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

Articles

Banking

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

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

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

Facts

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

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

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

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

Which law applies?

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

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

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

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

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

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

Fraud and unconscionability

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

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

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

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

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

Conclusion

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

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Competition

Singapore Airport Competition Code: Merger control provisions come into force on 20 January 2010

The mergers and acquisitions ("M&A") framework under the Civil Aviation Authority of Singapore (the "CAAS") Airport Competition Code (the "Code") has come into force on 20 January 2010. Pursuant to section 44 of the Civil Aviation Authority of Singapore Act (the "CAAS Act"), the notice of issue of the revised Code was published in *The Business Times* on 20 January 2010.

Allen & Gledhill LLP advised the CAAS on the establishment of the merger control framework under the Code.

Aside from the M&A provisions, the Code also sets out the prohibitions against anti-competitive behaviour in the airport market, which is defined as any market in Singapore where an airport licensee is engaged in the provision of airport facilities and services. All airport licensees are required to comply with the Code.

The new M&A provisions focus on the activities of airport licensees in relation to joint ventures and other acquisitions not covered by sections 42, 57 and 58 or Part V of the CAAS Act. The M&A provisions are introduced in the Code to provide an appropriate and effective M&A analytical framework, bearing in mind the sectoral regulatory framework of the CAAS' scope of responsibilities and policy objectives.

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These recent developments were highlighted in the Allen & Gledhill Competition Law Alert of 2 February 2010. If you would like to be on our competition and antitrust related electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

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The new merger control framework establishes the procedures and processes for M&A notification by the airport licensees, as well as evaluation and decision-making by the CAAS.

Elsa Chen, Deputy Director of Competition Economics, who was part of the Allen & Gledhill LLP team advising the CAAS on the Code, observes that the provisions take into account the intricacies of the airport market in Singapore and will help to ensure timely M&A assessment and evaluation, which will in turn foster the development of a competitive airport market in Singapore without undue regulatory burden.

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This recent development was highlighted in the Allen & Gledhill Competition Law Alert of 19 February 2010. If you would like to be on our competition and antitrust related electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

Malaysian competition law by 2011

The Malaysian competition legislation is expected to be in force by next year 2011. Malaysia's Minister for Domestic Trade, Co-operatives and Consumerism is reported by Malaysia's *Business Times* to have announced this development. There is some similarity between the Singapore Competition Act and Malaysia's Fair Trade Practices Bill. Both regimes will cover anti-competitive agreements and abuses of a dominant position. The Malaysian regime, while not yet covering mergers, is also intended to prohibit unfair trade practices, which in Singapore is covered by legislation such as the Consumer Protection (Fair Trading) Act.

"The introduction of Malaysian competition law will be another positive step towards the establishment of an ASEAN competition policy by 2015," comments Daren Shiau, Head of the Allen & Gledhill Competition & Antitrust practice, who has worked closely with the Market Integration Directorate of the ASEAN Secretariat and who was nominated to provide capacity-building training to the ASEAN Experts Group on Competition (AEGC) in Nha Trang, Vietnam last year.

Lim Teong Sit, Managing Partner of Rahmat Lim & Partners, an associate firm of Allen & Gledhill LLP, notes that: "From the experience in other jurisdictions, Malaysian companies will need to invest time and effort to align their business practices and agreements to the prospective competition legislation as early as possible. This is to ensure that their operations are fully compliant with Malaysia's competition law when it comes into effect."

With the recent announcement in relation to Malaysian legislation, the status of competition laws in ASEAN is as follows:

Country	Comprehensive Competition Law			Sectoral Regulation	Unfair Competition
	Anti-competitive Agreements	Abuses of Dominance	Merger Control		
Brunei	No	No	No	Yes (e.g. telco)	No
Cambodia	No	No	No	No	No
Indonesia	Yes	Yes	Yes	No	Yes
Laos	No	No	No	No	No

For further information or if you would like to receive a copy of the Allen & Gledhill ASEAN Merger Control Chart, please contact:

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Country	Comprehensive Competition Law			Sectoral Regulation	Unfair Competition
	Anti-competitive Agreements	Abuses of Dominance	Merger Control		
Malaysia	Pending (targeted 2011)	Pending (targeted 2011)	No	Yes (e.g. media, energy, telecoms)	Pending (targeted 2011)
Myanmar	No	No	No	No	No
Philippines	No	No	No	Yes (e.g. telco, electricity, oil)	Yes
Singapore	Yes	Yes	Yes	Yes (e.g. telco, media, electricity, gas, post, airport)	Yes
Thailand	Yes	Yes	Yes	Yes (e.g. telco)	Yes
Vietnam	Yes	Yes	Yes	Yes (e.g. telco, electricity)	Yes

Allen & Gledhill ASEAN Merger Control Chart

Allen & Gledhill LLP has prepared an ASEAN Merger Control Chart which provides an overview of the merger control regime in Singapore, Thailand, Vietnam and Indonesia, being the four ASEAN countries with an existing merger review framework under their respective competition laws.

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Corporate

MAS establishes Corporate Governance Council

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

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

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The Council may also draw on the assistance of other individuals in the course of its work.

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

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

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

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

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

Background facts

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

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

The issues

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

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

Diversion of commission due to Plaintiff

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

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

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

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

Payment of commission to third parties

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

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

Decision

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

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

Public Prosecutor v Chui Siew Pun [2009] SGDC 293

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

Facts

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

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

The offence

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

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

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

Referring to a previous Singapore District Court's decision, *Ng Geok Eng v Public Prosecutor* [2006] SGHC 232 which also dealt with the offences of engaging in practices that operated as a deceit upon certain securities trading firms under section 201(b) of the SFA, the court commented that the offences under section 201(b) of the SFA were often referred to as "unauthorised" share trading cases. It was held that, the term "unauthorised"

could refer to the lack of consent on the part of the account owner or the securities trading firm with whom the account was opened.

Sentence

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

Comment

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

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Singapore Exchange

SGX provides guidance on proposals for restructuring or spin-offs

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

Key considerations

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

- (i) whether the proposal complies with the chain listing principle set out in the Listing Manual;
- (ii) whether the entities seeking a separate listing have clearly differentiated businesses and assets that are independently managed; and

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- (iii) whether the remaining businesses of the listed entities are viable, profitable and continue to comply with the Mainboard admission criteria. In this regard, the revised Mainboard criteria, issued by the SGX for public consultation on 6 January 2010, may need to be taken into consideration (an article about this development was featured in a previous issue of the Legal Bulletin (January 2010). To read the article entitled “*SGX proposes new Mainboard listing criteria and introduction of SPACs*”, please [click here](#).

SGX retains discretion

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

Reference material

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

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Tax

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

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

Overview

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

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

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Current agreements implementing the EOI Standard

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

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

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

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

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

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

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

Reference materials

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

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Singapore High Court holds prefabricated dormitories not “plant” within meaning of sections 19 and 19A of Income Tax Act

ZF v Comptroller of Income Tax [2010] SGHC 14

This is an appeal by ZF (the “**appellant**”) against the decision of the Income Tax Board of Review (the “**Board**”) which held that certain prefabricated dormitories were not “plant” within the meaning of sections 19 and 19A of the Income Tax Act (the “**Act**”) in the context of the appellant’s trade.

Facts

The appellant was in the business of providing dormitory accommodation and had built dormitories using prefabricated material at a particular site, over which a three year lease had been granted. The lease could be terminated by giving 90 days’ written notice. The appellant contended that as a result of the short-term lease and the short notice period to vacate the site, the dormitories had to be installed and dismantled quickly. In addition, the modular nature of the dormitories allowed the appellant to re-use the prefabricated structures to fit into the size of the next site available for use. If the appellant had built the dormitories with brick and mortar, it would lose its considerable investment if the dormitories were to be demolished upon receipt of notice of termination. Given the limited period of the lease and the possibility of termination upon 90 days’ notice, it was commercially necessary that the dormitories possessed those features.

The only question before the court was whether, in the circumstances, the portable and demountable dormitories qualified as “plant” for the purposes of sections 19 and 19A of the Act so as to qualify for initial and annual allowances available under those provisions for machinery and plant.

