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Allen & Gledhill LLP also publishes the monthly Financial Services Bulletin. To view the January 2010 issue, please click here.

These recent developments were highlighted in the Allen & Gledhill Competition & Antitrust Review of 27 January 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

Articles

Competition

Competition Commission of Singapore Reviews Block Exemption Order for Liner Shipping Agreements

On 19 January 2010, the Competition Commission of Singapore (the "**CCS**") announced that the CCS is reviewing the necessity of continuing the Competition (Block Exemption for Liner Shipping Agreements) Order 2006 (the "**BEO**") after its expiry on 31 December 2010. The BEO was gazetted on 14 July 2006 and deemed to take effect retrospectively from 1 January 2006 until 31 December 2010.

What is the BEO?

Essentially, the BEO exempts a category of liner shipping agreements from the prohibition under section 34 of the Competition Act (the "**Act**"), provided that certain conditions and obligations are fulfilled, such as allowing member liner operators to offer their own service arrangements on a confidential basis. Section 34 of the Act prohibits agreements, decisions and practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore unless they are exempt under the Act.

The BEO permits a wide range of liner activities including agreement between the liner operators on detailed capacity decisions and prices subject to certain conditions. In line with the CCS' general regulatory approach to focus on competitive effects rather than the form of the agreement, there is only one comprehensive BEO for all liner shipping agreements. The CCS review of the BEO comes after the repeal of the European Commission Block Exemption for liner shipping conferences in 2006 and the adoption of a new European Commission Block Exemption Regulation for liner shipping consortia in 2009.

Our Head of Competition & Antitrust Practice, Daren Shiau, observes that the review of the BEO is likely to have implications on the high liner traffic which operates through Singapore. In particular, liners operating on routes between Singapore and other parts of Asia which have not been subject to stringent competition rules to-date should watch out for any changes to the compliance requirements arising from the review of the BEO.

CCS will consult key stakeholders and commission consultants

As part of the current review, the CCS will gather information from key stakeholders and engage consultants. One of the key tasks for the consultant will be to conduct an empirical study on the impact of the BEO on Singapore's economy, and make recommendations to the CCS on whether the BEO should continue and if it should be revised.

Our Deputy Director of Competition Economics, Elsa Chen, observes that the current BEO recognises the technical efficiencies which liner agreements bring about. The CCS in its review may need to take into consideration that sufficient competitive pressure is maintained between competing liners and liner alliances under the structure of the BEO, and the continued relevance of the BEO to the economic progress of Singapore as a transshipment hub.

According to the CCS, a public consultation may be held, if necessary, to provide stakeholders with the opportunity to comment on any proposed changes. It is expected that the tender for the consultancy study will be made

available in January or February 2010 on GeBIZ, the Singapore Government's electronic procurement portal.

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Reference material

More information is available on the CCS website **www.ccs.gov.sg**, please **click here** to view.

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Insurance

MAS reviews age of capacity to enter into insurance contracts

The Monetary Authority of Singapore (the "**MAS**") is conducting a public consultation on its proposal to remove the minimum age of capacity to enter into an insurance contract, provided written consent from the policy owner's parent or guardian is obtained for policy owners below the age of 18.

The MAS' proposals are set out in a consultation paper it issued on 6 January 2010.

Removing minimum age of capacity to enter into insurance contract

Currently, section 58 of the Insurance Act provides that persons who are 10 years or older may enter into an insurance contract. For those who are below the age of 16, the written consent of a parent or guardian is required before they may do so.

The MAS suggests removing the minimum age of capacity to enter into an insurance contract as it is of the view that the requirement for written consent from a parent or guardian should provide sufficient safeguard against a minor inadvertently entering into a contract of insurance or surrendering his policy.

Age of independent capacity to enter into insurance contract

With effect from 1 March 2009, the age of contractual capacity in Singapore has been lowered from 21 years to 18 years.

Currently, under the Insurance Act, the age of capacity to enter into an insurance contract is 16 years as those who are 16 or older may enter into an insurance contract without parental consent.

The MAS proposes to align the age of capacity to enter into an insurance contract with the age of contractual capacity for all other types of contracts. In other words, the minimum age at which a person can own an insurance policy without parental consent will be raised from 16 to 18 years.

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Dealing with an insurance policy

As it stands, section 58 of the Insurance Act only provides for the ownership and surrendering of insurance policies by a person who is 16 or younger. Section 58 is silent on all other dealings relating to an insurance policy, e.g. assignment, delegation and taking out of policy loan.

The MAS proposes to expand the scope of section 58 to encompass not only policy ownership but all dealings relating to the policy.

Closing date for submission of feedback

The public consultation remains open until 8 February 2010 for the submission of comments.

Reference material

Please **click here** to access the consultation paper on the MAS website **www.mas.gov.sg**

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MAS consults on Policy Owners' Protection Fund schemes and insurance resolution

On 23 December 2009, the Monetary Authority of Singapore (the "**MAS**") announced that it is reviewing two sets of measures to strengthen the protection of insurance policy owners and has begun public consultations on both.

The first set of measures relates to the Policy Owners' Protection Fund ("**PPF**"), which is funded by the industry to compensate policy owners in the event of the default of an insurer. The second set of measures seeks to enhance the MAS' powers relating to the resolution of insurers in Singapore.

The consultation period for both sets of measures conclude on 29 January 2010.

PPF schemes

Background

The Insurance Act provides for separate PPF schemes for life and general insurance to compensate policy owners of life policies and compulsory insurance policies (e.g. insurance required under the Work Injury Compensation Act), respectively. The MAS had earlier commenced a review of the existing PPF schemes to ensure that they keep pace with industry and regulatory developments.

The MAS issued a consultation paper in December 2005 on the first phase of the PPF review which covered issues relating to the membership, scope and level of coverage, continuity of coverage, funding and size of levies. At that time, it was proposed then that the PPF would provide compensation of up to S$500,000 for sums assured and S$100,000 for surrender value of policies covered under the PPF life insurance scheme.

