

Legal Bulletin

A summary of developments in the law

At a glance

| | |
|---|----|
| MAS to establish Corporate Governance Council and review of Code of Corporate Governance in the pipeline | 4 |
| MOM releases Tripartite Advisory on Managing Manpower Challenges for companies no longer facing excess manpower | 5 |
| MOM conducts public consultation on draft Tripartite Guidelines for Re-employment of Older Employees | 6 |
| Singapore joins OECD white list after signing 12th agreement incorporating international standard for exchange of information for tax purposes | 8 |
| Parliament passes Income Tax (Amendment) Bill 2009: Implementing Budget 2009 changes and other changes | 9 |
| SGNIC launches Chinese domain names in Singapore | 10 |
| New UK Supreme Court replaces UK House of Lords from 1 October 2009 | 11 |
| UK Supreme Court focuses on meaning of clause in context of entire document and transaction rather than in isolation | 12 |
| Singapore High Court finds senior employee owing fiduciary duties akin to director | 14 |
| English High Court discusses meaning of “true and fair view” in warranty | 15 |
| Singapore High Court interprets meaning of “for the time being in force” in arbitration clause | 17 |
| Singapore Court of Appeal considers whether terms of agreement varied by “without prejudice” communications | 21 |

[Click here for Table of Contents](#)

In this issue

Articles

- MAS to establish Corporate Governance Council and review of Code of Corporate Governance in the pipeline 4
- MOM releases Tripartite Advisory on Managing Manpower Challenges for companies no longer facing excess manpower 5
- MOM conducts public consultation on draft Tripartite Guidelines for Re-employment of Older Employees 6
- Singapore joins OECD white list after signing 12th agreement incorporating international standard for exchange of information for tax purposes 8
- Parliament passes Income Tax (Amendment) Bill 2009: Implementing Budget 2009 changes and other changes 9
- SGNIC launches Chinese domain names in Singapore 10
- New UK Supreme Court replaces UK House of Lords from 1 October 2009 11

Cases

Banking

- UK Supreme Court focuses on meaning of clause in context of entire document and transaction rather than in isolation 12

Corporate & financial services

- Singapore High Court finds senior employee owing fiduciary duties akin to director 14
- English High Court discusses meaning of “true and fair view” in warranty 15

Dispute resolution

- Singapore High Court interprets meaning of “for the time being in force” in arbitration clause 17

General

Evidence

- Singapore Court of Appeal considers whether terms of agreement varied by “without prejudice” communications 21

News

- Harmony Convention Holding Pte Ltd's S\$129.5 million loan facilities 22
- Completion of offering of second series of notes guaranteed by Temasek Holdings (Private) Limited 23
- Initial public offering of Avago Technologies Limited 23

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Margaret Chew
Elizabeth Wong
Soo Seong Theng
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Anitha Rajaram
Natalie McGibbon

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| | |
|--|----|
| Acquisition of shares in Bharti Telecom Limited | 24 |
| Perennial Katong Retail Trust acquires Katong Mall | 24 |
| Allen & Gledhill electronic communications | 24 |

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

Articles

MAS to establish Corporate Governance Council and review of Code of Corporate Governance in the pipeline

On 19 November 2009, in delivering the keynote address at the 2009 Asian Investors' Corporate Governance Conference, Mr Heng Swee Keat, the Managing Director of the Monetary Authority of Singapore (the "**MAS**"), announced that a Corporate Governance Council (the "**Council**") will be established. The first mission of the Council will be to conduct a review of the Code of Corporate Governance (the "**Code**").

Establishment of Corporate Governance Council

The objective of the Council, comprising members from the private and public sectors, will be to promote a high standard of corporate governance in companies listed in Singapore so as to maintain and enhance investors' confidence. The Council is conceptualised with reference to the former Council for Corporate Disclosure and Governance (the "**CCDG**") but will be responsible for corporate governance matters only.

The members of the Council, and its terms of reference, are expected to be announced in early 2010.

Review of Code of Corporate Governance for listed companies

The Code prescribes a set of principles of good governance and code of best practices for companies listed on the Singapore Exchange Securities Trading Limited (the "**SGX-ST**"). It applies to the listed companies on a "comply or explain" basis.

When the Council is set up, it will conduct a review of the Code in the light of the corporate governance issues thrown up by the financial crisis, in particular, those relating to:

- Quality and composition of the Board;
- Implementation of effective risk management; and
- Remuneration practices.

