

Legal Bulletin

A summary of developments in the law

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These recent developments were highlighted in the Allen & Gledhill KnowledgeShare Alert of 4 August 2006. If you would like to be on our KnowledgeShare Alert mailing list, please e-mail us at publications@allenandgledhill.com

Articles

Ministry of Finance consults on Limited Partnerships Bill 2006

The Ministry of Finance (the “**MOF**”) is conducting a public consultation exercise from 2 August 2006 to 8 September 2006 to seek comments on a draft Limited Partnerships Bill 2006 (the “**Draft LP Bill**”) as well as the proposed related amendments to the Business Registration Act, the Goods and Services Tax Act, and the Income Tax Act. To view the Draft LP Bill, please [click here](#).

A limited partnership (“**LP**”) is a partnership comprising at least one general partner with unlimited liability and limited partners with limited liability. The general partner is personally liable for all the debts and obligations of the LP in return for having the right to manage the partnership business. The limited partners are not personally liable for the debts and obligations of the LP beyond their agreed contributions so long as they do not take part in managing the partnership business.

Key proposals under the Draft LP Bill include the following:

Legal structure and registration requirements

- An LP does not have a separate legal personality from its partners
- An LP must be registered with at least two partners and at least one of whom must be a general partner. There is no maximum limit to total number of partners and a body corporate can be a partner. Subject to the terms of the partnership or other relevant agreement, new partners may be introduced without the consent of the existing limited partners
- Unless otherwise provided in the partnership or other relevant agreement, matters relating to the partnership business may be decided by a majority of the general partners (to the exclusion of the limited partners)

Accounting records and audit

- An LP’s accounts need not be audited nor filed, but proper accounting records that would enable true and fair financial statements to be prepared and audited, if necessary, must be kept

Liability of partners

- A general partner’s personal liability covers all the debts, obligations and liabilities of the LP incurred during the period when he is a general partner. The liability will be joint and several where there are two or more general partners
- A limited partner is not personally liable for the debts, obligations or liabilities of the LP unless he participates in the management of the LP’s business. However a limited partner can engage in certain specified “safe harbour” activities without incurring such personal liability
- A limited partner will be liable to refund any distribution of capital or profits made to him in certain events relating to the bankruptcy and insolvency of the general partners

Assignment of partnership

- A partner is entitled to assign or transfer his interest in an LP, subject to applicable restrictions in the partnership agreement. Such assignment or transfer does not mean that the partner has ceased to be a partner of the LP

Conversion to LP

- In a conversion from a partnership firm to an LP, there will be no change in the vesting of the business, undertaking and assets for persons who are partners of the partnership firm and who will become partners of the LP on registration. The partners of the partnership firm before the transfer should continue to remain liable (jointly and severally) for the liabilities and obligations of the firm which were incurred prior to or which arise from any contract entered into prior to the "conversion" into the LP

Tax treatment

- An LP is tax transparent and the partners are taxed on their share of the income or gains of the LP according to their personal income tax rates

Application of the Partnership Act

- Unless excluded by the Draft LP Bill, the Partnership Act and general rules applicable to partnerships will continue to apply to an LP. These rules include those governing the dissolution of an LP when there is a change of partners

For a report on the proposals in the Draft LP Bill, please [click here](#).

To view the MOF's press release, please [click here](#).

Business Registration Act

To view proposed amendments to the Business Registration Act, please [click here](#). The MOF is asking for specific feedback relating to certain issues. For the list of issues, please [click here](#).

Goods and Services Tax Act

For a summary of the proposed amendments to the Goods and Services Tax Act, please [click here](#). To view proposed amendments to the Goods and Services Tax Act, please [click here](#).

Income Tax Act

For a summary of the proposed amendments to the Income Tax Act, please [click here](#). To view proposed amendments to the Income Tax Act, please [click here](#).

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These recent developments were highlighted in the Allen & Gledhill Financial Services Update of 4 August 2006. If you would like to be on our Financial Services Update mailing list, please e-mail us at publications@allenandgledhill.com

MAS issues consultation paper on proposed changes to Banking Act

Introduction

On 31 July 2006, the Monetary Authority of Singapore (the “**MAS**”) released a draft Banking (Amendment) Bill 2006 (the “**Draft Bill**”) for public consultation. Comments on the Draft Bill must be submitted to the MAS by 31 August 2006.

The Draft Bill proposes to amend the Banking Act with the primary objectives of strengthening prudential safeguards, facilitating risk-based supervision, providing banks with greater operational flexibility and updating banking regulations.

Key proposed amendments to the Banking Act

1.	<p>Proposed revision to section 29: Revision of methodologies for limiting concentration risk and related party exposures</p>	
	<p>Useful references: Please click on the titles of the following documents to read more about the proposed methodologies:</p> <ul style="list-style-type: none"> • MAS Industry Consultation on Amendments to Section 29 of The Banking Act dated 15 January 2005 • MAS Response to Feedback Received - Consultation on Amendments to Section 29 of The Banking Act dated 15 May 2006 	
	Current position	Proposed amendment
	<p>Current prudential limits on credit facilities extended by banks designed to limit concentration risk:</p> <ul style="list-style-type: none"> • Section 29(1)(a) and (b): Single borrower limit of 25% of a bank’s capital funds and substantial loans limit of 50% of a bank’s total credit facilities on credit facilities extended by a bank to a single borrower or a group of borrowers under the common control of a single person <p>Current prudential limits on credit facilities extended by banks to minimise the scope for conflict of interest and to limit contagion risks in respect of related entities of banks:</p>	<ul style="list-style-type: none"> • To apply the limits to all exposures (including equity investments, contingent liabilities, etc.), not just to credit facilities, to a single counterparty or group of related counterparties posing a single risk • Exposures to well-rated counterparties will be exempted from inclusion in the new exposures limits and credit risk mitigation will be recognised • To widen the limits on exposures of a Singapore-incorporated bank to its substantial shareholder group and exposures of a bank in Singapore to financial entities in which the bank holds a major stake

	<ul style="list-style-type: none"> • Section 29(1)(d) and (e): Limits on unsecured credit facilities to directors, director-related entities, banks' related corporations and banks' employees 	
2.	Proposed revision to section 9 read with section 40: Introduction of risk-based asset maintenance requirement	
	Useful references: Please click on the titles of the following documents to read more about the new asset maintenance regime: <ul style="list-style-type: none"> • MAS Industry Consultation on An Asset Maintenance Framework for Foreign Banks dated 14 January 2005 • MAS Response to the Industry Consultation on An Asset Maintenance Framework for Foreign Bank Branches dated 18 January 2006 • MAS Note on Asset Maintenance for Foreign Bank Branches dated 14 February 2006 	
	Current position	Proposed amendment
	<ul style="list-style-type: none"> • Section 9(1)(c)(ii): Foreign banks are required to hold not less than S\$10 million of net head office funds in Singapore with not less than S\$5 million in the form of assets approved by the MAS 	<ul style="list-style-type: none"> • Foreign banks to hold not less than S\$5 million of assets in Singapore, valued in the manner specified by the MAS • To introduce requirement for foreign bank branches to maintain a minimum level of eligible assets in Singapore in proportion to their liabilities • To require banks that pose greater supervisory concerns to comply with higher asset maintenance requirements
3.	Proposed revision to section 62: Revising priority ranking of deposit liabilities of a bank	
	Current position	Proposed amendment
	<ul style="list-style-type: none"> • Non-bank and inter-bank deposit liabilities of a bank rank ahead of other unsecured liabilities of the bank in the event of a winding up of the bank 	<ul style="list-style-type: none"> • Non-bank deposit liabilities of a bank rank ahead of other unsecured liabilities of the bank • Inter-bank deposit liabilities of a bank rank behind non-bank deposit liabilities and <i>pari passu</i> with other unsecured liabilities