Current consultation

The second consultation paper revisits some of the issues covered in the first consultation paper to take into account developments since then. The MAS proposes the provision of 100 per cent. coverage of protected liabilities of all life, accident and health policies under the PPF life insurance scheme. Section 46 of the Insurance Act currently protects 90 per cent. of an insurer's liability on any life policy in the event of default of the insurer. The MAS believes that this proposal will allow for better protection to policy owners. Similarly, the MAS proposes to cover 100 per cent. of liabilities of all protected lines under the PPF general insurance scheme.

The second consultation paper also sets out proposals relating to the implementation details of the PPF schemes including:

- Governance and administration of the PPF;
- Management of the PPF;
- Collection of levies;
- Payouts using PPF monies; and
- Priority ranking of liabilities.

Insurance resolution

The MAS also seeks to enhance its powers relating to the resolution of insurers, in order to strengthen the MAS' ability to secure continuity in insurance coverage, particularly for life policies.

This consultation paper sets out the powers that the MAS proposes to introduce in the Insurance Act that will apply before an insurer goes into liquidation (i.e. when the insurer is in financial difficulties), where an insurer has gone into liquidation (i.e. when the insurer has failed), and where an insurer enters into a scheme of arrangement under the Companies Act.

The MAS has also reviewed the powers provided for under the Banking Act with respect to bank resolutions and also considered the resolution powers in other jurisdictions. The MAS notes that many of the powers in the Banking Act for bank resolutions are also relevant to insurance resolutions and intends to align the insurance resolution framework to the bank resolution framework in respect of these powers.

As the proposed powers have some impact on the application of the Companies Act, the MAS will also seek the views of the Ministry of Law, the Attorney-General's Chambers, and the Accounting and Corporate Regulatory Authority on these proposed powers.

Reference materials

To view the consultation paper on PPF schemes, please **click here**. To view the consultation paper on insurance resolution, please **click here**. Both consultation papers are available on the MAS website **www.mas.gov.sg**

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Intellectual Property & Technology

Copyright Act amended with effect from 31 December 2009: Changes to Copyright Tribunal's jurisdiction and operational aspects

The Copyright Act has been amended with effect from 31 December 2009 with the key objective of updating and maintaining its relevance in the face of advancing technologies which have given rise to new ways of accessing and using copyright works. Principally, the amendments concerned the jurisdictional and operational aspects of the Copyright Tribunal (the "**Tribunal**").

Consequential amendments were also made to the Copyright Tribunal (Procedure) Regulations pursuant to the Copyright Tribunal (Procedure) (Amendment) Regulations 2009, which also came into force on 31 December 2009.

Key amendments

The key amendments to the Copyright Act are set out below:

- The Tribunal will be able to hear licence disputes relating to all types of copyright works, including disputes relating to the reproduction and storage of digital sound recordings in hard disks for commercial use.
- The jurisdiction of the Tribunal will be expanded to cover licensors who are in the business of collectively administering copyright licences for different copyright owners. This development ensures that the Tribunal acts as a check against licensors imposing unreasonable licensing fees and terms. The Intellectual Property Office of Singapore (the "**IPOS**") intends to enact further regulations in relation to this provision. Following the approach in Australia and the United Kingdom, individual copyright owners will not fall under the Tribunal's jurisdiction.
- The Tribunal may substitute a licence scheme.
- Operationally, the Tribunal will expect an increase in the number of appointed Deputy Presidents and members.

Background

As a matter of background, the IPOS conducted a public consultation to seek feedback on the proposed changes to the jurisdiction and operational aspects of the Tribunal in February/March 2008. The Act was introduced as a Bill in Parliament in August 2009 and passed the following month.

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Singapore Court of Appeal upholds restraint of trade clause in music publishing contract

Chua Chian Ya v Music & Movements (S) Pte Ltd
[2009] SGCA 54

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In *Chua Chian Ya v Music & Movements (S) Pte Ltd*, the Singapore Court of Appeal was asked to consider the enforceability of a restraint of trade clause and whether a contractual obligation to account for royalties due had been sufficiently met.

Facts

The appellant was a local singer-songwriter ("**Ms Chua**") and the respondent ("**M&M**") was a music publisher which had previously published Ms Chua's works. Ms Chua had brought an action before the High Court ("**OS 937**") seeking a declaration that all rights in the songs composed by her (the "**compositions**") during the period of her first agreement with M&M (the "**Principal Agreement**") had reverted to her. The High Court dismissed her application, leading to the current appeal.

The agreements

In 2002, Ms Chua and M&M entered into the Principal Agreement for a stipulated period of three years. Under the Principal Agreement, Ms Chua agreed to compose songs exclusively for M&M, the rights in the compositions were assigned to M&M, and M&M was responsible for promoting Ms Chua's works and collecting her royalties. The Principal Agreement also provided that M&M would deliver a statement of all accounts to Ms Chua. It also had a suspension and termination clause (the "**termination clause**"), the salient part of which provided as follows:

> "In the event that [M&M] fails to account and make payment … or fails to perform any obligations required … and in the event that such failure is not cured within thirty (30) days after written notice has been served on the publisher … all rights in and to the compositions … shall revert to [Ms Chua] and [M&M] may not thereafter exercise any rights thereunder".

In 2005, the Principal Agreement was extended to 17 March 2007 when the parties entered into an Extension Agreement which contained the following clause (the "**restraint of trade clause**"):

> "The obligations of [M&M], namely to promote, publish and … commercially exploit all compositions … so as to generate royalties, revenue and income therefrom and to pay the same to [Ms Chua], shall survive 17 March 2007, and [M&M] shall undertake and shall continue to undertake to [Ms Chua] to expend all reasonable work and efforts to this end, and shall not neglect and/or fail to exploit any part, portion or particular composition".

Accounting discrepancies

M&M appointed Warner/Chappell ("**W/C**"), an international music publishing house, to tabulate and collect royalties arising from the use of Ms Chua's compositions. W/C was to send statements of accounts on the royalties collected ("**W/C's accounts**") to M&M who would then summarise these and send the summary and a copy of the accounts based on W/C's accounts to Ms Chua every six months.

On 14 November 2006, Ms Chua sought clarification on accounting discrepancies from M&M and W/C. In the same communication, Ms Chua sought to trigger the termination clause by requesting a confirmation that the agreement between herself and M&M had been terminated due to "inaccurate accounting".