Review of Corporate Governance Regulations for banks and significant life insurers

Singapore incorporated banks and significant life insurers are required to comply with mandatory Corporate Governance Regulations.

The MAS is in the midst of reviewing these Corporate Governance Regulations with a focus on:

- Enhancing the effectiveness of risk management at the Board level;
- Tightening the definition of "independence" by requiring the Nominating Committee to consider the length of service on the Board as an additional criterion in determining the independence of a director; and
- Aligning remuneration practices with the longer term interests of the banks and significant life insurers and their shareholders.

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Reference material

Please [click here](#) to read the key note address by Mr Heng Swee Keat on 19 November 2009, which is also available on the MAS website www.mas.gov.sg

[Back to Contents Page](#)

MOM releases Tripartite Advisory on Managing Manpower Challenges for companies no longer facing excess manpower

On 5 November 2009, the Ministry of Manpower (the “**MOM**”), the Singapore National Employers Federation (SNEF) and the National Trades Union Congress (NTUC) jointly released the Tripartite Advisory on Managing Manpower Challenges for Enhanced Competitiveness and Sustainability (the “**Advisory**”).

It has been one year since the issue of the Tripartite Guidelines on Managing Excess Manpower (issued in November 2008, revised in May 2009). Since then, some employers are no longer confronted with excess manpower. The purpose of the Advisory is to help such employers better manage long term manpower challenges. Employers still facing excess manpower may continue to refer to the Tripartite Guidelines on Managing Excess Manpower.

Scope of Advisory

The suggestions put forth in the Advisory include the following:

- **Review cost-cutting measures:** Employers should review whether implemented cost-cutting measures are still necessary and whether they could be gradually phased out. Any such review should be carried out in consultation with employees and trade unions (for unionised companies).
- **Moderate wage adjustments and/or one-off bonus payment:** Employers which have performed well or are recovering strongly should recognise their employees’ support and sacrifices during the economic downturn, for example, their willingness to accept wage freezes or wage cuts. Such employers could consider granting moderate wage adjustments and/or rewarding employees in the form of a one-off bonus payment. However, employers granting wage adjustments should be cautious and take into account the uncertain outlook in 2010.
- **Implement flexible wage systems and enhance productivity:** Employers are encouraged to implement the Monthly Variable Component (“**MVC**”) if they have not already done so, as the MVC can help them respond quickly to adverse economic conditions to cut costs and save jobs. Employers are also encouraged to focus on improving business productivity as a long-term strategy, e.g. introducing new products and services or improving processes.

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- **Pre-retirement planning and re-employment consultation:** Employers should engage employees (in consultation with unions for unionised companies) on pre-retirement planning and re-employment issues as early as possible, preferably not less than one year prior to re-employment.
- **Offer of re-employment:** Employers should offer re-employment contracts to eligible employees at least three months before retirement to allow sufficient time for the employees to consider the offer. The terms and benefits of re-employment contracts can be the same as those prior to re-employment, or different, subject to mutual agreement. Similarly, employers are encouraged to inform employees who do not qualify for re-employment at least three months before retirement.
- **Duration of re-employment:** Employers should offer three-year re-employment contracts, up to the age of 65. Alternatively, employers may re-employ employees on a term contract of at least one year, renewable up to the age of 65, so long as the employee continues to meet the eligibility criteria.
- **Employment Assistance Payment (“EAP”):** Employers should offer eligible employees a one-off EAP if they are unable to find suitable jobs for them. This is to tide these employees over a period of time while they look for alternative employment. The amount of EAP should be guided by the following principles:
 - There should be a minimum EAP amount to help the low-wage workers as they may have greater difficulty seeking alternative employment and could be adversely affected if they are not re-employed.
 - To moderate the financial burden on employers and to prevent the EAP from encouraging employees to stop working, there should be a maximum amount for EAP.
 - To take into account the employer’s obligation to re-employ eligible employees up to age 65, the EAP should decrease over time as this obligation diminishes as the employee approaches the age of 65 years.
 - For employees nearing age 65, the amount of EAP should not be greater than the salary payable for the remaining period of employment up to age 65.

The Draft Guidelines also provide guidance on wage adjustments, medical benefits, leave entitlement and other benefits.