4.	Proposed revision to section 4B: Flexibility for the MAS to prescribe what constitutes a “deposit”	
	Current position	Proposed amendment
	<ul style="list-style-type: none"> • Section 4B: “Deposit” is statutorily defined in section 4B(4) (read with sections 4B(5) and 4B(6)) 	<ul style="list-style-type: none"> • To empower the MAS to include or exclude any financial product in or from the definition of “deposit”
5.	Proposed revision to provisions in Part VII and inclusion of new Part VIIA: Enhancing the MAS’ role in bank resolution	
	Current position	Proposed amendment
	<ul style="list-style-type: none"> • The MAS has powers to conduct inspections and special investigations of banks • Parent supervisory authorities may conduct inspections of foreign banks in Singapore, subject to approval from the MAS 	<ul style="list-style-type: none"> • To provide more powers to the MAS to enhance its role in resolving a bank failure: <ul style="list-style-type: none"> - to provide the MAS the right to be heard in insolvency proceedings of a bank - to empower the MAS to approve the liquidator of a bank - to empower the MAS to direct a failed bank to transfer the whole or part of its business to another bank, with the Minister’s approval - to empower the MAS to direct shareholders of a failed bank to transfer their shares to another person, with the Minister’s approval - to empower the MAS to write down a failed bank’s share capital against losses and issue new shares to another subscriber, with the Minister’s approval
6.	Proposed revision to sections 38 and 39: Implementing proposed enhancements to the liquidity risk supervision framework	
	Useful references: Please click on the titles of the following documents to read more about the proposed enhancements to the liquidity risk supervision framework: <ul style="list-style-type: none"> • MAS Consultation Paper on Liquidity Risk Supervision Framework - A Revised Minimum Liquid Asset Framework dated 19 May 2006 	

	<ul style="list-style-type: none"> Article entitled “MAS proposes to fine-tune existing minimum liquidity risk supervision framework for banks” featured in May 2006 issue of the Allen & Gledhill Legal Bulletin 	
	Current position	Proposed amendment
	<ul style="list-style-type: none"> Base Minimum Liquid Assets (“MLA”) is computed based on “liabilities base” Eligible liquid assets include cash, SGS and bills of exchange Minimum 10% SGS requirement 	<ul style="list-style-type: none"> To allow the MAS to implement the proposed enhancements to the liquidity risk supervision framework which will <ul style="list-style-type: none"> impose MLA requirements on a revised set of “qualifying liabilities” which will replace the current “liabilities base” expand the range of assets qualifying as eligible liquid assets revise the computation of the MLA requirements and maintenance period replace the existing minimum SGS requirement with a minimum Tier 1 assets requirement, which includes cash and SGS formalise the procedures for MLA drawdown
7.	Proposed repeal of section 22 Lifting the statutory reserve fund requirement	
	Current position	Proposed amendment
	<ul style="list-style-type: none"> Every bank is required to maintain a reserve fund 	<ul style="list-style-type: none"> To abolish the requirement to maintain a reserve fund To allow banks to release the reserves over a 5-year period
8.	Proposed inclusion of new Part VIII Expanding the regulatory scope for credit card issuance	
	Current position	Proposed amendment
	<ul style="list-style-type: none"> Only banks and non-bank financial institutions are subject to the MAS’ rules on the issuance of credit cards 	<ul style="list-style-type: none"> To extend the regulatory scope of credit card issuance to all issuers, not just financial institutions, targeting Singapore market
	<ul style="list-style-type: none"> Only single party merchant credit where the card is used only for transactions with the issuer who is the sole party bearing the credit risks of the cardholders is exempted from the MAS’ rules on the issuance of credit cards 	<ul style="list-style-type: none"> To include a new exemption from the regulatory scope of credit card issuance for credit cards with low credit limits (not exceeding S\$500)

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To view the full text of the MAS consultation paper containing the Draft Bill, please [click here](#).

To view the MAS press release relating to the above development, please [click here](#).

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Securities and Futures Regulations amended to effect changes to margin requirements applicable to CMS licence holder which conducts securities financing or offers contracts for differences

The Securities and Futures (Financial and Margin Requirements for Holders of Capital Markets Services Licences) Regulations (the “**Regulations**”) were amended on 28 August 2006 to effect changes relating to the margin requirements that must be complied by a holder of a capital markets services licence (the “**CMS licence holder**”) which conducts securities financing or offers contracts for differences (“**CFDs**”).

The Regulations oblige a CMS licence holder for securities financing to obtain margin from each customer in respect of any provision of securities financing to the customer. The types of collateral that a CMS licence holder may take to meet margin requirements for its securities financing business (“**acceptable collateral**”) are prescribed in the Regulations. In this recent amendment, the Regulations were amended to expand the list of acceptable collateral.

In addition, the Regulations were also amended to impose margin requirements for a CMS licence holder that offers CFDs.

These amendments follow from an earlier industry consultation on “Acceptable Collateral and Contract for Differences” (the “**Consultation Paper**”) conducted by the Monetary Authority of Singapore (the “**MAS**”) in September 2005. The MAS issued its response to feedback received pursuant to the Consultation Paper (the “**MAS Response**”) on 27 July 2006.

The amendments to the Regulations are drafted taking into account feedback received in response to the Consultation Paper.

This article provides a summary of the amendments to the Regulations and the MAS Response. An article entitled “MAS releases consultation paper on “Acceptable Collateral and Contract for Differences”” which discusses the Consultation Paper is featured in the October 2005 issue of the Allen & Gledhill Legal Bulletin. Please [click here](#) to read the article.

Amendments to the Regulations

Expanded list of acceptable collateral

The Regulations now provide for an expanded list of acceptable collateral for a CMS licence holder’s securities financing business. Securities or financial instruments which are classified as acceptable collateral under the Regulations are (new additions to the list of acceptable collateral are italicised):