M&M explained that the discrepancies could have arisen because of W/C's mistake in paying Ms Chua royalties which were actually due to someone else. Ms Chua did not accept this reasoning and sought clarification of the statements which had been sent to her. There were further e-mails between the parties with M&M reiterating its previous explanation for the discrepancies and Ms Chua not accepting it and again seeking confirmation that the Principal Agreement had been terminated. In May 2008, Ms Chua's lawyers gave written notice to M&M requiring it to provide a proper detailed account for the period in issue. This request was not complied with and M&M would later contend that this was because the information was already provided to Ms Chua in the previous correspondence detailed above.

Issues before the Court of Appeal

Ms Chua argued the following issues before the Court of Appeal:

(a) The rights in the compositions had reverted to Ms Chua after 17 March 2007 (the date of expiry of the Extension Agreement) because the assignment of those rights did not survive the expiry of the Extension Agreement; and

(b) In any event, M&M's failure to account to Ms Chua for the royalties collected entitled her to terminate the Extension Agreement pursuant to the termination clause.

The court dealt in depth with both issues.

Assignment of composition rights

The court noted that the terms of the Principal Agreement were expressed clearly and that, in particular, it was clearly provided as an express term that the rights in the compositions were "irrevocably and absolutely" assigned to M&M. The effect of such an assignment clause is to assign the rights in the compositions to M&M for the entire term of the copyright in those works. Ms Chua argued that such an assignment clause was no longer the accepted practice within the music industry. The court was unmoved by this argument, stating that in the absence of undue influence, economic duress, misrepresentation or another vitiating factor, courts will uphold such contracts on the simple and self-evident basis that parties must honour the contracts they have entered into.

Restraint of trade clause

The court agreed with the High Court finding that M&M's rights in the compositions survived the expiry of the Extension Agreement due to the specific wording of the restraint of trade clause.

Ms Chua argued that the effect of that clause was to impose "an unreasonable and inequitable restraint of trade". The court was unconvinced by this argument stating that generally covenants in restraint of trade are *prima facie* unenforceable unless the contractual provisions are shown to be reasonable, taking into account the interests of both the parties concerned and the public. In explaining its position, the court considered several hallmark cases but felt that none sufficiently addressed the specific issue argued by Ms Chua.

The court noted that a distinction should be drawn between restraints imposed on an artiste's ability to make a living (that is, by writing and performing music) and restraints on the sale by an artiste of his proprietary interest in his musical compositions. In this case, Ms Chua was in fact only challenging the *sale* of her intellectual property rights to M&M. The court was of the view that the restraint of trade clause was not in restraint of trade at all.

The court also said that the fact that the equitable doctrine of unconscionability was not relied upon does not mean that the relative bargaining power between the parties was immaterial. It noted that Ms Chua willingly entered into contracts with M&M and that she was not a new artiste when she entered the Principal Agreement. By the time Ms Chua had entered into the Extension Agreement, she had been in the music industry for six years.

The court considered the provisions in both the Principal Agreement and the Extension Agreement as being reasonable in law. It therefore reached the conclusion that the contractual arrangement between the parties was not objectionable as being in restraint of trade and Ms Chua's appeal on this ground therefore failed.

Breach of contractual obligation to account

M&M's legal obligation to account was clearly set out in the Principal Agreement and the court noted that as Ms Chua was being held to her contractual obligations, so must M&M.

To determine if M&M was in breach of its contractual obligation to account to Ms Chua, the court noted that there was a dearth of evidence to assist it in its determination. Numerous summaries of the accounts relating to Ms Chua were available to the court, but what was on record consisted of bare statements of the royalty payments received. There were no details as to how the sum of the royalties were determined.

M&M claimed that it had sent Ms Chua true and complete statements of account which explained the discrepancies. Neither party, however, adduced anything which might have constituted true and complete statements of account. Without such documentation, the court found that it had no way of determining the veracity of M&M's contention that it had provided true and complete statements to Ms Chua in accordance with its contractual obligations.

The court reached the conclusion that M&M could not have met its obligation to account to Ms Chua by the production of account summaries which provided no meaningful information as to how the amounts were arrived at, such as the breakdown of the number of copies of albums sold, the price at which each copy was sold and the income generated from Ms Chua's performances.

Hence, the court found a clear breach of M&M's contractual obligation which entitled Ms Chua to terminate the agreement pursuant to the termination clause in the Principal Agreement.

Conclusion

The Court of Appeal found that there was no unreasonable restraint of trade in the contractual agreements between the parties but did find that M&M was in breach of its contractual obligation to Ms Chua to account to her in relation to her royalties. Ms Chua's appeal was therefore allowed and the contract could be terminated.

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Singapore High Court rules against service provider of Internet-based facility which allowed public to record free-to-air broadcasts and films

RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd & Ors
[2009] SGHC 287

In *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd & Ors*, the Singapore High Court found that the service provider of an Internet-based facility which allowed members of the public to request for free-to-air broadcasts and films to be recorded for viewing had infringed the Copyright

Act. The High Court did not find the service provider to be liable for direct infringement of the copyright subsisting in the broadcasts and films. Instead, the court held that the service provider had infringed copyright laws by communicating the free-to-air broadcasts and films to the public and authorising the making of copies by the end-users.

Relevant facts

The plaintiff was the service provider who owned, operated and designed an Internet-based service at a specific website (the "**offending website**"), which allowed members of the public to request for free-to-air broadcasts and films to be recorded for viewing. The offending website provided members of the public with the equivalent functionality of a brick-and-mortar Digital Video Recorder ("**DVR**"). The term DVR generically refers to an entertainment appliance that provides record and playback capabilities similar to an analog-style video cassette recorder ("**VCR**"), but utilising recent digital and computer-related technologies. With an Internet DVR ("**iDVR**") like the one found on the offending website, the actual recording and storage of hardware and software are located at the operator's facility. In the plaintiff's case, this was their office premises.

The plaintiff's service was available to any member of the public in Singapore, with access to a computer and the Internet, who must first sign up for free at the offending website. Upon receipt of a request from a person, a copy of that broadcast or film would be made by the plaintiff's service and the person would then be able to view the same at his convenience. The recorded films and broadcasts would then be stored on the plaintiff's servers and deleted 15 days later.

