

Legal Bulletin

A summary of developments in the law

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

Articles

MOM issues advisories for Influenza A (H1N1-2009)

In June 2009, the Ministry of Manpower (the “MOM”) issued the following advisories and FAQs to help both employers and employees better understand and effectively respond to Influenza A (H1N1-2009). Please click on the provided links to access the required information:

- **Advisory to employers of foreigners from countries with community transmission of H1N1:** Employers who bring in employees, or who have existing employees returning from countries with community transmission of H1N1 are strongly urged to exercise social responsibility and take the following precautions:
 - (a) Advise these employees to minimise contact with the wider community within seven days of arrival;
 - (b) If feasible, to consider separating the accommodation of newly-arrived employees during this period;
 - (c) Closely monitor the employees for high fever (> 38 degrees Celsius), sore throat, cough, body aches, runny nose, headaches, tiredness within seven days of arrival; and
 - (d) Advise employees who develop any of the above symptoms to wear surgical masks, and call 993 for a dedicated ambulance service to bring him or her for further assessment at Tan Tock Seng Hospital.
- **Advisory for employment agencies:** Employment agents dealing with or housing foreign workers who have arrived from countries with community transmission of H1N1 should take the precautions outlined for employers above. Employment agents should be attentive and conscientious about monitoring these workers before deploying them to their employers.
- **FAQs on advisories to employers and employment agencies:** These FAQs provide more information for employers of foreign Employment Pass / S Pass / Work Permit holders.
- **H1N1 FAQs for the workplace:** These FAQs serve as a reference guide to assist employers and workplaces better understand and effectively respond to the Influenza A (H1N1-2009).

This is not the first time the MOM has issued guidance on the handling of H1N1 related issues. On 30 April 2009, the MOM, in consultation with the Singapore National Employers Federation (SNEF) and National Trades Union Congress (NTUC), issued the Tripartite Advisory on Workplace Measures to Tackle Influenza A (H1N1-2009) (the “**Tripartite Advisory**”). The Tripartite Advisory was revised and expanded on 26 June 2009 following the announcement by the Ministry of Health on the gradual transition from containment to mitigation approach. The Tripartite Advisory provides guidelines concerning (a) minimising workplace disruptions, (b) infection control measures, and (c) leaves of absence (including Home Quarantine Orders). Please [click here](#) to read the revised Tripartite Advisory.

These advisories and FAQs may also be accessed from the MOM website www.mom.gov.sg. Please [click here](#) to go to the relevant webpage.

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MOF conducts public consultation on draft Income Tax (Amendment) Bill 2009: Implementing Budget 2009 changes

From 22 June 2009 to 14 July 2009, the Ministry of Finance (the “**MOF**”) is conducting a public consultation on proposed changes to the Income Tax Act (the “**ITA**”). The MOF issued a consultation paper and a draft Income Tax (Amendment) Bill 2009 (the “**draft Bill**”) for this purpose.

Scope of consultation

The changes proposed in the draft Bill are intended to implement the tax changes announced in the Budget Statement 2009 (the “**Budget 2009 tax changes**”), as well as other tax changes (the “**non-Budget 2009 tax changes**”).

While feedback is sought on both the policy and drafting of the proposed non-Budget 2009 tax changes, the consultation in relation to the Budget 2009 tax changes focuses on feedback on the drafting of the legislation as the underlying policies have been adopted after extensive debate in Parliament.

Budget 2009 Tax Changes

Amendments are proposed to the ITA to implement the Budget 2009 tax changes. Key changes include:

- Reducing the corporate income tax rate from 18 per cent. to 17 per cent. which will take effect from Year of Assessment (YA) 2010;
- Introducing a new tax framework for corporate amalgamations aimed at minimising the tax consequences arising from an amalgamation taking place on or after 22 January 2009;
- Enhancing the loss carry-back relief scheme for the basis periods for YA 2009 and YA 2010;
- Exempting from tax all foreign-sourced income accrued outside Singapore on or before 21 January 2009 and remitted into Singapore during the period of 22 January 2009 to 21 January 2010 (both dates inclusive) by resident non-individuals and individual partners of partnerships in Singapore; and
- Enhancing fund management incentives for promoting fund management in Singapore. An Enhanced Tier to the existing fund management incentives will be introduced for funds with a minimum fund size of S\$50 million at the point of application among other conditions, with effect from 1 April 2009 to 31 March 2014 (both dates inclusive).

