanasia Limited, a substantial shareholder of Tiger Airways, to Morgan Stanley & Co. International plc (as stabilising manager) is exercised in full, the total proceeds raised would be increased to approximately S\$277.5 million. The IPO is the largest in Singapore since that of CapitaMalls Asia Limited in Q4 2009. Tiger Airways is the first low-cost airline to list on the SGX-ST and has a market capitalisation of approximately S\$781.3 million at listing.

Advising Tiger Airways as to Singapore law are Allen & Gledhill LLP Partners Tan Tze Gay, Shawn Chen and Rhys Goh, Senior Associates Goh Li Hui and Tan Se Lene, and Associate Wu Zhaoqi.

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