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Legal Bulletin

A summary of developments in the law

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Articles

Parliament passes Banking (Amendment) Bill 2006: Towards a more responsive regulatory framework for the Singapore banking sector

On 22 January 2007, the Banking (Amendment) Bill 2006 (the "**Bill**") was passed in Parliament. The Bill was introduced on 8 November 2006 after a public consultation exercise in July/August 2006.

Background

The enactment of the Bill will give effect to several new policies and measures to strengthen prudential safeguards, facilitate risk-based supervision, provide banks with greater operational flexibility, and update regulations. The Bill is part of an on-going process, embarked upon by the Monetary Authority of Singapore (the "**MAS**"), to enhance the robustness and responsiveness of the banking regulatory framework, in tandem with the growth in scope and sophistication of the activities of banks in Singapore.

The introduction of the Bill in Parliament was featured in a previous issue of the Allen & Gledhill Legal Bulletin (November 2006). To view the article entitled "*Parliament introduces Banking (Amendment) Bill 2006: Strengthening prudential safeguards and greater operational flexibility for banks*", please **click here**.

In the second reading speech of the Bill, Mr Lim Hng Kiang, Minister for Trade and Industry and Deputy Chairman of the MAS highlighted the following major amendments in the Bill:

Strengthening prudential safeguards

- **Revision of methodologies for limiting large exposures and related party exposures**. Currently, section 29 of the Banking Act (the "**Act**") sets prudential limits that prevent the default of any single borrower from seriously impacting the financial strength of a bank. The Bill introduces a number of changes to ensure that the prudential limits remain relevant and are in line with international best practice. First, instead of a limit based on credit facilities granted, the Bill proposes to apply the limits on all exposures (including equity and off-balance sheet exposures) to a single counterparty or group of related counterparties posing a single risk to the bank. Second, the MAS will recognise some common forms of credit risk mitigation adopted by banks. Third, lending limits to related corporations will be revised to reduce the risk of exposure of local banks to its substantial shareholder group(s) and to financial entities in which the bank holds a major stake. The MAS gave the industry a two-year grace period to comply with the revised section 29 of the Act.

- **Introduction of an asset maintenance regime**. The Bill will amend the Act to strengthen the foreign bank regulatory framework by requiring foreign full and wholesale bank branches to maintain a minimum level of eligible assets in Singapore in proportion to their deposit liabilities. The requirement aims to improve the recovery of assets from a failed foreign bank branch in Singapore to meet the claims of Singapore depositors. A six-month grace period will be given for foreign bank branches to make necessary adjustments to their asset allocations.

- **Amendment of the priority ranking of deposit liabilities of a bank**. Consistent with the objective of protecting non-bank depositors and to encourage prudence and market discipline in banks, the Bill will amend the Act to reorder the priority ranking in the event of a winding up of a bank. As changed, non-bank deposit liabilities will be placed ahead of inter-bank liabilities, with the latter ranking *pari passu* with other unsecured liabilities.

Enhancing the MAS' role in bank resolution

- **Wider role in the resolution process and broader range of resolution options**. When dealing with a bank in distress or insolvency, international experience has shown that it is important for the banking sector regulator, in the event that a private sector resolution is not possible, to take action quickly to minimise losses to depositors and other creditors and to maintain stability in the financial system. Currently, the MAS has limited powers in dealing with a distressed or insolvent bank. The Bill will enhance the MAS' role in insolvency proceedings of a bank, including the right to be heard and the power to approve the appointed liquidator. The Bill also empowers the MAS, with the approval of the Minister in charge of the MAS, to direct the sale of the business of a bank, and in the case of local banks, the issuance of new shares, the sale of existing shares, and the restructuring of capital. The MAS must be satisfied that the transfer is appropriate, having regard to the interests of depositors of both the transferor and the transferee, and the stability of the financial system in Singapore.

Facilitating risk-based supervision and allowing operational flexibility of banks

- **Calibration of prudential requirements to banks' profiles**. The Bill will make several amendments to the Act to allow the calibration of prudential requirements to an individual bank's financial strength, risk profile and risk management capabilities. For instance, the MAS may raise the large exposure limits for individual banks where there are strong justifications. A higher asset maintenance requirement may be imposed on a bank with greater supervisory concerns. Banks will also be allowed the operational flexibility to draw down their liquidity reserves to deal with liquidity stress situations. The MAS will be empowered to grant exemptions from requirements in the Act in specific cases.

Expanding the MAS' regulatory scope for credit card issuance

- **Extending regulation to all credit card issuers**. Presently, only financial institutions are subject to the MAS' rules on the issuance of credit cards. The Bill will extend the scope of regulation to all issuers targeting the Singapore market. Entities that have not been approved to issue credit cards in Singapore, including third parties acting on their behalf, will be prohibited from soliciting for or accepting card applications in Singapore. The MAS will be empowered to inspect the operations of approved card issuers for compliance with the MAS' rules on credit card operations.

- **Exemptions**. The Bill will also create exemptions from regulation. These will include single party merchant credit arrangements, where the card is used only for transactions with the issuer, and cards granting credit for small amounts not exceeding S$500.

Updating regulations

Other significant amendments that update the banking regulatory framework include:

- **Lifting the statutory reserve fund requirement**. With the enhancements to the banking regulatory framework over the years, there is no longer a need for banks to maintain a statutory reserve fund. The Bill will allow banks to release the reserves over a five year period.

- **Qualification of the restriction on the use of the word "bank"**. The restriction on the use of the word "bank" protects consumers from being misled as to the status of the entity they are dealing with. The Bill will qualify the restriction to accommodate legitimate uses, such as representative offices of foreign-licensed banks, central banks of other jurisdictions, and international financial institutions like the World Bank and Asian Development Bank.

- **Flexibility for the MAS to prescribe what constitutes a deposit**. To facilitate the MAS' response to product innovation, the Bill will empower the MAS to exclude or include any financial product from or in the definition of deposit. This is intended to cater to products that either legally satisfy the definition of "deposit" but do not meet the economic characteristics of a deposit, or conversely meet the economic characteristics of a deposit but do not satisfy the legal definition of "deposit".

- **Revision of rules on the disclosure of information**. The restriction on disclosure by the MAS of information furnished by banks will be qualified to allow disclosure of only non-customer information under limited circumstances such as sharing of aggregate unpublished information at international forum and contributing to research projects. The revised rules on information disclosure will balance the MAS' responsibility for surveillance and supervision of the financial sector with its obligation to preserve the confidentiality of individual banks' information.

- **Extending the obligation of accurate reporting to non-directors**. To underscore the importance of exercising due care in reporting information to the MAS, the Bill will extend the obligation, currently applicable only to directors and executive officers, to any person who furnishes information to the MAS.

- **Empowering the MAS to direct the removal of directors**. New section 54B of the Act will explicitly provide the MAS with the powers to direct the removal of directors from the board of a Singapore-incorporated bank, if these persons fail to perform their duties and functions to the detriment of the interests of the public and depositors.

The full text of the Bill is available on the Parliament's website. To view the Bill, please **click here**.

To view a copy of Mr Lim's speech delivered at the second reading of the Bill, please **click here**.

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MAS issues amendments to Code on Collective Investment Schemes

On 22 December 2006, the Monetary Authority of Singapore (the "**MAS**") made some amendments to the Code on Collective Investment Schemes (the "**Code**"). Amendments have been made to Appendix 1 of the Code which sets out the investment and borrowing guidelines applicable to non-specialised collective investment schemes ("**CISs**") which invest in equities and/or fixed income instruments.

Appendix 1 of the Code is revised in two areas:

- replacement of "single party limit" with "single issuer limit" and "single group limit"; and
- investment in financial derivatives.

The MAS conducted a public consultation between 24 May and 22 June 2006 to seek feedback on the above amendments. Please **click here** to read an article entitled "*MAS consultation on proposed amendments to the Code on Collective Investment Schemes*" in the May 2006 issue of the Allen & Gledhill Legal Bulletin, which provides a summary of the consultation paper.

A Response to feedback received pursuant to the earlier consultation was released on 22 December 2006, please **click here** to read the full text of the MAS' Response.

The final amendments took into account the feedback received from the consultation. The amendments took effect on 22 December 2006. A summary of the changes to Appendix 1 of the Code is as follows.

Single issuer limit and single group limit

Before 22 December 2006, the Code provided that a CIS is subject to a "single party limit", namely, it may only invest up to 10 per cent. of the deposited property of the CIS in securities issued by and deposits placed with the same entity. For the purpose of the "single party limit", a company, its subsidiaries, fellow subsidiaries and holding company were regarded as one entity.