- cash;
- a share or convertible bond listed on the Singapore Exchange Securities Trading Limited (the “**SGX-ST**”);
- a share or convertible bond listed on a recognised group A exchange and that is:
 - *in the case of a share, included in a market index of that recognised group A exchange; or*
 - issued by a corporation with shareholders’ funds of not less than S\$200 million or its equivalent in any foreign currency;
- in the case of an initial public offer, securities to be listed on the SGX-ST which have been fully paid for by a customer of a CMS licence holder;
- securities quoted on the Central Limit Order Book (CLOB) International;
- a debt security:
 - *issued by a government or public authority of any country or territory, or a recognised multilateral agency specified in the Regulations, with a long-term rating of not less than BB-minus by Fitch Ratings, Ba3 by Moody’s Investor Services, or BB-minus by Standard & Poor’s;*
 - *issued by any other entity with a long-term rating of not less than BBB-minus by Fitch Ratings, Baa3 by Moody’s Investor Services, or BBB-minus by Standard & Poor’s;*
 - *being a short-term debt instrument with a rating of not less than F3 by Fitch Ratings, P3 by Moody’s Investor Services, or A3 by Standard & Poor’s;*
 - *listed on the SGX-ST or a recognised group A exchange if, and only if, the issuer’s shares are listed on that exchange and qualify as acceptable collateral;*
- an authorised collective investment scheme (“**CIS**”) (other than exchange traded funds and property funds);
- a recognised CIS (other than exchange traded funds and property funds) where its prices are published daily and at least 90 per cent. of its deposited assets are invested in instruments that qualify as acceptable collateral;
- an exchange traded fund quoted on the SGX-ST or a recognised group A exchange which tracks an index of, or basket of, stocks quoted on the SGX-ST or a recognised group A exchange;
- a property fund listed on the SGX-ST or a recognised group A exchange;
- any contract traded on the SGX-ST or a recognised group A exchange where the shares of the issuer of the contract, and the shares of the issuer of the underlying security, qualify as acceptable collateral; or
- such other securities or financial instruments that the MAS may specify.

The Regulations now impose differentiated haircuts for each type of securities that qualifies as acceptable collateral. The haircuts applicable to each of the acceptable collateral are set out in new Table 17 of Fourth Schedule to the Regulations.

Margin requirements for CMS licence holder that offers CFDs

Under the Regulations, a CMS licence holder who enters into a CFD with its customers is required to obtain margin from each customer, in the form of acceptable collateral, for the purpose of trading in CFDs.

Differentiated minimum margin requirements are imposed on different types of CFDs, depending on the underlying instrument and the risk mitigation features embedded in the CFDs. In addition, there is only a single-tier minimum margin requirement for each type of CFD.

A new Table 18 is inserted in Fourth Schedule to the Regulations to set out the minimum margin requirements for the following types of CFDs:

- Equity CFDs;
- Index CFDs;
- Foreign Exchange CFDs;
- CFDs with non-guaranteed stop-loss;
- CFDs with guaranteed stop-loss;
- any other CFDs.

The MAS Response

The issues addressed in the MAS Response include the followings.

Shareholders' funds requirement waived for foreign index stocks

Acceptable collateral prescribed under the Regulations includes securities quoted on a recognised group A exchange that are issued by a corporation with shareholders' funds of not less than S\$200 million or its equivalent in any foreign currency (the "**shareholders' funds requirement**"). Taking into account feedback from the industry, the MAS proposes to accept foreign index stocks listed on a recognised group A exchange as acceptable collateral without having to comply with the shareholders' funds requirement.

The applicable haircuts for index stocks and non-index stocks will be 15 per cent. and 25 per cent. respectively.

CIS

The Consultation Paper proposes to include CISs that meet the following criteria as acceptable collateral:

- authorised or recognised by the MAS under the Securities and Futures Act,
- their prices are published on a daily basis, and

- at least 90 per cent. of their deposited assets are invested in instruments that qualify as acceptable collateral (the “**90 per cent. requirement**”).

In the light of the industry feedback, the 90 per cent. requirement will be waived for all CISs authorised by the MAS (except futures and options funds and hedge funds) subject to a 25 per cent. haircut.

Bonus shares entitlements and cash dividends recognised as acceptable collateral

To avoid the practical problems in valuing share collateral during the interim period between the book closure date and the crediting of the bonus shares/cash dividends, the MAS suggests:

- counting bonus shares entitlements of an ex-dividend share held as collateral towards acceptable collateral; and
- offsetting cash dividends declared and payable on an ex-dividend share held as collateral against the amount financed.

This will be subject to the securities financier establishing legal certainty over the receipt and deposit of such bonus shares or cash dividends into its client’s margin account.

Rejecting bank guarantees, letters of credit and fixed deposits as acceptable collateral

The MAS rejected the industry’s proposal to include bank guarantees, letters of credit and fixed deposits as acceptable collateral. The MAS Response provides a detailed explanation for the MAS’ stance with regard to the risks posed by these instruments as acceptable collateral.

To view the full text of the MAS Response, please [click here](#).

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MOM announces details of Personalised Employment Pass (“PEP”) which will be introduced from 1 January 2007

On 24 August 2006, the Ministry of Manpower (the “**MOM**”) announced that it will introduce a Personalised Employment Pass (“**PEP**”) from 1 January 2007 to help Singapore better attract and retain global talent.

Currently, the issue of an Employment Pass (“**EP**”) is tied to a specific employer and any change of employer requires a fresh application. The new PEP scheme is not tied to any employer and will be granted on the strength of an EP holder’s individual merits. A foreigner with a PEP will be able to remain in Singapore for up to six months in between jobs for new employment opportunities.

The following is a summary of the features of the PEP.

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Eligibility

The following groups will be eligible for the PEP if they had earned a basic salary of at least S\$30,000 in the preceding year and fulfilled the minimum work period as follows:

- P Pass holders that have at least two years' working experience on a P Pass;
- Q1 pass holders with at least five years' working experience on a Q1 pass; and
- Foreign graduates from institutions of higher learning in Singapore with at least two years' working experience on a P or Q1 Pass.

Benefits – Job flexibility

Generally, PEP holders can accept employment in any sector although there may be some jobs where prior permission is required. The MOM will be providing details about this. PEP holders do not need to re-apply for a new pass when changing jobs.

PEP holders will also have the flexibility of remaining in Singapore for a continuous period of up to six months without a job to evaluate employment or work opportunities. They will not be required to leave Singapore during this time.

Dependant privileges

PEP holders will continue to enjoy the dependants' privileges of their original passes or current eligibility at the point of PEP application, whichever is higher. Those who switch to higher-paying jobs may apply for the corresponding dependants' privileges.

P1, P2 and Q1 Pass holders are eligible to bring his spouse and children under 21 years of age on Dependant's Passes. A P pass holder can also bring his parents and parents-in-law on Long-Term Social Visit Passes.

Conditions of validity

- **Maximum unemployment period.** This cannot exceed six continuous months at any point.
- **Minimum annual basic salary.** PEP holders must earn an annual basic salary of at least S\$30,000 for each calendar year of the PEP.
- **Requisite notifications to the MOM.** PEP holders and their employers will need to keep the MOM informed of each change in the PEP holders' employment status and agree to make available to the MOM information on their annual basic salary. PEP holders will also need to notify the MOM of any changes in their contact details.

Duration

The PEP will be issued only once for five years. It is not renewable.

To view the MOM's press release dated 24 August 2006, please [click here](#).

For a summary of the features of the PEP scheme, please [click here](#).

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The MOM has also issued a set of FAQs in respect of the new PEP scheme. To view the FAQs, please click on the title of each of the following topics:

- [Rationale for the PEP scheme](#)
- **Specifics of the PEP**
 - [Eligibility](#)
 - [Conditions for validity](#)
 - [Exit from the PEP](#)
- [Application and processing](#)
- [Others](#)

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MAS and Ministry of Law consult on proposed changes to unsecured credit rules and similar rules for moneylenders

The Monetary Authority of Singapore (the “**MAS**”) and the Ministry of Law invite interested parties to give their views on a joint consultation paper on unsecured credit rules (the “**Joint Consultation Paper**”). Comments on the Joint Consultation Paper must be submitted to the MAS or the Ministry of Law by 7 September 2006.

