

Legal Bulletin

A summary of developments in the law

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

These recent developments were highlighted in the Allen & Gledhill KnowledgeShare Alert of 20 February 2009. If you would like to be on our financial services related or general electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

Articles

SGX introduces further measures to facilitate fund raising

With effect from 20 February 2009, the Singapore Exchange Limited (the “**SGX**”), in consultation with the Monetary Authority of Singapore (the “**MAS**”), has introduced further measures to accelerate and facilitate the fund raising efforts of listed issuers.

The new measures were announced in a news release issued by the SGX on 19 February 2009.

The following are highlights of the new measures.

A. Allow up to 100 per cent. renounceable pro-rata share issuance

Issuers are now allowed to issue up to 100 per cent. of their issued share capital via a pro-rata renounceable rights issue.

The SGX Listing Rules previously allowed a listed issuer to seek a general mandate from shareholders for issuance of new shares on a pro-rata basis amounting to not more than 50 per cent. of issued share capital. The increase in the 50 per cent. limit to 100 per cent. follows feedback received by the SGX that the 50 per cent. limit in the SGX Listing Rules may not meet market needs in the current volatile market and tight credit conditions, as the time needed to obtain shareholders' approval to issue shares above the 50 per cent. threshold subjects issuers and underwriters to prolonged market exposure and compromises fund raising efforts.

This measure is subject to the condition that the issuer makes periodic announcements on the use of the proceeds as and when the funds are materially disbursed and provides a status report on the use of proceeds in the annual report.

Companies and business trusts may avail themselves of this new measure subject to compliance with applicable legal requirements such as provisions in the Companies Act and the Business Trusts Act requiring issuers to seek shareholders'/unitholders' approval, and the limitations in any existing mandate from shareholders/unitholders.

Real estate investment trusts (“**REITs**”) can make use of this measure provided they comply with the provisions of their trust deeds, applicable legal requirements and the limitations in any existing mandate from unitholders.

The SGX is of the view that any concerns over dilution of minority shareholders' interests are mitigated in a pro-rata renounceable rights issue as all shareholders have equal opportunities to participate and can dispose of their entitlements through trading of nil-paid rights if they do not wish to subscribe for their rights shares.

B. Increase discount limit for placement exercise

Listed issuers are now allowed to undertake non pro-rata placements of new shares priced at discounts of up to 20 per cent. to the weighted average price for trades done on the SGX for the full market day on which the placement or subscription agreement is signed, subject to the following conditions:

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- (a) the issuer seeks shareholders' approval in a separate resolution (the "**Resolution**") at a general meeting to issue new shares on a non pro-rata basis at a discount exceeding 10 per cent. but not more than 20 per cent.; and
- (b) the resolution seeking a general mandate from shareholders for the issuance of new shares on a non pro-rata basis is not conditional on this Resolution.

This measure is introduced following feedback from industry participants that the 10 per cent. maximum discount for placements undertaken using the general share issue mandate affects the attractiveness and viability of placement exercises.

C. Scrip dividend schemes

Subject to compliance with the Companies Act and other statutory requirements, an issuer will not be required to seek shareholders' approval for scrip dividend schemes as long as shareholders are provided with the option to elect for their distributions to be paid in cash.

D. Allow placements to certain substantial shareholders without specific shareholders' approval

The SGX will allow placements to substantial shareholders without specific shareholders' approval if such arrangements have the following safeguards in place:

- (a) the substantial shareholder:
 - (i) does not have representation (whether directly or indirectly through a nominee) on the board of the issuer; and
 - (ii) does not have control or influence over the issuer in connection with the day-to-day affairs of the issuer and the terms of the placement;
- (b) the placement is effected through an independent process such as book-building;
- (c) the placement is made to more than one placee; and
- (d) the proportion of issued shares of the issuer held by the substantial shareholder immediately after the placement is not more than the proportion of issued shares of the issuer held by it immediately before such a placement.

E. Allow underwriters to include non-major shareholders of the issuer as sub-underwriters

Following the announcement on 12 January 2009 to allow sub-underwriting for major shareholders, the SGX has clarified that the same arrangement may be extended to other shareholders. Issuers who wish to adopt the more extensive sub-underwriting arrangements will be required to inform The Central Depository (Pte) Limited (the "**CDP**") immediately upon announcement of the issue and provide an offer window of at least five days from the start of the rights offer period for these other shareholders to subscribe for their entitlements.

Shareholders who subscribe for their rights entitlements during this offer window will be entitled to receive a cash payment not exceeding the underwriting fee attributable to their entitlements, which will be paid to them by the underwriters after the close of the rights issue.

F. Introduction of “when-issued” trading for rights issue

In order to further shorten the market exposure period for participants of rights issues, the SGX will allow “when-issued” trading of the rights shares to commence on the next business day after the close of the rights offer. Issuers wishing to adopt “when-issued” trading should inform the CDP immediately upon announcement of the issue. Settlement for all trades done on a “when issued” basis will be effected on the same settlement date as trades done on the first day of “ready” trading of the rights shares.

G. MAS to consult on proposed requirement for REITs to hold annual general meetings

In its news release, the SGX has also disclosed that the MAS will be consulting on a proposed requirement for REITs to hold annual general meetings to promote good corporate governance and to be in line with the practices for listed companies and business trusts.

While the measures outlined in paragraphs B to F above appear to refer only to shares of companies which are listed on the SGX, such measures should be similarly applicable to REITs and business trusts as well, subject to compliance with applicable provisions in the trust deeds, the Listing Manual, applicable laws, regulations as well as other regulatory requirements, and in relation to REITs, the Code of Collective Investment Scheme (incorporating the Property Funds Guidelines).

The new measures outlined in paragraphs A to C above will be in effect until 31 December 2010. The effectiveness of these measures will be reviewed at the end of the period.

Please [click here](#) to read the news release issued by the SGX on 19 February 2009 which is also available on the SGX website www.sgx.com

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These recent developments were highlighted in the Allen & Gledhill Tax Update of 24 February 2009. If you would like to be on our tax related electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

IRAS seeks feedback on proposed tax framework for corporate amalgamations

It was announced in the Singapore Budget Statement 2009 that a new tax framework for qualifying corporate amalgamations will be introduced to minimise the tax consequences arising from amalgamations. On 20 February 2009, the Inland Revenue Authority of Singapore (the “IRAS”) issued a consultation paper seeking feedback on the proposed tax framework and, in particular, with respect to the following questions:

- (a) What are the issues and concerns that amalgamating companies and the amalgamated company may face if the tax framework is adopted?
- (b) What further measures should the Government consider implementing to prevent potential abuses of companies seeking to monetise tax assets under the tax framework?

Why a new tax framework is proposed

In an amalgamation of companies under the Companies Act, the amalgamating companies may continue as a single new company or as one of the amalgamating companies (in either case, an “**amalgamated company**”). All property, rights, privileges, liabilities and obligations, etc. of each of the amalgamating companies will be transferred to and assumed by the amalgamated company.

Under existing tax rules, the amalgamating companies would be considered to have ceased their businesses and disposed of their assets and liabilities. Conversely, the amalgamated company would commence a new business. Various tax issues may follow from the cessation of business, and the disposal of assets and liabilities by the amalgamating companies, and accordingly the current rules may result in such amalgamations not being tax efficient.

The proposed tax framework seeks to minimise the incidence of these tax issues by treating the amalgamated company as continuing the businesses of the amalgamating companies for tax purposes. It is proposed that “the amalgamated company would be treated as having ‘stepped into the shoes’ of the amalgamating companies and continued with the business(es) seamlessly” on the date of amalgamation.

The proposed new tax framework is strongly welcomed and will certainly help to add clarity to the tax treatment of such amalgamations, which will hopefully not result in additional tax liabilities to companies undertaking such amalgamations.

Scope of proposed tax framework

Sections 215B to 215G of the Companies Act provide for the amalgamation of companies without court approval (referred to in the consultation paper as “**statutory voluntary amalgamations**”).

It is proposed that a “qualifying statutory amalgamation” under the proposed tax framework is a statutory voluntary amalgamation that satisfies the following conditions:

- (a) all the amalgamating companies must be tax residents of Singapore before the amalgamation;
- (b) the amalgamated company must be a tax resident of Singapore after the amalgamation; and
- (c) on the day of amalgamation, the amalgamated company intends to continue the business(es) of the amalgamating companies as part of the amalgamated company’s business or enlarged business.

The proposed tax framework is also applicable to a court-directed or approved amalgamation under the Companies Act or Banking Act subject to the same conditions.

It is proposed that the new tax framework will apply to qualifying statutory amalgamations that take place on or after 22 January 2009.