To overcome limitations posed by the "single party limit", the Code was amended to replace the "single party limit" with a "single issuer limit" and a "single group limit"

The "single group limit" provides that investments in securities issued by a group of companies (namely, a company, its subsidiaries, fellow subsidiaries and its holding company) should not exceed 20 per cent. of the deposited property of a CIS.

Notwithstanding the "single issuer limit" and "single group limit", investments in any security that is a component of a CIS's reference benchmark may be up to the benchmark weighting of the issuer, with an additional absolute overweight allowance of two percentage points above the benchmark weight. The reference benchmark should be one that is widely accepted and constructed by an independent party.

The "single issuer limit" and "single group limit" do not apply to the placement of short-term deposits arising from:

- subscription monies received at any point in time pending the commencement of investment by the CIS;
- liquidation of investments pending reinvestment; or
- liquidation of investments prior to the termination or maturity of a CIS, where the placing of these monies with various institutions would not be in the interests of participants.

Annex 1b to Appendix 1 sets out scenarios illustrating the application of the "single issuer limit" and "single group limit", in particular, how investment limits would be calculated for any group of companies.

Investment in financial derivatives

Before 22 December 2006, a CIS is only allowed to invest in financial derivatives for hedging and efficient portfolio management ("**EPM**").

The Code is revised to allow a CIS to invest in financial derivatives for purposes other than hedging and EPM.

A CIS that make use of financial derivatives should ensure that the risks related to such financial instruments are duly measured, monitored and managed. The CIS should also not allow its exposure to financial derivatives to exceed 100 per cent. of the deposited property of the CIS at any time. Such exposure must be calculated by converting the derivative positions into equivalent positions in the underlying assets embedded in those derivatives. If a CIS wishes to adopt a different method for calculating the exposure, it should obtain prior consent from the MAS.

The prospectus in a CIS which invests in financial derivatives must contain the following:

- a statement as to whether financial derivatives are used for the purposes of hedging or meeting the investment objectives of the CIS or both;
- where the exposure of the CIS to financial derivatives is calculated using a method other than the method prescribed in the Code, a description of the method used and how it differs from the prescribed method;
- a description of the risk management and compliance procedures and controls adopted; and
- a statement that the manager will ensure that the risk management and compliance procedures and controls adopted are adequate and that it has the necessary expertise to control and manage the risks relating to the use of financial derivatives.

The Code provides for a grace period to comply with these new requirements. CISs investing in financial derivatives as an asset class have to comply with these requirements by 22 March 2007, while CIS investing in financial derivatives for purposes of hedging existing positions in a portfolio or EPM provided that the derivatives are not used to gear the overall portfolio, have up to 22 December 2007 to comply with these requirements.

To view the MAS press release dated 22 December 2006 relating to the above development, please **click here**.

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Please **click here** to view the full text of the revised CIS Code dated 22 December 2006.

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MAS issues Notices and Guidelines on Prevention of Money Laundering and Countering the Financing of Terrorism

On 29 December 2006, the Monetary Authority of Singapore (the "**MAS**") issued revised Notices and Guidelines on Prevention of Money Laundering and Countering the Financing of Terrorism (the "**Notices and Guidelines**") for the financial sectors regulated by the MAS. The Notices and Guidelines are similar in substance and structure, subject to variations to adapt to the needs of each sector.

The MAS had conducted two rounds of public consultations on the Notices in January 2005 and August 2006 and a public consultation on the Guidelines in August 2006. The Guidelines are meant to supplement the Notices and should be read in conjunction with the Notices. The Guidelines provide further guidance on the requirements set out in the Notices.

Please click on the titles of the following articles featured in past issues of the Allen & Gledhill Legal Bulletin which provide a summary of the matters highlighted for discussion in the public consultations:

- ***MAS issues consultation on Draft Guidelines to Draft Notices on Prevention of Money Laundering and Countering the Financing of Terrorism*** (September 2006)
- ***MAS second consultation paper on draft Notices on Prevention of Money Laundering and Countering the Financing of Terrorism*** (August 2006)
- ***MAS issues consultation paper on proposed revisions to the Notice on Prevention of Money Laundering*** (January 2005)

On 29 December 2006, the MAS issued the "Response to feedback received – Consultation on anti-money laundering and countering the financing of terrorism (AML/CFT) Notices and Guidelines" compiling the comments to the earlier draft Notices and Guidelines release in August 2006 that are of wider interest to the industry, together with the MAS' responses to these comments. Please **click here** to view the Response.

Full text of the Notices and Guidelines

Following from feedback received in these consultations, the MAS has fine-tuned the Notices and Guidelines. To read the full text of each Notice or Guideline, please click on the title of the respective Notice or Guideline:

Banks

- **Notice to Banks on Prevention of Money Laundering and Countering the Financing of Terrorism [MAS Notice 626]**
- **Guidelines to MAS Notice 626**

Merchant banks

- **Notice to Merchant Banks on Prevention of Money Laundering and Countering the Financing of Terrorism [MAS Notice 1014]**
- **Guidelines to MAS Notice 1014**

Money changers and remittance businesses

- **Notice to Holders of Money-Changer's Licence and Remittance Licence on Prevention of Money Laundering and Countering the Financing of Terrorism [MAS Notice 3001]**
- **Guidelines to MAS Notice 3001**

Finance companies

- **Notice to Finance Companies on Prevention of Money Laundering and Countering the Financing of Terrorism [MAS Notice 824]**
- **Guidelines to MAS Notice 824**

Life insurers

- **Notice to Life Insurers on Prevention of Money Laundering and Countering the Financing of Terrorism [MAS Notice 314]**
- **Guidelines to MAS Notice 314**

Financial advisers

- **Notice to Financial Advisers on Prevention of Money Laundering and Countering the Financing of Terrorism [MAS Notice FAA-N06]**
- **Guidelines to MAS Notice FAA-N06**

Capital markets intermediaries

- **Notice to Capital Markets Service Licensees and Exempt Persons on Prevention of Money Laundering and Countering the Financing of Terrorism [MAS Notice SFA04-N02]**
- **Guidelines to MAS Notice SFA04-N02**

Approved trustees

- **Notice to Approved Trustees on Prevention of Money Laundering and Countering the Financing of Terrorism [MAS Notice SFA13-N01]**
- **Guidelines to MAS Notice SFA13-N01**

Trust companies

- **Notice to Trust Companies on Prevention of Money Laundering and Countering the Financing of Terrorism [MAS Notice TCA-N03]**
- **Guidelines to MAS Notice TCA-N03**

Commencement date of Notices and Guidelines

All of the above Notices and Guidelines will take effect on 1 March 2007 save for the Notices and Guidelines applicable to trust companies, which will take effect on 1 April 2007.

Banks, merchant banks, finance companies and money changers and remittance businesses which will be subject to a new requirement under the Notices and Guidelines to include originator information in cross-border wire transfers will only have to comply with this requirement on 1 July 2007.

Applicability of the Notices and Guidelines

Financial institutions which are subject to more than one of the above Notices and Guidelines (for example, a bank which is also a holder of capital markets services license holder) are only required to abide by the Notice and Guideline issued under their primary licence.

Key changes

The key global changes in the Notices and Guidelines include:

- extending the coverage of the Notices and Guidelines to countering of terrorism financing;
- establishing a more rigorous set of customer due diligence ("**CDD**") measures;
- recognition of a risk-based approach for CDD; and
- introducing measures to deal with "politically exposed persons" ("**PEPs**").

There will be a new requirement on banks, merchant banks, finance companies, money changers and holders of remittance licence to include originator information in cross-border wire transfers.

The discussion below provides a summary of the key changes affecting all Notices and Guidelines unless otherwise specified.

Extending coverage of the Notices and Guidelines to counter terrorism financing

In view of the developments in Singapore law to legislate terrorism financing and the FATF (Financial Action Task Force) recommendations, the coverage of the Notices and Guidelines will be extended to terrorism financing. The financial institutions will be required to adopt the measures set out in the Notices and the Guidelines for the purpose of preventing money laundering as well as countering terrorism financing.

More rigorous customer due diligence measures

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

The new CDD measures include an express requirement on the financial institutions to complete verification of the identities of the customer and beneficial owner before establishing business relations with any customer or

undertaking any transaction for a customer unless the following conditions are satisfied:

- the deferral of completion of the verification of identity of the customer and beneficial owner is essential in order not to interrupt the normal conduct of business operations; and

- the risks of money laundering and terrorism financing have been effectively managed by the financial institutions.

