

Legal Bulletin

A summary of developments in the law

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These recent developments were highlighted in the Allen & Gledhill Financial Services Update of 22 March 2007. If you would like to be on our Financial Services Update mailing list, please e-mail us at publications@allenandgledhill.com

Articles

Changes to Singapore Code on Take-overs and Mergers to take effect on 1 April 2007

Introduction

Following consultations in 2006, the Securities Industry Council (the “**SIC**”), Singapore’s take-over offers regulator, is introducing changes to the Singapore Code on Take-overs and Mergers (the “**Code**”), **effective 1 April 2007**.

The revisions were aimed to “review and update the Code” in light of “market innovations and evolving international practices”. By and large, the changes are welcome and have succeeded in achieving their stated aims, although some details remain to be worked out in practice and some of the changes may raise further questions.

The SIC has also decided to further study a couple of proposed changes that may have a wide-ranging implication on Singapore mergers and acquisitions (“**M&A**”) practice, including whether the Code should apply to real estate investment trusts (“**REITs**”).

This update highlights the key changes to the Code and their implications.

The Code applies to foreign companies / business trusts with a primary listing in Singapore

The Code is amended to apply to foreign companies / business trusts with a primary listing in Singapore, but not to those with only a secondary listing in Singapore.

This change is in line with market practice and reinforces the usual practice of incorporating a provision in the constitution of a foreign entity to the effect that it and its shareholders are subject to the application of the Code.

It is unclear whether this change will have retroactive effect on foreign entities with a primary listing in Singapore which have previously received a ruling to the effect that the Code does not apply to them. It may be prudent for such entities to consult the SIC on this point.

Waiver on application of the Code

The Code is amended to give the SIC an express (hitherto implied) discretion to waive the Code to:

- foreign entities with primary listing in Singapore;
- Singapore entities with primary listing overseas; and
- public but unlisted entities that are otherwise subject to the Code (more than 50 investors and net tangible assets of not less than S\$5 million).

In considering a waiver application, the SIC stated that it would take into account, among other things:

- the number of Singapore investors and the extent of trading in Singapore; and

- the existence of protection afforded to Singapore investors under the rules of the relevant foreign jurisdiction.

From a practical perspective, the first test suggests that whether the Code applies to a foreign entity with a primary listing in Singapore may change from time to time, depending on the extent of Singapore investors' participation. In addition, once it has been determined that the Code applies or does not apply, does this trigger a disclosure obligation under the continuous disclosure rules of the Singapore Exchange Securities Trading Limited (the "SGX-ST")?

The second test should be relatively straight-forward to apply in most cases involving foreign entities constituted in haven jurisdictions – it is unlikely that minority shareholders' appraisal rights under company law codes in these jurisdictions will in themselves be regarded as sufficient protection. But what if the home jurisdiction of a foreign entity has its own tender offer rules and those rules differ in certain fundamental respects from the Code – e.g., where there is no requirement to make a mandatory general offer for all shares upon acquiring effective control?

The SIC has also indicated that it "would not normally" waive the Code with respect to foreign entities with a primary listing in Singapore, but will consider waiving specific Code provisions in appropriate circumstances – e.g., where those provisions conflict with applicable foreign rules. The SIC is against a wholesale waiver because it believes that if a foreign entity wishes "to benefit from the branding a primary listing would accord, it should comply with the full gamut of rules and regulations that are applicable to a Singapore-incorporated company listed on the [SGX-ST], i.e. compliance with both the SGX Listing Rules as well as the Code".

The Code regulates a "trust scheme" and amalgamations

The Code is amended to regulate a trust scheme (i.e., an acquisition of control over a business trust by way of an amendment to the trust deed constituting the trust following a unitholders vote) and an amalgamation of companies (following the introduction of the court-free amalgamation process in the Singapore Companies Act last year). Like a scheme of arrangement, both are just different ways of structuring an acquisition and it is correct that the Code should apply to all.

In contrast to a scheme of arrangement, however, the Code imposes an explicit time discipline to a trust scheme and an amalgamation:

- the scheme / amalgamation document must be posted within 35 days of the announcement of the transaction; and
- the acquisition must be effective within 60 days of the posting of the document.

Currently, a scheme of arrangement takes between four and six months from announcement to become effective. While the deadlines for a trust scheme and an amalgamation will be challenging, it is to be hoped that they will have the beneficial effect of expediting the pace of executing public M&A transactions in Singapore generally.

Concert party presumption includes a person (not a bank) giving financial assistance to acquire shares

The Code is amended to extend the "concert party" presumption to "any person who has provided financial assistance (other than a bank in the ordinary course of business) [to another party] for the purchase of voting

rights". This brings the Code in line with the Hong Kong take-overs code, though there is no corresponding presumption in the UK take-overs code.

A "bank" continues to be excluded from the concert party presumption if it lends money to a person to acquire shares on arm's length terms. However, the Code is amended to caution that the SIC should be consulted if the arrangement between that bank and that person involves the bank "acquiring offeree company shares or an option over such shares, or otherwise creates an incentive for the bank to assist [that person] in obtaining or consolidating effective control of the offeree company".

It is likely that the scope of the extended presumption and caution will have to be worked out in practice. For example, what will constitute relevant "financial assistance" and "incentive" for this purpose? Notably, also, private equity investors would not generally fall within the definition of "banks".

Equality of information to competing offerors, including asset purchasers

The Code is amended to extend the equality of information rule to a person seeking to purchase all or materially all of the assets and/or businesses of an offeree company. For this purpose, "material" assets are those which account for or contribute more than 30 per cent. of the offeree company's sales, earnings, assets or market capitalisation.

This change seeks to level the playing field between a share offeror and an asset purchaser. Under the existing Code, if an offeree company has given information to one (preferred) share offeror, it is bound to give the same information to another share offeror, even if that other share offeror is unwelcome. With the change, the offeree company is bound to give the same information to an asset purchaser - and, conversely, an asset purchaser is entitled to request the same information from the offeree company.

Break fees permitted, subject to certain safeguards

In line with UK practice, the Code is amended to recognise expressly that break fees are permitted under the Code, subject to certain "safeguards". In particular:

- the break fee must be "minimal" and "normally no more than one per cent. of the value of the offeree company calculated by reference to the offer price"; and
- the offeree company board and its financial adviser must confirm in writing to the SIC that, among others, they believe the break fee is in the best interest of the offeree company shareholders.

Break fees have not to-date been customarily seen in Singapore public M&A transactions. While we expect the use of break fees will be driven primarily by market forces, it would be interesting to see what impact, if any, this new rule will have on this.

Pricing of cash alternative to a scrip consideration in a mandatory offer

If an offeror enters into a conditional agreement to acquire, for example, 30 per cent. of an offeree company from a selling shareholder, the offeror is obliged to make a mandatory offer when the closing conditions are fulfilled. Even if the offeror is issuing new listed shares to pay the selling shareholder, the offeror must make available a cash alternative in the mandatory offer.

The Code is amended to provide that the cash alternative must not be less than:

- the volume weighted average price (“**VWAP**”) of the offeror’s shares on the day of the announcement of the agreement; and
- the highest price paid by the offeror and its concert parties for offeree company shares in the six months preceding the announcement and subsequently.

What happens if the closing conditions take a long time to fulfill? If the conditions are fulfilled within three months of the announcement of the agreement, the announcement day-VWAP remains valid as a price reference point. If later, then the price reference point is the VWAP of the offeror’s shares on the day the conditions are fulfilled. The SIC has discretion to extend the three-month deadline and indicated that it is prepared to deal with those transactions that require “prolonged regulatory approval on a case-by-case basis”.

The three-month deadline imposes a more explicit time discipline on how long a conditional acquisition agreement is to be completed – previously, all that the Code requires is that the conditions must be fulfilled within a “reasonable period”.