Meaning of “plant”

The court referred to Lindley LJ’s classic exposition in *Yarmouth v France* (1887) 19 QBD 647 on the characteristics of a “plant” where the learned judge said:

“There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business, - not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business...”

“Plant” is not an ordinary English word

The court also highlighted that the courts have consistently held that the word “plant”, in the context of capital allowances, should *not* be accorded its ordinary dictionary meaning but should be read in light of the decided authorities. The proper determination as to whether something is “plant” depends upon the application of various tests, in this case the relevant ones being the “functional” or “business use” test and the “premises” test.

The “functional” or “business use” test

The court noted that “functional” test entails an examination of the function of the apparatus in question in the context of the business of the taxpayer. In other words, whether an asset functions as plant for a taxpayer has to be determined by consideration of that particular taxpayer’s trade and

examining the function of the asset in that particular taxpayer's trade. What is "plant" for one trade, may not be "plant" for another trade.

In the court's view, it was the dormitories, not the partitions, that were the subject matter of the inquiry. The fact that the dormitories were portable and demountable did not alter the fact that the subject matter of the inquiry was the dormitories. The portability and demountability were the *properties* of the dormitories and not the *function* of the dormitories.

The appellant had also contended that although the dormitories might seemingly be the setting *in which* the business of the appellant is carried on, they ought to be regarded as plant since they are apparatus *with which* the business is carried on. The court found that the dormitories afforded the accommodation which it was in the business of the appellant to provide. The court was of the view that it was not a requirement that to qualify as a plant, the dormitories actively performed a function. Whether an asset functions as plant has to be determined by an examination of the function of that asset in the context of the business of the taxpayer. On that basis, the court was of the view that the dormitories satisfied the function test.

The "premises" test

To qualify as plant for the purpose of capital allowances, the dormitories also needed to pass the "premises" test.

This test was enunciated by Hoffmann J in *Wimpy International Ltd v Warland (Inspector of Taxes)* [1988] STC 149 as follows:

"I take Lord Lowry [in *Scottish & Newcastle Breweries*] to be saying that even if an embellishment for the purposes of trade passes the 'business use' test, it still has to pass the 'premises' test and *something which 'becomes part of the premises' fails that test unless the premises are themselves plant.*" [emphasis added]

The test is not simply whether the structure is used for a business purpose but whether it is used as plant rather than as premises, i.e. the structure performed a function other than that of merely providing accommodation for the carrying on of a business.

The court found that although the dormitories were built to enable the taxpayer to carry out its business activity of providing accommodation, it was also true that the provision of shelter was a typical function of premises. The dormitories were not essentially different from hotel premises where travellers are accommodated.

Although the appellant sought to argue that the portability and demountability of the dormitories was an additional function, the court found this contention to be untenable. The portability and demountability of the dormitories were merely the properties of the dormitories and not a function. The dormitories served only to provide accommodation to workers, this being the typical function of premises. This remained so even if it be said that the dormitories were the structures with which the business was carried on.

Conclusion

Accordingly, although the dormitories passed the "business use" or "functional" test, the court held that they failed the "premises" test.

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General

MOM introduces enhanced factory registration scheme from 1 March 2010

On 4 February 2010, the Ministry of Manpower (the “**MOM**”) announced it will introduce an “Enhanced factory registration scheme” (the “**new Scheme**”) for those factories with higher risk activities from **1 March 2010**. The new Scheme strengthens the requirements for implementation of risk management and safety and health management system in these factories at the point of registration.

The Workplace Safety and Health (Registration of Factories) Regulations have been amended with effect from 1 March 2010 to implement these changes.

Summary of the new Scheme

Under the new Scheme, registration requirements are commensurate with the level of risk of the factory operations. Hence, different registration requirements are stipulated for two groups of factories within this category based on the different levels of risks their operations entail.

Group A (One-time Factory Registration Scheme)

One-time Factory Registration is applicable to the following classes of factories:

- Construction worksites;
- Shipbuilding and ship-repairing yards;
- Pharmaceutical plants;
- Wafer fabrication plants; and
- Metalworking factories with 100 or more persons employed.