The Guidelines provide that an example where it may be essential not to interrupt the normal course of business would be with respect to securities trades, where market conditions are such that a financial institution has to execute transactions for the customer very rapidly.

In addition, the Guidelines may treat a financial institution as having effectively managed the risks of money laundering and terrorism financing if it has adopted internal policies, procedures and controls that set appropriate limits on the financial services available to the customer before completion of CDD measures.

If a financial institution allows business relations to be established without first completing CDD measures, the Notices require that CDD measures be completed as soon as reasonably practicable. Examples of what may be considered as a reasonable timeframe in such circumstances are set out in the Guidelines. Financial institutions are expected to factor into their internal procedures and control the time limitations provided in the Guidelines.

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

Definition of "customer"

The Guidelines have expanded the definition of "customer" in some Notices and advise the financial institutions to perform CDD as widely as possible on persons that they deal with in the course of their business operations and not just on "the person in whose name an account is opened or intended to be opened", or to whom a financial institution "undertakes or intends to undertake any transaction without an account being opened".

For example, banks, merchant banks, finance companies, financial advisers and holders of a capital market services licence should consider whether CDD measures should be applied to the underlying investors of portfolio managers (where the latter are the customers of the financial institutions). Banks, merchant banks and holders of a capital market services licence should also consider whether certain persons are their "customers" in substance for the purpose of determining whether CDD measures should be applied to them even though the customers' accounts are held with their offices in another country or jurisdiction for book-keeping purposes.

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

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

Examples of when a financial institution might adopt simplified CDD measures are set out in the Guidelines and they include the following situations:

- where reliable information on the customer is publicly available to the financial institution;

- where the customer is a listed company that is subject to regulatory disclosure requirements;

- where the financial institution is dealing with another financial institution whose anti money laundering/countering the financing of terrorism controls it is familiar with by virtue of a previous course of dealings; or

- where the financial institution is dealing with another financial institution which is subject to and supervised for compliance with anti money laundering/countering the financing of terrorism requirements consistent with standards set by the FATF.

The Notices specifically identify PEP, their immediate family members and their close associates as a category of customers to which the financial institutions must perform the enhanced CDD measures. A PEP is defined in the Notices as a natural person who is or has been entrusted with prominent public functions in a foreign country, including the roles held by a head of state, a head of government, government ministers, senior civil servants, senior judicial or military officials, senior executives of state-owned corporations and senior political party officials.

The Guidelines explain that the MAS recognises that the process of determining whether an individual is a PEP may not always be straightforward and would generally consider it acceptable for a financial institution to refer to databases of PEPs either compiled commercially or by official authorities.

In addition, the financial institutions are also obliged to perform enhanced CDD measures for such other categories of customers, business relations or transactions as the financial institutions may assess to present a high risk for money laundering and terrorist financing. The financial institutions may take into account factors such as the type of customer, the type of product or service that the customer purchases, and the geographical area of operation of the customer's business in assessing the risk of money laundering and terrorist financing.

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

Including originator information in cross-border wire transfers

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

- name;

- account number (or unique identification number assigned by the ordering institution where no account exists); and

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

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Examples of suspicious transactions and suspicious transactions reporting forms

Some examples of suspicious transactions and the suspicious transactions reporting forms are set out in the Appendices of the Guidelines.

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Parliament passes Statutes (Miscellaneous Amendments) Bill 2006: Changes to record keeping periods

The Statutes (Miscellaneous Amendments) Bill 2006 was passed in Parliament on 22 January 2007. The Bill was first introduced on 8 November 2006.

Among other things, the Statutes (Miscellaneous Amendments) Bill 2006 will effect changes to the following statutes to shorten the period for record keeping to five years:

- Building Maintenance and Strata Management Act 2004
- Business Trusts Act
- Charities Act
- Companies Act
- Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act
- Customs Act
- Financial Advisers Act
- Income Tax Act
- Limited Liability Partnerships Act 2005
- Money-changing and Remittance Businesses Act
- Moneylenders Act
- Pawnbrokers Act
- Securities and Futures Act
- Trust Companies Act

This development was first announced in the 2006 Budget Statement. To view the relevant segment of the 2006 Budget Statement, please **click here**.

When the Statutes (Miscellaneous Amendments) Bill 2006 comes into force, the new period for retention of records will apply to any document whether the obligation to keep or retain such document first arose before, on, or after the date of commencement of the amendment to the relevant Act.

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To view the Statutes (Miscellaneous Amendments) Bill 2006, please **click here**.

When the Statutes (Miscellaneous Amendments) Bill 2006 was first tabled in Parliament on 8 November 2006, there was featured in the Allen & Gledhill Legal Bulletin (November 2006) an article which discussed in more detail the changes to be made to the Acts listed above. To view the article, please **click here**.

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Parliament passes Income Tax (Amendment) Bill 2006: Implementation of income tax changes announced in 2006 Budget Statement

On 22 January 2007, the Income Tax (Amendment) Bill 2006 was passed in Parliament. The Bill was first read in Parliament on 8 November 2006.

When the Bill comes into force, it will amend the Income Tax Act primarily to implement the income tax changes announced in the 2006 Budget Statement.

The Income Tax Act will be amended in relation to various matters including the following:

- tax exemption for locally administered trust
- tax exemption on income derived by an approved shipping investment enterprise
- deduction allowed for cost of treasury shares
- computing profits of financial instruments
- tax treatment of prescribed Islamic financing arrangements
- concessionary tax rate for discount from qualifying debt securities
- concessionary tax rate on specified income of approved shipping investment manager

To view the Income Tax (Amendment) Bill 2006, please **click here**.

When the Income Tax (Amendment) Bill 2006 was first tabled in Parliament on 8 November 2006, there was featured in the Allen & Gledhill Legal Bulletin (November 2006) an article which discussed in more detail the changes to be made to the Income Tax Act. To view the article, please **click here**.

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Parliament passes Trade Marks (Amendment) Bill 2006: Giving effect to certain articles in Singapore Treaty on the Law of Trademarks

On 22 January 2007, the Singapore Parliament passed the Trade Marks (Amendment) Bill 2006 (the "**Bill**"). The Bill will come into force on a date to be published in the Government Gazette. The Bill was introduced in Parliament on 8 November 2006. An article on the introduction of the Bill was featured in a previous issue of the Allen & Gledhill Legal Bulletin (November 2006). To view the article, please **click here**.

Among other things, the Bill will amend the Trade Marks Act (the "**Act**") to give effect to certain articles of the Singapore Treaty on the Law of Trademarks (the "**Singapore Treaty**"). For instance, the Act will be amended to provide for an application for registration of a trade mark to be divided into two or more separate applications for registration of the trade mark. Other amendments include changes to effect the following:

- to enable a person to make a single application for the registration of a series of trade marks in respect of goods or services belonging to two or more different classes

- to provide for the grant of a licence under an application for registration of a trade mark to be a registrable transaction under section 41 of the Act

To view the Bill, please **click here**.

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Parliament passes Charities (Amendment) Bill 2006: Changes in regulation of institutions of a public character

The Charities (Amendment) Bill 2006 (the "**Bill**") was read a second time and passed in Parliament on 23 January 2007.

The key changes that will be made to the Charities Act (the "**Act**") pursuant to the Bill are as follows:

- changes in the regulation of institutions of a public character ("**IPCs**")

- expanding the definition of "fund-raising appeal"

- additional functions, duties and powers of the Commissioner of Charities (the "**COC**")

- establishment of a Charity Council

Regulation of IPCs

A new Part VIIIA comprising new sections 40A, 40B and 40C will be introduced in the Act to govern the regulation of IPCs. The regulatory regime for IPCs will be migrated from the Income Tax Act to the Act.

When in force, these new provisions in the Act will also provide for the appointment of sector administrators who will be carrying out the duties of approving and regulating IPCs for the COC. Central fund administrators who are appointed under the Income Tax Act to administer the regulation of IPCs will be replaced by sector administrators appointed under the Act.

There is a transitional provision in the Bill that deems any approval granted to an IPC under the Income Tax Act as an approval under the Act after the Bill comes into force. As such, the tax benefits applicable to the IPC for the remainder of the duration for which the IPC approval was earlier granted under the Income Tax Act will be preserved.

Expanding definition of "fund raising appeal"

The Bill will also introduce a revised definition of "fund-raising appeal" that is broad enough to include appeals in any form, whether the appeals are made expressly or impliedly, or whether or not words such as "appeal", "fund-raising" and the like are actually used.