Non-Budget tax changes

Aside from implementing the Budget 2009 tax changes, changes arising from an on-going review of the ITA are also proposed to refine existing tax policies and the tax administration. These proposed changes include the following:

- Removing the Commonwealth Tax Relief;
- Amendments relating to real estate investment trusts (“**REITs**”):

- Clarifying that distributions to REIT unit holders must be in the form of cash for the purpose of according tax transparency to trustees of REITs;
- Introducing a temporary relief measure to accord tax transparency for distributions to REIT unit holders in the form of units;
- Clarifying that REIT distributions which constitute return of capital for REIT unit holders would be applied towards reducing the cost of units held by unit holders;
- Introducing a tax framework for public private partnerships where the contract is or contains a finance lease;
- Disregarding for tax purposes, certain gains and losses arising from disposal of real properties; and
- Providing for the “arm’s length principle”. A new provision will be introduced to provide for the avoidance of doubt that all types of related party transactions are subject to arm’s length principle and that the Comptroller of Income Tax may make adjustments if a transaction between related parties has been made on terms which differ from those which would be made between independent persons.

Summary of comments received and MOF response

The MOF will be releasing on its website a summary of the main comments received on the consultation paper together with the MOF’s response by September 2009.

Links to source materials

Please [click here](#) for the full text of the consultation paper.

Please [click here](#) for the draft Bill.

Please [click here](#) for a summary table listing and explaining the proposed changes to the ITA to implement the Budget 2009 Tax Changes.

Please [click here](#) for a summary table listing and explaining the proposed changes to the ITA to implement the non-Budget tax changes.

Please [click here](#) for the MOF press statement.

The linked resources are available from the MOF website www.mof.gov.sg.

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MOF conducts public consultation on draft Goods and Services Tax (Amendment) Bill 2009: Implementing Budget 2009 changes

From 3 to 24 June 2009, the Ministry of Finance (the “**MOF**”) conducted a public consultation on proposed changes to the Goods and Services Tax Act (the “**Act**”). The MOF issued a consultation paper and a draft Goods and Services Tax (Amendment) Bill 2009 (the “**draft Bill**”) for this purpose.

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Scope of consultation

The changes proposed in the draft Bill are intended to implement the goods and services tax (“**GST**”) changes announced in the Budget Statement 2009 (the “**Budget 2009 tax changes**”), as well as other tax changes (the “**non-Budget 2009 tax changes**”).

Budget 2009 tax changes

Amendments to the Act were proposed to implement the following changes:

- Zero-rating treatment for all aircrafts used wholly for international travel as well as the sale and lease of aircraft parts forming part of a qualifying aircraft; and
- GST suspension for goods temporarily removed from zero-GST or licensed warehouses for auctions and exhibitions.

Non-Budget 2009 tax changes

Aside from implementing the Budget 2009 tax changes, changes arising from an on-going review of the Act were also proposed to refine existing tax policies and the tax administration. These proposed changes included the following:

- Allowing a trust to be registered in its own name, while continuing to make the trustees liable for compliance with the Act;
- Extending to electronic vouchers the current practice of accounting for GST on physical vouchers at the point where the physical vouchers are redeemed for goods and services. Amendments to the GST (General) (Amendment) Regulations were proposed to implement this change; and
- Requiring taxpayers to state their grounds of objection when applying for a review or revision of a decision made by the Comptroller of GST. This will align the Act with requirements under the Income Tax Act and Property Tax Act.

Summary of comments received and MOF response

The MOF will be releasing on its website a summary of the main comments received on the consultation paper together with the MOF’s response by August 2009.

Links to source materials

Please [click here](#) for the full text of the consultation paper.

Please [click here](#) for the draft Bill.

Please [click here](#) for the draft GST (General) (Amendment) Regulations.

Please [click here](#) for a summary table listing and explaining the proposed changes to the Act.

Please [click here](#) for the MOF press statement.

The linked resources are available from the MOF website www.mof.gov.sg.

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ASEAN States launch ASEAN Patent Examination Co-operation (ASPEC) Programme with effect from 15 June 2009

The first regional patent co-operation project known as the ASEAN Patent Examination (ASPEC) Programme (the “**Programme**”) was launched on 15 June 2009. The programme will be subject to regular review. The eight participating intellectual property offices are from the ASEAN member states of Singapore, Cambodia, Indonesia, Lao PDR, Malaysia, the Philippines, Thailand and Vietnam (the “**participating IP offices**”).

Under the programme, a participating IP office may, in its own search and examination work, make reference to another participating IP office’s search and examination results. However, there is no obligation to adopt any of the findings or conclusions reached by another IP office. A participating IP office is expected to conclude its own search and examination work and decide on the grant of a patent based on its own national laws.

As the programme facilitates the sharing of search and examination results between the participating IP offices, there will be expected savings of time and effort through the reduced duplication of search and examination work done.

The following information is posted on the Intellectual Property Office of Singapore (the “**IPOS**”) website www.ipos.gov.sg:

- [Notice and procedures](#)
- [ASPEC Request Form](#)

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

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Patent Prosecution Highway Pilot Programme between Intellectual Property Office of Singapore and Japan Patent Office

In June 2009, it was announced that the Intellectual Property Office of Singapore (the “**IPOS**”) and the Japan Patent Office (the “**JPO**”) will be launching a cooperative initiative called the Patent Prosecution Highway (the “**PPH**”). The PPH will have a pilot period of one year, commencing on 1 July 2009 and ending on 1 July 2010.