Group B (Renewable Factory Registration Scheme)

Renewable Factory Registration is applicable to the following classes of factories:

- Factories engaged in the processing or manufacture of petroleum, petroleum products, petrochemicals or petrochemical products;
- Bulk storage terminals with storage capacity of 5,000 or more cubic metres of toxic or flammable liquid; and
- Chemical plants engaged in the manufacture of fluorine, chlorine, hydrogen fluoride, carbon monoxide or synthetic polymers.

Reference materials

To find out more details of the new Scheme, please [click here](#) to view a section entitled “The Enhanced Factory Registration Schemes” on the MOM website www.mom.gov.sg

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Available resources include:

- [FAQs on the Enhanced Factory Registration Scheme](#)
- [MOM press release dated 4 February 2010](#)

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

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

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

Background facts

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

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

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

The counterclaim

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

Reciprocity

In the High Court's view a contractual promise to pay money is not automatically enforceable once its conditions precedent have been satisfied. Regard must be had to the rest of the contract. The High Court used the term

“reciprocity” to refer to the “mutual and dependant” nature of the obligations that form a contract. The High Court then found that, as a principle of contract law, the requirement of reciprocity “recognises that, when the several obligations of a contract are *on their true construction* part of one indivisible bargain, a party cannot expect to enforce his counterparty’s obligations when he himself did not, cannot, or is unwilling or able to, perform his own obligations”.

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

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

Exceptions to reciprocity

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

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

Decision

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

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

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

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

Facts

The first defendant ("**Liew**") was a Sales Manager for Baldor Electric (Asia) Pte Ltd ("**Baldor**") and reported to Baldor's Managing Director ("**Tan**").

Liew issued two letters under Baldor's letterhead certifying that an Indonesian incorporated company, PT Kenvin ElektriKA Makmur ("**PT Kenvin**"), was Baldor's authorised distributor/agent in Indonesia. About the same time, the second defendant, Liew's wife ("**Neo**") received two payments from PT Kenvin. Before tendering his resignation from Baldor, Liew received a third payment from PT Sarana, a customer of PT Kenvin, and received a fourth payment in Singapore dollars from another customer of PT Kenvin (all payments to be known as "**PT Kenvin payments**").

After leaving Baldor, Liew began his employment with the third defendant, WEG Export Adora SA ("**WEG**"). Liew's relationship with WEG began while he was still employed by Baldor. Liew met with WEG representatives and sent four sales inquiries in his capacity as Baldor Sales Manager to WEG's Export Manager for Asian Markets.

Subsequently, Baldor demanded repayment of the PT Kenvin payments. Liew agreed to repay the amount in three instalments and confirmed that he did not receive any monies from any other companies or other monies from PT Kenvin.

Baldor also alleged that Liew had used or disclosed confidential information to WEG ("**Baldor Information**"). Liew responded that the Baldor Information was available in the public domain and that he had no intention to pass confidential information to WEG for the purposes of commercial profit or advantage. He also alleged that Baldor had not suffered any resulting loss or damage.

Liew's employment with WEG was eventually terminated.

Issues before the court

The present action concerned Baldor's allegations that Liew had breached his fiduciary duties and/or his duty of confidentiality and duties of fidelity and good faith which he owed to Baldor as its Sales Manager. Baldor also claimed against Neo as constructive trustee for moneys received on behalf of Liew acting in breach of his duties to Baldor. Baldor's claims against WEG were for inducing Liew to breach his duties to Baldor and/or for unlawful interference in and as constructive trustee in respect of corporate opportunities diverted to WEG by Liew. Baldor also claimed conspiracy to defraud against Liew and WEG.

Was Liew a fiduciary?

Baldor alleged that Liew was a fiduciary by virtue of his position as Baldor's Sales Manager. The court noted that not all contractual duties owed by employees to their employers are fiduciary. The court noted that Liew did not attend Baldor's Board of Directors' meeting, had no say in Baldor's financial

decisions, did not have the authority to take decisions regarding Baldor's operations and Liew reported directly to Tan and not to Baldor US, Baldor's parent company. Further, there was no evidence that Liew had the power to hire or fire Baldor employees and he also did not have the authority to appoint Baldor distributors. Given these factors, the court decided that Liew was not a fiduciary.