Currently, financial institutions granting unsecured credit facilities or issuing unsecured credit cards to individuals are required to abide by a set of unsecured credit rules administered by the MAS. The moneylenders regime, which is supervised by the Ministry of Law, does not have similar unsecured credit rules for both licensed moneylenders and exempted moneylenders that grant unsecured personal loans to the public.

The proposals in the Joint Consultation Paper are intended to update the MAS’ existing unsecured credit rules, and to apply these revised rules to the moneylenders regime with appropriate modifications. The common application of unsecured credit rules to both financial institutions and moneylenders would ensure a more consistent regime for granting of unsecured credit in Singapore.

Key recommendations in the Joint Consultation Paper include:

- **Proposed amendments to unsecured credit rules for financial institutions**
 - lowering the minimum annual income threshold for unsecured credit facilities from S\$30,000 to S\$20,000. The minimum annual income requirement for credit card facilities remains at S\$30,000
 - setting the maximum aggregate credit limit of all unsecured personal credit facilities and credit cards granted by a financial institution at four times of monthly income for individuals with a requirement for at least S\$30,000 in annual income.

For individuals with annual income of at least S\$20,000 but below S\$30,000, the maximum aggregate credit limit will be twice their monthly income

- in tandem with a lowering of the minimum income threshold, making credit checks with a credit bureau will be compulsory for financial institutions granting unsecured personal loans or issuing credit cards
- requiring lenders of unsecured credit facilities to clearly disclose finance and late payment charges
- **Proposed introduction of unsecured credit rules for moneylenders**
 - for unsecured loans exceeding S\$3,000, income checks are mandatory and moneylenders must ensure that the applicant has an annual income of at least S\$20,000
 - for unsecured loans of S\$3,000 and below, income checks are not mandatory and moneylenders cannot charge interest rates that exceed 18 per cent. per annum
 - requiring moneylenders to clearly disclose all charges for unsecured credit facilities

The Joint Consultation Paper also proposes the exclusion of certain types of loans from these unsecured credit rules. These loans include business loans to sole proprietorships, education loans and renovation loans. For renovation loans, in order to ensure that applicants do not over borrow, the unsecured credit loan will not be permitted to exceed six times the applicant's monthly income or S\$30,000, whichever is the lower.

The existing Banking (Credit Card and Charge Card) Regulations and MAS Notice 635 on Unsecured Credit Facilities to Individuals will be combined into a single piece of subsidiary legislation under the Banking Act. Other MAS Notices governing the granting of unsecured credit facilities to individuals by merchant banks, finance companies and insurers will be revised to reflect the proposed changes, taking into account feedback during the consultation period.

The proposed revised credit rules for moneylenders will be incorporated into the existing Moneylenders Rules.

To view the full text of the Joint Consultation Paper, please [click here](#).

To view the MAS press release relating to the above development, please [click here](#).

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MAS second consultation paper on draft Notices on Prevention of Money Laundering and Countering the Financing of Terrorism

On 4 August 2006, the Monetary Authority of Singapore (the “**MAS**”) released a second consultation paper on the proposed revisions to the MAS notices on prevention of money laundering and countering the financing of terrorism (the “**Second Consultation Paper**”). The MAS conducted an earlier consultation, in January 2005, on the first draft of a revised MAS Notice to Banks No 626 on Prevention of Money Laundering and Countering the Financing of Terrorism (the “**First Consultation Paper**”).

The Second Consultation Paper contains drafts of notices on anti-money laundering and countering the financing of terrorism (the “**Draft Notices**”) for the following entities (the “**Entities**”):

- Banks (MAS 626)
- Finance companies (MAS 824)
- Merchant banks (MAS 1014)
- Money changers and remittance licence holders (MAS 3001)
- Life insurers (MAS 314)
- Capital markets services licence holders (SFA 04-N02)
- Financial advisers (FAA-N06)
- Approved trustees (SFA13-N01)
- Trust companies (TCA-N03)

These Draft Notices are drafted taking into consideration the feedback received on the First Consultation Paper and recent developments in international standards in the area of anti-money laundering and countering of terrorism financing.

Comments on the Draft Notices must be submitted to the MAS by 4 September 2006.

The key proposed global changes in the Draft Notices include:

- extending the coverage of the Draft Notices to countering of terrorism financing;
- establishing a more rigorous set of customer due diligence (“**CDD**”) measures;
- recognition of a risk-based approach for CDD;
- introducing measures to deal with “politically exposed persons” (“**PEPs**”); and
- requiring some of the Entities to include originator information in cross-border wire transfers.

Extending coverage of Draft Notices to counter terrorism financing

Since 2002, Singapore has enacted legislation to counter terrorism financing. The Terrorism (Suppression of Financing) Act together with the Monetary Authority of Singapore (Anti-terrorism Measures) Regulations criminalise any form of direct or indirect assistance to terrorists and, *inter alia*, impose a duty on any persons in Singapore to report or prevent terrorism financing.

In view of these legislative developments and the FATF recommendations, the coverage of the Draft Notices will be extended to terrorism financing. The Entities will be required to adopt the measures set out in the Draft Notices for the purpose of preventing money laundering as well as countering terrorism financing.

More rigorous customer due diligence measures

The Draft Notices will require the Entities to perform more detailed customer due diligence (“**CDD**”) measures to verify the identities of their customers. These measures are currently referred to as the “know your customer” measures in the existing notices on prevention of money laundering applicable to the Entities.

The new CDD measures include an express requirement on the Entities to complete CDD measures before establishing business relations with any customer unless the following conditions are satisfied:

- it is essential for the Entities not to interrupt the normal conduct of business; and
- the risks of money laundering and terrorism financing have been effectively managed by the Entities.

The Draft Notices also expressly require an Entity to perform such CDD measures as may be appropriate to its existing customers having regard to its own assessment of materiality and risk.

Risk-based approach for CDD measures and measures to deal with PEP

Under the Draft Notices, simplified CDD measures will be permitted but enhanced CDD measures will be required in other situations where the risk of money laundering and terrorism financing are higher.

The Draft Notices specifically identify PEP, their immediate family members and their close associates as a category of customers to which the Entities must perform the enhanced CDD measures. A PEP is defined in the Draft Notices as a natural person who is or has been entrusted with prominent public functions in a foreign country, including the roles held by a head of state, a head of government, government minister, senior civil servant, senior judicial or military official, senior executive of state owned corporation and senior political party official.

In addition, the Entities will be required to perform the enhanced CDD measures for such other categories of customers, business relations or transactions as the Entities may assess to present a higher risk for money laundering and terrorism financing. The Draft Notices do not provide examples of such high risk customers.

The Entities are to give particular attention to business relations and transactions with any person from or in countries and jurisdictions known to have inadequate anti money laundering and countering the financing of terrorism measures, as determined by the Entities or notified to the Entities generally by the MAS or other foreign regulatory authorities.

Including originator information in cross-border wire transfers

To be in line with the FATF's Special Recommendation VII on Wire Transfers, the Draft Notices will require banks, finance companies, merchant banks and holders of remittance licence, which are the ordering institutions in a cross-border wire transfer, where the amount to be transferred exceeds S\$2,000, to include in the message or payment instruction that accompanies or relates to the wire transfer the originator's:

- name,
- account number, and
- address, unique identification number, or date and place of birth.