The defendants were the copyright owners of various free-to-air broadcasts and films. After receiving the defendants' cease and desist letters for copyright infringement, the plaintiff commenced action against the defendants for groundless threats of copyright infringement and conspiracy. The plaintiff's latter claim of conspiracy was subsequently dismissed. The defendants counterclaimed for copyright infringement with respect to the free-to-air broadcasts and films.

Issues to be decided by the court

The High Court decided that the claim and counterclaim turned on the disposal of one issue: whether at the time the cease and desist letters were issued the plaintiff had infringed the defendants' copyright. This main issue was broadly crystallised by the court into the following three sub-issues:

- Was the plaintiff liable for infringement of the defendants' rights in making copies of the broadcasts and films?
- Was the plaintiff liable for communicating the broadcasts and films to the public?
- Could the plaintiff rely on any safe harbour or fair dealing provisions to escape liability?

Was plaintiff liable for infringement of defendants' rights in making copies of the broadcasts and films?

For the purpose of this case, the relevant provisions in the Copyright Act were sections 83, 94 and 103(1).

Section 103(1) provides that a copyright is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Singapore, or authorises the doing in Singapore of, any act comprised in the copyright. Section 83 provides that copyright in relation to a cinematograph film includes the exclusive right to make a copy of the film or communicate the film to the public. Section 84 provides that copyright in relation to a television broadcast or sound broadcast includes the exclusive right to make a cinematograph film of the broadcast, or a copy of such a film, or in the case of a television broadcast or a sound broadcast, to re-broadcast it or to otherwise communicate it to the public.

Following the requirements under the Copyright Act, the parties agreed that the issue was to identify the person who made copies of the broadcasts and films. The plaintiff argued that the end-user of the offending website was the maker and that the plaintiff should not be liable for any allegedly infringing copies made.

The court found that the maker of the infringing copies was indeed the end-users and hence the plaintiff was not liable for direct infringement of the copyrights subsisting in the broadcasts and films. However, the court ruled that the plaintiff was liable for authorising the making of copies by the end-users. In reaching this conclusion, the court took into consideration the following factors:

- A "Frequently Asked Questions" section on the offending website represented that the plaintiff had the actual authority to provide its service to end-users.
- The offending website required registration and login details, thereby establishing a "continuing relationship" with its end-users.
- While the plaintiff could not control the exact programmes being shown on the various channels it could record, it did choose to provide recording functionality to channels that were all subsumed under the defendants' various copyrights.
- Finally, and most importantly, the "instrumentality" of the plaintiff's iDVR consisted solely of recording the defendants' copyrighted films and broadcasts.

Was the plaintiff liable for communicating the broadcasts and films to the public?

The court found the plaintiff liable for infringing the defendants' copyrights in communicating the broadcasts and films to the public for the following reasons:

- It was not seriously disputed that the plaintiff's system transmitted, by electronic means, the relevant television programme to the registered end-user who had asked to view it.
- It should not matter that the plaintiff's service was available only to registered end-users, when any member of the public with an Internet connection may register for free.
- At the time the relevant communication was made, the end-user had already communicated its preference to the plaintiff (this necessarily has to take place before any recording or transmission). The plaintiff therefore was the one responsible for determining the content of the communication upon playback.

Could the plaintiff rely on any safe harbour or fair dealing provisions to escape liability?

The plaintiff argued unsuccessfully that it was a network service provider within the meaning of section 193A of the Copyright Act and therefore was entitled to rely on any or all of the defences available under Part IXA of the Copyright Act. The court held that the very nature of the plaintiff's system was such that its purpose was diametrically opposed to the intent of the safe harbour provisions found in Part IXA of the Copyright Act. The court pointed out that the plaintiff was in the business of operating a website that made copies of copyrighted material while the safe harbour provisions existed to protect *bona fide* network service providers from inadvertently being found liable for copying copyrighted material.

The court then went on to rule that section 193B of the Copyright Act would also offer no protection to the plaintiff because the operation of the offending website could hardly be said to be an automatic technical process without any selection of the electronic copy of the material by the plaintiff.

The court also ruled that the plaintiff failed to qualify for the fair dealing defence under section 109 of the Copyright Act. In reaching this conclusion, the court was greatly influenced by the fact that the plaintiff's service was a commercial project with the eventual goal of monetisation through advertisements and the licensing of advertising technology. While section 109 does countenance a balancing exercise between commercial gain and public benefit, rather than an absolute prohibition against commercial uses, the court felt that the offending website was set up primarily for private profiteering.

Conclusion

In summary, since the plaintiff could not rely on any safe harbour or fair dealing provisions to escape liability, it was held to be liable for authorising the making of copies of the broadcasts and films and communicating the same to the public.

The court granted the defendants an interlocutory judgment with damages to be assessed by the registrar.

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Medico-Legal

Changes to Medical Registration Act: Streamline disciplinary processes, enhance medical registration, increase penalties and introduce Register of Family Physicians

The Medical Registration Act (the "**Act**") will be amended to keep it more relevant in light of recent issues in professional conduct and standards that have arisen due to changing demands and expectations of patients and the public. Essentially, the amendments are intended to achieve the following objectives:

- To strengthen and streamline the Singapore Medical Council's (the "**SMC**") existing disciplinary processes;

- To provide a wider range of orders and penalties which the SMC can impose;

- To adopt a more nuanced approach to medical registration for both local and foreign-trained doctors; and

- To set up a Register of Family Physicians.

Effective date

The Act will be amended by the Medical Registration Act (Amendment) Bill 2009 (the "**Bill**") which was passed in Parliament on 11 January 2010. The amendments will take effect on a date to be announced.

Background

As a matter of background, the Bill was introduced in Parliament on 19 October 2009, following a public consultation which was jointly conducted by the Ministry of Health (the "**MOH**") and the SMC from 14 January 2009 to 25 February 2009.

Reference materials

Please **click here** for the Second Reading Speech, and **click here** for the Closing Speech delivered in Parliament.