Duties of fidelity and good faith

The court observed that it is trite law that there is an implied term in the employer's favour that the employee will serve the employer with good faith and fidelity.

The court found that the evidence overwhelmingly suggested that Liew had an interest in PT Kenvin as it showed that he had financial control over PT Kenvin as the second signatory of PT Kenvin's bank account. Liew also set PT Kenvin's internal policies and decided the salaries of employees and that his consent was sought in respect of PT Kenvin's operational matters. There was also evidence suggesting that Liew had provided 80 per cent. of PT Kenvin's paid up capital.

The court also accepted Baldor's contention that Liew had appointed PT Kenvin as Baldor's Indonesian distributor without Baldor's approval.

Given the above, the court found that Liew had breached his duties of fidelity and good faith to Baldor by acting outside his authority in certifying in two letters that PT Kenvin was Baldor's authorised distributor/agent in Indonesia. The court also noted that even if PT Kenvin had been properly appointed, Liew's failure to inform Baldor that PT Kenvin's business was not doing well as it allegedly had problems with its internal controls and required financial assistance was also a breach of his duty of fidelity to Baldor. There was also evidence to show that Liew had placed the interest of PT Kenvin over that of Baldor, his employer.

In relation to the PT Kenvin payments, it was the court's opinion that the payments were the fruits of Liew's breaches of duty to Baldor. The court found that Liew had breached his duty of fidelity and good faith to Baldor by preferring his own interest over that of Baldor. He had sold Baldor motors to PT Kenvin at prices below the pricing guidelines and gave the false appearance that PT Kenvin had been properly appointed as an authorised distributor case. Further, he diverted a Baldor customer to PT Kenvin and collected money due to PT Kenvin without repaying the money due from PT Kenvin to Baldor.

Liew's diversion of sales inquiries to WEG was also a breach of his duty of good faith and fidelity to Baldor. However, the court noted that there was a lack of evidence of any response from the customer concerned or of any further communication between Liew and WEG regarding the inquiries. Such evidence would be required to prove that damage resulted from the diversion of the inquiries from Baldor to WEG. Therefore, Baldor's claim in relation to damage suffered as a result of the diversion of customer inquiries failed before the court.

Other issues

The court briefly dealt with the other issues in this matter:

- **Baldor Information:** The court found that it had not been proven that the Baldor Information was in fact divulged to WEG or that there would be a risk that such information, assuming it was confidential which the court did not accept, would be divulged.

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- **Liability of Neo as constructive trustee:** In order to establish that Neo was liable for knowing receipt of the first two of the PT Kenvin payments, Baldor had to show whether an honest person in her position knew or ought to have known that the amounts received were in breach of duties of fidelity and good faith. Such knowledge is inferred from the evidence adduced. The court noted that, while much of Neo's behaviour was suggestive of knowledge and that Neo had proved herself to not have been candid with the court, it was not prepared to infer liability without more evidence.
- **Conspiracy between Liew and WEG to defraud Baldor:** The court noted that alleging conspiracy requires a high degree of proof. While still based on the civil standard of balance of probabilities, the amount of proof required is higher than that which would be required in a normal civil action. The court did not find that the evidence supported a claim of conspiracy as Liew's contact with WEG was in regard to prospective employment which is not illegal. The court found that Liew had not done anything to undermine Baldor's plans and products while still in its employ.
- **Did WEG induce Liew to breach his duties to Baldor:** The court did not accept that WEG had induced Liew to breach his duties to Baldor as it was clear that Liew had initiated the first contact with WEG and in relation to the Baldor sales inquiries Liew passed to WEG, the court noted that Liew assured WEG that Baldor was not able to quote for the inquiries and this caused WEG to accept them.

For the reasons set out above, the court held that Baldor succeeded in its claim that Liew had breached his duties of fidelity and good faith which he owed to Baldor as its Sales Manager.

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News

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

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

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

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

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

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

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The initial public offering of shares in Tiger Airways Holdings Limited

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

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

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