To view the Second Consultation Paper, please [click here](#).

To view the MAS' press release relating to the Second Consultation Paper, please [click here](#).

To view an article entitled "MAS issues consultation paper on proposed revisions to the Notice on Prevention of Money Laundering" featured in the January 2005 of the Allen & Gledhill Legal Bulletin which discusses the First Consultation Paper, please [click here](#).

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MAS releases response to feedback received on recommendations to enhance Policy Owners' Protection Fund Scheme

From 16 December 2005 to 27 January 2006, the Monetary Authority of Singapore (the "**MAS**") conducted a public consultation on draft recommendations to enhance the Policy Owners' Protection Fund ("**PPF**") Scheme. Currently, a PPF scheme is provided for in the Insurance Act to provide compensation to policy owners for life policies and compulsory insurance policies, such as motor third party bodily injury and Workmen's Compensation Act liability insurance, in the event of the default of an insurance company.

The Consultation Paper issued on 16 December 2005 (the "**Consultation Paper**") was the first of two phases of review to ensure that the PPF scheme remains relevant taking into account market developments. In its review, the MAS studied the equivalent schemes in other jurisdictions. The review is guided by two fundamental principles: the need to provide adequate protection to policy owners while keeping the cost of the PPF affordable, and achieving an equitable allocation of cost among insurers participating in the scheme.

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The first phase of the review covered issues relating to membership, scope of coverage, level of coverage, continuity of insurance coverage, funding method and size of levies.

The second phase of the review will focus on the implementation details of the PPF scheme including the structure, organisation and mandate of the PPF administrator, PPF payout procedures and public education of the scheme. Further public consultations will be undertaken.

On 2 August 2006, the MAS released its response to the feedback received on the recommendations set out in the Consultation Paper. The feedback received that is of a wider interest, together with the MAS' comments, spanned various issues including the following:

- **Membership**
 - Participation of insurers with equivalent coverage from other jurisdictions
 - Treatment of new entrants
 - Inclusion of run-off insurers in life insurance PPF Scheme
- **Scope of coverage – Life insurance**
 - Exclusion of offshore policies
 - Limiting the coverage of life insurance PPF Scheme
 - Coverage of inward reinsurance portfolio
 - Clarification on guaranteed benefits
- **Scope of coverage – General insurance**
 - Limiting the coverage of general insurance PPF Scheme
 - Interaction of general insurance PPF Scheme with the Motor Insurance Bureau
- **Level of coverage**
 - Joint ownership of policies
- **Method of funding**
 - Relevance of pre-funding of PPF
- **Levies**
 - Charging PPF levies to insurance funds
 - Understanding of supervisory rating methodology
 - Risk based levies
 - Clarification on protected liabilities
 - Premium income of the protected lines of business

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- **Other feedback received**
 - Second phase of the review of the PPF Scheme
 - Trigger of PPF

To view the Consultation Paper released on 16 December 2005, please [click here](#).

To view the response of the MAS released on 2 August 2006, please [click here](#).

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Cases

Corporate & financial services

Singapore High Court considers the principles concerning the giving of financial assistance under section 76(1)(a)(i)(A) of the Singapore Companies Act

PP v Lew Syn Pau & Anor
[2006] SGHC 146

The Singapore High Court's decision in *Public Prosecutor v Lew Syn Pau & Anor* is significant and instructive for its interpretation of section 76 of the Companies Act and is a landmark case for the meaning of "financial assistance". Subject to exceptions, section 76 prohibits a company from providing financial assistance for the acquisition of its own shares.

The first accused, Mr Lew Syn Pau ("**Mr Lew**") was a friend and business associate of the second accused, Mr Wong Sheung Sze ("**Mr Wong**"). Mr Wong was the executive chairman and a director of Broadway Industrial Group Ltd ("**BIGL**"). BIGL is an investment holding company listed on the main board of the Singapore Exchange. Mr Wong was also a director of Compart Holdings (S) Pte Ltd ("**Compart Holdings**"), Compart Asia Pte Ltd ("**Compart Singapore**"), and Compart Asia Pacific Limited ("**Compart Mauritius**"). Compart Mauritius was a company incorporated in the Republic of Mauritius.

In this case summary, Compart Holdings, Compart Singapore and Compart Mauritius are referred to collectively as the Compart Group (the "**Compart Group**"). The Compart Group together with BIGL are referred to as the BIGL Group (the "**BIGL Group**"). They were all related companies. Compart Mauritius was a wholly-owned subsidiary of Compart Singapore which in turn was a subsidiary of Compart Holdings. Compart Holdings was in turn a subsidiary of BIGL.

Mr Lew was a director of each of the companies in the Compart Group. BIGL also engaged Mr Lew in his capacity as a director of his own company, Capital Connections Pte Ltd to assist in finding suitable prospective investors for BIGL. Mr Lew managed to find an investor ("**Mr Tan**"). However, Mr Tan had difficulties raising the required funds. Mr Wong then suggested that

Mr Lew take a director's loan of S\$4.2 million from Compart Mauritius out of which he would advance a sum of S\$4 million to finance Mr Tan's intended subscription for shares in BIGL.

On these facts, Mr Wong was charged with knowingly and wilfully authorising BIGL to indirectly give financial assistance to a third party, Mr Tan, through a loan from Compart Mauritius, to enable Mr Tan to purchase BIGL shares. Mr Lew was charged with abetting the transaction. Both Mr Wong and Mr Lew were charged under section 76(1)(a)(i)(A) of the Companies Act. At the close of the Prosecution's case, it was submitted that the Defence had no case to answer on the basis that even on the facts as presented by the Prosecution, there was no offence committed in law.

The High Court noted that the material prohibition is contained in section 76(1)(a)(i)(A) and that forbids a company which is the target of an intended acquisition from directly or indirectly giving any financial assistance for the purposes of or in connection with the acquisition. It is to be contrasted with the prohibition contained in section 76(1)(a)(i)(B) which prohibits a *subsidiary company* from providing such financial assistance in relation to the acquisition of its holding company. Sundaresh Menon JC noted that while the facts of the present case might appear at first blush to fit more easily within the ambit of section 76(1)(a)(i)(B), that course was not open to the Prosecution because section 4 of the Companies Act defines a "company" as one incorporated in Singapore. Compart Mauritius was thus not a "company" within the meaning of the section. Hence, in order to establish the ingredients of the charge, the Prosecution had to prove that the financial assistance had been provided by BIGL.

The approach to the interpretation of section 76: the giving of financial assistance

Menon JC observed that the strict construction rule is only applied to ambiguous statutory provisions as a tool of last resort. The proper approach to be taken by a court construing a penal provision is to first consider if the literal and purposive interpretations of the provision leave the provision in ambiguity. It is only after these and other tools of ascertaining Parliament's intent have been exhausted that the strict construction rule kicks in the accused person's favour.

Menon JC therefore approached the interpretation of section 76 with no predisposition towards a narrow or restrictive interpretation. Rather, he approached it having regard to the legislative objectives and the language used to achieve those objectives, and considered whether the acts of the accused persons could fairly be said to be caught by the prohibition.