Summary of proposed tax framework

The following is a summary of the features of the proposed tax framework:

- (a) **Capital allowances and writing down allowances:** The amalgamated company will be allowed to continue to claim capital allowances on plant and machinery, and industrial buildings transferred from the amalgamating companies on the same basis as the amalgamating companies. In other words, there is a deemed election of section 24 of the Income Tax Act and no balancing charge or allowance is made on the transfer of assets from the amalgamating companies to the amalgamated company. Similarly, the amalgamated company will be allowed to claim writing down allowances on intellectual property rights on the same basis as the amalgamating companies.
- (b) **Assets on capital account:** For tax purposes, the amalgamated company will be deemed to have held any capital asset from the date the asset was first acquired by the amalgamating company and at the historical cost of acquisition incurred by the amalgamating company. The consultation paper recommends that the amalgamated company should continue to maintain sufficient documentation on the original acquisition of all capital assets.
- (c) **Assets on revenue account:** For tax purposes, assets on revenue account will be transferred at their carrying amounts in the accounts of the amalgamating companies. Hence, no gain or loss should be realised by the amalgamating companies and the amalgamated company takes over the trading stock at the same cost.

However, as the amalgamated company may be required to revalue the trading stock at fair value for accounting reasons, the amalgamated company may elect to take over the trading stock at fair value. This would mean that the amalgamating companies are deemed to have sold the trading stock at fair value and would be subject to tax on the accounting gain.

- (d) **Change of intention:** General tax principles are applicable if there is any change of intention with respect to any asset held by an amalgamating company upon amalgamation. For example, if there is a change of intention for a trading asset of an amalgamating company to be held as a capital asset after amalgamation, a trading gain is deemed to be realised upon amalgamation equal to the fair value of the asset on amalgamation less the cost of acquisition of the asset.
- (e) **Bad debts, contingent losses, etc.:** The amalgamated company is treated as continuing the businesses of the amalgamating companies and will be entitled to any deduction for bad debts that may be made for the amalgamating companies' businesses.
- (f) **Deduction of interest and related borrowing costs:** Unfortunately, no change is proposed to the existing rule - hence if Company A obtains a loan to finance the acquisition of shares in Company B and the two companies subsequently amalgamate, the interest expenses incurred with respect to the loan will not be deductible against the taxable income of the amalgamated company, as the IRAS is of the view that the direct link must exist and be maintained for a deduction of the interest expenses (which would not be the case here given that the loan was obtained for the purpose of acquiring shares in Company B).

- (g) **Unabsorbed capital allowances, losses and donations:** To facilitate corporate amalgamations, the utilisation of unabsorbed capital allowances, losses and donations across entities (i.e. for the benefit of the amalgamated company) may be allowed if the corporate amalgamation is undertaken for commercial reasons and are not tax motivated.

It is proposed that such transfers will be subject to the following conditions:

- (i) The amalgamating company must be carrying on an active trade or business and is not dormant at the point of amalgamation;
- (ii) The amalgamated company continues to carry on the same trade or business as the amalgamating company from which the unabsorbed items were transferred; and
- (iii) The shareholding test requirements, similar to that under sections 37(12) and 23(4) of the Income Tax Act are met unless a waiver by the Comptroller of Income Tax is granted.

In addition, the authorities are also considering if additional conditions should be imposed to prevent abuse and monetisation of the unabsorbed tax assets of the amalgamating companies.

- (h) **Unremitted foreign-sourced income:** Foreign-sourced income of the amalgamating companies will generally not be deemed to be remitted to Singapore upon amalgamation.
- (i) **FRS 39 tax treatment:** If any amalgamating company has previously adopted the FRS 39 tax treatment, the amalgamated company must adopt the FRS 39 tax treatment.
- (j) **Goods and services tax:** No change is proposed to existing rules. In other words, no goods and services tax will be applicable if the amalgamation is a transfer of a going concern.
- (k) **Stamp duty:** Relief from stamp duty may be available for qualifying statutory amalgamations after recent amendments to the applicable rules.
- (l) **Tax liabilities:** The amalgamated company will take over the tax liabilities and obligations of the amalgamating companies.
- (m) **Tax incentives:** Approval from the relevant authorities should be obtained prior to amalgamation for any tax incentives enjoyed by the amalgamating companies to continue to apply for the amalgamated company.

Feedback sought

The closing date for submission of feedback on the proposed new tax framework is **20 March 2009**.

Please [click here](#) to access the full text of the consultation paper on the proposed tax framework for corporate amalgamations, which is also available on the IRAS website www.iras.gov.sg

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These recent developments were highlighted in the Allen & Gledhill KnowledgeShare Alert of 24 February 2009. If you would like to be on our general electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

Lowering of age of contractual capacity from 21 years to 18 years effective 1 March 2009

With effect from 1 March 2009, the age of contractual capacity in Singapore will be lowered from 21 years to 18 years as a result of amendments to the Civil Law Act.

Following this development, contracts entered into by a minor who has attained the age of 18 years (the “**specified minor**”) will be given the same effect as if the contracts were entered into by a person of full age. A contract made by a specified minor will therefore be binding on and enforceable against him as if he were a person of full age. A specified minor may also bring certain legal proceedings in his own name and without a litigation representative, as if he were of full age.

However, the following contracts, if entered into by a specified minor, will not have effect as if he were of full age (the age of contractual capacity for these contracts continues to be 21 years):

- contracts for the sale, purchase, mortgage, assignment or settlement of any land, other than a contract for a lease of land not exceeding three years;
- contracts for a lease of land for more than three years;
- contracts whereby the minor’s beneficial interest under a trust is sold or otherwise transferred to another person, or pledged as a collateral for any purpose;
- contracts for the settlement of (i) any legal proceedings or action in respect of which the minor is, pursuant to any written law, considered to be a person under disability on account of his age, or (ii) any claim from which any such legal proceedings or action may arise; and
- contracts whereby a trust is extinguished or the terms of the trust are varied.

The following statutes will also be amended with effect from 1 March 2009 to facilitate specified minors engaging in certain commercial activities:

- **Bills of Exchange Act:** To allow for a bill of exchange that is drawn or indorsed by a specified minor to be enforced against him.
- **Companies Act:** To allow a specified minor to be a director of a company.
- **Conveyancing and Law of Property Act:** To provide that a lease not exceeding three years that is executed by a specified minor as a principal will not be deemed to be a settled estate within the Settled Estates Act.
- **Employment Act:** To provide that a minor below the age of 18 years is competent to enter into a contract of service and to enable a contract of service to be enforced against a specified minor.
- **Limited Liability Partnerships Act:** To enable a specified minor to act as a manager of a limited liability partnership.

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For more information about this development, please click on the titles of the following articles which were featured in previous issues of the Allen & Gledhill Legal Bulletin:

- [Civil Law \(Amendment\) Bill 2009 passed in Parliament: Lowering the age of contractual capacity from 21 years to 18 years](#) (January 2009)
- [Civil Law \(Amendment\) Bill 2008 tabled for first reading: Lowering the age of contractual capacity from 21 years to 18 years](#) (November 2008)

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Steering Committee for reviewing Companies Act studying three areas for change

In a speech delivered at an anniversary dinner hosted by the Singapore Institute of Directors on 17 February 2009, Minister for Finance Mr Tharman Shanmugaratnam highlighted three specific areas that are being studied by the Steering Committee established for reviewing the Companies Act.

The Steering Committee for reviewing the Companies Act

Chaired by Attorney-General Professor Walter Woon, the Steering Committee is established to conduct a fundamental review of the Companies Act. The Steering Committee is assisted by five Working Groups studying five broad areas of company law.

In its review, the Steering Committee will take into account of changes in other jurisdictions as well as changes in the business and investment environment in the last seven or eight years. The Companies Act will be cleaned up and re-crafted such that the new Act will convey the intent of corporate legislation and the rules in clear, concise and unambiguous language which can be readily understood by those involved in running or investing in a business enterprise.

The Steering Committee is also exploring ways to lessen the regulatory burdens on companies, or to make the statutory requirements easier to comply with, without compromising on transparency and accountability to third parties. Another aspect that the Steering Committee is considering is how to avoid "hard-coding" too many regulatory rules in the body of the Companies Act, and instead enable procedures to be modified as the environment changes, through changes to subsidiary legislation.

The three specific areas that the Steering Committee is studying are as follows:

- (a) Codification of directors' duties
- (b) Removing restrictions on financial assistance
- (c) Replacing the concept of the Exempt Private Company with a "small company" definition

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Codification of directors' duties

Currently, section 157 of the Companies Act contains a statutory statement of a director's duties. However, section 157 is not an exhaustive statement of a director's duties.

In the UK, a list of directors' duties which are derived from common law rules and equitable principles is set out in the UK Companies Act. The Steering Committee is evaluating whether to follow this approach.

Instead of codifying all the directors' duties in the Companies Act, the Steering Committee is also exploring the option of providing greater clarity to directors via practice directions or guidance notes. This is also practiced in the UK, which issues guidance notes on directors' duties, and such notes contain practical illustrations detailing the practices to adopt in actual situations such as coverage during board meetings.

Removing restrictions on financial assistance

Financial assistance by a company for the acquisition of its own shares or those of its holding company is currently prohibited in Singapore pursuant to section 76 of the Companies Act. The rationale for the prohibition is to protect creditors and shareholders against possible misuse and depletion of a company's assets.

The Steering Committee is studying the reforms in several other countries (such as Australia, New Zealand, Canada, Italy and the UK) which have essentially liberalised the restrictions on financial assistance by a company for the acquisition of its own shares or those of its holding company.

The Steering Committee will be studying the issue and making its recommendations in this regard.