Both speeches are posted on the MOH website **www.moh.gov.sg**

To read the full text of the Bill on the Singapore Parliament website **www.parliament.gov.sg**, please **click here**.

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Mental Capacity Act 2008 in force from 1 March 2010: Appointing proxy decision makers

The Mental Capacity Act 2008 reforms and updates the law where decisions need to be made on behalf of persons lacking capacity in two situations: (a) where they lose mental capacity at some point in their lives (for example as a result of dementia or brain injury), and (b) where the incapacitating condition has been present since birth.

The Mental Capacity Act 2008 (the "**Act**") will come into operation on 1 March 2010.

Key features of the Act include the following:

- **Assumption of capacity:** A person must be assumed to have capacity until it is proved otherwise and must also be supported to make his own decision, as far it is practicable to do so.

- **Mental impairment:** The inability to make a decision must be caused by an impairment of or a disturbance in the functioning of the mind or brain. A person is not to be treated as lacking capacity to make a decision simply because he makes an unwise decision.

- **Decisions based on best interests:** Every act done or decision made for a person who lacks capacity must be done or made in that person's best interests.

- **Lasting power of attorney:** There will be a new statutory form of power of attorney, namely, the lasting power of attorney. A lasting power of attorney is a power of attorney under which the donor ("**P**") confers on the donee (or donees) authority to make decisions about P's personal welfare, property and affairs when P no longer has capacity to make such decisions.

- **Excluded decisions:** There is a list of excluded decisions that can never be made on behalf of a person who lacks capacity, for instance, consent to marriage, adopting or renouncing a religion, making or revoking a CPF nomination and register or withdrawing an objection to a human organ transplant/donation. The excluded decisions are listed in section 26.

- **Appointment of Public Guardian:** The Minister of Community Development, Youth and Sports may appoint an officer known as the Public Guardian, whose functions will include establishing and maintaining a register of lasting powers of attorney, and dealing with representations (including complaints) about the way in which a donee of a lasting power of attorney is exercising his powers.

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An article about the Act was featured in a previous issue of the Allen & Gledhill Legal Bulletin (September 2008). To read the article entitled "*Mental Capacity Bill 2008 passed in Parliament: Appointing proxy decision makers*", please **click here**.

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Mental Health (Care and Treatment) Act 2008 in force from 1 March 2010: Enhancing safeguards for protection of patients compulsorily admitted into psychiatric institutions

The Mental Health (Care and Treatment) Act 2008 (the "**Act**") will come into force on 1 March 2010 and enhance safeguards for the protection of the interests of patients who are compulsorily admitted into psychiatric institutions.

Current provisions regulating admission and detention of persons of unsound mind in mental hospitals which are set out in the Mental Disorders and Treatment Act (the "**MDTA**") will be repealed and re-enacted under the new Mental Health (Care and Treatment) Act. The provisions of the MDTA relating to inquiries into mental disorders and the appointment of committees of person and estate of mentally disordered persons, which the Act will repeal, will be re-enacted with amendments in the Mental Capacity Act 2008.

To read about the Mental Capacity Act 2008, please refer to the article entitled "*Mental Capacity Act 2008 partially in force from 1 March 2010: Appointing proxy decision makers*" in this issue of the Allen & Gledhill Legal Bulletin (January 2010).

Key amendments

The key amendments under the Act are set out below:

- The Minister for Health (the "**Minister**") may designate a part of a hospital instead of the whole hospital as a psychiatric institution.

- The term "psychiatric institution" will replace the current term "mental hospital" used in the MDTA.

- A psychiatric institution must be inspected at least once every three months by two or more visitors, one of whom must be a medical practitioner. Currently, the inspection is once every month.
- An inpatient may be further detained for further treatment without first being discharged.

- The period of further detention after the first month of detention has been reduced from the current 12 months to six months. Thereafter, further detention may be imposed under a Magistrate's order for a period not exceeding six months, which is a reduction from the current 12-month limit.

- There is a general increase in penalties for some of the offences under the Act. For instance, if a relative refuses to produce the mentally disordered person in his charge to the police during an inspection, he will be guilty of an offence punishable with a fine not exceeding S$4,000. The current penalty for the same offence is a fine not exceeding S$1,000. In the case of offences relating to the improper reception or detention of mentally disordered persons in a psychiatric institution or hospital, the penalty is a fine of S$5,000 and/or imprisonment for a term not exceeding four years, for the offence of ill treatment not resulting in death. If death results from the ill-treatment, the penalty is a maximum fine of S$20,000 and/or imprisonment for a term not exceeding seven years. Any person found to have sexual intercourse with a patient while in the psychiatric institution will be guilty of an offence punishable with a maximum fine of S$20,000 and/or an imprisonment for a term not exceeding 10 years.

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Background

The Act was introduced in Parliament on 21 July 2008 and passed on 15 September 2008. Between February and March 2008, the Ministry of Health conducted a public consultation on a draft version of the Act.

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Mergers & Acquisitions

SIC issues Practice Statement on announcements relating to possible offers

The Securities Industry Council (the "**SIC**") issued a Practice Statement on 13 January 2010 regarding the announcement requirements relating to a possible offer.

Where a target company is the subject of rumour or speculation of a possible offer, there is undue movement in the target company's share price, or there is a significant increase in the volume of share turnover of the target

company, the party concerned has to make an announcement depending on the circumstances of the case.

The Practice Statement provided guidance and clarification in respect of the following:

- Responsibility for announcements
- Announcement timing
- Content of holding announcements
- Updates to holding announcements

Reference material

Please **click here** for the full text of the Practice Statement posted on the MAS website **www.mas.gov.sg**

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Singapore Exchange

SGX proposes new Mainboard listing criteria and introduction of SPACs

The Singapore Exchange Limited (the "**SGX**") is proposing changing the Mainboard listing criteria, raising the issue price in initial public offerings ("**IPOs**") or reverse take-over applications, and introducing a separate listing framework for Special Purpose Acquisition Companies ("**SPACs**").

These proposals were disclosed in a consultation paper issued by the SGX on 6 January 2010.