It is not uncommon, however, for the share price of an offeror who has announced a material acquisition and will be issuing shares to pay for the acquisition to fall after announcement. In this context, it remains to be seen whether the three-month deadline will have the same effect of imposing a time discipline, although it is of course in an offeror’s interest to close the acquisition as soon as possible.

Partial offers

The Code is amended to ease the requirements for a partial offer in certain respects, including the following:

- with respect to a partial offer for less than 30 per cent. of voting rights:
 - no independent financial adviser is required to be appointed; and
 - offerors and their concert parties may acquire offeree company shares both before and after, but not during, the partial offer (with respect to a partial offer for 30 per cent. or more, no purchases of offeree company shares can be made before, during and after the offer); and
- an offeror who already holds more than 50 per cent. of the offeree company shares does not need to obtain prior approval of the offeree company shareholders to make a partial offer, so long as its offer will not result in:
 - it holding more than 90 per cent. of the shares in issue; or
 - the offeree company failing to comply with the minimum free float requirements of the SGX-ST (currently, at least 10 per cent. of equity securities of a company listed on the SGX-ST must be held by the public).

When a cash or scrip alternative is required

The Code currently provides that a cash alternative is required when an offeror and its concert parties have acquired 10 per cent. or more of the offeree company shares for cash during or “immediately preceding” the offer period. The look-back period is now amended to six months preceding the offer period.

The Code is also amended to provide for the converse situation: a scrip alternative is required when an offeror and its concert parties have acquired 10 per cent. or more of the offeree company shares for scrip during the offer period and three months prior thereto. This amendment is aimed to reinforce the principle of equality of treatment among all offeree company shareholders.

While the rules prescribing when a cash or scrip alternative is required are by and large mirror provisions, they differ in certain key respects (including the six-month vs. three-month look-back periods). The detailed application of these rules may also have to be worked out in practice.

Setting aside a no-increase statement in a competitive situation

The Code is amended to clarify when a no-increase statement may be set aside. In particular, the SIC recognises that a competitive situation may arise not only when a competing offer has been announced, but may also arise when:

- a pre-conditional offer is announced – this is because such a pre-conditional offer announcement goes beyond the mere possibility of a competing offer, especially as all the pre-conditions must meet the objective and material test under the Code; and
- a proposal to acquire all or materially all of the assets and/or businesses is announced.

Recognising that an asset acquisition proposal may constitute a competitive situation is the second notable instance in this round of changes (after the changes to the equality of information to offerors described above) where the SIC seems to have tried to “level the playing field” between a share offer and an asset acquisition. It is interesting to see whether this will be seen in other aspects of application of the Code.

Independent financial adviser to make recommendations when all offeree directors conflicted

The Code is amended to provide that where all offeree directors are conflicted and exempted by the SIC from making a recommendation to offeree company shareholders on the offer, then the responsibility for making the recommendation rests primarily on the independent financial adviser to the offeree company. This brings the Code in line with the Hong Kong take-overs code.

Other changes

Other notable changes to the Code include:

- pushing back the cut-off time for closing of offer from 3.30 pm to 5.30 pm;

- providing that purchases of offeree company shares by the offeror and its concert parties will count towards the acceptance condition only if:
 - in the case of purchases through the SGX-ST, there is no “pre-agreement or collusion” between the parties to the trades and their agents; and
 - in all other cases (including off-market purchases), they are “fully completed and settled”;
- shortening the period to settle an offer from 21 to 10 days;
- lengthening the validity period of a whitewash waiver for options and convertible securities from two to five years after they are issued; and
- giving the SIC jurisdiction to levy a fee in respect of the lodgment and processing of offer documents to recover the costs in administering the Code. The fees range from a minimum of S\$3,000 to a maximum of S\$250,000, depending on the value of the offer, with the cap being reached for offers valued at over S\$250 million.

Application of the Code to REITs under review

The SIC is studying further whether the Code should apply to REITs and the extent to which specific provisions of the Code will need to be tailored to apply to REITs.

In the meantime, parties intending to:

- acquire 30 per cent. or more of the total units of a REIT;
- (when holding between 30 per cent. and 50 per cent.) acquire more than one per cent. of the total units of a REIT in any six-month period; or
- make an offer for a REIT,

are advised to consult the SIC beforehand.

Dealings in derivatives and options under review

Currently, when a person buys an option or derivative referenced to shares of an offeree company:

- the underlying shares are not necessarily aggregated with his shareholding, especially if the option or derivative is cash-settled; and
- he is only obliged to disclose his dealings in such option or derivative if he owns five per cent. or more of the underlying shares.

Recent changes to the UK take-overs code have considerably tightened the aggregation and disclosure rules. For the time being, the SIC has also decided to study further whether to introduce changes to the Code to “adopt the UK approach” in respect of dealings in options and derivatives.

In the meantime, a person who wishes to acquire options or derivatives should consult the SIC beforehand if the shares in the offeree company underlying such options or derivatives would, when aggregated with his (and his concert parties’) shareholdings, exceed the mandatory offer thresholds.

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Useful references

Please click on the title of the following documents for some useful references published by the Monetary Authority of Singapore or the SIC on this topic:

- [Summary of other changes to the Code](#)
- [MAS press release dated 15 March 2007 in relation to the above development](#)
- [“Consultation Paper on Revision of the Singapore Code on Take-overs and Mergers”](#) issued on 21 June 2006
- [“Consultation Conclusions On Revision of the Singapore Code on Take-Overs and Mergers”](#) issued on 15 March 2007
- [Revised Code with the new changes tracked against the text of the original Code](#)

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MAS releases public consultation on “Enhancements to the Regulatory Regime Governing REITs”

On 23 March 2007, the Monetary Authority of Singapore (the “**MAS**”) released a consultation paper entitled “Enhancements to the Regulatory Regime Governing REITs” (the “**Consultation Paper**”).

The Consultation Paper contains proposals to amend the Property Fund Guidelines (“**REIT Guidelines**”) to keep pace with the rapid development of the Singapore real estate investment trust (“**REIT**”) market. The proposed changes aim to achieve the following broad objectives:

- establish measures to safeguard the interests of unitholders;
- provide clarity and flexibility on investment guidelines;
- rationalise guidelines where compliance costs exceed benefits; and
- introduce a licensing framework for REIT managers under the Securities and Futures Act (the “**SFA**”).

A summary of the proposed changes is set out below.

Enhancing disclosure requirements relating to short-term yield enhancing arrangements

The MAS intends to formalise its current practice of requiring REITs to disclose prominently all financial engineering arrangements that are used to boost short-term yields and their associated financial effects and risks in offering documents, circulars, announcements and marketing materials of the REITs.

Disallowing arrangements at initial public offerings (“IPO”) that entrench REIT managers

Arrangements at IPO that would entrench REIT managers are currently discouraged for fear that they would impede the market for corporate control. The Consultation Paper proposes to disallow such arrangements.

The REIT Guidelines will require approval by unitholders post-listing for any arrangements that have the characteristics of providing long-term management contracts to REIT managers or imposing high termination fees.

The following conditions must be observed in approving such arrangements:

- the arrangement must be specifically approved by a majority of unitholders at a general meeting, with the REIT manager and its related parties abstaining; and
- the circular to unitholders must include an opinion from the REIT trustee that such arrangements are on normal commercial terms and are not prejudicial to the interests of unitholders.

Disallowing discounts to institutional investors at IPO

The prohibition against offering discounts to institutional investors for subscribing to substantial amounts of IPO units will be formalised in the REIT Guidelines.

Safeguards for distributions to unitholders

The REIT manager of a REIT that wishes to pay dividends in excess of current income of the REIT will be subject to certification and disclosure requirements similar to those required for business trusts, to ensure that long-term development of the REIT is not compromised through such distributions to unitholders.

Increasing minimum threshold for investment in real estate

Currently, the REIT Guidelines require 35 per cent. of a REIT's assets to be invested in real estate and at least 70 per cent. of a REIT's assets to be invested in real estate and real estate-related assets (e.g. shares of property companies).