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

The initiative allows the IPOS and the JPO to share their search and examination results with each other. Applicants seeking patent protection for an invention in both countries may choose to go through this route. For instance, where IPOS is the Office of First Filing and the Singapore

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application contains claims that are determined to be allowable/patentable, the applicant may request accelerated examination at the JPO for the corresponding application filed with the JPO as the Office of Second Filing.

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

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

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

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

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MOH issues response to feedback received on proposed amendments to Medical Registration Act

Following a public consultation conducted in January / February 2009, the Ministry of Health (the “MOH”) issued a media release on 28 May 2009 announcing that it has received positive feedback in support of the proposed amendments to the Medical Registration Act (the “MRA”). The proposed amendments include the establishment of a Register for Family Physicians, defining appropriate sub-specialties, streamlining of registration and disciplinary proceedings.

Please [click here](#) to read more about the proposed amendments in an article entitled “MOH and SMC propose amendments to the Medical Registration Act” in a previous issue of the Allen & Gledhill Legal Bulletin (January 2009).

The MOH has responded to some of the key issues raised by the respondents. For instance, a minority of the respondents were of the view that the establishment of the Register of Family Physicians would not raise the standard of primary care as they felt that communication skills and empathy were more important than being on the register. In response, the MOH has stated that it will emphasise to the medical professionals that the postgraduate family medicine training serves to upgrade the knowledge and skills of general practitioners and the courses would cover professionalism and communication skills. There was also a suggestion that self-regulation may be achieved through medical audits and peer review. The MOH has responded, agreeing that the on-going medical audits and peer review are important components of self-regulation in the medical profession.

For more details about the MOH’s response, please click on the following documents which are available from the MOH website www.moh.gov.sg:

- [Annex A - Collation of e-consultation responses](#)

- [Annex B - Key issues and MOH's response](#)
- [MOH media release](#)

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Cases

Corporate & financial services

Singapore High Court examines principles in granting a winding-up application against a foreign company in Singapore

Re Projector SA [2008] SHC 234

The Singapore High Court in *Re Projector SA* examined the principles in granting a winding-up application against a foreign company in Singapore under the Singapore Companies Act and clarified, among other things, that section 253(1) of the Companies Act does not prevent a foreign creditor from making a winding-up application against a foreign company in Singapore.

Projector SA was incorporated in Belize and registered as a foreign company in Singapore. In August 2008, ING Belgium NV ("**ING**") applied to the Supreme Court of Belize to wind up Projector SA. In September 2008, ING filed the present application to wind up Projector SA in Singapore under section 253(1)(b) of the Singapore Companies Act.

At almost the same time, one of Projector SA's creditors in Singapore, referred to as Mitsui in this case summary, obtained a judgment in default of defence (the "**Judgment**") against Projector SA in Singapore for, among other things, a sum arising from the dispute between the parties. After obtaining the Judgment, Mitsui immediately applied for a writ of seizure and sale against shares which it claimed were owned by Projector SA in another Singapore company.

Upon filing the present winding up application against Project SA in Singapore, ING applied for a stay of proceedings in Mitsui's execution proceedings against Projector SA and the stay of proceedings was granted by the court.

In October 2008, the Supreme Court of Belize ordered the winding up of Projector SA and the appointment of liquidators for the company.

The primary issue in this case summary concerned Mitsui's opposition to the application for the winding-up of Project SA on grounds which include the following:

- ING had no standing to make the application;
- ING's action was an abuse of process as it was brought up for collateral purposes, including preventing Mitsui from duly executing the Judgment against Projector SA;
- ING had not shown a sufficient nexus between Projector SA and Singapore so as to justify a Singapore winding-up order.

ING's standing to make the winding-up application

Section 253(1)(b) of the Singapore Companies Act provides that a company may be wound up under an order of the court on the application of, among others, "any creditor, including a contingent or prospective creditor, of the company".

Mitsui asserted that the court had no jurisdiction to deal with the application of ING, a foreign creditor. It was argued that the only two parties who had an interest in a Singapore winding-up of a foreign company were Singapore creditors and the foreign liquidator, and that ING, being a foreign creditor and not a Singapore creditor or a foreign liquidator, had no *locus standi* to bring the application to wind up Projector SA. No authorities were cited to support this proposition.

The Singapore High Court did not agree with Mitsui on this argument and held that section 253(1) provides that a company may be wound up under an order of the court on the application of "any creditor" and no distinction is made therein between a Singapore creditor and a foreign creditor. The court found no reason to read into section 253(1) an additional requirement that the creditor who presents a winding-up application against a foreign company in Singapore must be a Singapore creditor.