The court observed that the Companies Act does not proscribe the giving of assistance generally. In particular, the court noted that a company may have very good commercial reasons for facilitating the conclusion of an intended acquisition of its shares and it is entitled to exercise efforts to secure that end as long as it does not give *financial* assistance. This was a critical issue in the present case.

The court held that the term "financial assistance" is to be understood as a matter of commercial usage though it is important to have regard to the section as a whole. For assistance, the court referred to section 76(2) which lists several examples of giving financial assistance including the making of a loan, the giving of a guarantee, the provision of security, the release of an obligation, or the release of a debt. The court noted that the common thread running through each of these instances is that the act in question actually or contingently depletes the assets of the assisting company.

The court held that the criteria is not one directed at technical economic equivalence in the company's position before and after the transaction. Rather, the real issue is whether the assets of the company has in fact been used or been put at risk for the purpose of the intended acquisition. If the answer to this is in the affirmative, then there may be financial assistance in the relevant sense whether or not the risk has materialised and whether or not the actual asset position has diminished.

The court also noted that, having regard to the legislative purpose of the prohibition contained in section 76, namely to preserve the company's capital and prevent the use of its assets in connection with an intended acquisition of its shares, there does not appear to be any good reason to conclude that the legislature intended to criminalise conduct which does not entail the use of a company's resources whether directly or in any way that encumbered or placed such resources at risk.

Accordingly, the court concluded that in order to establish that a company has given *financial* assistance it would be *necessary* to establish that there has been a depletion of the assets of the company as aforesaid. But this may not always be sufficient to warrant the conclusion that the transaction was in substance one involving the giving of financial assistance. In the present case, the fact that financial assistance was given in connection with the acquisition was not disputed. The key issue was whether it was given by a prohibited entity. Section 76 is ultimately there to protect the company and its creditors. It would be wrong to approach the section in a way that would stifle legitimate commercial activity that is in the interests of the very company the section is meant to protect, or that would encourage creative but ultimately pointless efforts to get out of transactions that were entered into in good faith but which turn out later to have been less beneficial than expected.

On the facts of the present case, the financial assistance in question took the form of a perfectly straightforward loan, not from BIGL, but from Compart Mauritius, to Mr Lew and then to Mr Tan. The Prosecution's case rested on the financial assistance having been given by BIGL.

Accordingly, the court held that the Prosecution's case would fail unless it could be shown that:

- (a) the giving of financial assistance by a subsidiary directly is *ipso facto* equivalent to the giving of such assistance by the holding company *indirectly*, or
- (b) the prohibition on giving assistance *indirectly* in some way allows the court to ignore the separate legal personality between BIGL and its subsidiaries.

Giving financial assistance indirectly

The Prosecution submitted that BIGL did not have to be the party giving the loan if it was shown that it had control over the funds of Compart Mauritius, and those funds were advanced to Mr Tan. In a nutshell, BIGL made the loan possible.

The court held that this submission was incorrect in law as it failed to consider the distinction between the company giving *financial* assistance on the one hand and on the other, the company giving *any other type* of assistance. Where the company gives any other type of assistance that is not financial assistance, it is simply not within the prohibition. It matters not that such other assistance is given with a view to facilitate the intended acquisition; or that it is given to facilitate or induce someone else to give financial assistance in order to facilitate the intended acquisition. The court

held that to say that such assistance without more is to be treated as indirect financial assistance is to place upon the section a construction that was never intended, namely, that the company shall not provide any assistance of any sort if that assistance directly or indirectly results in the purchaser being financially assisted even by some entity not within the prohibition. The court was also of the view that this argument ignores the principle that the question whether financial assistance has been given must be examined from the point of view of the *company giving* rather than from the point of view of the *intending purchaser receiving* such assistance. Once the view point is shifted away from the company giving the assistance, it leads to precisely this sort of confusion. The temptation in doing this is to focus on the fact that the purchaser has been financially assisted. That is not prohibited and in transactions of any size, purchasers frequently will be.

In order to come within the section, it must first be established that the company had given financial assistance. The fact that the section would be contravened if such assistance had been given indirectly meant only that there was no need to demonstrate a single, direct, uninterrupted causal link between the company and the recipient of the financial assistance; and that the inquiry was ultimately directed at the substance and not the form of the transaction. Thus, the section would be contravened as long as financial assistance was given by the company even though it was given through many intermediaries and in a form that did not fall within a conventional understanding of that term.

Whether the giving of financial assistance by a subsidiary directly is *ipso facto* equivalent to the giving of such assistance by the holding company *indirectly*

As to whether the giving of financial assistance by a subsidiary directly *ipso facto* constitutes the giving of such assistance indirectly by its holding company, the court rejected the notion that the giving of financial assistance by the subsidiary *ipso facto* also constitutes the giving of such assistance by the parent. The court held that there can be no doubt that in the ordinary case the relevant act of the subsidiary, in this instance the giving of financial assistance, remains the act of that entity only. This follows from the basic doctrine underlying all of company law that each company is a legal person separate and distinct from every other company. This is no less true where the companies are related.

In the context of the prohibition on a company giving financial assistance for the acquisition of its shares, the Legislature has made its intention clear that the doctrine of separate legal personality is to apply with the full force by enacting separate provisions that prohibit a company giving financial assistance in the acquisition of its own shares (section 76(1)(a)(i)(A)) and that prohibit a subsidiary company from giving financial assistance in the acquisition of shares in its holding company (section 76(1)(a)(i)(B)).

Furthermore, if as explained above, a foreign subsidiary is not itself within the prohibition in section 76(1)(a)(i)(B), then it would be illogical to hold that the holding company of such a subsidiary should itself be found to have contravened the prohibition in section 76(1)(a)(i)(A) by virtue of an action of the subsidiary that was not prohibited.

However, the court cautioned that although the fact that the giving of financial assistance by the subsidiary does not *ipso facto* constitute the giving of such assistance by the parent, that is not to say that it would never amount to such. For example, where the act of the subsidiary is itself a breach of the prohibition then to the extent that breach was procured by the holding company it would constitute an offence (quite possibly by abetment).

Whether the prohibition on giving assistance *indirectly* allows the court to ignore the separate legal personality between BIGL and its subsidiaries

As to whether the prohibition on giving assistance *indirectly* in some way allows the court to ignore the separate legal personality between BIGL and its subsidiaries, the court approached the question by considering the issue whether the giving of financial assistance by a subsidiary will also constitute the giving of financial assistance by the holding company.

Adopting this approach, the court stated two general propositions which are firmly established. First, the owner of a company does not own the company's assets. The company owns its assets. It would follow that the holding company has no direct proprietary interest in the assets of its subsidiaries. Secondly, each company is a separate legal entity in its own right. A company and its owner are two separate entities. The acts of the former will not be imported to the latter as a general rule. These principles are not displaced even if the shareholder controls the company in question; or if one is looking at the situation of a group of companies

The fact of control was the central basis upon which the Prosecution maintained its position that BIGL had given financial assistance even though the loan had been made by Compart Mauritius. The court was of the view that it is clear that reliance upon the fact of control and of consolidation of group accounts is misplaced if it is thereby sought to be suggested that the doctrine of separate legal personality is something displaced in a group setting.