Additional functions, duties and powers of the COC

The new powers that will be granted to the COC include:

- suspending or removing any trustee, charity trustee, officer, agent or employee of a charity from being a member of the charity (new section 25A of the Act);
- directing any person to apply any property held by or on trust for a charity (even after the charity has ceased to exist or operate) to apply the property properly for the purposes of the charity (new sections 26A and 26B of the Act); and
- prohibiting, stopping or restricting (by imposing conditions) the conduct of any fund-raising appeal by any charity or person (new section 39B of the Act).

Establishment of Charity Council

The Act will contain a new Part IIA which provides for the establishment and functions of the Charity Council which will be tasked to advise the COC's office on its regulatory work, in addition to promoting self-regulation and good governance standards in the charity sector.

Please **click here** to view the full text of the Bill.

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Parliament introduces Health Products Bill 2006 on 22 January 2007

On 22 January 2007, the Health Products Bill (the "**Bill**") was tabled for first reading in the Parliament.

Objective of the Bill

The Bill aims to amalgamate the existing controls for regulating medicines, which currently reside in various pieces of legislation, into one omnibus Act. This proposal follows from industry feedback that having the regulatory controls fragmented and spread out in different legislation is confusing and difficult to understand. Furthermore, there are areas where the various legislation overlap. The overlapping of controls in some areas sometimes makes compliance with the legal requirements unnecessarily complicated.

Medicines and health-related products are currently regulated under the following legislation:

- the Medicines Act;
- the Medicines (Advertisement and Sale) Act;
- the Poisons Act;
- the Sale of Drugs Act.

The Health Sciences Authority (the "**HSA**") conducted a public consultation between 15 June 2005 and 31 July 2005 seeking comments on the draft Bill. For more information about the public consultation, please **click here** to read an article entitled "*HSA conducts public consultation on proposed Health Products Bill*" featured in a previous issue of the Allen & Gledhill Legal Bulletin (June 2005).

When enacted as law, the Bill will be administered by the HSA.

Scope of the Health Products Act

The Bill seeks to regulate the manufacture, import, supply, presentation and advertisement of "health products".

"Health product" is defined in section 2 of the Bill to mean any substance, preparation or device that falls within any of the categories of health products specified in the First Schedule of the Health Products Act (when it is enacted) (the "**Act**") and:

- is represented for use by humans;
- whether because of its presentation or otherwise, is likely to be taken for use by humans; or
- is included in a class of substances, preparations or devices which are or are ordinarily intended for use by humans,

solely or principally for a health-related purpose.

"Health-related purpose" means a therapeutic, preventive, palliative, diagnostic or cosmetic purpose, or any other purpose for the promotion or preservation of human health and well-being, and includes the following purposes:

- preventing, diagnosing, monitoring, treating, curing or alleviating any disease, disorder, ailment, injury, handicap or abnormal physical or mental state, or the symptoms thereof, in humans;
- compensating for any injury or handicap in humans;
- investigating, modifying or replacing any part of the human anatomy or any physiological process in humans;
- testing the susceptibility of humans to any disease, disorder or ailment;
- influencing, controlling or preventing conception in humans;
- testing for pregnancy in humans;
- inducing anaesthesia in humans;
- destroying or inhibiting micro-organisms that may be harmful to humans; and
- cleansing, fragrancing, deodorising, beautifying, preserving, improving, altering or restoring the complexion, skin, hair, nails or teeth of humans.

The breadth of the definition of "health products" is intended to extend the coverage of the Act to health supplements (like vitamins) as well as to capture diverse health products which are available in the market that do not fall within the ambit of any of the existing legislation. A product that fits into the definition of "health product" *per se* is not subject to the Act unless it is specified in the First Schedule to the Act. Section 4 of the Bill provides that the Act will apply only in relation to the categories of health products that are specified and described in the first and second columns of the First Schedule of the Act to the extent prescribed in the third column thereof.

Currently, "medical device" is the only health product specified in the First Schedule to the Bill.

A new section 77 will be introduced in the Medicines Act to deal with the transfer of the regulation of medicinal products from the Medicines Act to the Bill. By virtue of the new section 77, where a medicinal product regulated under the Medicines Act is categorised as a health product and is regulated under the Bill, the Minister for Health will, by an order published in the *Gazette*, declare that the Medicines Act will cease to apply to that medicinal product. This will avoid duplicity of regulation. The Medicines Act will be repealed by a separate Bill when all medicinal products, currently regulated under that Act are categorised as health products and are regulated under the Bill. No time frame is indicated for the transfer.

Activities regulated under the Bill

All health products that are specified in the First Schedule to Bill must be registered before they can be manufactured, imported and sold in Singapore. Health products are registered in accordance with the categories specified in the First Schedule to the Bill.

The Bill regulates dealings concerning health products that are specified in the First Schedule as follows:

- manufacturer's licence is required for a person who manufactures any health product

- importer's licence is required for a person who imports any health product

- wholesaler's licence is required for a person who supplies any health product by wholesale

- supply of health products must be carried out in accordance with prescribed requirements in the Act

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There are also prohibitions against the manufacture, import or supply of adulterated, counterfeit, unwholesome health products or health products that have been tampered with.

Presentation (for example, labeling, packaging and naming of health products) and advertisement of health products are also governed under the Bill.

Please **click here** to view the full text of the Bill.

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SIC Issues Practice Statement on Acceptances

On 3 January 2007, the Securities Industry Council (the "**SIC**") issued a Practice Statement on Acceptances. The Practice Statement was issued to provide certainty as to the level of acceptance at the close of an offer in accordance with Note 1 on Rule 28.1 of the Singapore Code on Take-overs and Mergers (the "**Code**").

Under Note 1 on Rule 28.1 of the Code, all offers are required to be conditional upon a prescribed level of acceptance. The offeror must take the necessary measures and procedures so that all the parties to the offer may be confident that the result of the offer is arrived at by an objective procedure which, as far as possible, eliminates errors or uncertainty.

The SIC noted that under current practice, an offeror normally permits a depositor to accept the offer in respect of on-market share purchase transactions by submitting the relevant original contract statement, together with the completed acceptance form, to the Central Depository (Pte) Ltd (the "**CDP**"). The acceptance is conditional upon the "Free Balance" of the depositor's securities account being credited with the purchased shares within a certain period (normally five days or more), notwithstanding that such period may go beyond the close of the offer.

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The Practice Statement states that original contract statements submitted in respect of purchased shares which have yet to be credited to the "Free Balance" of the relevant depositors' CDP securities accounts as at the close of the offer should not be counted towards fulfilling the acceptance condition.

Please **click here** to read the full text of the Practice Statement.

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SGX lowers securities transaction costs

On 11 January 2007, the Singapore Exchange Ltd (the "**SGX**") announced that the following changes in fees which will take effect on 1 March 2007:

- reduction in securities clearing fee rate from 0.05 per cent. to 0.04 per cent. of the contract value;
- increase in the maximum clearing fee from S$200 to S$600.

The reduction in the clearing fee rate will result in lower clearing fees for trades below S$500,000.

The SGX will also be making adjustments to the minimum bids schedule, including reducing the minimum bid size for higher priced stocks, by mid 2007.

The revisions to both the securities clearing fee and minimum bids schedule are aimed at lowering transaction costs and improving market efficiency.

Please **click here** to view the SGX's press release dated 11 January 2007 in relation to the above development.

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IRAS withdraws 1998 off-budget concession on stamp duty deferment

In June 1998, a concession to defer stamp duty payment on all contracts for the sale and purchase of lands and properties was introduced as part of the package of off-budget measures to assist businesses during the economic slowdown.

The Government has decided to withdraw the concession with effect from 15 December 2006 as the economic conditions and the property market have improved.

When it was available, the concession allowed property buyers to pay the stamp duty at a later date instead of paying it upfront upon signing the contract for purchase. For properties under construction, the buyer would pay the stamp duty within 14 days after the date of Temporary Occupation Permit ("**TOP**"), or 14 days after the date he subsequently contracted to sell the property, whichever was the earlier. For lands and completed properties where TOPs had been issued, the buyer would pay stamp duty within 14 days after the date of the transfer of the property, or 14 days after the date he subsequently contracted to sell the property, whichever was the earlier.

With the withdrawal of the concession on 15 December 2006, the normal treatment would apply, that is, a property buyer is required to pay stamp duty within 14 days from the date of acceptance of the option to purchase.

However, buyers who accepted their options to purchase before 15 December 2006 will continue to enjoy the stamp duty deferment concession.