Reference materials

Please click on the provided links to access the required information:

- [Consultation paper](#)
- [Draft Tripartite Guidelines for Re-employment of Older Employees](#)
- [Feedback Template](#)

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- [Press release](#)

These resources are available on the MOM website www.mom.gov.sg

[Back to Contents Page](#)

Singapore joins OECD white list after signing 12th agreement incorporating international standard for exchange of information for tax purposes

On 13 November 2009, Singapore signed its 12th agreement to incorporate the Organisation for Economic Cooperation and Development's (the "OECD") international standard for the exchange of information for tax purposes (the "EOI Standard") in the existing treaty for the avoidance of double taxation with France.

With the signing of this agreement, Singapore has joined the "white list" of countries that have substantially implemented the EOI Standard. Since then, agreements have also been signed with Brunei on 13 November 2009 and with Finland on 16 November 2009.

Current agreements implementing the EOI Standard

Singapore has signed agreements implementing the EOI Standard with the following countries:

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

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

Reference materials

The IRAS press releases announcing the agreements signed with France, Brunei and Finland can be found on the IRAS website www.iras.gov.sg. To read the press releases, please click on the provided links:

- [Agreement with France](#)
- [Agreement with Brunei](#)
- [Agreement with Finland](#)

[Back to Contents Page](#)

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Parliament passes Income Tax (Amendment) Bill 2009: Implementing Budget 2009 changes and other changes

Parliament passed the Income Tax (Amendment) Bill 2009 (the “**Bill**”) on 23 November 2009. When in force, the Bill will amend the Income Tax Act (the “**Act**”) to implement the tax changes announced in the Government’s 2009 Budget Statement as well as to make other amendments to the Act arising from a periodic review of the income tax system. The changes will come into force on various dates as indicated in the Bill.

Background

The Ministry of Finance (the “**MOF**”) conducted a public consultation on a draft Income Tax (Amendment) Bill 2009 (the “**draft Bill**”) from 22 June 2009 to 14 July 2009. On 21 August 2009, the MOF issued its response to the feedback received from the public consultation. The Bill was introduced in Parliament on 14 September 2009.

Scope of changes

The changes to the Act will encompass issues including the following:

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

Reference materials

Please [click here](#) for the full text of the Bill which is posted on the Singapore Parliament website www.parliament.gov.sg

Please [click here](#) to read the Second Reading Speech delivered in Parliament on 23 November 2009 by Mrs Lim Hwee Hua, Second Minister for Finance, on the Income Tax (Amendment) Bill 2009. The speech is posted on the Ministry for Finance website www.mof.gov.sg

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

[Back to Contents Page](#)

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Reference materials

Please [click here](#) to view the full text of the Advisory.

Please [click here](#) to read the MOM press release in relation to the above development.

Both resources are available from the MOM website www.mom.gov.sg

[Back to Contents Page](#)

MOM conducts public consultation on draft Tripartite Guidelines for Re-employment of Older Employees

From 16 November 2009 to 18 December 2009, the Ministry of Manpower (the “**MOM**”) is conducting a public consultation on the draft Tripartite Guidelines for Re-employment of Older Employees (the “**Draft Guidelines**”).

Background

Re-employment legislation was announced by PM Lee Hsien Loong in August 2007, as part of a series of measures to tackle the challenges of an ageing population. It was announced that re-employment legislation would be enacted by 1 January 2012 to require employers to offer re-employment to eligible workers, up to the age of 65.

On 23 April 2008, the Tripartite Implementation Workgroup (the “**TIWG**”) released the Tripartite Advisory on the Re-employment of Older Workers (the “**Advisory**”) to help companies adopt re-employment early, ahead of the 2012 timeline.

Taking into account the feedback obtained on the Advisory, the TIWG has updated and converted the Advisory to the Draft Guidelines. The Draft Guidelines offer practical solutions to help employers put in place the necessary systems and processes for re-employment, including pre-retirement planning, re-employment consultation, adjustments to wages and benefits, and the offer of employment assistance payment.

Expected time for implementation

The Draft Guidelines are expected to be finalised by early 2010 and then released for implementation by companies.

Scope of Draft Guidelines

The following are some of the measures proposed in the Draft Guidelines:

- **Re-employment eligibility criteria:** Employers should aim to re-employ the majority of their older employees. Employers should offer re-employment contracts to all employees who are medically fit to continue working and whose performances are assessed to be satisfactory or above.