ING's action was an abuse of process

Mitsui asserted that ING's ulterior motive in filing this winding-up application was to prevent Mitsui from enforcing the Judgment against Projector SA and not to enable all creditors of Projector SA to get an equal share of the available assets. ING insisted that its intention was to put in place the insolvency regime for *pari passu* distribution of assets to unsecured creditors in Singapore. ING also pointed out that both Mitsui and Samsung were unsecured creditors and there was no reason why they should be allowed to steal a march on other creditors of Projector SA.

The court commented that while Mitsui was entitled to take steps to protect its position, other creditors of Projector SA, whether local or foreign, could not, without more, be restrained from taking advantage of the insolvency regime established under the Companies Act to protect their own positions. It followed that in the absence of other evidence to the contrary, ING's application to wind up Projector SA in Singapore could not be regarded as an abuse of process.

Whether ING had shown a sufficient nexus between Projector SA and Singapore

The general principles are that for the court to have jurisdiction to make a winding-up order in respect of a foreign company, it must be shown *either* that Projector SA had assets in Singapore *or* that Projector SA had a sufficient nexus or connection with Singapore.

Whether Projector SA had assets in Singapore

ING pointed out that Projector SA had assets in Singapore in the form of two substantial receivables and a 50 per cent. shareholding in a Singapore company, which it held through a wholly-owned Belize subsidiary. On this argument, the court noted that by applying for a writ of seizure and sale against shares which Mitsui claimed were owned by Projector SA in another Singapore company, Mitsui had conceded that Projector SA had assets in Singapore.

Mitsui however further asserted that for ING to succeed in its application, it must also be shown that there would be a surplus of a company's funds

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after payment to local creditors. To support this argument, Mitsui relied on principles established in cases where shareholders of a company had tried to wind up the company. The court however distinguished these cases by holding that creditors were in a different position from shareholders.

In this regard, the court held that it had been made clear in many cases that the presence of assets of a company in Singapore is not determinative of whether the court has jurisdiction to order the winding-up of such a company. While the presence of a foreign company's assets within a jurisdiction would show a close connection with that jurisdiction, it is not necessary for a foreign company to have assets in the jurisdiction before it can be wound up in Singapore. On this basis, the court held that an applicant for a winding-up order against a foreign company should not be imposed with an additional burden to prove that there will be a surplus of funds after local creditors have been paid.

Whether there was a sufficient nexus

With reference to a set of general principles as to what constitutes a sufficient nexus between a foreign company and Singapore, the Singapore High Court found on the facts that there was evidence of a sufficient nexus between Projector SA and Singapore.

The court then went on to consider whether it should exercise its discretion to order the winding-up of Project SA. Balancing the interests of all parties concerned in the present application, the Singapore High Court ordered that Projector SA be wound up. In the court's view, issuing a winding-up order against Projector SA would reinforce the insolvency regime which the Belize court put in place and would result in the general body of creditors receiving the benefit of the statutory protection available under the Singapore Companies Act, including the automatic stay of proceedings, the prohibition on the disposal of assets, the inhibition on execution proceedings and the claw back provisions.

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Dispute resolution

Singapore Court of Appeal upholds hybrid form of international arbitration

Insigma Technology Co Ltd v Alstom Technology Ltd [2009] SGCA 24

The Singapore Court of Appeal decision of *Insigma Technology Co Ltd v Alstom Technology Ltd* concerned the novel and important legal issue of whether an arbitration agreement may validly provide for *one* arbitral institution to administer an arbitration under the rules of *another* arbitral institution. In this case, the arbitration agreement between the parties provided for the resolution of disputes by the Singapore International Arbitration Centre (the "SIAC") in accordance with the Rules of Arbitration of the International Chamber of Commerce (the "ICC Rules"). The Court of Appeal agreed with the High Court in deciding that the arbitration agreement was valid, enforceable and capable of being performed and that the arbitral tribunal constituted by the SIAC (the "tribunal") in accordance with the ICC Rules was therefore validly constituted under the arbitration agreement. The choice of a hybrid form of arbitration is a matter of agreement between the parties and is wholly consistent with Singapore's policy on the role of international commercial arbitration in resolving commercial disputes as set out under section 15A of the International Arbitration Act.

The arbitration agreement

The appellant and respondent were parties to a licence agreement governed by Singapore law. The disputed arbitration agreement was provided for in the licence agreement and read as follows:

“Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English ...”

The issues on appeal came about when a dispute between the parties was referred to arbitration pursuant to the arbitration agreement. The actual dispute is not relevant for the purpose of this case summary.

The issues on appeal

The appellant first raised the issues before the tribunal during the hearing on preliminary issues. Dissatisfied with the tribunal's decision on the issues, the appellant appealed to the High Court. When the High Court dismissed the appeal, the appellant appealed to the Court of Appeal, raising the issues again.