To align the minimum threshold for investment in real estate with the requirements in UK, US and Hong Kong and ensure that REITs remain as vehicles that invest substantially in income producing real estate, the MAS proposes to require REITs to invest at least 75 per cent. of their assets in income producing real estate. Up to 25 per cent. of the REIT's assets may be invested in other permissible investments specified in the REIT Guidelines, such as real estate-related assets, cash, government securities, listed or unlisted debt securities, or listed shares of companies not in the real estate business.

Removing the five per cent. Single Party Limit for investments in real estate-related securities

The MAS proposes to remove the five per cent. Single Party Limit (“SPL”) for investments in real estate-related securities. However, the five per cent. SPL for investments in non-real estate-related securities will be retained as REITs should not have concentrated investments in such assets.

Allowing joint ownership through investments as tenants-in-common

Under the REIT Guidelines, REITs can only invest in real estate as joint owners through acquiring shares or interests in unlisted single purpose vehicles (“**SPVs**”). Taking into account valid commercial reasons for REITs to invest directly in properties instead of through SPVs, the MAS is proposing to allow REITs to hold interests in real estate directly as tenants-in-common, subject to the safeguards in the REIT Guidelines on joint ownership.

Limit on revenue from non-rental income

In order to preserve the fundamental nature and characteristics of REITs as largely passive property-owning investment vehicles, the MAS presently imposes a limit on REITs’ revenue that is derived from non-rental income.

The MAS proposes to formalise its position in the REIT Guidelines that it will not allow more than 10 per cent. of a REIT’s revenue to be derived from sources other than:

- rental payments to be made by tenants of properties held by the REIT; and
- interest, dividends, and other similar payments from SPVs and other permissible investments held by the REIT.

The MAS is also seeking views on alternative structures proposed for investment vehicles earning substantial non-rental income.

Independence of valuers

Valuers of a REIT’s assets are not allowed to receive payments of more than S\$200,000 in a financial year for services performed for parties whom the REIT is contracting with. The MAS intends to clarify that the current S\$200,000 threshold applies only to parties who are buying or selling assets to the REIT. At the same time, public views are also sought on whether the S\$200,000 threshold should be raised, and if so, to what level.

Changes relating to interested party transactions (“IPTs”)

Removal of requirements for IPTs to reduce costs

The REIT Guidelines provide that a REIT may only acquire assets from or sell assets to interested parties if two independent valuations of each of those real estate are obtained.

Where unitholders’ approval is not required for an IPT (i.e. value of the IPT is less than five per cent. of the REIT’s NAV), the trustee of the REIT is currently required to provide a written confirmation that the transaction is carried out on normal commercial terms and is not prejudicial to the interests of unitholders if:

- the acquisition price is more than the lower of the two independent valuations; or
- the disposal price is less than the higher of the two independent valuations.

The Consultation Paper contains a proposal to require for the trustee's confirmation only in limited circumstances when:

- the acquisition price is more than the average of the two independent valuations; or
- the disposal price is less than the average of the two independent valuations.

Where the IPT is equal to or greater than five per cent. of a REIT's NAV, an independent expert is also required to render an opinion, in addition to requiring the conduct of two independent valuations. The independent expert should opine on whether the transaction is carried out on normal commercial terms and is not prejudicial to the interests of unitholders. Concluding that the independent expert's opinion may not add significantly to an investor's evaluation process, and that adequate safeguards are in place under the REIT Guidelines, the MAS proposes to remove the requirement for an independent expert to render an opinion.

Aligning IPT requirements under the REIT Guidelines with the Listing Manual

The IPT requirements under the REIT Guidelines will be aligned with the requirements under the Listing Manual of the Singapore Exchange Securities Trading Limited (the "SGX-ST") in two aspects:

- aggregation of IPTs for the purpose of obtaining unitholders' approval:
 - once unitholders' approval is obtained in respect of IPTs with values equal to or greater than five per cent. of NAV in a financial year, the REIT is not required to obtain unitholders' approval for subsequent transactions with the same interested party for the remaining period of the financial year unless the total value of those subsequent transactions constitutes five per cent. or more of its NAV.
- definitions of "interested party", "controlling unitholder" and "associate":
 - replacing the list of entities connected to the manager and controlling unitholder with the term "associate";
 - removing a sponsor who does not have a controlling interest in the REIT or is not associated with the manager or the controlling unitholder as an interested party; and
 - retaining the manager and trustee for the REIT as well as their associates as interested parties.

Trustee's duties in reviewing contracts

There is a general requirement under the REIT Guidelines that REIT trustees must ensure that all contracts entered into on behalf of the REIT are legal, valid, binding and enforceable by or on behalf of the REIT in accordance with its terms. The REIT Guidelines will be revised to clarify that REIT trustees' duties to review such contracts are limited material contracts which:

- constitute five per cent. or more of the REIT's gross revenue; or
- are not entered into in the ordinary course of business (such as acquisitions and borrowings).

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Removing requirement for desktop valuation

A desktop valuation of all the real estate assets of a REIT has to be conducted prior to the issuance of new units in the REIT post-IPO if the last valuation is more than six months old. The MAS proposes to remove the requirement for a desktop valuation as long as the REIT manager confirms that there is no material change in the value of the properties since they were last valued. This does not affect the existing requirement for REITs to conduct a full valuation of their real estate assets at least once annually.

Introducing a licensing framework for REIT managers under the SFA

Some of the proposals in implementing a new licensing regime for REITs managers under the SFA are as follows:

- REIT management will be defined as a regulated activity under the Second Schedule of the SFA;
- introducing capital requirements and licence fees for REIT managers;
- existing REIT managers will be migrated to the new licensing regime, but will continue to adhere to the criteria for REIT managers as set out in the REIT Guidelines;
- all professional employees of REIT managers will hold a capital markets services (“**CMS**”) representative’s licence and will be required to meet minimum entry and examination requirements similar to those applicable to existing CMS representatives;
- the coverage and administration of the Capital Markets and Financial Advisory Services Examination will be amended to cater to the specialised nature of REIT management; and
- transitional arrangements will be implemented to ease the transition for existing REIT managers and professional employees.

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

Please [click here](#) to view a press release by the MAS relating to the above development.

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Media Development Authority of Singapore consults on proposed changes to Media Market Conduct Code

The Media Development Authority of Singapore (the “**MDA**”) is conducting a public consultation on proposed revisions to the Media Market Conduct Code (the “**Code**”) as part of its first triennial review to update the Code to address changes in the media industry. In this regard, the MDA has issued a draft revised Code for public comment (the “**draft revised Code**”). The Code was first implemented in April 2003 to address competition issues related to the broadcasting and print sectors.

The MDA informed that, where applicable, the draft revised Code's competition principles and applications will be aligned with international best practices and the Competition Act as administered by the Competition Commission of Singapore.

The key revisions to the Code are as follows:

- **Extend scope of application of the Code:** It is proposed that the application of the Code include the entire media industry in addition to the current broadcasting and print sectors. As such, if this change is accepted, the Code will apply to the film sectors and others as specified by the Minister for Information, Communications and the Arts by order published in the *Gazette*.
- **Prohibition on anti-competitive leveraging:** The MDA proposes a prohibition against any media service provider from unreasonably leveraging on its affiliates' significant market power in a media or non-media market. This change aims to promote healthy competition amongst all media service providers.
- **Market and dominance:** Market and dominance definitions will be adopted on a case-by-case basis based on the facts of a competition case and current media market dynamics. Currently, markets and dominant licensees are pre-defined. The pre-defined markets and dominant licensees will remain as a transitional provision under the draft revised Code.
- **Access to advertising capacity:** A media service provider which is considered dominant in the media market as defined under the Code must provide any other media service provider with access to advertising capacity on reasonable and non-discriminatory prices, terms and conditions, subject to a list of allowable restrictions which the MDA will provide under the Code. This proposed change is to ensure that a dominant media service provider does not abuse their significant market power by denying any media service provider, particularly their competitors, access to their advertising capacity.