The Prosecution's case

The Prosecution argued that that the financial assistance in question was given by BIGL. In particular, it was argued that Mr Wong, being in control of the operations of BIGL and its subsidiaries, in fact was able to and did arrange the loan by virtue of his control over BIGL and Compart Mauritius. The purpose of the loan was solely to enable the acquisition of the BIGL shares.

Taking the Prosecution's case at its highest and assuming all the factual assertions were true, the court could not see how that rendered the giving of the loan by Compart Mauritius the giving of financial assistance by BIGL. The key to note was that Compart Mauritius was a *bona fide* company established years before this transaction for perfectly valid and legitimate tax reasons. Compart Mauritius was not a sham or façade. It was not even a wholly-owned subsidiary of BIGL. In the court's view, the assertions in the factual points raised by the Prosecution went no further than to say that Compart Mauritius was amenable to control by its parent company and Mr Wong. If the Compart Mauritius board was in fact ineffectual and the directors acted otherwise than in that company's interest then those directors may well face a liability for breach of their fiduciary duties. However, that would not render the actions in question anything other than those of Compart Mauritius. The fact that the loan was given at the request or even following strong pressure from BIGL (assuming this was so) made no difference because the commercial reality was that a subsidiary company was often liable to act in line with the wishes of its parent company. This was not sufficient to ignore the separation of legal personalities.

Conclusion

In the present circumstances, the court was satisfied that:

- (a) no financial assistance was in fact given by BIGL;

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- (b) the relevant financial assistance was given by Compart Mauritius;
- (c) there was no prohibition on Compart Mauritius giving the financial assistance in question;
- (d) there is no basis at law to sustain any contention that the financial assistance given by Compart Mauritius is to be attributed to BIGL; and
- (e) nor could such financial assistance as was given by Compart Mauritius constitute the indirect giving of financial assistance by BIGL within the meaning of section 76(1).

As the result, the court held that the Prosecution had failed to make out a key element of the charge namely that BIGL gave the financial assistance in question. Mr Wong and Mr Lew were therefore acquitted of the charges brought against each of them.

Allen & Gledhill successfully represented the second accused.

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Intellectual property & technology

Unauthorised installation of computer software programs: Singapore District Court imposes criminal penalties on company

PP v PDM International Pte Ltd
[2006] SGDC 91

PP v PDM International Pte Ltd is the first prosecution under the new penal provisions of the Copyright Act. The offences in this case fell under section 136(3A) of the Copyright Act. Section 136(3A), which provides for criminal penalties for willful acts of primary copyright infringement, came into force on 1 January 2005. Prior to 1 January 2005, the acts of copyright infringement complained of in this case would not be a criminal offence under the Copyright Act. Hence, this is a significant case to note as it is an indication of the Singapore courts' treatment of criminal offences in relation to the willful infringement of copyright for commercial advantage under the Copyright Act.

PDM International Pte Ltd ("**PDM**") is an interior design company and has been in operation since 1996. As a result of a complaint by Business Software Alliance ("**BSA**"), PDM's office was raided whereby computer software programs such as AutoCad 2002, Adobe Photoshop 7.0, Adobe Acrobat Reader and Microsoft Office were found to have been installed in PDM's computer systems without the proper licences. Some of these programs were installed in PDM's computer systems as far back as April 2001. PDM had been using these programs for their daily design work until the raid in September 2005. The police also seized five CD-ROMS believed to contain pirated copies of computer software.

PDM was faced with three charges under section 136(3A) of the Copyright Act for wilfully installing computer software programs onto its computers which constituted an infringement of the copyright in a work in order to obtain a commercial advantage, at a time when copyright subsisted in the works published by Autodesk, Adobe and Microsoft. PDM pleaded guilty to two charges and consented to the remaining charge being taken into consideration for the purposes of sentencing.

Under section 136(3A) of the Copyright Act, PDM faced a fine of up to S\$20,000 for each charge proceeded on. In determining the quantum of the fine to be imposed, the following are relevant considerations:

- profit made by the offender arising from the offence;
- value of the subject-matter of the offence;
- amount of injury done; and
- financial position of the offender.

In mitigation, PDM asked the court to consider, amongst others, that it did have licences for the other software programs which were installed and used and that it was in the process of obtaining the appropriate licensed software. Further, PDM had no information technology (“IT”) department and the manager handling the upgrading exercise was away on maternity leave. It was also argued that PDM’s infringement did not cause as much loss as sales of pirated software. As such, the loss suffered by the copyright owner in the present case would be much lower as it would only be limited to the number of computers that ran the unauthorised software.

On the other hand, the DPP urged the court to impose a heavy fine on PDM. The DPP pointed out that the total retail costs of the unlicensed software installed and used by PDM was S\$78,174.73 and this far exceeded the maximum fine of S\$40,000 that could be meted out to PDM on its two charges. Further, PDM’s financial position appeared strong. The DPP also drew the court’s attention to a previous Singapore case, which although the offences were under different provisions of the Copyright Act, could provide guidance to the court on the amount of fine to impose. In that case, the offender was fined a total sum of S\$10,000 on five charges for dealing in copies of pirated cinematograph films, which was about 50 times the retail costs of the infringing articles in that case. The DPP submitted that a heavier fine for PDM would give effect to the legislative intent of section 136(3A) of the Copyright Act and would also act as a deterrent to would-be offenders.

In response, the court did not think that the previous Singapore case could provide guidance as different issues were involved. In the present case, section 136(3A) of the Copyright Act provided clear guidance for the court to determine the seriousness of the offence and the level of punishment to be meted out for offences. There was clearly commercial advantage as PDM did not pay for the use of the software programs on additional computers in respect of some of the programs. The court concluded that the PDM undoubtedly benefited and gained financially during the period when such unauthorised software programs were being used.

The court did not think it was relevant that PDM had no IT department or that its manager in charge of procuring the necessary licences was not available at the material time because it was a matter which could have been rectified a lot earlier prior to the raid. The court’s position is that businesses which do not have IT departments should have systems in place to ensure that they are in compliance with the law and not blame the absence or inadequacy of systems in their businesses for violating the Copyright Act. However, the court took note of the fact that subsequent to the raid on their premises, PDM did take various measures to regularise the use of the software programs so as to remain compliant with the law. It was also a relevant factor that PDM was a first-time offender and that it pleaded guilty without wasting the State’s time and resources. In agreeing with the DPP, the court was also of the view that the parliamentary intention behind section 136(3A) of the Copyright Act must be given full effect by the imposition of a deterrent sentence. The

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sentences imposed must show that there would be a robust response in the form of deterrent fines for any such infringement of intellectual property rights.

The court imposed a fine of S\$15,000 for each charge.

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General

Money laundering

English Court of Appeal's decision highlights statutory route of disclosure to be taken by bank when money laundering is suspected

K Ltd v National Westminster Bank Plc
[2006] EWCA Civ 1039

The facts of the present case highlight the statutory route of disclosure that should be taken by a financial institution when it knows or has reasonable grounds to believe that a customer's account is or will be used for money laundering.

In *K Ltd v National Westminster Bank Plc*, the defendant bank (the "**Bank**") did not comply with a payment request made by its customer (the "**Customer**") to pay money out of the Customer's account. When the Bank informed the Customer that it could not comply with its instruction, the Customer immediately put the matter in the hand of its solicitors who, after letters before action, applied to the court for an injunction to restrain the Bank from continuing to act in breach of the contract of mandate between the Bank and the Customer whereby the Bank had agreed to honour its customer's instructions.