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As a transitional measure, buyers who accepted the option to purchase or signed the sale and purchase agreement between 15 and 31 December 2006, will have up till 14 March 2007 to pay the stamp duty without any penalty. These buyers are required to complete and send a prescribed form to the Commissioner of Stamp Duties within 14 days after accepting the option to purchase or signing the sale and purchase agreement.

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CCS issues response to public feedback on proposed merger control regime

On 11 December 2006, the Competition Commission of Singapore (the "**CCS**") published its response to the public submissions on the proposed merger regime under the Competition Act (the "**Act**") which it had received, following a three-week public consultation which commenced on 20 October 2006.

The public submissions were generally supportive of the CCS' proposals to allow merger parties to notify an anticipated merger for its decision and to empower the CCS to accept commitments proffered by merger parties to address competition concerns.

Some of the CCS' other key responses are as follows:

- Mergers effected before 1 July 2007, when the merger regime under the Act comes into force, will not be subject to the merger regime. Ancillary restrictions which are directly-related and necessary to the implementation of these mergers will similarly be excluded from the Act.
- The CCS will consider accepting requests for pre-notification discussions one month before the merger regime comes into force, i.e. from 1 June 2007.
- The CCS will request third parties to submit their views on a merger situation which has been notified to the CCS within a stipulated time. Such third-party submissions will be carefully scrutinised to ensure that frivolous ones do not frustrate or delay merger proceeding.
- The CCS and the Securities Industry Council (the "**SIC**") are working together to align processes so as to ensure the smooth functioning of both regulatory regimes, and to provide greater certainty to the market. Parties involved in take-over offers that are subject to both the Singapore Code on Take-overs and Mergers, which is under the purview of the SIC, and the merger provisions of the Competition Act, will need to take into account the requirements under both regimes.
- The CCS will clarify in the guideline, that the validity period for a decision will apply only to a favourable decision allowing an anticipated merger to proceed. As market circumstances change over time, a validity period of one year to effect a merger is reasonable and necessary.
- The substantive assessment guideline will be amended to clarify that co-ordination between a joint venture's parent companies may fall within section 34 of the Act if the co-ordination takes place outside the approved joint venture. The CCS will also clarify that transactions by venture capitalists and private equity investors could raise possible

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competition concerns, particularly if there is coordination of conduct among companies within their portfolio that are in the same market.

- The test for substantial lessening of competition will be applied prospectively. The starting point for assessing the future will depend on the facts.

For the CCS' media release of 11 December 2006, please **click here**.

For the paper outlining the CCS' response to the public submissions, please **click here**.

An article discussing the CCS' public consultation of the proposed merger regime was featured in a previous issue of the Allen & Gledhill Legal Bulletin (October 2006). To view the article entitled "*Competition Commission of Singapore consults on proposed merger control regime*", please **click here**.

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MAS responds to feedback on Consultation Paper on Proposed Regulatory Framework for Mortgage Insurance Business

On 12 October 2006, the Monetary Authority of Singapore (the "**MAS**") released a Consultation Paper on the Proposed Regulatory Framework for Mortgage Insurance Business (the "**Consultation Paper**").

On 8 January 2007, the MAS issued a response to feedback (the "**Response**") received for the Consultation Paper, and incorporated the relevant feedback into the final regulatory framework. Comments that are of wider interest, together with the MAS' responses, were set out in the Response.

Background

Mortgage insurance protects residential mortgage lenders against losses on mortgage loans arising from default by borrowers. In July 2005, the MAS announced an increase in the "loan-to-value" ("**LTV**") limit for housing loans granted by banks from 80 per cent. to 90 per cent. In conjunction with this increase, the MAS also announced that it was prepared to consider mortgage insurance as an alternative risk mitigant to higher capital charge on loans with LTVs exceeding 80 per cent. and that it would study the appropriate regulatory framework for mortgage insurers.

Final regulatory framework

The MAS will be regulating mortgage insurance business based on the insurance regulatory framework applicable to general direct insurers. To address risks specific to mortgage insurance business, the MAS will put in additional regulatory requirements, which include:

- mortgage insurers will be required to operate as mono-line insurers;

- certification of mortgage insurers' policy liabilities will have to be carried out by the MAS;

- in valuing mortgage insurance liabilities, approved actuaries will be

required to make explicit allowance for, and disclose in their valuation reports, key risk drivers such as probability of default by LTV, loss given default and seasoning;

- mortgage insurers will be subjected to the insurance risk-based capital requirements under the Insurance (Valuation and Capital) Regulations 2004 with mortgage insurance being treated as a business with medium volatility. In addition, they will be subjected to an annual contingency reserve requirement to address the cyclical nature of mortgage insurance business;

- based on feedback received, two features in the treatment of contingency reserves maintained by trade credit insurers will be adopted:

  – up to 50 per cent. of the insurance risk requirements maintained in respect of a particular insurance fund can be met using no more than 50 per cent. of the contingency reserves set aside in that fund;

  – annual contribution to the contingency reserves need not be made if the reserves exceed 400 per cent. of the highest amount of net written premiums in respect of mortgage insurance in the past two years

- mortgage insurers will not be allowed to deal directly with borrowers in the loan origination process. This prohibition includes, but is not limited to, solicitation of business from and entering into contracts with borrowers; and

- to address concerns on the effects of mortgage insurance on borrowers, the bank is required to disclose to the borrower the following before the commencement of the arrangement:

  – the nature of mortgage insurance;

  – the name of the mortgage insurer;

  – the borrower's rights and responsibilities under the mortgage insurance contract, if any;

  – any subrogated rights that the mortgage insurer may acquire in the event of the borrower's default and its effects on the borrower.

The regulatory framework also provides criteria for allowing Singapore-incorporated banks to recognise the credit risk mitigation effects of mortgage insurance for a mortgage loan with an LTV of more than 80 per cent. but not more than 90 per cent.

To view the Response, please **click here**. The finalised regulatory framework, which incorporates some of the feedback received, can be found in Appendix B to the Response.

The features of the Consultation Paper was highlighted in a previous issue of the Allen & Gledhill Legal Bulletin (October 2006). To view the article entitled "*MAS proposes regulatory framework for mortgage insurance business*", please **click here**.

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MOF issues response to feedback received from public consultation on draft Goods and Services Tax (Amendment) Bill 2006

From 8 September 2006 to 6 October 2006, the Ministry of Finance (the "**MOF**") conducted a public consultation on a draft Goods and Services Tax (Amendment) Bill 2006 (the "**draft Bill**").

The draft Bill covers the initiatives announced in the Budget 2006 Statement as well as other changes or refinements to existing tax policies and administration resulting from on-going review of the Goods and Services Tax ("**GST**") system.

On 12 December 2006, the MOF issued its response to the feedback received from the public consultation. The MOF has accepted feedback received in the following areas:

- implementing an Advance Rulings System for GST;
- aligning the GST treatment of Islamic financial arrangements with the GST treatment of conventional financing arrangements that they are economically equivalent to;
- allowing insurers input tax claims based on the tax fraction of cash payments paid to qualifying policyholders under insurance contracts that are subject to GST;
- revising the record keeping period from 7 to 5 years;
- implementing revised GST rules for zero-rating of advertising services.

To view the press release issued by the MOF on 12 December 2006, please **click here**.

To view the summary of response, please **click here**.

To view the draft Goods and Services Tax (Amendment) Bill 2006, please **click here**.

For a Summary Table of the proposed changes, please **click here**.

An article discussing the public consultation on the draft Bill has been featured in a previous issue of the Allen & Gledhill Legal Bulletin (September 2006). To view the article entitled "*MOF conducts public consultation on draft Goods and Services Tax (Amendment) Bill 2006*", please **click here**.

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Energy Market Authority issues Second Request for Feedback to proposed amendments to Gas Act: Measures to ensure open access to the gas network

On 26 December 2006, the Energy Market Authority (the "**EMA**") issued a Second Request for Feedback to proposed amendments to the Gas Act (the "**Second Request**"). The initial request for public feedback (the "**Initial Request**") was on the first draft of the proposed amendments to the Gas Act and this was conducted in February 2006.

To view an article in a previous issue of the Allen & Gledhill Legal Bulletin (February 2006) on the Initial Request entitled "*Public consultation on proposed amendments to Gas Act*", please **click here**.

Based on the feedback received from the Initial Request, the EMA has revised the proposed amendments to the Gas Act (the "**second draft of the proposed amendments**"). The Second Request relates to this second draft of the proposed amendments.