The public consultation will close on 7 May 2007.

For the MDA's press release of 26 March 2007, please [click here](#).

For a summary of the proposed changes, please [click here](#).

For the MDA's Explanatory Note, please [click here](#).

For the draft revised Code, please [click here](#).

For further information on the MDA website, please [click here](#).

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Recent amendments to the Patents Act operative with effect from 1 April 2007

The Statutes (Miscellaneous Amendments) Act 2007, which was passed in Parliament on 22 January 2007, introduces amendments to the Patents Act. These amendments take effect on 1 April 2007. There will be consequential amendments to the Patents Rules which also came into force on 1 April 2007. The amendments align the provisions of the Patents Act with the corresponding changes to the regulations under the Patent Cooperation Treaty (the "PCT"). The changes in the PCT regulations are operative from 1 April 2007. To read about the PCT amendments, please [click here](#).

There are two key amendments:

- **possible to claim earlier priority date after 12-month deadline:** Currently, when an applicant files an application for a Singapore patent, it is possible to claim priority of an earlier application for the patent (in a Paris Convention or WTO member country) as long as the applicant files the subsequent application in Singapore within 12 months from that earlier application. For applications that qualify for a date of filing on or after 1 April 2007, an applicant may file subsequent applications in Singapore even after the 12-month deadline has passed and still claim priority based on the earlier application, subject to certain conditions. In deciding whether to allow the applicant to claim an earlier priority date under such circumstances, the Registrar of Patents will take into account factors such as whether the failure to file the subsequent application was unintentional or occurred in spite of due care required by the circumstances having been taken.
- **adding missing parts of an application without affecting date of filing:** Currently, the late filing of any drawings in a patent application may result in the re-dating of the original filing date of the application. In other words, the addition of a missing drawing to a patent application could potentially affect the date of filing. For applications initiated on or after 1 April 2007, the amendments to the Patents Act allow the addition of missing parts (i.e. the drawing or part of the description of the patent application) without affecting the date of filing of the application if certain conditions are met.

The amendments to the Patents Act and Patents Rules were the subject of a public consultation conducted by the Intellectual Property Office of Singapore (the "IPOS") in July / August 2006. As part of the public consultation, the IPOS also dealt with proposed changes that will repeal current provisions in the Patents Act relating to restrictive covenants. However, these changes are not dealt with in the current amendments taking effect on 1 April 2007. A short article on the public consultation was featured in a previous issue of the Allen & Gledhill Legal Bulletin (July 2006). To view the article entitled "*IPOS conducts public consultation on patents laws in Singapore*", please [click here](#).

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IPOS conducts public consultation exercise on draft Copyright (Excluded Works) Order 2007

The Intellectual Property Office of Singapore (the “IPOS”) is conducting a public consultation exercise on the draft Copyright (Excluded Works) Order 2007 (the “draft Order”) from 15 March 2007 to 14 April 2007.

The purpose of this public consultation is to determine whether the list of excluded works stated in the draft Order should be exempted from the prohibition against circumvention of technological access control measures as applied to them. Section 261C of the Copyright Act prohibits the circumvention of technological access control measures as applied to copyright material and protected performances. However, section 261D of the Copyright Act provides that the Minister for Law may exclude specified copyright material and performances; or specified classes of copyright material and performances from the prohibition in section 261C. Currently, the Copyright (Excluded Works) Order 2005 (the “Order”) applies and will expire on 31 October 2007.

As a matter of background, a public consultation exercise was conducted from 15 June to 15 August 2006 to seek feedback on whether the list of excluded works under the Order should continue to be exempted from the prohibition against circumvention of technological access control measures as applied to them. Generally, the feedback submitted to the IPOS indicated that most of the parties were satisfied with the specified copyright material and classes of material stated in the Order. To view an article in a previous issue of the Allen & Gledhill Legal Bulletin (June 2006) entitled “IPOS consults on exemptions to prohibition against circumvention of technological access control measures”, please [click here](#).

The draft Order incorporates some of the new rules published by the United States Copyright Office (the “USCO”) on 22 November 2006 to exempt non-infringing uses of specified classes of works from the effects of the anti-circumvention provisions in the US Copyright Act (17 U.S.C). The IPOS is of the view that some of the rules may benefit Singapore’s education sector, industries and users. The USCO anti-circumvention rulemaking may be accessed at the USCO website: <http://www.copyright.gov/>.

To view the draft Order, please [click here](#).

To view a comparative table showing the new rules of the draft Order and the existing rules of the Order, please [click here](#).

There are three proposed new rules that will exempt the following from the operation of section 261C of the Copyright Act:

- audiovisual works in the library of an educational institution that conducts courses in film or media, for the purpose of making compilations of portions of those works for educational use in the classroom;
- sound recordings and associated audiovisual works in compact disc format which are protected by technological protection measures that create or exploit security flaws or vulnerabilities in personal computers, for the purpose of good faith testing, investigating, or correcting of such security flaws or vulnerabilities;
- a computer program with a missing key code that is required for activation. The key code is considered lost for the purpose of this exemption only if it cannot be found after a reasonable search and a

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replacement is no longer commercially available. It must also be the case that the user will not be in breach of the licensing terms relating to the key code.

Once the Copyright (Excluded Works) Order 2007 is made, it will remain in force for a period of four years.

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Charities (Amendment) Act 2007 and related subsidiary legislation operative with effect from 1 March 2007: Changes in regulation of institutions of a public character

The Charities (Amendment) Act 2007 (the “**Amendment Act**”) has been gazetted and is operative with effect from 1 March 2007. With effect also from 1 March 2007, subsidiary legislation has been issued for the regulation of charities and institutions of a public character (“**IPCs**”).

The key changes introduced by the Amendment Act are as follows.

Regulation of IPCs

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

Further, the Amendment Act provides for the appointment of sector administrators who are carrying out the duties of regulating the administration of charities and of approving and regulating IPCs for the Commissioner of Charities (the “**COC**”). Central fund administrators who were appointed under the Income Tax Act to administer the regulation of IPCs have been replaced by sector administrators appointed under the Charities Act.

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

Expanded definition of “fund raising appeal”

The Amendment Act introduces a revised definition of “fund-raising appeal” that is broad enough to include appeals in any form, whether the appeals are made expressly or impliedly, or whether or not words such as “appeal”, “fund-raising” and the like are actually used.

Additional functions, duties and powers of the Commissioner of Charities

The COC is granted new powers, including:

- suspending or removing any trustee, charity trustee, officer, agent or employee of a charity from being a member of the charity (new section 25A of the Charities Act);

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

Establishment of Charity Council

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

Subsidiary legislation for the regulation of charities and IPCs

In accordance with the new regulatory regime, the following subsidiary legislation was issued:

- **Charities (Institutions of a Public Character) Regulations 2007**

These regulations provide for the regulation of IPCs, including approval of IPCs, fund-raising and use of donations, and reporting and disclosure requirements. The regulations also set out additional requirements for large IPCs, which include compliance with the Financial Reporting Standards prescribed by the Council on Corporate Disclosure and Governance. As referred to in the regulations, large IPCs are those with gross annual receipts in each financial year of not less than S\$10 million in the two financial years immediately preceding the current financial year of the IPCs.

- **Charities (Sector Administrators) Regulations 2007**

These regulations provide for the duties, functions and powers of sector administrators.

- **Designation of Sectors under the Supervision of Sector Administrators**

These regulations provide for the persons or organisations designated as sector administrators and their appointed sectors.

For an article entitled "Parliament passes Charities (Amendment) Bill 2006: Changes in regulation of institutions of a public character" which was featured in a previous issue of the Allen & Gledhill Legal Bulletin (January 2007), please [click here](#).