Replacing the concept of the Exempt Private Company with a "small company" definition

In order to reduce the regulatory burden and simplify compliance for small companies, the Steering Committee is considering whether to introduce a "small company" definition in the Companies Act with qualifying criteria such as total annual turnover, gross assets and number of employees.

Under the Companies Act, companies which fall within the definition of exempt private company ("**EPCs**") enjoy certain benefits, such as exemption from filing accounts with the Accounting and Corporate Regulatory Authority. The current definition of an EPC allows even large private companies in terms of assets or operations to enjoy the benefits of EPC status. This means that other stakeholders such as creditors, customers and employees may not have ready access to the company's financial information. Introducing a "small company" definition with appropriate qualifying criteria to replace the EPC concept would be more consistent with the market perception of a company's size, and would recognise the interests of this broader group of stakeholders besides shareholders. Adopting a "small company" regime would also align Singapore company law with the practices in other countries such as the UK, Australia and New Zealand.

The Steering Committee will be issuing a public consultation paper on its recommendations.

Please [click here](#) for the full text of the Speech delivered by Mr Tharman Shanmugaratnam, which is also available from the MOF website www.mof.gov.sg

An article about the Steering Committee was featured in a previous issue of the Allen & Gledhill Legal Bulletin (March 2008). To read the article entitled “*MOF convenes 11-member strong Steering Committee to review Companies Act*”, please [click here](#).

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International Interests in Aircraft Equipment Bill 2008: Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment expected to be in force in Singapore on 1 May 2009

The International Interests in Aircraft Equipment Bill 2008 (the “**Bill**”) was passed in Parliament on 19 January 2009 but a commencement date has yet to be published. It was tabled for its first reading on 17 November 2008. The Bill seeks to implement the Convention on International Interests in Mobile Equipment (the “**Convention**”) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the “**Protocol**”). When in force, the Bill will give the Convention and the Protocol the force of law in Singapore.

Article XXVIII of the Protocol provides that the Protocol will come into force on the first day of the month following the expiration of three months after the date of deposit of the instrument of ratification by the relevant Contracting State. According to the International Institute for the Unification of Private Law (UNIDROIT), Singapore deposited the instrument of ratification on 28 January 2009, which means that, for Singapore, the Protocol will come into force on 1 May 2009.

Useful links

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

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

- [International Interests in Aircraft Equipment Bill 2008 passed in Parliament: Establishing a legal framework for international interests in aircraft objects](#) (January 2009)
- [International Interests in Aircraft Equipment Bill 2008 tabled for first reading: Establishing a legal framework for international interests in aircraft objects](#) (November 2008)

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Maximising the ownership and exploitation of intellectual property assets during an economic recession

The financial fallout continues unabated. We struggle to contemplate where and when the global economy will see the worst, but this demands an exactitude of prescience that lies well beyond conventional judgment. Most of us would be content with bracing ourselves for a year (possibly more) of gloom. Over the next 12 months prices will come down, assets will devalue, trade financing will come to an end, and with that a steadily declining GDP, particularly for trade dependent economies. The prevailing corporate wisdom demands for cash conservation, and cost cuts, including jobs and other saving measures. The halcyon days are over for now, and most commentators agree that it will get worst before it gets better.

It would be too simplistic to merely categorise intellectual property (“IP”) assets as being recession-proof. But if one was to attempt to make this argument, the starting point would be that IP assets are long-term acquisitions. Patents generally expire 20 years from the date of filing, copyright for most works lasts for 70 years post mortem auctoris, and trade marks, if maintained, may last indefinitely subject to continued genuine use and the absence of adverse third party rights. These terms of protection are such that IP assets generally survive a number of economic boom/bust cycles, prior to expiration. Long-term IP rights should not be relinquished, because you need them when the good times return. Or do you need them at all?

The current economic climate allows us to consider adopting a four-prong strategy. First, efficiently audit and take stock of the current IP portfolio, so as to secure long-term objectives. Secondly, as part of a cost cutting exercise, companies should consider outsourcing IP management and prosecution functions. Thirdly, while the values of other assets can be seen to slide during these troubled times, IP assets are no exception, and the timing may be such that unique acquisition opportunities present themselves. Fourthly, do not let up on enforcement efforts, as counterfeiting and other infringing activities may actually increase during a downturn, and rights owners should brace themselves for this. Each of these points will be addressed in turn. The underlying assumption to this article is that the IP-owning company still remains a viable entity and a going concern, albeit in an environment of slower or no growth. Different considerations would obviously apply if the company was facing a real prospect of liquidation and restructuring, and its IP assets would have to be managed alongside other rights and encumbrances so as to address the expectations and needs of creditors.

A stock-taking audit of IP assets

It is taken as a given that every IP asset owning company should have a policy or plan in place for the acquisition of IP rights, trade marking, branding for the purposes of marketing and positioning and an exploitative strategy (whether through licences, franchises, collaboration, distribution or production agreements). This IP policy or IP plan forms the underpinning of a company’s IP asset base. With the administration of proper valuation to IP assets, a company is able to add to its book value as well as maintain, if not add, to share value. During the halcyon days it could also form a useful basis for fund-raising through securitisation. Just look at the so-called “Bowie Bonds”, named after the rock star David Bowie, who raised millions based on the securitisation of music royalties (which were collateralised as future receivables).

A stock take or audit affects different IP rights in different ways. For patents, an IP audit mandates that a company does not own patents for the sake of ownership, but is a more considered exercise to test the existing patent portfolio for strength and quality. In a self-assessment or limited examination system, companies are able to obtain patent grants even in the face of adverse search examination reports. Whilst an arsenal of registered patents may ostensibly add to the asset list of a company, on closer inspection, many of these patents may fall away if you wish to enforce them. A counterclaim for invalidation will inevitably follow, and the aggressor will suddenly turn defender. An audit mandates that a company's weak patents are surrendered. If a patent is not going to survive a prior art challenge, it would not make sense to continue to pay costs to maintain the patent (for example the annuity that is due each year after a patent passes its fourth anniversary). A weak patent should be withdrawn or allowed to lapse; or better yet, it should not be filed at all in the first place.

For trade marks, an audit means the consolidation of house brands, and deciding if secondary brands and trade marks should cease to be protected. This is an exercise that is conducted in conjunction with business, and over time, consumption patterns dictate that some products will find more favour than others. This is inherent to the phenomenon of brand proliferation, where a multitude of sub-brands are commissioned to sell more products, but many would fall into irrelevance and non-acceptance. An audit exercise should rationalise and consolidate the existing suite of trade marks. It is also a truism that a key tool in cost reduction, is to scale back patent and trade mark filings, registrations and renewals, which would otherwise make up a large proportion of the company's IP budget.

The same can be said for registered designs, especially for those filed and protected under a system of self-assessment or limited examination. Are there obviously functional, "must-fit" or "must-match" features that may immediately call into question the validity of a particular design?

With copyright, the audit exercise becomes slightly more laborious and involved. As an unregistered right, proof of subsistence as well as ownership will always present challenges. An audit exercise will also call an employer's attention to claimed ownership of works created during and within the scope of employment. It will also call to question whether (especially in dubious cases) assignments have been entered into to put the question of employer-owner beyond doubt. In the middle to long term, a separate exercise may need to be conducted to evaluate the scope of employment contracts, as well as post termination restraints.

With an audit process underway, an additional level of scrutiny would be a review of instructions to external advisers. Meetings should be organised with commercial decision makers, so as to discuss the best ways to keep costs down - such as only searching trade marks where there is a real possibility they will be used and highlighting the types of trade marks most easily cleared for use and registration. On the other hand, in a new world where a well known trade mark is entitled to protection under the Singapore Trade Marks Act whether or not the trade mark has been registered in Singapore, or an application for the registration of the trade mark has been made, and whether or not the proprietor of the trade mark carries on business, or has any goodwill, in Singapore, IP advisers should also consider more competitive pricing for all-class searches, traversing even classes of goods and services which do not overlap with the intended field of activities. A search on the register of companies and businesses will also shed light on possible unregistered/common law rights that may exist in a business identifier. The exercise is a culmination of measuring the importance of product placement with the risk of adverse rights asserted by third parties against registration and use of the intended trade mark.

Outsourcing

Outsourcing of IP rights management and prosecution is another form of cost-cutting, and which allows existing employees to focus on commercialisation and sourcing business opportunities. With a correctional alignment that is applied to costs in general, and IP management budgets in particular, during a recessionary spiral, it would be necessary to work with external firms to *wholly* or *partially* outsource IP prosecution-related functions such as (i) drafting, and design drafting, (ii) computerised docketing and record keeping; (iii) account management, as well as (iv) the tracking of renewal, annuity and other deadlines. The terms of engagement would likely differ, but suffice it to say that more IP practices (particularly those from known outsourcing jurisdictions) will move to offer outsourcing services to companies that are re-calibrating internal resources to manage IP.

In the alternative, companies may also consider outsourcing on a limited and selected basis, for the management of a specific portfolio of trade marks, or suite of product patents. This would allow existing IP managers within an organisation to create separate nodes or sub-levels of outsourcing for selected products, so as to release (limited) resources for planning, strategy and other non-delegable IP activities, such as transactional drafting/negotiation, litigation, anti-counterfeiting and dispute management.