The issues were as follows:

- (a) **Whether the arbitration agreement was valid or void for uncertainty:** The appellant argued that since the agreement was for the arbitration to be administered by the SIAC, using the ICC Rules, it could not be carried out because the ICC Rules had many unique features which could not be administered by an institution other than the ICC. Further, an arbitration without the involvement of the ICC Secretariat and the ICC Court would not bear the “ICC’s hallmark of quality”, which was what the appellant had bargained for, and the tribunal, in construing the arbitration agreement to provide for an SIAC-administered arbitration under the ICC Rules with the relevant SIAC bodies substituting the roles of the corresponding ICC bodies, had rewritten the arbitration agreement.
- (b) **Whether the tribunal had been validly constituted under the arbitration agreement when it was constituted by the SIAC under the SIAC Rules and not the ICC Rules:** According to the appellant, the tribunal was not validly constituted because it had been originally constituted under the SIAC Rules whereas the arbitration agreement required the tribunal to be constituted under the ICC Rules.

Court of Appeal dismisses appeal

The Court of Appeal dismissed the appeal and agreed with the High Court in holding that (a) the arbitration agreement was valid, enforceable and capable of being performed, and (b) the tribunal was validly constituted under the arbitration agreement.

The High Court's reasoning was endorsed by the Court of Appeal and included the following:

- The parties had bargained for a hybrid *ad hoc* arbitration to be administered by the SIAC, applying the ICC Rules only. In principle, so long as no significant inconsistency arose, there was no problem with parties agreeing to an arbitration agreement providing for *one* arbitral institution to administer an *ad hoc* arbitration under the procedural rules of *another* arbitral institution.

- The substitution by the SIAC of the various bodies designated under the ICC Rules with the appropriate corresponding bodies in the SIAC to perform their respective functions was within the degree of flexibility allowed by the ICC Rules which respected party autonomy.
- Since it was clear and undisputed that the parties intended to resolve their disputes by arbitration and not litigation, all reasonable effort should be made to give effect to the parties' intention to arbitrate in an *ad hoc* arbitration.
- While it was generally not advisable or efficient to adopt or adapt institutional rules such as the ICC Rules for use in an *ad hoc* arbitration because of the need for an administering body, there was no practical problem nor objection in principle if the parties to the *ad hoc* arbitration nominated a substitute institution (the SIAC in this case) to administer the arbitration and substituted various organs to carry out similar functions to those carried out by the different parts of the ICC apparatus.
- On the facts, the appellant had acknowledged that the tribunal was properly constituted under the ICC Rules.
- Since the appointment procedures of the arbitrators under the SIAC Rules and the ICC Rules were the same in effect and agreed to by the parties, whether the subsequent confirmation of the appointments by the SIAC was made with reference to the SIAC Rules or to the ICC Rules would have made no difference at all to the outcome.

Observations of the Court of Appeal

Since this was the first occasion that the Court of Appeal has had to consider the legal validity of a hybrid form of international arbitration, the court made some observations including the following:

- An arbitration agreement should be construed like any other form of commercial agreement.
- Where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars. An arbitration agreement should also not be interpreted restrictively or strictly. A commercially logical and sensible construction is to be preferred over another that is commercially illogical.
- There should be no practical problem, as well as no objection in principle, to providing for such a hybrid *ad hoc* arbitration administered by one institution but governed by the rules (as adapted where necessary) of another.
- The appellant had argued that the arbitration agreement should not be given effect to because it was a "pathological clause" as the hybrid form of arbitration contemplated in the arbitration agreement was uncertain or unworkable. The expression "pathological clause" denotes arbitration agreements, and particularly arbitration clauses, which contain a defect or defects liable to disrupt the smooth progress of the arbitration. The concept of a pathological clause fulfils a *descriptive* function rather than a *prescriptive* function and labelling or describing a clause as "pathological" does not automatically invalidate it as an agreement. On the facts, the arbitration agreement did not satisfy the qualifying conditions of a pathological clause.

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- There were no policy considerations to bar the SIAC, as a matter of jurisdiction or power, from agreeing to administer the arbitration of the kind agreed to by the parties in the arbitration agreement.