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Cases

Corporate & financial services

English Court of Appeal holds that an assignee from a failed assignment of debt could not claim as the beneficiary of a declaration of trust in respect of the same debt

Barbados Trust Co Ltd v (1) Bank of Zambia (2) Bank of America NA
[2007] EWCA Civ 148

The English Court of Appeal in *Barbados Trust Co Ltd v (1) Bank of Zambia (2) Bank of America NA* held that an assignee of an invalid assignment of debt which did not comply with the requirements of a loan agreement could not claim, instead, as the beneficiary of a declaration of trust of the debt made by the assignor in its favour, as this would achieve a result inconsistent with the terms of the loan agreement.

Barbados Trust Co Ltd (“**BT**”) commenced the present action against the Bank of Zambia (“**BoZ**”) claiming for an admitted debt due from BoZ under an Oil Import facility (the “**Facility**”) where banks and financial institutions agreed to make available to BoZ a facility for the issue of letters of credit.

Debts under the Facility had been sold in the distressed debt market subject to Article 12 of the Facility. Article 12 provided that a lending bank’s rights and benefits under the Facility could only be assigned to another bank or financial institution if the prior written consent of BoZ had been obtained. Such consent was deemed to have been given if no reply was received from the BoZ within 15 days upon the service of a request for consent by a bank to BoZ.

The debts were ultimately assigned to the Bank of America (“**BoA**”) by Masstock (International) Ltd (“**Masstock**”). A request for consent to the assignment was sent by Masstock to BoZ and BoZ did not respond. However, the transaction between Masstock and BoA for the assignment was completed and became effective before the expiry of 15 days from the date the request for consent to the assignment was sent.

Subsequently, BoA declared a trust in its right of the debt due from BoZ in favour of BT. The declaration of trust recorded that BoA was the owner of the debt under the assignment from Masstock, and that it had entered into the declaration of trust for the avoidance of doubt because of BoZ’s challenge to the chain of assignments from BoA to BT. It declared that BoA held its rights, title, interest and benefits in respect of the debt due from BoZ on trust for BT and acknowledged that BT had the right to take all such lawful steps in its own name to secure payment by BoZ.

With this declaration of trust, BT commenced the present action suing as beneficiary under the declaration of trust naming BoA as defendant on the basis of the *Vandepitte* procedures. The *Vandepitte* procedures enable a beneficiary under a trust to obtain what he is beneficially entitled to in a situation in which the trustee will not sue for what the trustee is legally entitled to but which if he succeeds he must hold for the beneficiary.

BoZ challenged BT’s claim on two grounds, namely:

- **First ground:** the assignment to BoA was invalid as the assignment was effected without BoZ’s prior consent; and

- **Second ground:** even if the assignment to BoA were valid, permitting BT to claim against BoZ as a beneficiary under the declaration of trust would achieve a result that was inconsistent with the terms of the Facility that precluded anyone from enforcing BoZ's obligations under the Facility unless the loan was assigned to the assignee with the prior consent of BoZ in accordance with Article 12 of the Facility.

On the first ground, the judge at first instance held that the assignment was valid because BoZ was deemed to have consented to the assignment for not replying to Masstock's request for consent within the time frame stipulated under Article 12. However, the judge dismissed BT's claim eventually approving of BoZ's argument on the second ground. The English High Court held that it was not open to BoA to declare itself trustee for BT in order to entitle BT to make the claim against BoZ.

In the present appeal, both parties appealed against the High Court's decision, with BT appealing against the judge's decision on the second ground and BoZ appealing against the decision that the assignment was valid.

First ground

The English Court of Appeal disagreed with the English High Court (with Waller J dissenting) and held that the assignment was invalid. The court found that, on the construction of the facts of the case, BoZ's prior consent to the assignment had not been obtained in accordance with Article 12 of the Facility when the assignment was effected.

It was held that Article 12 of the Facility prohibited the assignment of established debt save within the restricted limits there allowed. It followed that BoA lacked legal title to the debt in question to even declare itself trustee for BT in order to entitle BT to make the claim against BoZ. Hence, the English Court of Appeal was of the view that, on this point alone, the appeal should be dismissed.

However, for completeness, the English Court of Appeal went on to consider the second ground and highlighted useful principles governing the *Vandepitte* procedures.

Second ground

The English Court of Appeal held that, on the facts, there was nothing in Article 12 of the Facility to suggest that the limitations on assignment went as far as preventing the contract between would-be assignor and assignee taking effect as between those two as a declaration of trust. As a matter of law, there is good authority for the proposition that a failed assignment may take effect as a declaration of trust between its immediate parties. This is certainly true so far as a declaration of trust which is limited to the proceeds of a claim (or the fruits of a contract) when received.

However, the ultimate question in the present appeal was whether, in the present circumstances where there had been a prohibition on assignment, and the legal owner declined himself to claim, the law would permit the beneficiary of a trust to make use of the *Vandepitte* procedures in order to reduce a debt into possession.

The English Court of Appeal agreed with the High Court judge that, as a general principle, the law would not permit the *Vandepitte* procedures, to be misused in the commercial context where inappropriate. It was the English Court of Appeal's view that the declaration of trust in the present matter was merely a device to bring before the court, at the instance of BT, a claim

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which BoA could not have otherwise brought before the court. On that hypothesis, the court held that equity would not allow it to enforce the declaration trust. Accordingly, BT's claim should also be dismissed on this ground.

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Dispute resolution

Arbitration

Singapore High Court finds no breach of natural justice in Philippine arbitration case

Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc
[2007] 1 SLR 278; [2006] SGHC 206

The decision in *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* demonstrates that Singapore courts will not be inclined to interfere with the arbitral process, particularly to set aside awards issued by international arbitral tribunals, in the absence of manifest breach of the rules of natural justice.

The facts

The Government of the Republic of the Philippines ("**GOP**") applied, under section 24 of the International Arbitration Act (the "**Act**") and Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") to set aside the partial award (the "**Award**") made in the arbitration between GOP and Philippine International Air Terminals Co, Inc. ("**PIATCO**").

The dispute between the parties arose from a project involving the construction of a third terminal building at the Ninoy Aquino International Airport in Manila. GOP awarded PIATCO the rights over the project under various concession agreements, including an amended and restated concession agreement dated 26 November 1998 (the "**ARCA**").

PIATCO duly commenced construction and asserted that by November 2002, the terminal was prepared to start operations. In January 2003 however, GOP advised PIATCO that the award of the project to PIATCO was null and void and accordingly, filed several petitions with the Philippine Supreme Court to enjoin enforcement of the concession agreements.

PIATCO responded by commencing arbitration proceedings with the International Chamber of Commerce International Court of Arbitration ("**ICC**") pursuant to the arbitration clause of the ARCA (the "**arbitration agreement**").

On 5 May 2003, the Philippine Supreme Court issued its decision (the "**Agan decision**") whereby it held by a majority that there had been serious violations of the Philippine Constitution and certain statutes and rules of fundamental public policy that rendered the concession agreements null and void *ab initio*.

The arbitration proceedings and award

The arbitration agreement provided:

“All disputes, controversies or claims arising from or relating to the construction of the Terminal and/or Terminal Complex or in general relating to the prosecution of the Works shall be finally settled by arbitration in the Republic of the Philippines following the Philippine Arbitration Law or other relevant procedures. All disputes, controversies or claims arising in connection with the Agreement except as indicated above shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators in accordance with the said Rules. The place of arbitration shall be Singapore and the language of the arbitration shall be English.”

At the outset, GOP took the stand that the arbitration agreement was not valid and that an ICC arbitration tribunal had no jurisdiction to adjudicate any dispute between it and PIATCO. Notwithstanding GOP's objections, the ICC decided that the arbitration should proceed between the parties and informed the parties that the arbitral tribunal, when constituted, would have to decide on its own jurisdiction.

After PIATCO filed its reply in the arbitration proceedings, the parties agreed to divide the arbitration proceedings into jurisdiction and quantum phases. At the preliminary conference, GOP proposed and the tribunal recognised that parties would have to brief the tribunal on the legal issues governing the arbitration agreement and the law governing the arbitration proceedings. The determination of these issues was recognised as a necessary prerequisite to enable parties to make their submissions on jurisdiction and the validity of the arbitration agreement. The parties made their respective submissions.