Yet another alternative would be for companies to encourage short-term secondments from law firms, so as to manage the delicate balance between in-sourcing and out-sourcing. The synergies are obvious, for the company will benefit from additional and much needed manpower, and the law firm will gain invaluable insight and knowhow on a client's operations and processes, ultimately acquiring a long-term understanding of the client's business needs. It will serve the client better in the long term. The modern IP practitioner is a lawyer who understands the client's business and commercial priorities, and how operations are run in practice.

Acquisition opportunities

In a downturn, opportunities may also abound. It is a good time to look at competitors, and in the event, if one of them is distressed, or fast approaching financial embarrassment, it may be the opportune moment to obtain the transfer of that one trade mark or family of marks that has always been cited against your application(s), or used in opposition proceedings in various countries.

A similar exercise may also be conducted for patents - acquiring the ownership of patents with a view to gaining additional market control or generate additional revenue by licensing or litigation. This so-called "patent trolling" is not actually as sinister or pejorative as it sounds - it is a creature of the free market and competitive exploitation. It is a revenue-generating model in its own right.

Traditional disciplines will still have to apply. Distressed sales should also necessitate (perhaps even more so) due diligence for title and non-infringement searches, with accompanying warranties. Ultimately, a risk assessment should be made, because warranties guaranteeing title and insulation against third party infringements will have little value if the seller has no economic means to support the warranty. Third party licensing rights may also be affected or avoided by the asset transfer. The buyer should also consider that such transactions should be rendered immune against possible unravelling by a liquidator in the event that one is appointed in the seller's insolvency. For example, too much bargaining may result in a sale below fair market value, which may expose the transaction to some risk of reversal.

Another omission often lies in the retention or hire of employees from the seller, who are familiar with the IP or technology under sale and can assist in the transition into new ownership.

Currently a company's acquisition of legal and economic rights in respect of all genres of IP rights is automatically subject to a write-down over a period of five years, under a write-down allowance (the "WDA") scheme. The recent Budget has affirmed and recognised the importance of keeping up the momentum of development for new creative industries like media and digital entertainment ("MDE"). The WDA has been revised to write down capital expenditure incurred by a MDE company or partnership for the acquisition of IP rights (in respect of MDE content), over a two (as opposed to five) year period, subject to conditions. This new treatment will be granted on an approval basis by the Economic Development Board in respect of IP rights for MDE content acquired for the period 22 January 2009 to 31 October 2013. Companies should take full advantage of such incentives which are a function of necessity and national development during difficult times.

At the end of the current recession, we may look back at the acquisitions of new technologies and IP and rationalise, with the benefit of hindsight, that they were part of a market correction and a "hard reset" that any economic ecosystem would inevitably have had to endure (for the better) during a recession.

Enforcement efforts and litigation

Brand owners beware. Counterfeiters will take every advantage of a company's uncertainty and publicly disclosed weaknesses to organise a systematic manufacture and distribution of knock-offs during a recession. There will continue to be a proliferation of knock-offs of luxury and other branded items that sell for 20 to 33 per cent. of the actual retail price. Even for countries who have established a no-tolerance regime against counterfeiting, a recession may force companies to take their eyes off this policing, and easily cause backsliding of the IP enforcement record.

It may sound predatory, but in harder economic times, there are often fewer customers than there are suppliers. Businesses who have already invested in IP protection will be inclined to enforce these rights against competitors, so as to try and provide yet another business distraction for a (possibly failing) competitor, and poach its customer base, using legitimate, if not perceived to be entirely valiant, efforts. In other words, do not forsake nor abandon a litigation/enforcement strategy in Singapore or elsewhere. Having an aggressive IP enforcement strategy can help build a reputation, and can also create a deterrent effect on infringers. Litigation can also carry certain ancillary benefits. In the case of trade marks, one of the touchstones for determining the "well known" status of a trade mark is the extent to which its rights are enforced in different jurisdictions. So the message is: protecting a company's IP is probably more important during tough economic times, and hopefully every company should have an influential figure to protect the litigation budget and maintain the priority of rights protection. It should also be remembered that aggression does not have to lead to staggering legal costs. Alternative dispute resolution is available, and can be quicker, cheaper and offer more confidentiality.

Concluding remarks

So even if companies find ourselves immersed in a climate of gloom and vicious cost-cutting, they should be urged to identify opportunity amidst difficulty. Companies should never underestimate the proclivity of new technologies to emerge that will perform better, faster and cheaper than the

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prevailing state of the art. Science will still develop and creativity will abound. When a financial crisis occurs, disruption and mayhem may open the door for a nimble, adaptable company to acquire new IP (possibly in diversified industries and so spread IP risk), and gain market share. As Warren Buffet famously said, "Buy when there is *fear* in the market".

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IDA public consultation on Review of the Code of Practice for Info-communications Facilities in Buildings (COPIF) for the Use of Space and Facilities by Licensees

On 5 February 2009, the Info-communications Development Authority of Singapore (the "IDA") issued a consultation paper entitled "Review of the Code of Practice for Info-communications Facilities in Buildings 2008 (the "COPIF 2008") for the Use of Space and Facilities by Licensees".

All residential and non-residential building development projects which receive provisional or written permission for its construction from the Urban Redevelopment Authority on or after 15 September 2008 are required to comply with the COPIF 2008. The COPIF 2008 ensures that developers or owners of buildings provide adequate space and facilities within their buildings for the installation of equipment and plant used by Facilities-Based Operators ("FBOs") to provide info-communication services to the building occupants.

Since the COPIF 2008's release, a FBO has requested the IDA to review some of the issues relating to the COPIF 2008. The IDA has considered the request and is proposing some revisions to the COPIF, which is the focus of the current public consultation. The proposed revisions relate to the following paragraphs in the COPIF 2008:

- Connection of lead-in pipes based on actual demand;
- Free use of the particular licensee's unused lead-in pipes and associated lead-in manholes after the relevant effective date; and
- Disconnection of unused lead-in pipes.

The consultation closed on 26 February 2009.

The following documents are available on the IDA website www.ida.gov.sg
Please click on the relevant titles to view the full details:

- [COPIF 2008](#)
- [Consultation Paper on the Review of the Code of Practice for Info-communications Facilities in Buildings \("COPIF"\) for the Use of Space and Facilities by Licensees](#)

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IPOS and USPTO launch Patent Prosecution Highway, a pilot cooperation initiative

Recently, on 2 February 2009, the Intellectual Property Office of Singapore (the "IPOS") and the United States Patent and Trademark Office (the "USPTO") launched a cooperative initiative called the Patent Prosecution Highway ("PPH") which will have a pilot period of one year ending on 2 February 2010. With this initiative, the IPOS joins other patent offices of jurisdictions such as Japan, Australia and the United Kingdom in establishing a patent prosecution highway with the USPTO.

This initiative is intended to facilitate faster prosecution of patent applications because references to earlier work done could reduce or even eliminate the need for subsequent search and examination work. It is also expected to achieve better search and examination because one patent office may check with and rely on the other office for previously unavailable databases.

The initiative allows the IPOS and the USPTO to share their search and examination results with each other. Applicants seeking patent protection for an invention in both countries may choose to go through this route. For instance, where IPOS is the Office of First Filing and the Singapore application contains claims that are determined to be allowable/patentable, the applicant may request accelerated examination at the USPTO for the corresponding application filed with the USPTO as the Office of Second Filing.

The initiative will have a pilot period, followed by full implementation. The IPOS and USPTO will assess the results of the pilot programme to decide whether and how the initiative may be fully implemented after the pilot period. The pilot period may be extended for up to another year. The patent offices may even decide to terminate the initiative earlier depending on, among other things, the volume of participation and corresponding manageable level, in which case a notice will be published. A notice will be published by both offices if there is any adjustment to the pilot programme.

The following information is posted on the IPOS website www.ipos.gov.sg:

- [Notice on filing PPH requests to the IPOS](#)
- [Notice on filing PPH requests to the USPTO](#)

Please [click here](#) for more information about the initiative, which is also available on the IPOS website.

For information on the other PPH initiatives which are available on the USPTO website (www.uspto.gov), please [click here](#).

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Cases

Banking

English High Court construes jurisdiction clause in account agreement

Middle Eastern Oil LLC v National Bank of Abu Dhabi
[2008] EWHC 2895 (Comm)

In *Middle Eastern Oil LLC v National Bank of Abu Dhabi*, in the context of an application for a stay of proceedings, the English High Court considered a jurisdiction clause in a bank account agreement.

Background

The claimant was a company incorporated in Dubai in the United Arab Emirates (the “UAE”) and the defendant was a bank incorporated in Abu Dhabi in the UAE. The claimant had an account with the defendant’s Dubai branch.

In March 2002, the defendant failed to transfer funds, on the instructions of the claimant, from the claimant’s Dubai account to an account in London. The funds were not transferred as instructed because the defendant had been directed by the Central Bank of the UAE, pursuant to the money laundering laws of the UAE, to place the funds in a suspense account. (The funds in question were regarded as suspicious because they had been transferred to the Dubai account from Lebanon on the instructions of a company in Kazakhstan.)