By way of background, the Government announced in March 2000 its policy decision to restructure the gas industry to facilitate competition in gas import and retail, with transportation to be undertaken by PowerGas Ltd. The Gas Act was passed in March 2001 to establish the regulatory framework for this.

The EMA is proposing amendments to the Gas Act to implement the Government's policies to allow new gas importers and retailers to have open competitive access to the gas pipeline infrastructure, and enhance the security of the Singapore gas system. Further, potential investors will have greater clarity of the regulatory regime in the gas industry.

The key amendments addressed in the second draft of the proposed amendments include matters pertaining to the following:

- **Licensing regime**: It is proposed that various activities relating to gas will be made subject to licensing requirements. These include the shipping of gas, operators of onshore receiving facilities, and importers of liquefied natural gas ("**LNG**"). Further, a LNG terminal will be subject to special administrative orders should the need arise.

- **Measures to ensure open access to the gas network**: The EMA is proposing that there be a Gas Network Code which has the effect of contract, to be imposed on all gas shippers. The gas transporter and any relevant gas shipper are deemed to have agreed to and observe and perform the provisions of the Gas Network Code. The Gas Act will provide for the Gas Network Code in the proposed new Part VIA. Another proposal is to amend the open access regime in the Gas Act to facilitate the liberalisation of the new gas market. The Gas Act will also be amended to empower the EMA to require users of a relevant facility to enter into an arrangement for the allocation of gas.

- **Strengthening regulatory powers**: The EMA will revise the relevant provisions in the Gas Act relating to control of ownership of critical infrastructure. Such provisions are to apply prospectively. There is also a proposed new section on exempted transactions. Further, the Gas Act will be amended to ensure that shippers in shipping gas to their end users be accorded powers and obligations similar to that of gas retailers.

The consultation closed on 15 January 2007.

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To view the Second Request for Feedback, please **click here**.

For the EMA's response to feedback received on the Initial Request, please **click here**.

The EMA has posted on its website an information paper on Policy on Gas Import Control. To view the information paper, please **click here**.

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Cases

Dispute resolution

Arbitration

Singapore Court of Appeal examines applicability of the doctrine of champerty to arbitration proceedings

Otech Pakistan Pvt Ltd v Clough Engineering Ltd & Anor [2006] SGCA 46

This case raises an interesting legal point, not previously considered by Singapore courts, on the applicability of the doctrine of champerty to agreements to assist litigants in arbitration proceedings in the same way as it applies to court proceedings.

The relevant facts

The respondent Clough Engineering Ltd ("**Clough**") was the project contractor for the construction and upgrading of two gas-condensate processing plants in Pakistan. Its contracts for these two projects were entered into with the Oil and Gas Development Company Limited ("**OGDCL**"), a Pakistani government-owned corporation.
Disputes arose, and Clough commenced legal proceedings in Pakistan against OGDCL. In 1997, Clough engaged the services of the plaintiff, Otech Pakistan Pvt Ltd ("**Otech**"), to assist it in bringing or defending its claims against OGDCL (the "**1997 Agreement**"). In return for these services, Clough agreed to pay Otech 40 per cent. of any sum recovered in excess of US$8 million on the first project, and 50 per cent. of any amount recovered in excess of US$3 million on the second project.

The disputes remained unresolved, and at the end of 1999, Clough decided to pursue a negotiated settlement with OGDCL. Clough wanted to offer Otech an incentive to conclude the negotiated settlement, so the parties conducted discussions on a more advantageous remuneration package.

The relationship between Clough and Otech deteriorated and Clough terminated Otech's services. In July 2004, Clough finally settled its disputes with OGDCL for US$7.5 million. Otech sued for breach of agreement, insisting that an agreement had been reached in 1999 for it to be paid 20 per cent. of any settlement sum paid to Clough by OGDCL.

The Singapore High Court dismissed Otech's claims on a finding that there was no evidence of an agreement between the parties in 1999 for Otech to be paid 20 per cent. of the settlement sum. Also, even if there had been a revised agreement reached in 1999, Otech was not entitled to the amount

claimed because it played no part in the conclusion of the settlement of the disputes between Clough and OGDCL.

The decision of the court

The court dismissed Otech's appeal from the decision below. On the facts, the court found that no agreement was reached to revise Otech's remuneration package. On the basis of this conclusion alone, the appeal was without merit. While strictly, the court did not need to pass upon the other issues raised on appeal, it proceeded to do so because it found the aspect on champerty to be noteworthy of discussion, not having been previously considered by any Singapore court.

Champerty in arbitration

Champerty was raised by Clough as one of its defences to Otech's claim. Champerty exists where one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action. A champertous contract offends public policy because of its tendency to pervert the due course of justice and is therefore unenforceable.

Clough submitted that the 1997 Agreement was champertous because it involved Otech giving aid to Clough for a share of what Clough might recover from OGDCL. Otech contended that the doctrine of champerty did not apply to arbitration proceedings.

There has been a conflict of judicial opinion on this issue in other jurisdictions. The High Court of Hong Kong held the view that it is not appropriate to extend the prohibition against champerty, which is a principle of the public justice system, to the private consensual system of arbitration. The Hong Kong court cited an English case, *Giles v Thompson* ([1993] 3 All ER 321 in the Court of Appeal, and [1994] 1 AC 142 in the House of Lords). In that case, the English Court of Appeal observed that the condemnation of champerty had only been done in the context of civil litigation and extending it to private arbitration would involve a radical new step. When the case went on appeal, the House of Lords stated that "the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants". The Hong Kong court took these views altogether to indicate that there was a strong inclination among the judges in England not to apply the doctrine of champerty to arbitration proceedings.

The Singapore Court of Appeal took a different view. Analysing *Giles v Thompson*, it remarked that the House of Lords made no observations relating to the place of the doctrine of champerty in arbitration as that was not the issue at hand. However, the policy considerations on which the doctrine are based – these being, the interests of justice and of litigants – are as important in arbitration as they are in litigation, and the natural inference would be that champerty is as applicable in the one as it is in the other.

This view is amplified by another English case, *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1999] Ch 239, where the judge emphasised that arbitration proceedings are a form of litigation, and that the *lis* prosecuted in an arbitration will be a *lis* that could, had the parties preferred, have been prosecuted in court. The public policy concerns that the course of justice should not be perverted and that claims should not be brought on a speculation or for extravagant amounts apply just as much to arbitration as they do to litigation. Hence, the principles behind the doctrine of champerty

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are general principles that must apply regardless of the mode of proceedings chosen for the resolution of a claim.

Finally, the court cited the present case as a good example of why the doctrine must apply to arbitration. On the evidence, Otech had repeatedly urged Clough to increase the amount that it was demanding as settlement from OGDCL. The court supposed that this was because Otech had everything to gain from a higher settlement price. It would be absurd to condone such behaviour by saying that it was permitted because the parties were looking to resolve their dispute by way of arbitration instead of in the courts.

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Singapore High Court expounds on principles applicable to experts' awards in construction disputes

Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title No 1256 [2006] SGHC 245

Following the decision in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR 634 ("***Evergreat***"), the Singapore High Court presided over by V K Rajah J had another opportunity to provide guidance on the legal principles to be applied in defining an expert's role in dispute resolution and the instances when there would be legitimate basis for judicial intervention into an expert's decision.

The decision in *Evergreat* was featured in a previous issue of the Allen & Gledhill Legal Bulletin (December 2005). To view the case note entitled "*Singapore High Court gives guidance on role of experts when compared to arbitrators*", please **click here**.

The relevant facts

In *Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title No 1256* [2006] SGHC 245, the plaintiff was the main contractor engaged by the defendant to perform improvements on a condominium project. A dispute arose with regard to the completeness of the works, and the plaintiff commenced proceedings to recover amounts allegedly due to it. The parties reached a compromise, embodied in a Settlement Agreement, whereby they agreed to appoint an independent expert to assess the sums due for the works done and related claims. The Settlement Agreement provided that the expert's decision would be final and that no appeal would lie against such decision.

The appointed expert (the "**Expert**") issued a report assessing sums payable by the defendant to the plaintiff and denying the defendant's claim for liquidated damages (the "**Award**"). Claiming that the Expert had breached the terms of her appointment, the defendant applied to set aside the Award. The court dismissed the application and set out its reasons for doing so.