Revising SGX-ST Mainboard listing criteria

The SGX is proposing to revise the existing listing criteria so that a company seeking a Mainboard listing must satisfy one of the following two quantitative criteria:

- **Criterion 1:** Be profitable in the latest financial year and have an operating track record of at least three years and a market capitalisation of not less than S$150 million based on the issue price and post-invitation issued share capital; or

- **Criterion 2:** Have generated operating revenue in the latest financial year and a market capitalisation of not less than S$300 million based on the issue price and post-invitation issued share capital.

The proposed new Mainboard listing criteria will apply to both IPOs and reverse take-over applications alike.

The SGX expects to implement the proposed new Mainboard listing criteria in the fourth quarter of 2010.

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Raising minimum issue price in IPOs and reverse take-over applications

The SGX is also proposing to raise the minimum issue price in an IPO or a reverse take-over application from S$0.20 to S$0.50.

Listing framework for SPACs

In the consultation paper, the SGX characterises a SPAC as a shell company seeking an IPO to raise funds which will be used to acquire operating businesses through business combinations. Business combinations may take the form of a merger, share exchange, share acquisition, share purchase or reorganisation involving one or more operating businesses or assets. As the SGX has seen an increasing interest in the introduction of SPACs in Singapore, it is proposing a separate listing framework for such companies with appropriate safeguards.

Submission of comments to SGX

The public consultation remains open for the submission of comments until 3 February 2010.

Reference material

Please **click here** to access the SGX consultation paper which is available on the SGX website **www.sgx.com** under "SGX Corporate Home".

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Tax

IRAS circular provides guidance and clarification on new tax framework for corporate amalgamations

A new tax framework for qualifying corporate amalgamations ("**Qualifying Amalgamations**") has been introduced to minimise the tax consequences arising from corporate amalgamations. The legislative provisions for the new framework are introduced by the Income Tax (Amendment) Act 2009.

On 20 January 2010, the Inland Revenue Authority of Singapore (the "**IRAS**") issued a circular entitled "Tax Framework for Corporate Amalgamations" to provide administrative guidance on the new framework.

Scope of new framework

A Qualifying Amalgamation is an amalgamation where the notice of amalgamation under section 215F of the Companies Act or the certificate of approval under section 14A of the Banking Act is issued on or after 22 January 2009. The Minister for Finance may also approve an amalgamation as a Qualifying Amalgamation where the amalgamation has a similar effect as a statutory voluntary amalgamation under the Companies Act.

Generally under the new framework, the amalgamated company would continue to carry on the businesses of the amalgamating companies as if there is no cessation of the existing businesses of the amalgamating companies and the amalgamated company takes over the assets, rights and liabilities of the amalgamating companies.

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Reference material

Please **click here** for the full text of the IRAS circular which is available from the IRAS website **www.iras.gov.sg**

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General

Quorums of Statutory Boards (Miscellaneous Amendments) Act 2009 in force from 15 January 2010: Revising quorum for board meetings of statutory boards

The Quorums of Statutory Boards (Miscellaneous Amendments) Act 2009 (the "**Act**"), which came into force on 15 January 2010, revises the quorum for board meetings stipulated in the Acts of 16 statutory boards, and in so doing, institutes a formal quorum requirement for these statutory boards.

Minimum quorum requirement

Essentially, the 16 Acts are amended to implement a quorum requirement for board meetings of "one-third of the total number of members or three members, whichever is the higher". The amendment will align the 16 Acts with the other Acts establishing statutory boards.

The aim of this quorum requirement is to ensure that board decisions are not dominated by a very small number of individuals, but are not so onerous as to hinder the effective functioning of the statutory boards. As the new provision is a minimum requirement, those statutory boards with more stringent quorum requirements may retain their existing provisions.

Among the 16 Acts are the Agency for Science, Technology and Research Act, Economic Development Board Act, Land Transport Authority of Singapore Act and Urban Redevelopment Authority Act.

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Reference material

An article about the Act was featured in a previous issue of the Allen & Gledhill Legal Bulletin (October 2009). To read the article entitled "*Parliament passes Quorums of Statutory Boards (Miscellaneous Amendments) Bill 2009: Revising quorum for board meetings of statutory boards*", please **click here**.

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Singapore Court of Appeal clarifies responsibilities of employers with employees working at heights and those working on third-party premises

Chandran a/l Subbiah v Dockers Marine Pte Ltd [2009] SGCA 58

The Singapore Court of Appeal in *Chandran a/l Subbiah v Dockers Marine Pte Ltd* had the opportunity to clarify the responsibilities employers have when their employees work at heights and on third-party premises. The court's judgment is also instructive for its detailed discussion of the employers' duty of care in general and the relevance of foreign caselaw, as well as its observations on the relevance of industry codes.

Facts

In this case, the appellant claimed damages for personal injuries and consequential losses he suffered while in the employ of the respondent, a stevedoring company. The appellant fell from a height of about 10 metres while he was attending to the loading of some cargo containers in the hold of a vessel. The appellant claimed that the respondent had breached its common law duty of care as an employer and by its negligence caused the accident.

The court found the respondent fully liable for the injuries that the appellant suffered.

Relevance of foreign caselaw

The court noted that it is trite to say that the common law requires employers to take reasonable care for the safety of their employees in all the circumstances of the matter. This is the golden rule from which all other specific duties in relation to an employer's obligations to its employee spring from.

The court highlighted that it must be appreciated that what might have been acceptable commercial and social practices *vis-à- vis* employees decades ago may no longer be considered acceptable today. For coherence and relevance, the common law in this area of employers' duties and responsibilities to their employees has to conform to the prevailing needs and contemporary values of society. Legal obligations and standards in the workplace must therefore now be determined in the light of the prevailing regulatory framework, current work safety attitudes, and advances in knowledge and improvements in technology as well as community expectations. There has undoubtedly been a marked change in the social climate towards ensuring that there are adequate safety standards in the workplace, particularly in the last decade or so, and this must be considered in evaluating an employer's duty of care in any particular situation.

However, the court cautioned that even if current case law from foreign common law jurisdictions may appear relevant, each such decision that is being relied on must be carefully scrutinised and evaluated to ensure that it was not based on policy considerations peculiar to the times and the place concerned, social mores or regulatory circumstances that might not be applicable to Singapore.