Criminal proceedings were brought in Dubai against the claimant’s officers. The claimant’s officers were eventually acquitted and the funds were released to the claimant in September 2005.

In March 2008, the claimant brought proceedings in a claim in tort against the defendant in England in respect of the defendant’s failure to transfer the funds as instructed. The intended recipient of the funds was Emir8 Petroleum PLC (“Emir8”), a company incorporated in the UK, in which the claimant held shares. It was alleged that the failure to transfer the funds to Emir8 in 2002 had led to a cashflow crisis that culminated in the liquidation of the company. The claimant alleged that it had thereby lost the value of its shares in Emir8.

Application to stay the proceedings

The defendant sought an order to stay the proceedings before the English courts on the grounds that (a) the claimant was obliged by contract to sue in the UAE and there were no strong grounds for not enforcing that contract, and (b) the UAE was clearly and distinctly the more appropriate forum for the determination of the claim.

The jurisdiction clause

The bank’s terms and conditions contained the following jurisdiction clause:

“The Bank and the Customer submit to the jurisdiction of the Civil Courts of the United Arab Emirates but without prejudice to the Bank’s general right to take proceedings, where necessary, in any court wheresoever.”

The defendant submitted that the jurisdiction clause was an exclusive jurisdiction clause in that it binds the claimant, should it wish to sue the defendant, to do so in the courts of the UAE. In challenging this contention, the claimant submitted that the jurisdiction clause only had the following effect: if one party brings proceedings in the courts of the UAE the other will submit to the jurisdiction of the courts of the UAE, leaving untouched the parties' right to commence proceedings elsewhere if they were able to found jurisdiction.

The court concluded that the jurisdiction clause was intended to oblige the customer to commence proceedings concerning its banking relationship in the UAE courts but not to oblige the bank to do so. The court said that this was "an obvious inference" from the express provision that the bank was allowed to pursue proceedings in other jurisdictions, with no mention made of the customer enjoying similar rights. The claimant was therefore contractually bound to commence proceedings concerning his banking relationship with the defendant in the UAE courts.

Was there a "strong reason" for not enforcing the jurisdiction clause?

The claimant was unable to show any strong reason not to enforce the exclusive jurisdiction clause.

The claimant contended that: (a) its claim had a strong connection with England as its alleged loss (the loss of the value of its shares in Emir8, a UK company) was sustained in England; (b) the applicable law of the claim in tort was English law, and (c) the quality of justice in England was superior to that in the UAE.

The court rejected all these arguments. In holding that the applicable law of the tort was that of the UAE, the court stressed that the most significant elements constituting the tort occurred in the UAE against the backdrop of the UAE money laundering laws. Although the court accepted that the alleged loss was sustained in England and that this was a significant element of the tort, the court noted that the events which allegedly caused that loss, which occurred in the UAE, were more significant.

Forum non conveniens

The decision is also of interest because the court analysed the defendant's alternative basis for its stay application, that of *forum non conveniens*, i.e. that the UAE was clearly and distinctly the more appropriate forum for the determination of the claim.

The court held that the UAE courts were the more appropriate forum. In concluding that the UAE courts were the forum which had the most real and substantial connection with the subject matter of the dispute, the court noted that:

- (a) both the claimant and the defendant were incorporated in the UAE;
- (b) the claimant's bank account was held at the defendant's branch in Dubai in the UAE;
- (c) the funds which were the subject of the claim were in the defendant's bank in the UAE;
- (d) the reasons why the defendant did not transfer the funds as instructed were connected with the money laundering laws of the UAE;

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- (e) the courts of the UAE were best placed to decide whether the defendant, in the context of the UAE money laundering laws, had wrongly refused to transfer the funds in question to Emir8; and
- (f) the contractual banking relationship between the parties was governed by the law of the UAE and the proper law of the tort claim was also that of the UAE.

The fact that the alleged loss was sustained in England was insufficient to establish that England was the more appropriate forum.

Judgment

In the circumstances, the court granted a stay of the claimant's proceedings in England.

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Corporate & financial services

Singapore High Court considers construction and validity of corporate guarantee

Cytec Industries Pte Ltd v Asia Pulp & Paper Co Ltd
[2009] SGHC 32

The Singapore High Court decision of *Cytec Industries Pte Ltd v Asia Pulp & Paper Co Ltd* revolves around the construction and validity of a corporate guarantee. On a construction of the guarantee in question in this case, the court held that the parties had intended to execute the guarantee as a deed to formally avoid the issue of consideration. In any event, even if the guarantee was not executed as a deed, the court was of the opinion that the plaintiff had given the requisite consideration. Further, the court held that the defendant was estopped from raising any limitation defences as it had contracted out of the Limitation Act.

The plaintiff, Cytech Industries Pte Ltd, concluded a Letter of Intent (“LOI”) with APP Chemicals International (Mau) Ltd (“**APP Chemicals**”). The LOI confirmed APP Chemical’s intent to purchase products from the plaintiff and the plaintiff’s willingness to sell. If the plaintiff proved to be up to mark as a supplier, a Purchase Agreement (“**PA**”) would then be awarded to it. At the time the LOI was signed, however, there was no certainty that parties would enter into a PA subsequently. The plaintiff then commenced selling their goods to APP Chemicals pursuant to the LOI (but before any PA was concluded) and the claim relates to these goods sold but for which APP Chemicals failed to pay. A few months later, the defendant Asia Pulp & Paper Company Ltd, the parent company of APP Chemicals, entered into a guarantee with the plaintiff, whereby it undertook to guarantee the payment obligations of APP Chemicals (the “**Guarantee**”). Among other things, the Guarantee set out the consideration for the Guarantee in the Preliminary Statements. The Guarantee also provided in Article 2(e) that the liability of the defendant under the Guarantee was not to be released by any statute of limitation. The Guarantee was executed under seal and backdated.

The parties’ contentions

The defendant argued that execution of the PA was required under the Preliminary Statements of the Guarantee and that it formed part of the

consideration for the Guarantee. As the plaintiff and APP Chemicals did not enter into the PA, the Guarantee was unenforceable for want of consideration. The defendant also argued that the parties never intended that the Guarantee be executed as a deed. Further, the defendant argued that part of the plaintiff's claim was time-barred.

The plaintiff contended that the Guarantee was executed as a deed and hence consideration was not required. Alternatively, it was argued that adequate consideration was furnished by the plaintiff in any event. It also submitted that the scope of the Guarantee covered pre-PA purchases made by APP Chemicals. As for the limitation defence, the plaintiff argued that the defendant was not entitled to rely on a limitation defence as a result of Article 2(e) of the Guarantee.

The consideration issue

With regard to the arguments concerning consideration, the court opined that when the requisite intention is clear, the non-affixation of a seal on a deed was of no material consequence. The fact that the company seal had been affixed on a document does not *per se* raise any legal presumption that the parties intended it to be executed as a deed. However, evidentially, it could lend weight to a party's assertion that the document was intended to be and had in fact been executed as a deed.

In the present case, apart from the fact that the Guarantee was sealed, there were no definitive words in the Guarantee which indicated that it was intended to be executed as a deed. On balance, the court was of the view that the Guarantee had in fact been executed as a deed for the following reasons:

- the fact that it was sealed lends support to the contention that it was intended to be executed as a deed.
- it was somewhat unusual, in today's commercial context, to set out the "consideration" in the Preliminary Statements or recitals, given that the court is cautious in spelling a covenant out of a recital, because that is not the part of the deed in which covenants are usually expressed.
- the parties backdated the Guarantee despite knowing that no consideration had been provided by either party then.

In the premises, the court was satisfied that it was more likely that the parties had intended to execute the Guarantee as a deed to formally avoid the issue of consideration.

In any event, even if the Guarantee was not executed as a deed, the court was of the opinion that the plaintiff had given the requisite consideration. Clause (v) of the Preliminary Statement stated that the Guarantee was given "in consideration of the foregoing preliminary statements and the Supplier entering into the Transaction Documents". Clause (i) of the Preliminary Statement provided that "at the request of the Guarantor, the Supplier has entered into or will enter into a purchase agreement", while clause (ii) envisaged transactions prior to a PA, and defined the documents *vis-à-vis* these prior transactions, and the PA, as "Transaction Documents". Therefore, there was no doubt that the scope of the Guarantee covered obligations incurred by APP Chemicals prior to the entry of the PA. Further, as both parties knew that the PA had not been signed when the Guarantee was issued, the defendant could not argue that the PA was a condition precedent or formed part of the consideration for the Guarantee.

The court held, alternatively, that on a purposive construction, it appeared that the PA was not part of the consideration for the Guarantee in relation to the pre-PA obligations. It was stated in the Preliminary Statement that it was a condition precedent to the Transaction Documents (which included the pre-PA transactions) that a guarantee first be issued. In short, this all meant that the plaintiff would not have transacted with APP Chemicals in the absence of a guarantee (including at the pre-PA stage), and that the parties never intended the PA to be a condition precedent for the Guarantee to operate.