The mandate of experts

Drawing from his decision in *Evergreat*, V K Rajah J reviewed the legal principles to be applied in defining an expert's role and responsibilities. He emphasised that both arbitration and expert awards rest on a common foundation – contract law. The labeling of an appointment as "arbitrator" or "expert" is not in itself always conclusive. The essential difference lies in the

duties and functions that the terms of appointment impose. An expert will have sole discretion to arrive at his determination without being hamstrung by procedural and evidential requirements. He is permitted to inject into the process his personal expertise and to make his own inquiries without any obligation to consult the parties. The "acid test" is whether the appointee can act on his subjective opinion and is not obligated to make a decision only on the basis of the evidence presented to him. The court reiterated its view in *Evergreat* that the single and most important distinction between expert determination and litigation/arbitration is that due process, or the right of both parties to be heard, does not apply to an expert's determination.

The court further stated that there is nothing contrary to public policy in allowing an expert to resolve all disputes in a matter, regardless of whether such issues are legal or factual. The wider trend is towards an expeditious, economical and user-friendly alternative to litigation and arbitration. The court emphasised that expert determination is particularly suitable for resolving technical issues and disputes, and the court's jurisdiction is not completely excluded or ousted because it continues to have jurisdiction to police the contract to ensure that the expert has not exceeded his remit.

Challenging an expert's award

In contrast to *Evergreat*, there was common ground in the present case that the Expert had been appointed as an expert and not as an arbitrator. The principal point of contention of the defendant herein was that the Expert had acted outside the terms of the Settlement Agreement by failing to make a proper assessment. Moreover, that the assumptions that went into the Expert's determination could amount to manifest error that justified judicial intervention.

In *Evergreat*, the court held that an award cannot be challenged and set aside unless the expert has committed a material breach of instructions since then, as a matter of law, the relevant act will not be binding on any of the parties. The court reiterated that holding in the present case, and held that in the absence of fraud or collusion, if the parties agree that an expert's decision is final a court should not inquire:

- how a decision has been reached;
- into the basis for the decision; or
- whether the decision was indeed correct.

As a rule, there is no legal review process prescribed by law for experts' awards. Parties who appoint an expert must acknowledge and accept the risk that though an expert might and can err, such risk is in lieu of the expense, uncertainty and perhaps delay that court or arbitration proceedings may occasion. Even where arguably the expert was mistaken, the proper remedy for the aggrieved party would be to bring an action for negligence against the expert.

Thus, an expert cannot be compelled to give reasons for his decision unless his remit required a reasoned or speaking award. A court would then enforce such a term as an integral part of the contract. Even then, the ultimate issue for the court to resolve remains that of deciding whether the valuation, report or award is in accordance with the parties' contract.

The court was satisfied that the Expert in this case had more than amply discharged her contractual responsibilities. The Expert's contractual obligation essentially required that she "assess" the amounts due for the works done and related claims. While the terms of reference did not require

her to render a reasoned award, she had effectively set out a summary as to how she had discharged her responsibilities, and appeared to have carefully considered the contentions of both parties.

Neither did the court find merit in the defendant's second argument that the assumptions made by the Expert were susceptible to challenge on the basis that they could amount to a manifest error. The court stated that the term "manifest error" is usually expressly incorporated in conclusive evidence clauses to allow challenges to be made when there are plain and obvious errors in what the certificate purports to represent. In the context of experts' awards, the court concurred with the view of the English court in *Campbell v Edwards* [1976] 1 WLR 403 that the right of review extends only to correcting apparent mistakes or errors that appear on the face of the award, such as apparent mathematical miscalculations.

Accordingly, the defendant's appeal was dismissed.

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Intellectual property & technology

Singapore High Court considers inverse passing off and breach of confidence in "ten-minute haircut salon" case

QB Net Co Ltd v Earnson Management (S) Pte Ltd & Ors [2006] SGHC 183

The case of *QB Net Co Ltd v Earnson Management (S) Pte Ltd & Ors* illustrates the process of the Singapore High Court's analysis of the factors necessary to establish the tort of inverse passing off and breach of confidence. On the facts of the case and based on the evidence adduced, the plaintiff's claims for inverse passing off and breach of confidence were dismissed. The plaintiff also unsuccessfully argued that the defendants committed the tort of a conspiracy to injure the plaintiff. This case summary focuses on the issues of inverse passing off and breach of confidence.

Relevant facts

The plaintiff was a Japanese company which operated and offered licences to operate, ten-minute haircut salons trading as, *inter alia*, "QB House" in a few countries worldwide, including Singapore. The plaintiff commenced its chain of ten-minute haircut salons in Japan in 1996.

In mid-2000, the second defendant decided to obtain a franchise from the plaintiff to operate "QB House" haircut salons in Singapore. QB House Pte Ltd ("**QBHPL**") was thus set up to operate the "QB House" outlets in Singapore. QBHPL entered into two licence agreements with the plaintiff in 2001 and 2004 respectively (the "**Licence Agreements**"). According to the terms of the Licence Agreements, the plaintiff granted QBHPL the right to operate haircut salons in Singapore and Malaysia under the trade names "QB House" and "QB Shell", and to adopt the plaintiff's QB House system, QB House get-up and QB House marks. In return, QBHPL paid royalties and licence fees to the plaintiff. The second defendant was a director of QBHPL. Subsequently, relations between the plaintiff and QBHPL soured. In 2005, the first defendant, entered into a sale and purchase agreement with QBHPL (the "**S&P Agreement**") to acquire the business assets of QBHPL and to take over the employment of its employees. The first defendant then commenced its ten-minute haircut business in Singapore under the trade name "EC House".

The third defendant was the first defendant’s sole non-executive director. The second defendant became a consultant to the first defendant.

The plaintiff commenced proceedings against the first defendant for inverse passing off. The plaintiff also claimed against all three defendants for breach of confidence.

Inverse passing off

Inverse passing off is an actionable wrong in Singapore, which is not a nominate tort in its own right . It is an example of an actionable misrepresentation to which the normal principles of passing off apply. In order to succeed in an action for inverse passing off, the plaintiff must prove that there is:

- goodwill attached to their services;
- that the first defendant misrepresented themselves as the commercial source of the services in question; and
- that the plaintiff’s goodwill was damaged as a consequence.

Is there goodwill attached to the plaintiff’s services?

The plaintiff asserted that there was goodwill associated with its name “QB House”, as well as its QB House system and get-up. Two issues arose for consideration in relation to the element of goodwill:

- Did goodwill accrue in respect of the plaintiff’s QB House system and get-up and services?
- If so, did such goodwill accrue solely to the plaintiff?

The court agreed with the plaintiff that goodwill may accrue in respect of the get-up of business premises and items used in trade. However, the threshold for establishing goodwill in this respect is generally quite high. A plaintiff who asserts goodwill in its get-up must show the presence of particular features in its goods and services which are “capricious” (i.e. not common to the trade) but which have come to be associated with the plaintiff’s goods. This would require the plaintiff to adduce “strong persuasive evidence”.

The court held that the plaintiff failed to establish the existence of goodwill in respect of its QB House system, get-up and services. While it might be argued that the plaintiff’s use of a ticket-vending machine, electronic sensors and a no-reservations system were unusual features of a haircut salon, these factors alone were insufficient to warrant a finding of goodwill. The court also did not think that the plaintiff’s use of a special vacuum cleaner to remove freshly cut hair, the use of working cabinets which minimised the movement of hairdressers while at work and the ten-minute service offered by the plaintiff to be sufficiently distinctive to support a finding of goodwill. According to the court, it could be argued that this particular style or get-up is characteristic of the haircut trade and open for all in that trade to adopt, as long as sufficient care is taken to distinguish the source of the services and products in question.

For completeness, the court went on to address the linked issue of whether goodwill had accrued solely to the plaintiff. The court held that although it was a licensee, QBHPL had acquired a shared ownership in the goodwill of the plaintiff’s business, so it could not be said that goodwill had accrued solely to the plaintiff. The general rule is that a licensee does not acquire

goodwill in respect of the licensor's business unless the licensee had gone above and beyond its duties to acquire goodwill in the business. This would depend on the facts of each case. On the facts of the present case, the court was of the opinion that QBHPL played an equally (if not more) significant role in promoting the QB House trade name and its haircut services in Singapore. However, the court did not think that the goodwill acquired by QBHPL had passed to the first defendant under the S&P Agreement.

Did the first defendant misrepresent themselves as the commercial source of the services?