SGNIC to launch Chinese domain names in Singapore

On 3 November 2009, the Info-communications Development Authority of Singapore's (the "IDA") issued a media release announcing that the Singapore Network Information Centre ("SGNIC"), the national registry for domain names, will be accepting initial registrations for Chinese Domain Names from 23 November 2009.

Domain names such as 开心.sg will be now possible. Registration can be made in all the domain name categories, namely .sg, .com.sg, .org.sg, .net.sg, .edu.sg, .gov.sg, .per.sg. The SGNIC will offer these Chinese domain names at both 2nd and 3rd levels in all categories. For instance, a 2nd level domain name would be 开心.sg, while a 3rd level domain name would read as 开心.com.sg.

Registration of Chinese domain names will be carried out in the phases set out below, with single-character Chinese domain names, such as 开.sg and numeric domain names in Chinese such as 一二三.sg to be available for a premium during the first three phases of registration:

- **Phase 1:** Government agencies (23 November 2009 - 31 December 2009)
- **Phase 2:** For trade mark holders (7 January 2010 - 18 February 2010)
 - Multiple applications will be subject to bidding.
 - Trade mark holders need to be registered with the Intellectual Property of Singapore. Service marks will not be eligible.
- **Phase 3:** For all (25 March 2010 - 6 May 2010)
 - Multiple applications will be subject to bidding.
 - All entities may apply but will be subject to a priority fee.
- **General launch:** 10 June 2010 onwards
 - All entities may apply.

Registrations are subject to the "SGNIC Chinese Domain Names (CDNs) Launch Guidelines" which prescribe policies and procedures concerning applications during the various phases, priority claims, biddings and other general implementation details.

Reference materials

Please [click here](#) to view the IDA media release posted on its website www.ida.gov.sg

Please click on the following provided links to access the required information which is available from the SGNIC website www.sgnic.sg:

- [Frequently Asked Questions](#)
- [SGNIC Chinese Domain Names \(CDNs\) Launch Guidelines](#)
- [Registrant Agreement](#)

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- [Registration Policies, Procedures and Guidelines](#)
- [Singapore Domain Name Dispute Resolution Policy](#)

[Back to Contents Page](#)

New UK Supreme Court replaces UK House of Lords from 1 October 2009

On 1 October 2009, the UK Supreme Court replaced the UK House of Lords as the highest court in the UK.

Structure

The UK Supreme Court is an independent institution, which is separate from Parliament. The first justices of the 12 member court are the existing law lords but future law lords will be appointed by a newly established and independent Supreme Court Appointments Commission. They are to be known as Justices of the Supreme Court.

The UK Supreme Court is now the final court of appeal for civil cases in England and Wales, Scotland and Northern Ireland and for criminal cases in England and Wales and Northern Ireland.

As a result of the change, what was formerly known as the “Supreme Court of England and Wales” (i.e. the Crown Court, High Court and Court of Appeal) will be renamed the “Senior Courts of England and Wales”.

Judgments

UK Supreme Court judgments will appear on the Decided Cases tab of its new website, available at www.supremecourt.gov.uk/index.html. The website also includes a tab for Current Cases as well as other useful links.

The archive of UK House of Lords judgments (1996-2009) can still be found on the House of Lords site, available at <http://www.publications.parliament.uk/pa/ld/ljjudgmt.htm>.

One of the first cases decided by the new UK Supreme Court, *In Re Sigma Finance Corporation (in administrative receivership)* [2009] UKSC 2, is reported below.

[Back to Contents Page](#)

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Cases

Banking

UK Supreme Court focuses on meaning of clause in context of entire document and transaction rather than in isolation

In Re Sigma Finance Corporation (in administrative receivership)
[2009] UKSC 2

On 1 October 2009, the UK Supreme Court replaced the UK House of Lords as the highest court in the UK. In one of its first cases, *In Re Sigma Finance Corporation (in administrative receivership)*, it was faced with the interpretation of a contentious clause within a Security Trust Deed. In that particular context, the UK Supreme Court held that the document had to be interpreted in the light of its commercial intention and the nature of the contracting parties' business. Detailed analysis of the clause's wording therefore had to give way to business common sense.