On 3 September 2004, the tribunal informed the parties that it intended to render its decision in the form of a partial award. GOP objected on the basis that an award would, in contrast to an order, resolve disputed issues finally and definitely and, in this case, the tribunal could not decide with finality the issue of the law governing the arbitration proceedings until it had considered and decided certain related jurisdictional issues which would be adjudicated with the merits.

The tribunal did not reply to GOP on its objections and instead issued the Award which was received by the parties on 27 October 2004. In the Award, the tribunal decided: (i) that Singapore law was the law governing the arbitration proceedings, and (ii) that Singapore law was the law governing the arbitration agreement.

On the first issue, the tribunal considered that Singapore was designated as the place of arbitration in order to obtain a neutral venue for dispute resolution in view of the fact that PIATCO was contracting with the government of the Philippines with respect to an infrastructure project in the Philippines. It followed, in the tribunal's view, that the procedure of the arbitration would be governed by the law of Singapore.

On the second issue, the tribunal found that the principle of severability of an arbitration clause from the contract applied in this case. It noted that the parties had not specifically chosen a law to govern the arbitration agreement and considered whether there had been an implied choice of law. The tribunal observed that the arbitration agreement contained two separate and severable arbitration obligations which were not necessarily governed by the same legal regime. The first related to construction disputes which were to be settled by arbitration in the Philippines. The second related to all other

disputes which were to be referred to ICC arbitration in Singapore. From this, the tribunal concluded that there was a “strong implication” that the parties implied a choice of Singapore law to govern the arbitration of non-construction disputes.

The challenge

GOP applied to the Singapore High Court to set aside the Award. The two key findings of the tribunal that GOP complained about were the finding on the applicability of the principle of severability and the finding that Singapore was chosen as a neutral place for the arbitration.

The grounds of GOP’s application included: (i) the allegation that there had been a breach of natural justice in the conduct of the arbitration before the ICC, and (ii) that the Award dealt with issues not within the scope of the submission to arbitration.

Severability

GOP contended that the issue of severability was critical to its objections to the jurisdiction of the tribunal because of the decision in the *Agan* case. If the concession agreements were null and void, the arbitration agreement was also null and void, unless it could be severed from the concession agreements. GOP asserted that in the preliminary conference, the parties were directed to provide submissions on choice of law issues only – that is, relating to the law governing the arbitration proceedings and the law governing the arbitration agreement. In GOP’s view, the tribunal’s finding in the Award that the principle of severability applied was a premature determination made before the jurisdictional phase of the arbitration. As such, the tribunal went beyond the scope of the issues submitted to it at that time, and effectively deprived GOP of one of its jurisdictional objections.

PIATCO contended that consideration of the issue of severability was a necessary ingredient in the tribunal’s reasoning process that led it to hold that Singapore law was the proper law of the arbitration agreement.

The Singapore High Court considered that the tribunal was faced with a classic challenge to its jurisdiction, i.e. that there was no basis for such jurisdiction since the jurisdiction clause had allegedly died with the main contract. Yet at the same time the tribunal was being asked to consider what laws governed the arbitration agreement and proceedings. The court agreed with PIATCO that in such a situation, it was a prerequisite for the tribunal to consider whether the arbitration agreement could be separated from the main contract and survive despite the alleged nullity of the main contract, or whether it had been extinguished with its parent. If the principle of severability was not available to the tribunal then it would have been pointless for it to go on to consider the choice of law issues.

The court also found merit in PIATCO’s contention that GOP, in its submissions, had dealt with severability in substance even if it had not used that precise word. When GOP recognised that there could potentially be different choices of law in relation to the main contract, the arbitration agreement and the arbitration procedure, the court considered this to mean an implicit admission that the principle of severability would necessarily be involved when the issue of the governing law of any of these matters arose.

The court further stated that whilst GOP might not have wanted the severability issue to be decided at the choice of law stage, this was not a matter that it could control if the tribunal considered that the determination of this issue was a necessary part of determining the governing law. While the court can appreciate GOP’s argument that the issue of severability affects

one of its jurisdictional objections, that consequence cannot change the legal necessity (as held by the tribunal) for the tribunal to consider severability before going onto the substantive hearing on jurisdiction.

The court concluded that the issue of severability was within the scope of the matters submitted to the tribunal, and that GOP had ample opportunity to address it. In the light of this, there was no breach of natural justice under the Act or the Model Law to merit the setting aside of the Award.

Neutrality

GOP's case on the foregoing issue was two-fold. First, it argued that the tribunal did not inform the parties that it would be making a determination on the neutrality of Singapore as a venue for arbitration. Thus, it was allegedly not afforded an opportunity to address the issue. Secondly, it contended that the finding of neutrality in the Award caused grave prejudice to GOP because it was tantamount to a pre-determination of one of GOP's jurisdictional objections at the next phase of the proceedings.

The Singapore High Court pointed out that an arbitral award is not liable to be struck down on application in the courts because of allegations that it was premised on incorrect grounds, whether of fact or of law. The court considered that GOP's complaint in relation to the tribunal's making a finding that the law governing the arbitration proceedings is Singapore law when this was in fact an issue entwined with the jurisdictional issue was really an appeal on the merits against this part of the tribunal's decision. An application to set aside an award made in an international arbitration is not an appeal on the merits and cannot be considered in the same way as the court would consider the findings of a body over whom it had appellate jurisdiction.

Moreover, it was the court's view that, in the absence of evidence as to the actual circumstances in which the contract was concluded, the tribunal proceeded properly and objectively in construing the contract before it. The court observed that the tribunal adopted an objective approach when it construed the contract before it as it would construe commercial contracts, that is, having regard to the arbitration agreement in the context of the document as a whole and the surrounding circumstances as they were made known to the tribunal. The conclusion that it came to on the basis of the document alone could not estop or prevent it in any way, after hearing the evidence, from deciding the jurisdictional arguments on the basis of the evidence put forward and the submissions of the parties. No pre-judgment of the issue had been made. Therefore, GOP's challenge on the grounds of breach of natural justice with respect to this issue must be dismissed.

The court dismissed the application to set aside the Award with costs.

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Insolvency

English Court of Appeal: Payment by insolvent company to non-creditor constitutes a preference under English Insolvency Act

Re Sonatacus
[2007] EWCA Civ 31

In the recent decision of *Re Sonatacus* [2007] EWCA Civ 31, the English Court of Appeal had to deal with the issue of preferential payment from an insolvent company (the “**Company**”) to a party which was not a creditor of the Company (the “**Recipient Company**”). In the end, the court held that the payment constituted a preference under the English Insolvency Act (the “**Insolvency Act**”).

The claw-back provisions in the UK Insolvency Act discussed in the present case have their equivalent in sections 98, 99, 100 and 102 of the Singapore Bankruptcy Act. These provisions in the Bankruptcy Act are applicable to Singapore-incorporated companies by virtue of section 329 of the Companies Act and section 4(1) of the Civil Law Act, subject to the necessary modifications under the Companies (Application of Bankruptcy Act Provisions) Regulations. As such, this English Court of Appeal case might be of relevance should similar issues arise before the Singapore courts.

Mr S was the sole director of the Company and Mr A was a director and effective controller of the Recipient Company. Mr S and Mr A were friends. The Recipient Company agreed to lend a sum of £65,000 (the “**loan amount**”) to Mr S. The loan agreement was evidenced in a deed expressed to be made between Mr S and the Recipient Company. The Company was never a party to the loan agreement. The loan agreement provided for Mr S to repay the loan amount to the Recipient Company on written demand, together with interest.

At the request of Mr S, the loan amount was paid directly to the Company instead. However, the obligation to repay the loan amount to the Recipient Company remained with Mr S. Later on, Mr S directed the Company to transfer the sum of £50,000 into the Recipient Company’s bank account. The Company was insolvent at the time of the transfer, or became insolvent as a result thereof.