Accordingly, the court held that consideration for the guaranteeing of the pre-PA obligations was furnished by the plaintiff by its entry into pre-PA transactions with APP Chemicals, and the PA was “consideration” only for APP Chemical’s payment obligations under a PA. The latter had no relevance to any pre-PA transactions.

The limitation issue

The defendant argued that part of the plaintiff’s claim was time-barred and that Article 2(e) was of no avail to the plaintiff as apart from it being insufficiently clear, the clause was contrary to public policy.

The court noted that the rationale underpinning limitation provisions is the need to protect potential defendants from stale claims, given that they might be prejudiced by a change in circumstances, and/or the quality and availability of evidence. That being the case, the court saw no reason why, in principle, a defendant could not elect to forgo the protection afforded by the statute of limitation, and in the court’s view, this proposition was evident in section 4 of the Limitation Act which provides that limitation is not to operate as a bar to an action unless it is specially pleaded.

The court opined that if a defendant is at liberty to waive the protection accorded by the Limitation Act by simply not pleading it as a defence after an action has been commenced, there is little reason why he could not decide beforehand that he does not need the limitation safeguard, and contract out of it. Parties are free to contract out of the Limitation Act, and as it was evident that the parties in the present action had indeed done so by way of Article 2(e), it followed that the defendant was estopped from raising any limitation defences.

Allen & Gledhill LLP represented the successful plaintiff.

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Insolvency

Singapore Court of Appeal construes the words “enforceable by execution in Singapore” in section 61(1)(d) of Bankruptcy Act

AmBank (M) Bhd v Yong Kim Yoong Raymond
[2009] SGCA 5

Recently, in the case of *AmBank (M) Bhd v Yong Kim Yoong Raymond*, the Singapore Court of Appeal had to interpret section 61(1)(d) of the Bankruptcy Act in the context of a bankruptcy application which was premised on a foreign debt and involved a registered foreign judgment. Section 61 sets out the grounds upon which a bankruptcy petition may be brought and sub-section (1)(d) provides that such a petition may be grounded on a debt

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incurred outside of Singapore only if the debt is payable by the debtor to the petitioning creditor by virtue of a judgment or award which is enforceable by execution in Singapore. The Court of Appeal had to look into the meaning of the words “enforceable by execution in Singapore” because the creditor here sought to institute bankruptcy proceedings against the debtor after the debtor failed to respond to a statutory demand issued in relation to a registered foreign judgment which was time-barred under the Limitation Act and required the permission of the court to enforce.

This is the first time that any local court has interpreted section 61(1)(d) of the Bankruptcy Act.

The creditor was a Malaysian bank, while the debtor was a Singaporean. In November 1988, the creditor obtained a judgment in Malaysia (the “**Malaysian judgment**”) against the debtor for the debtor’s failure to honour his obligations under a personal guarantee. Six years later in October 1994, the creditor registered the Malaysian judgment (the “**registered judgment**”) in Singapore under the Reciprocal Enforcement of Commonwealth Judgments Act. However, it was not until 12 years later in September 2006 that the creditor finally served a statutory demand on the debtor. As the debtor did not pay the amount claimed, the creditor instituted bankruptcy proceedings against him in October 2006.

The creditor objected to the bankruptcy application and one of the grounds of objection was that the registered judgment was not a debt “enforceable by execution in Singapore” under section 61(1)(d) of the Bankruptcy Act because the creditor had not obtained the permission of the court under Order 46 Rule 2(1)(a) of the Rules of Court. Order 46 Rule 2(1)(a) provided that a writ of execution to enforce a judgment may not be issued without the permission of the court if more than six years have passed since the date of the judgment. It was common ground that leave to enforce the registered judgment had not been obtained.

The bankruptcy application was heard by an assistant registrar (the “**AR**”) who dismissed the debtor’s objections and allowed the creditor’s application. The debtor appealed against the AR’s decision and the appeal was allowed by Tan Lee Meng J in the High Court. Tan J agreed with the debtor that the words “enforceable by execution in Singapore” meant that a petitioning creditor must have in hand a judgment that was immediately enforceable by execution (the “**narrow meaning**”) and decided that the creditor was not entitled to present a bankruptcy application, given that it had failed to obtain the requisite permission from the court. The creditor appealed against Tan J’s decision.

Before the Court of Appeal, the creditor argued that section 61(1)(d) of the Bankruptcy Act was irrelevant and inapplicable to its application because the sub-section applied only when the debt relied upon to present the bankruptcy application was “incurred outside Singapore”. The creditor’s point was that since a foreign judgment that was registered under the Reciprocal Enforcement of Commonwealth Judgments Act was “of the same force and effect” as a judgment “originally obtained” in the Singapore courts, the Malaysian judgement was effectively converted to a Singapore judgment once registered. Accordingly, the registered judgment became for all intents and purposes a “Singapore debt” and thus section 61(1)(d) did not apply.

The Court of Appeal rejected this contention and held that there could be no doubt that the debt in question arose in Malaysia, and it was, in every way, a debt “incurred outside Singapore”. The court’s view was that whether a debt was incurred outside Singapore under section 61(1)(d) was a question of fact and that the registration of a foreign judgment cannot change the fact that the debt itself was incurred outside Singapore. The registration scheme

under the Reciprocal Enforcement of Commonwealth Judgments Act merely allowed a foreign judgment to be treated as if it were a judgment of a court in Singapore. The effect of the registered judgment would have no bearing on the applicability of section 61(1)(d).

The next contention put forward by the creditor was that Tan J had misinterpreted the words “enforceable by execution in Singapore” in section 61(1)(d). The creditor submitted that these words only required the registered judgment to be “capable of enforcement” and did not require that all procedural steps for execution under the Rules of Court first be complied with (the “**wide meaning**”).

The Court of Appeal held that the words “enforceable by execution in Singapore” in section 61(1)(d) has the narrow meaning as contended by the debtor and as accepted by Tan J. In other words, a petitioning creditor must have in hand a judgment that was “immediately enforceable” by execution (need not require permission of the court), and not “potentially enforceable” (require permission of the court in the case of a judgment of more than six years). The court felt that adopting the narrow meaning would best reflect Parliament’s policy underpinning the enactment of section 61(1)(d). Parliament’s intention was to give some added protection to debtors against foreign creditors commencing bankruptcy applications based on foreign debts. Undoubtedly, adopting the narrow meaning of “enforceable by execution in Singapore” (in contrast to the wide meaning) would mean that *more* is demanded of creditors in such applications (since the leave of the court would be necessary in the case of a judgment of more than six years), but it should be borne in mind that this was only so in the event that the creditors choose to delay enforcement of their registered judgments for more than six years without taking any enforcement actions, as in this case. On the other hand, adopting the wide meaning of “enforceable by execution in Singapore” in section 61(1)(d) might allow creditors to circumvent the need to obtain the permission of the court under Order 46 Rule 2(1)(a) of the Rules of Court for instituting proceedings for the execution of the judgment to recover the debt (and, consequently, the need to explain the delay to the court) by opting for the more draconian bankruptcy proceedings.

The Court of Appeal dismissed the creditor’s bankruptcy application.

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General

Compromise

Singapore Court of Appeal discusses necessary elements of the law of compromise

Gay Choon Ing v Loh Sze Ti Terence Peter and Another Appeal
[2009] SGCA 3

In *Gay Choon Ing v Loh Sze Ti Terence Peter and Another Appeal*, the Singapore Court of Appeal heard two related appeals concerning a decision of the Singapore High Court where the trial judge issued, *inter alia*, an order declaring that Gay held 1.55 million ordinary shares of S\$1 each in his family company, Gay Lip Seng & Sons (Pte) Ltd, on trust for Loh. Both parties appealed on different aspects of the High Court’s decision.

The main point the court considered was whether or not a Point of Agreement and a Waiver Letter signed by the parties constituted a valid compromise agreement between the parties.

Facts

The plaintiff, Loh, and the defendant, Gay, had had a close friendship lasting over 30 years and Loh employed Gay as the general manager of the former's company ("**ASP**"). Gay was based in Kenya from 1981 as part of his employment.

Gay was a shareholder in his family company, Gay Lip Seng & Sons (Pte) Ltd (the "**Company**"). The Company owned and operated a hotel (the "**Hotel**") which the Company decided to redevelop in 1993. A meeting of the shareholders of the Company thereafter agreed that S\$3 million represented the Hotel's property and that for each one share currently held, additional shares of 299,999 shares would be issued (the "**bonus shares**"). The Company increased its authorised share capital to S\$5.5 million. Construction costs of the redevelopment of the Hotel was to be borne by a bank but the bank required a contribution of 20 per cent. of the estimated total cost to be contributed by the Company. Gay therefore invested S\$2.5 million in return for 2.5 million shares.

To raise the money pledged, Gay turned to Loh. Loh alleged that Gay approached him to entice him into investing in the Company to enable the rebuilding and redeveloping of the Hotel. However, Gay's view was that Loh "readily agreed to extend a loan" to him. Gay also alleged that he confided in Loh that he would prefer to secure the loan and would pledge an equivalent number of shares to him. This was to ensure that, in the event of Gay's demise, Loh would be able to recover his loan. Whether the monies provided by Loh was an investment or a loan, it was clear that pursuant to this arrangement between the parties, Gay held shares on trust for Loh (the "**Shares**"). A Trust Deed was entered into to document this arrangement (the "**Trust Deed**").