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Real estate

Singapore Court of Appeal rules on propriety of purchaser's direct payment of incentive monies to minority owners to secure consent to collective sale

Chua Choon Cheng & Ors v Allgreen Properties Ltd and Another Appeal [2009] SGCA 21

The Singapore Court of Appeal decision in *Chua Choon Cheng & Ors v Allgreen Properties Ltd and Another Appeal* [2009] SGCA 21 raises an interesting legal issue about the propriety of purchaser's direct payment of incentive monies to the minority owners to secure the latter's consent to the collective sale. Is there an implied term or an obligation of good faith that requires a purchaser to obtain the prior consent of the consenting majority owners or, at the very least, to inform them before making such incentive payments? The Court of Appeal held that a purchaser does not owe a duty of good faith to a vendor of property in relation to the price of the property. The general principle is *caveat emptor*. It would not be possible to imply any new duty of good faith in law into collective sale contracts outside that stipulated in the statutory scheme under the Land Titles (Strata) Act. As to a duty of disclosure, the court held that there is no general duty of disclosure in the performance of an already concluded contract under the common law. Further, the court did not think that a duty of disclosure should exceptionally be implied in the context of collective sales.

Facts of the case

The facts of the case concerned the collective sale of the units in a condominium development to a developer Allgreen Properties Limited, the respondent ("**Allgreen**"). For a variety of reasons, centring on the inadequacy of the sale proceeds they would each receive, the minority owners adamantly objected to the collective sale at the sale price stated in the collective sale agreement (the "**CSA**"). Without the consent or knowledge of the majority owners, Allgreen secured the agreement of all the minority owners to the collective sale by offering them additional incentive payments (the "**Additional Payments**"). Upon receiving these Additional Payments, each of the minority owners immediately assented to the collective sale. The majority owners complained that Allgreen had wrongfully repudiated the SPA by breaching its terms in making the Additional Payments.

Issues before the Court of Appeal

Various issues arose for the court's determination. This case summary focuses on the following issues:

- whether there was an implied term in fact in the CSA or SPA prohibiting the making of Additional Payments to the minority owners; and
- whether a term should be implied in law into the CSA and/or SPA prohibiting the making of Additional Payments to the minority owners.

Implied term in fact

The majority owners argued that to give effect to the legislative intent that the distribution of the sale proceeds should be made fairly and equitably pursuant to the Land Titles (Strata) Act (the “Act”), a term should be implied to prohibit the making of such additional payments.

The court considered the law relating to implied terms in fact and held that it is settled law that a court will not lightly imply a term into a contract. The rule of thumb is that the more detailed or complex a contract is, the less likely it is that the court will imply a term into that contract. The touchstone for implying a term into a contract is always necessity and not merely reasonableness. Both the officious bystander and business efficacy test depended on the presumed common intention of the parties, which has to be objectively ascertained. The court agreed with the conclusion of Phang J (as he then was) in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 that the two tests are but different facets of the same coin.

The court rejected the argument of the majority owners and held that what they were seeking to do under the guise of invoking an implied term was to persuade the court to rewrite the SPA to rescue them from an improvident bargain.

Implied term in law

The appellants argued that a critical term, i.e. that no additional payments can be made without the Majority Owners’ prior consent, should be implied in law because it was consistent and necessary to give effect to legislative intent and the objective behind the collective sale regime. Otherwise, it would lead to an abuse of the collective sale process whereby a purchaser could opt to pay off the minority owners to prevent the Strata Titles Board from scrutinising the transaction, depriving the majority owners of protection under the Act and circumventing the safeguards under the Act to ensure that the collective sale was carried out in good faith.

Nature of the implied term in law

The court considered the law on this issue and noted that, by implying a term in law, the court is laying down a general rule in law that certain terms will be implied in all contracts of a defined type, unless it is contrary to the express words of the agreement. A court should ordinarily exercise considerable restraint in implying a term in law, given that such a term extends and applies to all future like cases. In the present case, the category of contracts for which such an implied term was to apply was that of all collective sale agreements as a class.

Implied term prohibiting making of additional payments to minority owners

The court was of the view that a term prohibiting the making of additional payments to minority owners could not be implied in law. Such a term would mean that even majority owners who are keen to ensure that the sale is carried through would be unable to incentivise any of the minority owners to alter their stances for the wider common good. Further, there will be instances where even the majority owners will welcome the purchaser’s offer of more money to the minority owners to ensure that the deal can be completed.

The court also pointed out that the Act provides that any order to increase the sale proceeds of an objecting minority owner, must be made with the consent of the sales committee. This provision, however, only applies where

the additional payments are to be made from the sale proceeds due to all the owners from the agreed sale price. The statutory scheme does not address the case of a purchaser paying the additional monies directly without the intervention of either the Strata Titles Board or the majority owners. Hence, it could be said with force that given the express provisions of the Act, Parliament has required the sales committee's consent for the making of additional payments only in this particular instance provided for in the Act. Hence, the court did not think that a term could be implied in law to prevent the purchaser from making additional payments to the minority owners on the basis of the purported legislative intent of the Act.

Implied term that purchasers will act in good faith

The appellants contended that it was necessary to imply a continuing duty of good faith on the part of the purchaser.

The court pointed out that, while such duties of good faith have been held to be applicable to certain classes of contracts, for example, contracts of insurance and employment contracts, the common law does not recognise a principle of good faith, in the sense of fair dealing, to be of general application.