The Bank resisted the Customer's application on the ground that it suspected that the arrangement would facilitate the use of criminal property by the Customer and by honouring the Customer's instruction, the Bank would be guilty of a criminal offence under the UK anti money laundering ("**AML**") law.

A person commits a criminal offence under the UK money laundering provisions in the UK Proceeds of Crime Act 2002 (the "**UK AML Act**") if he "enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person".

There is a similar prohibition in sections 43 and 44 of the Singapore Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (the "**Singapore AML Act**") which makes a financial institution guilty of an offence if it enters into or is otherwise concerned in an arrangement, knowing or having reasonable grounds to believe that the arrangement facilitates the retention or control by or on behalf of another of its customer's benefits of criminal conduct or drug trafficking (whether by concealment, removal from jurisdiction, transfer to nominees or otherwise) and the financial institution knows or has reasonable grounds to believe that its customer is a person who engages in or has engaged in criminal conduct or drug trafficking, or has benefited from criminal conduct or drug trafficking.

The English Court of Appeal rejected the Customer's application and held that the Bank could not be made to comply with the Customer's instruction.

The English Court of Appeal held that there could be no doubt that, if the Bank knew or suspected that money in the Customer's account was criminal property and, without making disclosure to the relevant AML authorities or without authorised consent from the relevant AML authorities (if disclosure were made), the Bank processed the Customer's cheque in such a way as to transfer that money into the account of another person, the Bank facilitated the use or control of that criminal property and thus committed an offence under the UK AML Act. It would be no defence to a charge under the UK AML Act that the Bank was contractually obliged to obey the Customer's instructions.

In fact, the Bank was not in breach of its contractual duty to the Customer for not obeying the Customer's instruction in the present circumstances because if a statute rendered the performance of a contract illegal, the contract was frustrated and both sides were discharged from further performance.

Therefore, the court agreed with the Bank that it had rights under the law not to honour the Customer's instruction. In addition, the court noted that the Bank in the present case had correctly followed the statutory route of disclosure under the UK AML Act.

In this case, when the Bank suspected that it would be liable for an offence under the UK AML Act by honouring the Customer's instruction, it refrained from honouring the Customer's instruction and made an authorised disclosure to the relevant AML authorities under the UK AML Act ("**Authorised Disclosure**").

When the Bank informed the Customer that it could not honour the latter's instruction, the Customer applied for an injunction in court against the Bank to restrain the Bank from doing so. In order to defend the Customer's application, the Bank had to disclose to the court its real reason for not honouring the Customer's instruction. However, the tipping-off provision in the UK AML Act prevented the Bank from making disclosure to the court unless such disclosure was made in accordance with the exceptions provided under the provision.

The tipping-off provision provided that the Bank would commit an offence if it knew or suspected that an Authorised Disclosure had been made and the Bank made a disclosure "which was likely to prejudice any investigation" which might be conducted following the Authorised Disclosure. The provision further provided that such disclosure did not amount to tipping-off if the disclosure was made by a professional legal adviser and the disclosure was made to any person in connection with legal proceedings or contemplated legal proceedings. Hence, to avoid breaching the tipping-off provision, the Bank procured his professional legal adviser to make the relevant disclosure to the court by a letter.

Similarly, in Singapore, if a financial institution encounters the same situation, sections 43 and 44 of the Singapore AML Act prohibit it from honouring a customer's instruction before disclosing its suspicion or belief that the customer's assets represent illegal proceeds from criminal conduct or drug trafficking to an authorised officer under the Singapore AML Act. The financial institution may honour the customer's instruction with the consent of the authorised officer.

Further, section 48 of the Singapore AML Act contains a similar tipping-off provision which prohibits the financial institution who knows that a disclosure has been made to an authorised officer under the Act from disclosing to any

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other person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure. However, disclosure made by an advocate and solicitor to disclose any information to any person for the purpose of legal proceedings is protected from the tipping-off provision.

Therefore, if the financial institution's customer commences legal proceedings against the financial institution for not honouring its instructions, the financial institution should procure its lawyers to make the relevant disclosure to the court in order to avoid breaching the tipping-off provision. For further reference, please [click here](#) to read the full text of sections 43, 44 and 48 of the Singapore AML Act (the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A)).

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News

Acquisition of GES International Limited

Venture Corporation Limited ("**Venture**") has entered into an implementation agreement with GES International Limited under which Venture will acquire all the issued ordinary shares of GES International Limited for approximately S\$980 million by way of a scheme of arrangement.

Advising Venture are Allen & Gledhill Partners Andrew M. Lim and Christopher Koh, Senior Associate Goh Peng Fong and Associate Adeline Wee.

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Initial public offering of CDL Hospitality Trusts

CDL Hospitality Trusts, a stapled group comprising CDL Hospitality Real Estate Investment Trust ("**H-REIT**") and CDL Hospitality Business Trust ("**HBT**") has raised approximately S\$353 million from its initial public offering. The offering comprised an international placement to investors, including institutional and other investors in Singapore and an offering to the public in Singapore. H-REIT's initial portfolio comprises Orchard Hotel, Grand Copthorne Waterfront Hotel, M Hotel and Copthorne King's Hotel, as well as the Orchard Hotel Shopping Arcade. This is the first hotel REIT in Singapore. Allen & Gledhill was the legal adviser to the offering, the sponsor (Millennium & Copthorne Hotels plc), the H-REIT Manager (M&C REIT Management Limited) and the HBT Trustee-Manager (M&C Business Trust Management Limited). The lawyers involved were Partners Penny Goh, Jerry Koh, Ho Kin San, Hoo Sheau Farn and Chua Bor Jern, Senior Associate Howe Pin Yit and Associate Colin Buay.

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Initial public offering of Frasers Centrepoint Limited

Frasers Centrepoint Asset Management Ltd, as manager of Frasers Centrepoint Trust (“**FCT**”), made an offering of 261,930,000 units in FCT. The offering, which comprised an international placement to investors, including institutional and other investors in Singapore, and an offering to the public in Singapore, raised approximately S\$269.8 million. The initial portfolio of FCT comprises three retail properties in Singapore – Causeway Point, Northpoint and Anchorpoint.

Allen & Gledhill acted as legal adviser to the offering, the sponsor (Frasers Centrepoint Limited) and the manager of FCT. The lawyers involved were Partners Penny Goh, Jerry Koh, Margaret Soh, Eudora Tan and Foong Yuen Ping, Senior Associate Rhys Goh and Associate Koh Yen Ling.

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Global Forum on Intellectual Property

The IP Academy recently held its inaugural Global Forum on Intellectual Property 2006 (“**GFIP 2006**”) in Singapore on 21 and 22 August 2006. The only multi-disciplinary intellectual property event in the Asia Pacific, the forum featured a distinguished line-up of international speakers and panelists who discussed how Asia Pacific’s growing economic influence will exert an increasing influence on global intellectual property creation, protection, exploitation and management.

Dr Stanley Lai, Partner of Allen & Gledhill and Head of the Firm’s Intellectual Property & Technology practice, was one of the speakers at GFIP 2006. He shared his thoughts on the Google Print case in relation to the balance between the benefits of creating a universal digital repository of knowledge and the rights of copyright owners whose works were reproduced without permission.

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