The parties, however, had differing understandings of what the Trust Deed meant with Gay believing it to mean that S\$1.55 million would be lent by Loh to him and Loh believing the S\$1.55 million to be an investment and that Gay held the Shares on trust for him.

The relationship between the parties started to sour in August 2003 when Gay sought to leave the employ of Loh and asked for a retirement sum to be paid to him as was apparently the practice of ASP. From August 2003 to October 2004, the parties engaged in numerous e-mail exchanges concerning the retirement sum and the fact of Gay leaving in the first place. The correspondence clearly demonstrated the acrimonious relations between the parties and the level of disagreement, which continued to escalate. However, in the midst of the e-mail negotiations, the parties acknowledged and recognised their past friendship and therefore sought to settle matters amicably rather than legally.

In October 2004, the parties concluded a Points of Agreement ("**POA**") document whereby Loh sold his beneficial interest in the Shares to Gay. On the same day, a waiver letter was sent by Loh in his capacity as managing director of ASP to Gay (the "**Waiver Letter**") which stated, *inter alia*, that Gay was leaving ASP without claims on ASP whatsoever and that, in turn, ASP acknowledged that it had no claims against Gay either. This letter was signed by both parties.

The acrimonious relations between the parties flared up once again in March 2005, this time in relation to the disputed sum. The High Court ruled in favour of Loh and held that Gay was holding the shares on trust for Loh. The High Court also ordered the rescission of the POA. Gay appealed these main issues while Loh appealed orders consequential to these main issues, such as that he was not entitled to 61.9 per cent. of the shares of the company and that he was to hand over the sum of S\$1.5 million to Gay.

However, the Court of Appeal found that the key issue, missed by both parties, was in fact whether or not the POA and the Waiver Letter constituted a valid compromise agreement. The court found that the findings and reasoning of the High Court with regard to all the other issues raised in this dispute to be both correct and meticulous. The Court of Appeal therefore stated that it would focus its decision on whether or not the parties concluded a valid compromise agreement, an issue not given much emphasis by either the parties or the High Court.

Law on compromise

The court quoted from noted textbooks and both Singapore and English case law in its efforts to explain the meaning of the law of compromise. The court stated that where parties have demonstrated that they intend to dispose of their dispute by reaching an amicable resolution agreeable to both parties, this compromise or settlement will be recognised and given effect to by the courts.

The court went on to note that a compromise is essentially founded on contract. Before a compromise can be reached between two parties, there must, of necessity, be an actual or potential dispute between the parties that can be disposed. The court here went on to state that the general principles of contract law apply with equal force to the law of compromise as in other contractual contexts. A compromise will not arise unless certain requirements are fulfilled; these include what is generally required under the common law of contract: an identifiable agreement that is complete and certain, consideration and an intention to create legal relations.

The court discussed these traditional contractual necessities at length and then applied these requirements to the facts at hand to determine if a valid compromise or settlement existed.

Identifiable agreement that is complete and certain

As stated above, the court noted that a compromise will not arise unless there was an "identifiable agreement that was complete and certain". This phrase means that negotiations between the parties must have crystallised into a contractually-binding agreement in which there is no uncertainty as to the terms of the contract concerned. The traditional tools of analysis centre around the concepts of offer and acceptance. In deciding whether this requirement has been fulfilled, the courts look at the whole course of the negotiations to ascertain if an agreement is reached at any given point of time. The court also stated that it should be noted that where such a point of agreement has been identified, the mere fact that negotiations continued thereafter did not of itself affect the existence of the agreement already concluded. The court went on to state that whilst it is true that the court concerned must examine the whole course of negotiations between the parties, this should be effected in accordance with the concepts of offer and acceptance. What is required, however, is a less mechanistic or dogmatic application of these concepts and this can be achieved by having regard to the context in which the agreement was concluded.

The court was of the view that, here, the POA and the Waiver Letter, which were executed contemporaneously on the same day, marked the crystallisation of the ongoing negotiations between the parties into a legally binding agreement in which all existing disputes between them were compromised or settled.

Consideration

The court issued a coda to its judgment which discussed the issue of the doctrine of consideration at length and considered the calls to revamp it or, indeed, to do away with it altogether. For the purposes of the matter at hand, however, the court sufficed to summarise the doctrine as it stands today.

Consideration signifies a return recognised in law which is given in exchange for the promise sought to be enforced. The court emphasised that this is why it is usually stated as a matter of course that consideration must always move from the promisee to the promisor.

Consideration was fulfilled in the present case by Loh's promise in the POA which would release Gay from all obligations under the Trust Deed, in return for which Gay would relinquish all claims against ASP. It was the court's view that the fact that the Waiver Letter was entered into between Gay and ASP (and not Loh) was legally irrelevant with regard to the issue as to whether Gay, by signing the Waiver Letter, furnished sufficient consideration to Loh in return for releasing Gay from any obligations under the Trust Deed. While it was true that ASP would benefit from the signing of the Waiver Letter, the very act of signing was done at Loh's request. The court found it to be clear from the correspondence between the parties, that although Loh was literally acting on behalf of ASP, he also had a personal interest in Gay signing the Waiver Letter.

The court found that there were no legal impediments from the perspective of the doctrine of consideration and went on to explain that it has been long established that legal sufficiency must be distinguished from the layperson's perception of adequacy in so far as the doctrine of consideration is concerned. The court will not inquire into the actual adequacy of the consideration concerned so long as there is sufficient consideration furnished by the promisee in the eyes of the law. The court was of the view that this approach is mandated by the need of the courts to give effect to the rationale of freedom of contract.

Intention to create legal relations

The court explained that it must be demonstrated that there was an intention on the part of both parties that the transaction entered into was to have legal effect before a valid contract can be said to have been formed. The parties must have intended that, if a disagreement arose of the contract not being subsequently honoured, the aggrieved party could invoke the assistance of the court. It should be noted that there are established presumptions in determining whether the intention to create legal relations exist. For instance, in social and domestic arrangements, there is a presumption that the parties do not intend to create legal relations. However, in business and commercial arrangements, there is a converse presumption to the effect that it is presumed that the parties do intend to create legal relations.

Keeping in mind the promises made through the POA and the Waiver Letter by both parties, the court had no doubt that the parties clearly intended to create a legal relationship through the signing of these documents.

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For the reasons set out above, the court found that there was a valid compromise or settlement agreement between the parties and dismissed Loh's appeal while allowing Gay's appeal.

To read an article on the judgment of the High Court entitled "*Singapore High Court examines trustee's duties under trust deed in context of fiduciary obligations*" featured in the April 2008 issue of the Allen & Gledhill Legal Bulletin, please [click here](#).

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Contract

Singapore High Court considers law of assignment of debt

Lanxess Pte Ltd v App Chemicals International (Mau) Ltd
[2009] SGHC 25

In *Lanxess Pte Ltd v App Chemicals International (Mau) Ltd*, the Singapore High Court had to decide on the validity of two alleged assignments relating to debts arising out of the supply of goods, amidst a transfer of business and merging of operations of the parties involved. The court examined the position under section 4(8) of the Civil Law Act as well as in equity.

The plaintiff's claim arose from numerous invoices issued by Bayer (Singapore) Pte Ltd to the defendant in the years 2000 to 2001 for chemical products supplied to the defendant. It was not disputed that a significant portion of the amount set out in these invoices remained outstanding. Claiming to be the assignee of the benefit of the amounts still owing under these transactions, the plaintiff brought the present suit for US\$10,199,553.12 (the "**debt**") with interest, or damages.

The plaintiff claimed to be the assignee of the benefit of the debt via the two following assignments:

- **First assignment:** There was an assignment from Bayer (South East Asia) Pte Ltd, formerly known (until 27 November 2000) as Bayer (Singapore) Pte Ltd ("**BSEA(1)**"), to Bayer Polyurethanes Asia Pte Ltd on 1 January 2002 via the Agreement for Sale and Purchase of Business ("**ASPB**"). On 2 January 2002, Bayer Polyurethanes Asia Pte Ltd changed its name to Bayer (South East Asia) Pte Ltd ("**BSEA(2)**") and BSEA(1) changed its name to Bayer Trading Pte Ltd. There was a notice in the Straits Times on 10 January 2002 (the "**ST advertisement**") informing of "...the integration of Bayer (South East Asia) Pte Ltd with its operation and the change of its name to Bayer (South East Asia) Pte Ltd with effect from 2 January 2002".
- **Second assignment:** There was a subsequent assignment from BSEA(2) to the plaintiff on 1 July 2004 via an Asset Purchase Agreement ("**APA**") dated 1 July 2004 and evidenced by a Deed of Assignment (the "**Deed**") dated 8 November 2005. There was a mistaken reference to BSEA(1) in the Deed. On 7 August 2004, Bayer Trading Pte Ltd (formerly BSEA(1)) was dissolved by way of members' voluntary winding up.

The defendant denied that there was any assignment in law or equity of the right to recover this debt. Hence, the issues before the court were whether the two alleged assignments were valid in law under section 4(8) of the Civil Law Act (the “Act”), or in equity.