Facts of the case

Sigma Finance Corporation ("**Sigma**") was a structured investment vehicle whose business included acquiring asset-backed securities and other instruments, using funds raised by issuing or guaranteeing US dollar and Euro medium term notes as well as other sources, such as derivatives. All of Sigma's assets were secured in favour of its secured creditors under the terms of a Security Trust Deed ("**SD**").

The financial crisis affected the value and liquidity of Sigma's assets as well as its ability to issue notes and raise funds to cover its obligations under previously issued notes and instruments as they matured. As a result, Sigma was unable to meet a number of margin calls and in October 2008 an enforcement event was called under the SD and receivers were appointed.

Terms of the SD

The objective of the appeal was to decide how Sigma's receivers should distribute its remaining assets and the UK Supreme Court found this decision to be dependent upon construction of the SD.

Under the SD, on occurrence of an enforcement event, the security trustee had a realisation period of up to 60 days to establish a short term pool (for liabilities with a maturity/payment date falling less than 365 days from the enforcement event) and a long term pool (for any other liabilities) using Sigma's assets. The pools were to be structured with a view to matching the principal amount of Sigma's short and long term liabilities with high quality rated assets in corresponding principal amounts and with corresponding maturity and payment dates. If that became impossible because Sigma's assets were worth less than its total indebtedness, the trustee was to calculate the proportionate deficit and reduce the amount of assets allocable to each pool accordingly.

The contentious clause

The clause of the SD at issue in the case was clause 7.6, which, during the realisation period, provided for discharge of short term liabilities as they fell due. This would have created effective priority for such short term liabilities within that period and whether or not this should have been the case was in

contention. The lower courts had held that it should because clause 7.6 had a clear natural meaning and there was nothing in its language to affect the operation of that meaning in the circumstances which arose.

Clause interpretation

The UK Supreme Court stated that the principles upon which a court should interpret a document such as the SD were not in doubt and referred to previous UK House of Lords decisions which highlighted the danger of focusing too narrowly on a critical phrase.

Therefore, in this case, the focus had to be on the general nature of the business involved, apart from the document itself, and upon the scheme and wording of the SD read as a whole. It was felt that the lower courts had attached too much weight to the natural meaning of the words in clause 7.6 and too little weight to the context in which the sentence appeared. Such caution was appropriate because the SD was a long and carefully drafted document containing sentences, which, if the meaning now trying to be ascribed to them had been contemplated, could have been drafted more clearly. In addition, of much greater importance when ascertaining the meaning a reasonable person will attach to a document is an understanding of the document's overall scheme and a reading of its individual sentences in the context of such scheme.

The UK Supreme Court felt that in complex documents such as the SD there are bound to be ambiguities and "an over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose".

Decision

In the light of the interpretation principles referred to above, the UK Supreme Court held that the provision in clause 7.6 for discharge of the short term liabilities as they fell due appeared in a context where it was assumed that all secured liabilities could be covered and no issue of priority would arise. To treat it as creating effective priority for short term liabilities could involve the risk "of giving to a sentence, buried in a provision like clause 7.6 which was concerned essentially with a different situation, the effect of changing fundamentally the apparent financial structure of the relationship."

The appeal was therefore allowed and, on the true construction of clause 7.6, the receivers were not obliged to use Sigma's assets to pay short term liabilities falling due for payment in the realisation period. Such liabilities were to be treated along with all other short term liabilities in respect of which payments were to be made from the short term pool.

[Back to Contents Page](#)

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Corporate & financial services

Singapore High Court finds senior employee owing fiduciary duties akin to director

ABB Holdings Pte Ltd & Ors v Sher Hock Guan Charles
[2009] 4 SLR 111; [2009] SGHC 157

The Singapore High Court in *ABB Holdings Pte Ltd & Ors v Sher Hock Guan Charles* held that a very senior employee of a company, though not appointed as a director, may owe the same fiduciary duties as a director to act in good faith and in the best interests of the company.

Facts

The plaintiffs in this action were part of a worldwide group of companies (“**ABB Group**”) which manufactured and sold low, medium and high voltage circuit breakers. The defendant worked for various companies in the ABB Group between 1990 and February 2003. He was a director of the second plaintiff and held senior management positions in the third plaintiff, first as General Manager and then Vice-President and Head of Business Area Low Voltage Products.