Subsequently, when the Company was wound up, its liquidators applied for a declaration that the payment of £50,000 made by the Company to the Recipient Company constituted a preference under the UK Insolvency Act and hence was void or voidable accordingly (the “**first application**”). It was alleged on behalf of the liquidators that the Company had received a loan from the Recipient Company in the sum of £65,000 thus making the latter a creditor of the Company. Further, in receiving the repayment of £50,000, the Recipient Company had been treated preferentially as compared to other non-secured creditors of the Company. In response, Mr A put in evidence to suggest that the loan of £65,000 had been made to Mr S personally, and that the Recipient Company was therefore a creditor of Mr S and not of the Company. Mr A’s evidence prompted the liquidators to make a second application for a declaration that the payment of £50,000 constituted a transaction at an undervalue under the Insolvency Act and was void or voidable accordingly because the Recipient Company allegedly provided no consideration to the Company for receiving the payment of £50,000 (the “**second application**”).

The district judge dismissed the first application but acceded to the second application by making a declaration that the payment of £50,000 made by the Company to the Recipient Company constituted a transaction at an undervalue under the UK Insolvency Act as no consideration was received by the Company from the Recipient Company in return for the payment. The Recipient Company appealed against the decision of the district judge but was dismissed (the “**first appeal**”). Hence, the present appeal by the Recipient Company to the Court of Appeal.

After a close analysis of the relationships between the parties and the effect of the payments that were made, the Court of Appeal made the following propositions:

- on the payment of the £65,000 by the Recipient Company to the Company, Mr S became a debtor to the Recipient Company for that amount and the Company became a debtor to Mr S for that amount
- on the payment of the £50,000 by the Company to the Recipient Company, the debts of the Company to Mr S and of Mr S to the Recipient Company were, to that extent, respectively discharged
- insofar as the payment of the £50,000 discharged the debt of the Company to Mr S, the Company gave a preference to Mr S under the Insolvency Act

The above propositions formed the basis for the dismissal of the first appeal in the court below. The judge who heard the first appeal concluded that the only consideration on which the Recipient Company could rely to defeat the suggestion of undervalue was the preferential payment to Mr S. The judge held that as a matter of law, a preferential payment which was inevitably susceptible to challenge could not amount to a consideration for the making of that very payment. The judge’s reasoning was challenged in the Court of Appeal. The Court of Appeal felt that the position in regard to the transaction at an undervalue was unsatisfactory and might require adjournment for further submissions and oral argument. However, the Court of Appeal decided to move on to the issue of preference claim, which was the substance for the first application made by the liquidators.

When the liquidators made the first application for the declaration that the payment of £50,000 made by the Company to the Recipient Company constituted a preference, they relied on section 239 of the UK Insolvency Act. One of the elements which must be proved under section 239 was that the preferential payment must have been made to a person who was a creditor of the insolvent company. As the payment of £50,000 was paid to the Recipient Company who was not a creditor of the Company, the Court of Appeal opined that the liquidators must also rely on section 241(1)(d) of the UK Insolvency Act, subject to the defence under section 241(2) of the same Act.

Basically, section 241(1)(d) of the Insolvency Act allows the court to direct a person who was not a creditor of the insolvent company, but who has received the benefits of the preferential payment which was established to have been made to a creditor of the insolvent company under section 239, to pay up the necessary sums. In the present case, the Court of Appeal concluded that it was without doubt that the Recipient Company was a person that received a benefit from the preference given by the Company to Mr S. However, the Recipient

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Company may rely on the defence in section 241(2) of the Insolvency Act to prove that it received the sum of £50,000 in “good faith”. On the facts, the Court of Appeal held that the Recipient Company failed to establish the “good faith” element.

The Court of Appeal dismissed the appeal but substituted for the declaration made by the district judge a declaration that the payment of £50,000 made by the Company to the Recipient Company constituted a preference within sections 239 to 241 of the UK Insolvency Act.

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General

Contract

English Court of Appeal construes consent and approval clauses in contractual licence

Lymington Marina Limited Macnamara & Ors
[2007] EWCA Civ 151

In *Lymington Marina Limited Macnamara & Ors*, the English Court of Appeal had to consider the scope of a clause in a licence granting marina berthing rights that permitted the licensor to refuse to approve a sub-licensee.

Lymington Marina Limited (“LML”) developed a marina and granted licences to berth a yacht at the marina. One of the licences was issued to Mr Macnamara, a keen yachtsman. Mr Macnamara died leaving three sons: Bingham, John and Rory. After a protracted dispute, the licence was assigned by the executor of Mr Macnamara’s estate, with the approval of LML, to Bingham. Bingham wished to grant sub-licences, to his brothers John and Rory. This appeal concerned the powers of LML under the licence to withhold its approval to sub-licences to John and Rory.

The relevant provisions, found in clause 3(k) of the licence, provided that the licensee may:

- “(i) *assign this Licence as a whole ... to an assignee approved by [LML] which approval may be granted or withheld at [LML’s] absolute discretion; or*
- “(ii) *authorise a third party to exercise all the rights hereby granted as a whole ... provided always that such third party shall first be approved by [LML].”*

Bingham sought to grant sub-licences to his brothers pursuant to clause 3(k)(ii).

According to LML, one of the original reasons for setting up the marina was to provide LML’s parent company with a regular clientele and a source of income for its repairing business. LML feared that sub-licensees would be casual users of berths in the marina and therefore would be much less likely to make use of the repair facilities than long-term users.

Among other issues, the Court of Appeal had to consider on what grounds, LML could refuse to approve a third party under clause 3(k)(ii). In approaching this issue, the court held that there were two material questions:

- (1) was LML's power to refuse to approve the sub-licensee restricted to grounds related to the particular sub-licensee?
- (2) was the power to refuse to approve the licensee subject to any restrictions, such as that it must be exercised in good faith, and for grounds related to the grant of the sub-licence?

Refusal of approval must be related to the third party

On question (1), the court was of the view that the contest was between an absolute discretion, which could be exercised on any ground, and a discretion that could only be exercised on the basis that there was some objection to the chosen sub-licensee arising in connection with his proposed use of the marina.

The Court of Appeal held that the express wording of clause 3(k)(i) and clause 3(k)(ii) made it impossible to hold that there was no distinction between LML's power to refuse approval under those provisions. Clause 3(k)(i) gave LML an express power to withhold approval in its absolute discretion, whereas clause 3(k)(ii) did not. Moreover, clause 3(k)(ii) expressly stated that what had to be approved was the third party himself. The grounds for objecting to a particular licensee had to be grounds that arose out of his proposed use of the marina. It followed from this interpretation that LML could not refuse to approve a sub-licensee on the basis that sub-licences were contrary to the commercial interests of itself or its parent company, save in so far as its commercial interests coincided with the refusal of approval to the grant of the sub-licence on grounds related to the particular sub-licensee.

Power to refuse approval need not be objectively justifiable

On question (2), it was held in the High Court that the refusal of consent to the sub-licensee failed the test of *Wednesbury* unreasonableness, a principle well-known in judicial review against public authorities arising from the decision of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. The Court of Appeal held that the judge was in error in using public law principles in this context. The right approach was to ask whether any term should be implied into clause 3(k)(ii) so that, even if LML exercised the power for reasons related to the identity of the proposed sub-licensee, the exercise of the power could still be set aside if the grounds for refusal of approval were, for instance, in bad faith or wholly unreasonable. A term is only to be implied into a contract in this type of situation if it is so obvious that reasonable parties would not have it necessary to include it or if the implication of the term is necessary to give the contract business efficacy.

In the present case, the implication of a term that any refusal of approval should be objectively justifiable would be onerous to LML and therefore could not have been so obvious that the parties to the licence would not have thought it necessary to mention it. Likewise, the provisions of clause 3 could work even if, under clause 3(k)(ii), LML's rejection did not have to be on objectively justifiable grounds. In those circumstances, the Court of Appeal did not consider that the term could be implied that consent could only be withheld on objectively justifiable grounds.