The court held that a purchaser does not owe any duty of care, much less a duty of good faith, to a vendor of property in relation to the price of the property. The general principle is *caveat emptor*. In the court's view, it would not be possible to imply any new duty of good faith in law into collective sale contracts outside that stipulated in the statutory scheme. Within the scheme, the purchaser owes no duty of good faith to the owners. The court referred to its decision in *Eng Ghee v Mamata Kapildev Dave* [2009] SGCA 14 and considered that it might be persuasively said that since Parliament has expressly considered the concept of good faith and carefully limited its application in this collective sale scheme, there can be no further room for any implication of an overarching duty of good faith imposed on any other parties involved in a collective sale. The duty of good faith requires the sales committee to discharge its duties in good faith in five specific areas, including (but not limited to): (a) the duty of loyalty or fidelity; (b) the duty of even-handedness; (c) the duty to avoid any conflict of interest; (d) the duty to make full disclosure of relevant information; and (e) the duty to act with conscientiousness. This duty of good faith is confined to the conduct of the sales committee (and the majority owners) in relation to the collective sale process. The court could see no pressing policy considerations that warranted the implication of a term that the purchaser has to deal with the majority owners in good faith. Their relationship is governed by the terms of the SPA, which would only have been settled in consultation with the sales committee's professional consultants. If such a term were important to the subsidiary proprietors it could be expressly provided for in the SPA.

Implied term that purchaser would disclose the making of Additional Payments to the majority owners

The majority owners argued that Allgreen had an implied duty to disclose that it was intending to make additional payments to the Minority Owners.

The court held that there is no general duty of disclosure in the performance of an already concluded contract under the common law. Further, the court did not think that a duty of disclosure should exceptionally be implied in the context of collective sales. As between the majority owners and the purchaser, there was nothing peculiar about their relationship, even in a collective sale setting, which warranted the implication of a continuing duty to disclose from the latter to the former.

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Conclusion

In all the circumstances, the court concluded that Allgreen had not breached any express or implied terms in the CSA or SPA by giving the Additional Payments to the minority owners.

The court acknowledges that the practice of some developers in making direct payments to minority owners to secure their consent can be potentially divisive and may even sometimes be ethically challenging. However, the court held that this did not mean that the law, as it now stood, prohibited such incentive payments. The Act itself plainly did not proscribe such payments. The court advised that sales committees that did not want to find themselves in a similar predicament in relation to incentive payments made by purchasers to minority owners could make provision for similar contingencies by expressly providing for them in the SPA.

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In brief

Singapore implements ASEAN and Plus Standards Scheme to facilitate cross-border offerings of securities within ASEAN region

On 19 June 2009, a statutory framework will take effect in Singapore enabling an issuer who is interested in undertaking a cross-border offering of securities within the ASEAN region to take advantage of the ASEAN and Plus Standards Scheme which aims to facilitate cross-border offerings of securities in the ASEAN region by harmonising disclosure requirements.

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

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MAS consults on amendments to the Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005: Changes in regulatory regime for restricted schemes

On 29 May 2009, the Monetary Authority of Singapore released a consultation paper on a proposal to amend the Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005 to effect changes in the regulatory regime for restricted schemes. The consultation closed on 29 June 2009.

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

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MAS conducts policy consultation on proposed changes to licensing and conduct of business rules

On 16 June 2009, the Monetary Authority of Singapore issued a consultation paper outlining proposed changes to the licensing and conduct of business requirements under the Securities and Futures (Licensing and Conduct of Business) Regulations and the Financial Advisers Regulations. The consultation period closes on 15 July 2009.

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

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MAS conducts public consultation on proposal to mandate AGMs for S-REITs

From 26 May 2009 to 26 June 2009, the Monetary Authority of Singapore (the “**MAS**”) conducted a public consultation on a proposal to mandate that real estate investment trusts in Singapore hold annual general meetings. The MAS proposes to implement the change with effect from 1 January 2010.

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

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MAS proposes amendments to MAS Notice 639 (Exposure to Single Counterparty Groups)

On 3 June 2009, the Monetary Authority of Singapore released a consultation paper on proposed amendments to MAS Notice 639 (Exposure to Single Counterparty Groups). Among other things, the proposed amendments relate to the disaggregation of exposures to entities under common control. The consultation period ends on 3 July 2009.

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

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SGX issues consultation paper on proposed revisions to CDP clearing fund structure and introduction of large exposure collateralisation for securities

On 15 June 2009, the Singapore Exchange Limited (the “**SGX**”) issued a consultation paper seeking comments from the public on proposed changes to the Central Depository (Pte) Ltd’s Clearing Fund (the “**CDP Clearing Fund**”) structure. The SGX is proposing to revise the CDP Clearing Fund structure by adopting a risk-based approach which will allow the contributions of Clearing Members to rise and fall with the level of risk that they bring to the clearing system arising from their outstanding trades. The

SGX also proposes the introduction of collateralisation of large securities settlement exposures of Clearing Members of the Central Depository (Pte) Ltd. The consultation period ends on 13 July 2009.