After leaving the plaintiffs, the defendant joined a competitor, Xiamen Huadian Switchgear Co Ltd (“**Huadian**”) as its General Manager.

The plaintiffs commenced this action asserting that the defendant had breached:

- Implied fiduciary duties owed to the plaintiffs as an employee and/or director of the second and third plaintiffs; and
- Fiduciary duties set out in the express terms of the employment contracts between the defendant and the second and third plaintiffs.

This case summary focuses on the Singapore High Court’s ruling on the issue relating to implied fiduciary duties of the defendant.

Fiduciary duties to the second plaintiff as a director

The Singapore High Court held that as a director of the second plaintiff, the defendant occupied a fiduciary position *vis-à-vis* the second plaintiff and owed it fiduciary duties including:

- Duty to act in good faith and in the best interests of the second plaintiff;
- Duty not to place himself in a position where his duty to the second plaintiff and his personal interests may conflict;
- Duty to disclose to the second plaintiff any potential threat and/or competitive risk posed to their business.

Fiduciary duties to the third plaintiff as an employee

The defendant had been an employee and not a director of the third defendant. Agreeing with the plaintiffs’ argument, the Singapore High Court held that an employment relationship may give rise to fiduciary duties and

that a senior employee may owe the same fiduciary duties to his employer as a director of that employer would. The more senior the employee and the greater the responsibility assumed by him, the greater would be the likelihood that he does owe such duties.

On the facts, the court held that the defendant who had held senior executive and managerial positions in the third plaintiff owed it fiduciary duties. This is by virtue of the fact that the defendant was part of the “top management” of the third plaintiff and was in charge of all aspects of its business, including the hiring and firing of employees of the plaintiffs.

Therefore, the Singapore High Court held the defendant owed the same fiduciary duties to the third plaintiff as those he owed to the second plaintiff as a director.

Alleged breaches by the defendant

In summary, the court found that the defendant had breached his fiduciary duties to the second and third plaintiffs, while he was still a director or employee of the second and third plaintiffs, in the following respects:

- The defendant undertook a commission from a potential competitor (the “**Competitor**”) to communicate with a foreign technical adviser with a view to engaging the adviser’s services as a consultant for the Competitor; and
- The defendant was aware that the Competitor was intent on developing a new generation of medium voltage products which would compete in the same markets as those in which the second and third plaintiffs sold their products, but failed to disclose such information to the plaintiffs.

The court commented that the correct action on the defendant’s part would have been to inform the second and third plaintiffs of the Competitor’s plans and to politely refuse to assist the Competitor in its search for a foreign technical adviser.

Accordingly, the Singapore High Court gave judgment for the second and third plaintiffs against the defendant.

[Back to Contents Page](#)

English High Court discusses meaning of “true and fair view” in warranty

Macquarie Internationale Investments Limited v Glencore UK Limited
[2009] EWHC 2267 (Comm)

In *Macquarie Internationale Investments Limited v Glencore UK Limited* [2009] EWHC 2267 (Comm), the English High Court considered the concept of “true and fair” against the background of accounting principles/reporting standards and broader companies legislation. In particular, whether accounts which are prepared in circumstances where a company has no or insufficient evidence about an existing asset or liability can nevertheless be “true and fair”.

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Facts

The claimant (“**Macquarie**”) entered into a share purchase agreement (the “**S&P Agreement**”) with the defendant (“**Glencore**”), for the acquisition of Corona Energy Holdings Limited, a Group of companies (“**Corona Group**”), a supplier of energy and natural gas in the UK. According to the terms of the S&P Agreement, Glencore was the sole warrantor and provided Macquarie with a number of warranties, including that the accounts of the Corona Group showed a true and fair view of its assets and liabilities and that the management accounts fairly reflected the Corona Group’s financial position.

Glencore gave a warranty in the S&P Agreement that:

“... the [group] Accounts (a) have been prepared in accordance with relevant accounting standards...(b) give a true and fair view of the assets and liabilities ...and the profits and losses of the [company] to which they relate...[and] (d) make appropriate provision for or note or otherwise disclose all material actual liabilities and all material contingent, deferred and disputed liabilities...of which the [company] to which they relate was aware as at [the relevant date] and in respect of which disclosure or provision is required under the relevant Accounting Standards” (the “**S&P Agreement clause**”).