As regards misrepresentation, the plaintiff must establish that the first defendant had misrepresented the plaintiff's goods and services as its own. In this regard, the court found that the plaintiff had successfully shown that the first defendant was guilty of such misrepresentation, taking into account the striking similarities between the manner in which QB House and EC House operated their businesses. The first defendant had continued to use the plaintiff's trading style, and was effectively holding itself out as an associated party to the plaintiff. Next, the court addressed the issue of whether confusion had been caused by the first defendant's misrepresentation, or whether there was a likelihood of confusion occurring in the normal course of trade. On the facts, the court found that the first defendant's misrepresentation was likely to confuse consumers.

Was the plaintiff's goodwill damaged by the first defendant's misrepresentation?

Since both the plaintiff and the first defendant were direct competitors in the same industry, the court was ready to infer that damage or the likelihood thereof had been caused to the plaintiff's goodwill. However, while the plaintiff had shown the existence of a material misrepresentation and damage, it failed to show the existence of goodwill in respect of its QB House system, get-up and services. Hence, the plaintiff's claim for inverse passing off failed.

Breach of confidence

To establish its claim for breach of confidence against all three defendants, the plaintiff had to prove the following elements:

- the confidential nature of the information in question;
- that the information was communicated in circumstances importing an obligation of confidence; and
- an unauthorised use of the information.

The court held that the plaintiff could not invoke the law of confidence because the information sought to be protected had in fact been disclosed in the plaintiff's patent applications. The protection afforded by the law of confidence is lost once a patent is granted. Instead, the proprietor of the information should sue for infringement in relation to the acts done after the date of publication of the patent. As such, the plaintiff failed to establish the first element against the three defendants.

Assuming that the information was confidential in nature, the court went on to deal with the second element of a claim for breach of confidence. The court found that where the first and third defendants were concerned, the plaintiff had not adduced direct evidence showing their awareness that the documents and information were confidential in nature. However, the second defendant had received them as a third party and under circumstances which

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gave rise to an obligation of confidence. As for the final element of unauthorised use of the information, the court held that the plaintiff had not proved its case against all three defendants.

In the circumstance, the plaintiff's claim for inverse passing off as well as breach of confidence failed.

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General

Contract

Singapore Court of Appeal ruled that supply contract was "project specific" based on purposive interpretation of terms

Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd [2006] SGCA 35

In *Panwah Steel v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd*, the Singapore Court of Appeal had to address the question whether an agreement to supply steel reinforcing bars ("**rebars**") was "project-specific" in the sense that the appellant needed only to supply rebars which were actually going to be used for a particular water reclamation plant project and for no other purpose. It is interesting to note how a claimant's different approaches in interpreting the same contract to establish the same effect can lead to a different holding by the courts. It is useful to look at some of the relevant provisions which were considered and which led to the conclusion that the contract was project-specific, based on a purposive interpretation.

The appellant was a stockist and trader who bought rebars from suppliers and resold the same to building contractors. The appellant entered into an agreement to supply rebars to the respondent (the "**contract**") for a two-year period. The quantity involved was stated in the contract as "Actual 39,000 Tons (-10% tolerance or actual)". At that time, the respondent was the main contractor for a proposed water reclamation plant project (the "**Project**").

Subsequently, the appellant's own supplier ceased to deliver the rebars to it, causing a shortfall (the "**Shortfall**") in the contracted amount of rebars which the appellant was to deliver to the respondent under the contract. The respondent demanded that the appellant deliver the Shortfall even though the Shortfall was not required for the Project as the respondent had earlier redeployed a surplus of rebars from another site to the Project. The respondent insisted on delivery of the Shortfall for purposes of replenishing its own stocks. As a result, the respondent withheld payment for the rebars already delivered and claimed damages against the appellant. The appellant's claim for the withheld payment was not disputed.

The High Court held that the appellant was entitled to its claim and that the respondent was entitled to its counterclaim under the contract. The appellant's claim was not disputed and the issues at first instance centred on the respondent's counterclaim.

In the High Court, the appellant submitted that it was an implied term of the contract that the supply and delivery of the rebars were meant only for the Project. Given the fact that the court will not rewrite the contract for the

parties based on its own sense of what ought to be just and fair, the test for an implied term is strict. It is based on the criterion of necessity. There are at least two broad categories of implied terms – "terms implied in fact" and "terms implied in law". In the High Court, the appellant focused on the category of "terms implied in fact". The tests for "terms implied in fact" are embodied in the oft-cited "business efficacy" and "officious bystander" tests. The High Court rejected the appellant's argument based on an implied term of the contract. Hence, the present appeal to the Court of Appeal.

In the Court of Appeal, the appellant argued that a purposive interpretation of the contract between the parties should be adopted and that such an approach would establish that the contract was indeed "project-specific". The Court of Appeal agreed with the appellant's argument. The Court of Appeal pointed out that the appellant was not arguing that any single term in the contract mandated the conclusion that the contract was "project-specific". The appellant's argument was that, adopting a purposive approach, the overall conclusion to be drawn from a reading of the relevant terms of the contract in an integrated fashion, led to the conclusion that the contract was "project-specific".

Some of the relevant terms in the contract which were considered were as follows:

- The heading in the contract entitled "Total Quantities", which read "Actual 39,000 Tons (-10% tolerance or actual). It was argued that the word "actual" was a clear indication that the contract was "project-specific", especially when the same word appeared subsequently in the contract. It reinforced the point that the contract was focused on an actual amount arising from a "project-specific" contract.

- The headings "Lead time for or" as well as "Delivery". Details under these headings supported the conclusion that the contract was "project-specific".

- Reference to the price being "inclusive of deliveries at designation location".

- A term which required the appellant to meet the respondent's deliveries, failing which the appellant would be liable for the difference in the costs of rebars purchased by the respondent. It was argued that this term supported the view that the contract was "project-specific" inasmuch as it could not be a term at large. The Court of Appeal found this argument to support the overall thrust of the purposive argument proffered by the appellant.

- A term which required the appellant to, within two working days, replace any rebars rejected by the Public Utilities Board. The term went on to provide that the respondent shall purchase the rebars from other source and charge the difference in the cost to the appellant in the event that the rejected rebars were not supplied on time. The Court of Appeal agreed with the appellant that such a term would not be included if the contract was not intended to be project-specific.

A term which provided that "No claim … whatsoever will be entertained for price fluctuation in labour, material, and transport, etc, within the project duration stated above."

In the circumstances, the appeal was allowed.

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News

Initial public offering of First Real Estate Investment Trust

Bowsprit Capital Corporation Limited, as manager of First Real Estate Investment Trust ("**First REIT**"), made an offering of 160.4 million units in First REIT, raising approximately S$114 million. The offering consisted of an international placement to investors, including institutional and other investors in Singapore, and an offering to the public in Singapore. Separately, 56 million units were issued to cornerstone investors, raising approximately S$40 million. The total amount raised from the IPO and from the issuance of the cornerstone units is approximately S$154 million. This is the first REIT in Singapore backed solely by Indonesian properties, and is sponsored by PT. Lippo Karawaci Tbk.

Allen & Gledhill was the legal advisor to the offering, the manager and the sponsor. The lawyers involved were Partners Jerry Koh, Ho Kin San and Chua Bor Jern, Senior Associates Lee Chau Hwei, Howe Pin Yit and Merissa Quek and Associate Derrick Khoo.

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Initial public offering of Babcock & Brown Structured Finance Fund Limited

Babcock & Brown BBSFF Holdings Limited made an offering of 323,460,000 ordinary shares in the capital of Babcock & Brown Structured Finance Fund Limited ("**BBSFF**") in December 2006. Including the exercise of the overallotment option on 11 January 2007, the offering raised approximately S$368.32 million. The offering consisted of an international placement to investors, including institutional and other investors in Singapore and certain warehouse debt investors, and an offering to the public in Singapore. The offering presented investors with an opportunity to invest in the Babcock & Brown Group's first listed fund which will source assets originated or identified by two of the five Babcock & Brown core business units, Operating Lease and Structured Finance, and is the first fund of its type to be listed in Asia.

Advising BBSFF and the vendor were Allen & Gledhill Partners Tan Tze Gay and Long Jek Aun and Senior Associate Vincent Teh.

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Acquisition of Guthrie GTS Limited

Alam Indah Bintan Pte Ltd has announced that it intends to make a voluntary conditional cash offer for all the issued ordinary shares in the capital of Guthrie GTS Limited ("**Guthrie**") other than those already owned, controlled or agreed to be acquired by it.

Advising Guthrie are Allen & Gledhill Partners Andrew M. Lim and Christopher Koh and Associates Adeline Yee and Sonita Jeyapathy.

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New Partners

Allen & Gledhill is pleased to announce the appointment of five new Partners with effect from 1 January 2007. To view the announcement, please **click here**.

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