Scope of the golden rule: Employees working on third-party premises

A distinctive feature of an employer's duty of care to his employees for their safety is that it is personal and therefore non-delegable. This means that the employer cannot escape liability simply by baldly asserting that another party was negligent and responsible for the employee's injury.

The respondent queried the basis for an inflexible application of this golden rule, especially when an employer's workers are sent to work in premises belonging to a third party. The court did not see much force in this submission as very often today, employees have to work outside their employers' premises. The same issue of working in third-party premises arises in every case where the employer does not own the premises where his workers are deployed to work, e.g, in building construction and maintenance, shipbuilding and repairing, transportation and storage, metalworking and other manufacturing activities, the marine industry, water, electrical and gas supply, engineering and even support services such as landscaping.

The court observed that it has been firmly established that the general duty of an employer to his employee to take reasonable care for his safety does not come to an end merely because the workman has been sent to work at premises which are occupied by a third party and not by the employer. The duty remains throughout the whole course of this employment. The real issue is not where the employees work but what reasonable steps their employers are required to take at all times to protect these employees, whether it be on the employer's own premises or third party premises.

Requisite standard of care expected of an employer

The respondent, while accepting that it had a broad duty of care to ensure the safety of the appellant, vigorously insisted that its scope was very narrow and, in any case, could not for practical reasons require an inspection of the vessel.

The general principles established in the tort of negligence apply to the doctrine of employer's liability. Where the standard of care is concerned, the guiding principle is the standard of a reasonable person. In the context of employer's liability, this means that the law will measure the behaviour of any particular employer against the scale of what a reasonable employer in that specific industry would have observed. The broad constituent elements of this composite standard of care expected of employers may be explained under various broad headings, such as a duty to provide a safe system of work, adequate equipment and adequately skilled workers. Far from being all encompassing or set in stone, the categorisation of employers' duties has in fact been generally acknowledged to be incomplete. For instance, to the classical three-fold categorisation, a fourth has been recognised as being historically justified: a duty to provide safe premises and access to it.

While this golden rule of care imposed on employers is in itself enduring, what is required for its proper discharge may differ enormously in different situations. Hence, any standard to which an employer has been held to in one case must be treated as merely indicative rather than conclusive of the standard expected in another situation.

In the present case, the court found that the respondent had failed to meet two aspects of its duty to take reasonable care for the safety of the appellant. In the court's view, the respondent should have performed the following but did not do so:

- carry out a risk assessment exercise, including inspecting the access to the hatch in question and the defective ladder for signs of danger to its workers, prior to the commencement of work; and

- take reasonable measures to minimise the risk of its workers falling from heights by providing safety equipment such as safety belts and safety harnesses.

Failure to perform risk assessment

The court found reasonable the proposition that employers should undertake a preliminary risk assessment before allowing its employees to commence work. This means that all employers should ordinarily familiarise themselves with the work environment in which their employees will have to function and ascertain if there are any likely risks that ought to give rise to safety concerns. The proposition is even more compelling if the employees will be working in unfamiliar territory. Without such a preliminary risk assessment, it would be difficult, if not impossible, for employers to take positive steps to remedy or address any hazard that may be present at the workplace, a task that it is obligated to perform to satisfy the golden rule.

Ordinarily, such an assessment should include a physical inspection of the work premises and equipment to be used. If conditions do not permit a satisfactory physical inspection, the employer should, at least, satisfy himself as to the working conditions which his employees will engage in by making appropriate inquiries and then assessing what the potential hazards might be. For example, if the workers are to work from heights, the employer is required to consider what safety precautions, if any, are required and to test the equipment to be used by its employees.

However, the court explained that the employer's duty to assess risks is not absolute. There may be circumstances where compliance with the golden rule will not require the performance of such a preliminary risk assessment. There may also be instances where it would be unreasonable to undertake such an exercise.

Local practice not acceptable as setting legal standard of duty of care

The court pointed out that even if the local practice of stevedoring firms does not include an inspection of the vessels on which its employees would operate, such a practice cannot be accepted as establishing the appropriate legal standard of duty of care for this industry in Singapore. The absence of even a basic inspection might unreasonably jeopardise the safety of stevedores. Given the potential injuries to employees of stevedoring companies in working from heights without adequate precautions taken for their safety, the court was of the view that such an industry practice, if it exists, should not be countenanced by the law. Hence, the court was unable to accept that stevedore employers in Singapore have no obligations in circumstances similar to the case at hand to conduct a preliminary risk assessment of the area of work for their employees, and in particular the equipment or apparatus they might use.

Workplace Safety and Health Act

The court thought it pertinent to examine the current legislative framework to ascertain whether employers are now also ordinarily expected to perform pre-work risk assessment exercises aside from the common law obligations considered above.

The court referred to the Workplace Safety and Health Act (the "**WSHA**"), which came into force on 1 March 2006. As the accident in the present case took place before the WSHA came into force, the WSHA was not applicable to the case.

The WSHA only applies to workplaces listed in the First Schedule of the Act. Section 12 of the WSHA provides that it shall be the duty of every employer to take such measures as are necessary to ensure the safety and health of his employees at work. The court was of the view that the measures to be

undertaken by an employer necessary to ensure the safety and health of his employees at work must surely ordinarily include the performance of a pre-work risk assessment exercise.

The court referred to the Parliamentary Speech delivered at the second reading of the WSHA when it was a Bill and took the view that it is clear that the responsibility to be discharged by employers under the WSHA continue to apply even when third-party premises are involved.

Observations on the relevance of Industry Codes

The court went on to consider the relevance of industry codes of conduct promulgated by regulatory authorities in ascertaining common law obligations. Strictly speaking, these codes (such as the Compliance Assistance Checklist (Working at Height) (the "**WSHAC Checklist**") issued by the Ministry of Manpower) are not legally binding and should not be unthinkingly deemed to have been automatically incorporated in, or even said to be invariably reflective of the existing common law standards of care. However, in the ascertainment of the appropriate standard of care to be adopted in each individual case, all relevant factors must be considered. The existence of a regulatory code of practice is one such factor that may be considered.