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

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SGX issues consultation paper on proposed amendments to SGX-DC Clearing Rules to facilitate clearing arrangement between SICOM and SGX

Between 28 May 2009 and 17 June 2009, the Singapore Exchange Limited (the “**SGX**”) conducted a public consultation on the proposed changes to the clearing rules of the Singapore Exchange Derivatives Clearing Limited (the “**SGX-DC**”) to cater for a clearing arrangement between the SGX and Singapore Commodity Exchange (the “**SICOM**”). Among other things, the proposed clearing arrangement between the SGX and SICOM will allow trades executed on SICOM to be cleared through the SGX-DC, in addition to the SICOM Clearing House.

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

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News

Singapore Airlines Limited proposes dividend in species of shares in Singapore Airport Terminal Services Limited

Singapore Airlines Limited (“**SIA**”) announced on 14 May 2009 that it is proposing a dividend *in specie* of substantially all of the shares it holds in Singapore Airport Terminal Services Limited to be distributed *pro-rata* and at no cost to SIA shareholders. The distribution is subject to SIA shareholders’ approval to be obtained at an extraordinary general meeting scheduled to be held end July 2009.

Advising SIA are Allen & Gledhill LLP Partners Lee Kim Shin, Richard Young and Steven Lo, Senior Associate Jon-Nathaniel Nair and Associate Tan Teng Sen.

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WBL Corporation Limited's underwritten rights issue of convertible bonds

WBL Corporation Limited (“**WBL**”) carried out a renounceable underwritten rights issue of S\$158.4 million convertible bonds due 2014. This is the first rights issue of convertible bonds by WBL.

Advising WBL are Allen & Gledhill LLP Partners Tan Tze Gay, Sharon Wee, Rhys Goh and Glenn Foo.

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CapitaCommercial Trust's one-for-one rights issue

CapitaCommercial Trust Management Limited (“**CCTML**”), the manager of CapitaCommercial Trust (“**CCT**”), has announced a fully underwritten renounceable rights issue to raise gross proceeds of approximately S\$828.3 million. Unitholders of CCT will be entitled to subscribe for one new unit in CCT for every one existing unit held as at the books closure date at S\$0.59 per rights unit. CCT is the largest listed commercial REIT in Singapore.

Advising CCTML are Allen & Gledhill LLP Partners Jerry Koh and Chua Bor Jern, Senior Associates Long Pee Hua and Teh Hoe Yue.

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PSA Corporation Limited issues S\$300 million Fixed Rate Notes due 2019

PSA Corporation Limited has issued S\$300 million Fixed Rate Notes due 2019. DBS Bank Ltd acted as lead manager and bookrunner for the issue and DBS Trustee Ltd acted as trustee for the noteholders.

Advising PSA Corporation Limited are Allen & Gledhill LLP Partners Tan Tze Gay and Glenn Foo and Associate Lu Zhu An. Advising DBS Bank Ltd and DBS Trustee Ltd are Allen & Gledhill LLP Partner Margaret Chin and Senior Associate Ong Kangxin.

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Allen & Gledhill is top Singapore law firm at the Asian Legal Business SE Asia Law Awards 2009



Allen & Gledhill LLP won five awards out of 34 categories, giving it first place ranking among Singapore law firms, at the Asian Legal Business (ALB) SE Asia Law Awards 2009, which was organised to recognise the largest, most innovative and complex legal work done in 2008.

The Firm was named **Singapore Deal Firm of the Year** and **Tax and Trusts Law Firm of the Year**, and was also awarded for:

- **Debt Market Deal of the Year** for its involvement in the City Development Islamic trust certificate program
- **Insolvency and Restructuring Deal** of the Year for its involvement in the Nomura-Lehman Brothers (Asia) acquisition
- **Singapore M&A Deal of the Year** for its involvement in the Lion Power Holdings-Senoko Power financing and acquisition

The ALB SE Asia Law Awards recognise the excellence of Southeast Asia's leading law firms as well as the top deals and dealmakers of 2008. The Firm has won the Singapore Deal Firm of the Year award for four consecutive years since 2006 and also won the Singapore Firm of the Year in 2005.

Our joint venture partners were also recognised at the awards. Congratulations to our joint law venture **Linklaters Allen & Gledhill**, which was named **Energy & Resources Law Firm of the Year** and our joint venture partner **Linklaters**, which was named **International Deal Firm of the Year**, and our alliance partner **Zaid Ibrahim & Co**, which was named **Malaysia Deal Firm of the Year**.

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