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

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Power to refuse approval must be exercised in good faith

Nonetheless, the Court of Appeal considered that there had to be implied a term that the power to withhold approval should be exercised in good faith and that the approval would not be withheld arbitrarily. This was because the parties clearly intended that the holder of the licence should have power to grant sub-licences under clause 3(k)(ii), subject only to the withholding of approval to the proposed sub-licensee. It was obvious that if the licence holder was to obtain the proper benefit of that clause, LML should not be in a position to withhold its approval in bad faith or capriciously.

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English High Court holds that an obligation to use reasonable endeavours is less stringent than one to use best endeavours

Rhodia International Holdings Limited & Anor v Huntsman International LLC [2007] EWHC 292 (Comm)

The decision of the English High Court in *Rhodia International Holdings Limited & Anor v Huntsman International LLC* is instructive for its construction of the term “reasonable endeavours” which is commonly found in commercial contracts. The court held that an obligation to use reasonable endeavours is less stringent than one to use best endeavours.

By a Sale and Purchase Agreement (the “**SPA**”), the first and second claimants (collectively referred to as “**Rhodia**”) agreed to sell to the defendant (“**Huntsman**”) or its designated purchaser (“**HSSUK**”) its chemical surfactants business at the Whitehaven site.

At the time the SPA was entered into, steam and electricity at the Whitehaven site were produced by a combined heat and power plant (the “**CHP Plant**”) at the site. The CHP Plant was supplied, and electricity and steam were provided, by National Power (Cogeneration) Limited (“**Cogen**”) pursuant to a CHP Energy Supply Contract made between the second claimant and Cogen (the “**Energy Supply Contract**”). The Energy Supply Contract permitted the second claimant to novate its rights under the contract subject to certain conditions being met, including that the second claimant satisfies Cogen of the capability of the new party to meet its obligations under the Energy Supply Contract.

Clause 15 of the SPA contained detailed provisions relating to the obtaining of consent to the novation of certain identified restricted contracts (of which the Energy Supply Contract was one). In particular, the clause imposed obligations on both parties to use reasonable endeavours to obtain the consent to the novation of the other party to the relevant restricted contract. Pending novation, Huntsman undertook to perform Rhodia’s obligations under the Energy Supply Contract and did in fact do so between March 2001 and March 2004.

By March 2004, as the Energy Supply Contract had not been novated to HSSUK, Huntsman gave notice to Rhodia that it no longer intended to perform Rhodia’s obligations under the Energy Supply Contract. At that time, Rhodia had no operational presence at the Whitehaven site and so was not in a position to perform those obligations itself. Shortly thereafter, the CHP Plant was shut down. In October 2004, Huntsman announced that it intended to close down the plant at Whitehaven.

In October 2005, Cogen commenced arbitration proceedings against the second claimant for the non-payment of invoices submitted by Cogen for the supply of steam and electricity under the Energy Supply Contract.

Rhodia claimed that any liability it had to Cogen was caused by Huntsman's breaches of the terms of the SPA, particularly clause 15. The central dispute was whether or not Huntsman complied with its obligations under clause 15. For the purposes of a discussion on "reasonable endeavours", the relevant segment of clause 15 provided as follows:

"15.1.1 With effect from the date of the [Sale and Purchase] Agreement, [the second claimant] and the Purchaser [i.e. Huntsman] shall use their respective reasonable endeavours to obtain all requisite consents or agreements of all parties to each Restricted Contract to whatever assignment, transfer or novation is necessary to enable the Purchaser to perform such Restricted Contract on or after Completion. For the purpose of obtaining any such consent or agreement, if such other party to the Restricted Contract...so reasonably requires, the Purchaser, its immediate parent company or one of the Purchaser's subsidiaries or subsidiary undertakings with sufficient standing and net worth shall enter into a direct covenant with such other party to perform and observe such Restricted Contract...from the date of its assignment, novation or transfer in favour of the Purchaser."

"Reasonable endeavours" less stringent than "best endeavours"

The court considered whether "reasonable endeavours" was to be equated with "best endeavours".

Referring to the unreported decision of Rougier J in *UBH (Mechanical Services) v Standard Life* (1986) and the decision of *Jolley v Carmel Limited* [2000] 2 EGLR 154, the court held that there is a distinction between best endeavours and reasonable endeavours and that the latter is less stringent than the former. In the court's view, an obligation to use reasonable endeavours to achieve an aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can. In that context, the court opined that it may well be that an obligation to use *all* reasonable endeavours equates with using best endeavours.

Scope of "reasonable endeavours"

As to what reasonable endeavours might entail, the High Court agreed with the analysis of Lewison J in *Yewbelle v London Green Developments* [2006] EWHC 3166 (Ch) where it was held that an obligation of one party to use reasonable endeavours to reach an agreement, not with the other party to the contract, but with a third party, did not require the party subject to the obligation to sacrifice its own commercial interests.

The High Court in the present case held that this rule is subject to the caveat that, where the contract specified certain steps have to be taken (as in the present case the provision of a direct covenant if so required) as part of the exercise of reasonable endeavours, those steps had to be taken, even if that could involve the sacrificing of a party's own commercial interests.

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

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Whether Huntsman had used its reasonable endeavours

The main thrust of Rhodia's complaint that Huntsman failed to use its reasonable endeavours to obtain Cogen's consent to the novation concerned the failure to provide a parent company guarantee or some other form of "direct covenant" and a related failure to explore with Cogen what it was that it required in terms of comfort or security.

On the facts, the High Court held that by early October 2001 at the latest, Huntsman knew that Cogen was requiring a guarantee from Huntsman. The High Court found that Huntsman, in not providing whatever form of guarantee was acceptable to Cogen from October 2001 onwards, was in breach of its obligations under Clause 15.1.2 of the SPA to use its reasonable endeavours to obtain the consent of Cogen to the novation of the Energy Supply Contract.

The fact that to give such a guarantee might have involved Huntsman sacrificing its commercial interests was no answer where Huntsman had assumed an obligation in mandatory terms under clause 15.1.2 of the SPA.

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News

Singapore Technologies Semiconductors Pte Ltd acquires STATS ChipPAC Ltd

Singapore Technologies Semiconductors Pte Ltd ("**STSPL**"), a wholly-owned subsidiary of Temasek Holdings (Private) Limited ("**Temasek**"), has announced a voluntary conditional cash offer for the ordinary shares (the "**Shares**") and American Depositary Shares ("**ADSs**") of STATS ChipPAC Ltd ("**STATS ChipPAC**") that STSPL does not already own.

The offer also includes an offer by STSPL for STATS ChipPAC's outstanding US\$115 million Convertible Notes due 2008 and US\$150 million 2.50 per cent. Convertible Notes due 2008.

Advising Temasek and STSPL are Partners Lucien Wong, Christina Ong, Lim Mei, Steven Lo and Yeoh Lian Chuan, Senior Associates Leona Yuen and Koh Shang Yun and Associate Cheryl Teo.

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Singapore Exchange Limited sells SGX Centre

Three wholly-owned subsidiaries of Singapore Exchange Limited, namely, the Singapore Exchange Securities Trading Limited, the Singapore Exchange Derivative Trading Limited and The Central Depository (Pte) Limited have agreed to sell to United Overseas Bank Limited their interest in the premises comprising certain units at the SGX Centre.

Advising Singapore Exchange Limited are Allen & Gledhill Partners Christina Ong, Margaret Soh, Eudora Tan and Steven Lo and Associate Tan Li Ping.

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Allen & Gledhill is IFLR Singapore Law Firm of the Year 2007

Allen & Gledhill has been named Singapore Law Firm of the Year 2007 by *International Financial Law Review*. This is the eighth consecutive year that the Firm has won the award, which is given to the firm with the best track record in providing advice on local law in relation to the most innovative international finance deals from the country in question. The prize-giving ceremony was held at The Ritz-Carlton, Hong Kong, on 1 March 2007.

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