Acknowledging that the WSHAC Checklist had not been issued when this accident took place, the court nevertheless considered it of some relevance to the proceedings as it was issued in March 2007 not long after the accident. Even after accepting the inapplicability of the detailed measures spelt out there for the purposes of liability in these proceedings, the court was of the view that the WSHAC Checklist nevertheless also reflects and reinforces at a general level the common law requirement that appropriate safety measures must be in place before any work from heights is undertaken. However, such standards are not conclusive as to the common law standard of care that has to be met in every situation.

If you would like to discuss the impact of this case on your business, please contact:

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News

Acquisition of UOB Life Assurance Limited by Prudential Singapore Holdings Pte Ltd

Prudential Singapore Holdings Pte Ltd ("**Prudential**"), a wholly-owned subsidiary of UK Prudential plc, entered into a sale and purchase agreement with United Overseas Bank Limited for the purchase of all the interests in Singapore based UOB Life Assurance Limited for a cash consideration of approximately S$428 million. The transaction also involves the setting up of bancassurance arrangements between the two groups in Singapore, Thailand and Indonesia.

Advising Prudential are Allen & Gledhill LLP Partners Andrew M. Lim, Richard Young, Lim Chong Ying, Sunit Chhabra, Lim Pek Bur and Francis Mok and Senior Associates Gracie Goh, Sylvia Taslim, David Teo and Catherine Neo.

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Completion of offerings of third, fourth and fifth series of notes guaranteed by Temasek Holdings (Private) Limited

Temasek Financial (I) Limited (“**Issuer**”) has completed the offerings of US$500 million 5.375 per cent. Guaranteed Debentures due 2039, S$300 million 4.0 per cent. Guaranteed Notes due 2029 and S$300 million 4.2 per cent. Guaranteed Notes due 2039 under the Issuer’s US$5 billion Guaranteed Global Medium Term Note Program (“**Program**”). These notes are unconditionally and irrevocably guaranteed by Temasek Holdings (Private) Limited (“**Temasek**”). This marks the third issuance of US$-denominated Guaranteed Notes and the first and second issuances of S$-denominated Guaranteed Notes by the Issuer under the Program. Temasek is rated AAA by Standard & Poor’s and Aaa by Moody’s Investors Service.

Advising Temasek and the Issuer as to Singapore law are Allen & Gledhill LLP Partners Yeo Wico, Andrew Chan, Sunit Chhabra and Glenn Foo, Senior Associate David Teo and Associates Yu Hanwen and Wee Li-En.

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Queensley Holdings Limited’s issue of notes and redeemable preference shares

Queensley Holdings Limited (“**Queensley**”) has issued S$320 million secured fixed rate senior notes due 2012, S$151 million secured fixed rate junior notes due 2012 and S$78 million redeemable preference shares (collectively, the “**Securities**”) in the securitisation of the property known as “Capital Square”. The proceeds from the issue of the Securities were used to redeem the existing bonds issued by Queensley. The senior notes and the junior notes are secured by, *inter alia*, a mortgage over Capital Square. The senior notes are listed on the Singapore Exchange Trading Securities Limited and the junior notes and the redeemable preference shares were wholly subscribed for by CAPITAL PLAZA Holding GmbH & Co. Singapur KG. The issue of the senior notes is the largest Singapore dollar corporate bond issue in a single tranche in Singapore this year.

Advising Australia and New Zealand Banking Group Limited (arranger and manager in respect of the issue by Queensley) and DBS Trustee Limited (as trustee for the holders of the senior notes and the junior notes) are Allen & Gledhill LLP Partners Margaret Chin, Margaret Soh and Magdalene Leong, Senior Associate Ong Kangxin and Associate Gillian Cheong.

Advising Queensley and Capital Square Pte Ltd (the owner of Capital Square) are Allen & Gledhill LLP Partner Jerry Koh, Senior Associate Long Pee Hua and Associate Wu Zhiyou.

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Allen & Gledhill wins Financial Times and Mergermarket M&A Award for South East Asia Legal Advisor of the Year two years in a row

Allen & Gledhill LLP has been named South East Asia Legal Advisor of the Year 2009 in the Financial Times and Mergermarket Asia Pacific M&A Awards. This is the second consecutive year the Firm has won this award since its inception in 2008. The M&A Awards recognise mergers and acquisitions expertise excellence in the Asia-Pacific region.

The winners were chosen based on M&A transaction data from mergermarket.com and independent expert opinion from a panel of leading Asian M&A practitioners.

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Appointment of Dr Stanley Lai as Senior Counsel

We are pleased to announce that our Head of Intellectual Property & Technology, Dr Stanley Lai, has been appointed as Senior Counsel on 9 January 2010 at the opening of the legal year. The appointment of Senior Counsel is given to those with outstanding ability as advocates, extensive knowledge of law and high professional standing.

Stanley is a specialist in all forms of Intellectual Property litigation and enforcement. He also maintains a commercial litigation practice, and regularly advises and represents clients on information technology disputes. Stanley advises a large number of local and foreign clients on branding strategy, and general IP portfolio management and domain name protection. Stanley's practice has also extended to advising bio-medical and pharmaceutical companies on issues of regulatory/ethical compliance, clinical trials, product recall and product liability. Stanley graduated from the University of Leicester with an LLB (Hons) degree in 1992. He was called to the Bar at Lincoln's Inn in 1993. He obtained an LLM from the University of Cambridge in 1994 and was called to the Singapore Bar in 1995. Stanley then commenced his Ph.D research at the University of Cambridge in the field of technology law and computer software copyright and completed his doctorate within three years. He is the first Singapore-born lawyer to have been conferred a Ph.D in Law from the University of Cambridge.

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New Partners

Allen & Gledhill LLP is pleased to announce the election of eight new Partners with effect from 1 January 2010. To view the announcement, please **click here**.

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Allen & Gledhill LLP (UEN/Registration No. T07LL0925F) is registered in Singapore under the Limited Liability Partnerships Act (Chapter 163A) with limited liability. A list of the Partners and their professional qualifications may be inspected at the address specified above. Contact particulars of the Partners may be found on the Allen & Gledhill website www.allenandgledhill.com