The legal requirements

The court first examined the requirements for a legal assignment under section 4(8) of the Act. There are three requirements: (1) the assignment must be absolute and not by way of charge only; (2) it must be in writing under the hand of the assignor; and (3) express notice in writing must be given to the person liable to the assignor under the assigned chose in action. Not only must there be express notice in writing, but the notice must also be clear, unambiguous and unconditional. However, there is no prescribed form of notice, nor is there a need for a separate document for the specific purpose of notifying the debtor. The fact of assignment may be implicitly recorded and it would suffice for information relative to the assignment to be conveyed in writing to the debtor.

As for equitable assignments, there is no requirement of notice to the debtor or even the assignee; what must be shown was a manifestation of the assignor’s intention to assign.

The first assignment - Whether the debt was validly assigned from BSEA(1) to BSEA(2)

The plaintiff relied on the ASPB as the operative document effecting the assignment of the benefit of the debt. However, the debt had been written off for accounting purposes and therefore was not reflected in a debit note dated 1 January 2002 which set out the assets and liabilities transferred to BSEA(2) (the “debit note”). The plaintiff argued that the ASPB was the operative document, and that despite the debt not appearing on the debit note it was nonetheless still an asset transferred via the ASPB. The defendant raised the issue that both the defendant as well as the debt was not mentioned in the ASPB. The court’s view was that on a plain reading of the ASPB, and considering the absolute and unconditional language of the ST advertisement, it was evident that the debt must be included in the transfer of business and merging of operations. The fact that the debt was written off for accounting purposes did not mean that it was extinguished. The debt was still an asset capable of being sold, transferred or assigned. The omission to specifically identify the debt or the defendant by name in the ASPB should not be taken as intent not to transfer the rights to the debt.

The next issue which the court had to address was the notice requirement. The court took into account the ST advertisement which, although, focused on the integration of BSEA(1)’s and BSEA(2)’s operations rather than the transfer pursuant to the ASPB, was nevertheless in writing and unconditional. There were also the statements of account issued by BSEA(2) recording the debt payments and balance which were signed by the defendant. This was taken to be evidence that the defendant not only had actual knowledge of the assignment and that the debt should be paid to the issuer of the statements of account but also as evidence that the defendant had acquiesced to it.

The first assignment was therefore held to be clearly valid in law and in equity.

The second assignment – whether the debt was assigned from BSEA(2) to the plaintiff

The plaintiff relied on the APA of 1 July 2004 as the instrument transferring the debt from BSEA(2) to the plaintiff. The APA provided for the sale of BSEA(2)'s entire polymers and chemical business and all related assets to the plaintiff; this was the same business that had earlier been sold and transferred from BSEA(1) to BSEA(2). The court held that the APA was the operative document and the mistaken reference in the Deed to BSEA(1) which had been voluntarily wound up at the time the Deed was made, was an ambiguity easily clarified by reference to the other contemporaneous documents. The court later went on to state that it did not really matter whether the defendant thought the assignor was BSEA(1) or BSEA(2) as long as there could have been no doubt as to the identity of the assignee. Further, there was no need for the debt to be specifically identified as a related asset in the APA.

The plaintiff continued to supply chemical products to the defendant after 1 July 2004, as BSEA(2) had done before. These shipments and partial payments were acknowledged by BSEA(2), the defendant and the plaintiff in the statements of account. As the plaintiff pointed out, the fact that BSEA(2) had transferred its polymers and chemicals business on 1 July 2004 to the plaintiff was reflected in the statements of account. The court held that each statement of account was an implicit record of the fact of assignment and plainly indicated to the defendant that by virtue of the assignment the plaintiff was entitled to receive the money. Furthermore, partial payment was actually made pursuant to, and the defendant's representatives accordingly acknowledged and signed some of these statement of accounts which would be evidence of written notice and the defendant's actual knowledge of and acquiescence to the second assignment. The court ruled that the second assignment was also a valid legal assignment.

Conclusion

In conclusion, the court's ruling was that the benefit of the debt was validly assigned to first BSEA(2) by BSEA(1), and then by BSEA(2) to the plaintiff. The plaintiff's claim was allowed.

Allen & Gledhill LLP represented the successful plaintiff.

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In brief

Extended settlement contracts and structured warrants: Exemption in Securities and Futures regulations from requirement to hold representative's licence

The Securities and Futures (Exemption from Requirement to Hold Representative's Licence) Regulations 2009 (the "**Regulations**") came into force on 16 February 2009.

Pursuant to the Regulations, the holder of a representative's licence to deal in securities and whose principal holds a capital markets services licence to trade in futures contracts will be exempted from the requirement under section 83(1) of the Securities and Futures Act to hold a representative's licence to trade in futures contracts:

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- (a) if, and only if, he trades only in extended settlement contracts and he complies with the specified conditions;
- (b) if, and only if, he trades only in structured warrants and he complies with the specified conditions; or
- (c) if, and only if, he trades only in extended settlement contracts and structured warrants and he complies with the specified conditions.

Please [click here](#) to read an article about this development in the February 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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SGX issues consultation paper on proposed rules to allow listings of life science companies on Catalist

On 11 February 2009, the Singapore Exchange Limited issued a consultation paper on proposed listing rules for non-commercialised life science companies on Catalist, its sponsor-supervised board for fast-growing companies.

Among other things, the consultation paper proposes amendments to the initial listing rules and continuing listing obligations to govern the listing of non-commercialised life science companies, i.e. life science companies that have not started commercial revenue-yielding activities in their primary line of businesses ("**non-commercialised life science companies**"). In this way, non-commercialised life science companies will be allowed to list on Catalist and access equity capital to fund their growth.

Please [click here](#) to read an article about this development in the February 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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SGX issues response to feedback received on consultation on the proposed launch of the SGX options on the MSCI Singapore Index Futures Contract

From 29 December 2008 to 8 January 2009, the Singapore Exchange Limited conducted a public consultation seeking comments on a proposal to introduce a new options contract, the SGX Options on MSCI Singapore Index Futures contract, and consequential amendments to the SGX MSCI Singapore Index

Please [click here](#) to read an article about this development in the February 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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SGX proposes revisions to derivatives clearing fund structure

On 23 January 2009, the Singapore Exchange Limited issued a news release and a consultation paper disclosing its proposal to revise the Clearing Fund structure of SGX-Derivatives Clearing to plan for growing market exposure and reinforce the integrity of the Clearing System.

Please [click here](#) to read an article about this development in the February 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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News

Rights Issues by CapitaLand Limited and CapitaMall Trust

CapitaLand Limited ("**CapitaLand**") is offering a one-for-two rights issue to raise approximately S\$1.84 billion of capital. The rights issue is fully underwritten, renounceable and entitled shareholders may trade their rights during the rights trading period. Temasek Holdings (Private) Ltd ("**Temasek**"), which has a direct interest in approximately 39.68 per cent. of CapitaLand's current share capital, will subscribe for and has agreed to sub-underwrite up to 39.68 per cent. of the rights issue. The joint lead managers and joint underwriters for the CapitaLand rights issue are DBS Bank, JPMorgan and Merrill Lynch.

Separately CapitaMall Trust ("**CMT**"), which is 29.7 per cent. owned by CapitaLand, is offering an underwritten renounceable nine-for-10 rights issue to raise approximately S\$1.23 billion. CapitaLand has agreed to procure that its relevant subsidiaries subscribe for their respective pro-rata entitlements under the CMT rights issue. CapitaLand has also agreed to subscribe for or procure the subscription of such number of additional units in CMT under the CMT rights issue which would, together with the pro-rata entitlements of its relevant subsidiaries, amount to up to 60 per cent. of the new units to be issued under the CMT rights issue. The joint lead managers and joint underwriters for the CMT rights issue are DBS Bank and JPMorgan.

Allen & Gledhill LLP were the advisors to the joint lead managers and joint underwriters for the CapitaLand rights issue and also separately advised Temasek and the CMT manager. Partners Tan Tze Gay and Leonard Ching advised the joint lead managers and joint underwriters for the CapitaLand rights issue, Partners Lim Mei, Hilary Low and Christopher Koh advised Temasek and Partners Jerry Koh and Chua Bor Jern advised the CMT rights issue and the CMT manager.

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Launch of Allen & Gledhill Competition Law Master Class Series

From April 2009, the Competition & Antitrust Practice of Allen & Gledhill LLP will launch the Competition Law Master Class Series consisting of small and focused sessions on key competition law developments by antitrust experts.

As one of the oldest and largest competition law practices in Singapore pre-dating the enactment of the Competition Act in 2006, and the antitrust practice with the oldest and largest competition economics team, the Competition & Antitrust Practice of Allen & Gledhill will curate and moderate periodic talks by internationally-renowned practitioners, economists and academics in the field of competition law.

The first talk in the series will be on **Anti-Monopoly Law in China: What You Need to Know**.

It will be presented by Erik Söderlind, the Partner of Linklaters LLP's Asian Competition Practice who is based in Hong Kong, and moderated by Daren Shiau, Head of the Allen & Gledhill Competition & Antitrust Practice.

If you are interested to attend the talk, please e-mail events@allenandgledhill.com

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