Subsequent to the S&P Agreement, companies within the Corona Group received unexpected invoices from Xoserve (the “**Xoserve charges**”), a company which managed the interface between gas shippers and gas transporters in the UK, for charges of approximately £3 million.

Before the English High Court, Macquarie alleged that the accounts and the management accounts were not as warranted because neither provided for the Xoserve charges. Macquarie sought damages for breach of warranty on the basis that the Corona Group’s subsidiaries had incurred charges that should have appeared in the accounts to comply with relevant accounting standards and to give a true and fair view of its finances. Macquarie contended that additional liabilities would have been reflected if the Xoserve charges had been included in the accounts and, as a result, Macquarie would have paid a significantly lower purchase price for the Corona Group.

“True and fair view”

The court noted that the warranties given separated the two requirements - for the accounts to have been prepared in accordance with accounting standards and to give a true and fair view of the target group’s financial position.

The court noted that the S&P Agreement did not define what it meant in using the expression “true and fair view”. However, the wording of the relevant clause of the S&P Agreement reflected the wording of section 226A(2) of the UK Companies Act 1985. Section 226A(2) of the UK Companies Act 1985 provides that (emphasis added):

“... the balance sheet must give a *true and fair view* of the state of affairs of the company as at the end of the financial year, and the profits and loss account must give a true and fair view of the profit and loss of the company for the financial year”.

This section is comparable to section 201(3) of the Singapore Companies Act and it should be noted that section 201 uses the term “true and fair view” throughout.

Section 227A(2) of the UK Companies Act 1985 contains a comparable obligation with regard to group accounts, again using the expression “true and fair view”.

The court noted that the expression “true and fair view” is not defined in statute, despite being used in the UK Companies Act 1985, but went on to observe that it is, however, an established and accepted standard for the preparation of financial statements. The expression must therefore be understood, and given effect to, in light of generally accepted accounting practices, which are reflected in the UK Financial Reporting Standards and, in this case, in the “relevant accounting standards” referred to in the S&P Agreement clause.

In relation to the Xoserve charges, the court agreed that the Corona Group did not have sufficient evidence of their existence before the S&P Agreement was completed and that it was not able to measure the charges as a monetary amount with sufficient reliability. The court therefore considered whether accounts prepared in circumstances where a company had no or insufficient evidence about an existing asset or liability could nevertheless be “true and fair”.

Noting that the Corona Group’s accounts were prepared in accordance with the standards stipulated in the S&P Agreement and, this being so, the court held that it could not then find that the accounts did not give a true and fair view of the assets and liabilities because of the missing Xoserve charges. The court found the same reasoning applied to the management accounts in relation to the Corona Group’s assets and liabilities. Accordingly, the accounts and management accounts were, in the circumstances of this case, true and fair and Glencore was not in breach of warranty.

[Back to Contents Page](#)

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Dispute resolution

Singapore High Court interprets meaning of “for the time being in force” in arbitration clause

Car & Cars Pte Ltd v Volkswagen AG & Anor [2009] SGHC 233

The case of *Car & Cars Pte Ltd v Volkswagen AG & Anor* was an appeal to the Singapore High Court against a decision of an Assistant Registrar which granted an order that all court proceedings in an action be stayed in favour of arbitration. The High Court interpreted the meaning of an arbitration clause which required the parties to refer any dispute to arbitration in accordance with the Rules of the Singapore International Arbitration Centre (the “**SIAC**”) “for the time being in force”. The court held that the words “for the time being in force” referred to the SIAC Rules in force at the time of the commencement of the arbitration.

The relationship between the parties

The appellant, Car & Cars Pte Ltd, had an agreement with the first respondent, Volkswagen AG, to import Volkswagen cars and commercial vehicles into Singapore (the “**Importer Agreement**”). The second respondent, Volkswagen Group Singapore Pte Ltd, is a subsidiary of the first respondent.

Through the Importer Agreement, which was concluded in 1999, the appellant was granted the right to import into Singapore and distribute Volkswagen cars and commercial vehicles. However, the respondents subsequently wished to import Volkswagen passenger cars on their own and not through the appellant. In December 2004, an agreement was concluded whereby the Importer Agreement was terminated, the second respondent became the Singapore importer for Volkswagen passenger cars, and the appellant was given the status of an authorised dealer for the second respondent (the “**Dealership Agreement**”). The appellant continued to be the importer of Volkswagen commercial vehicles and products other than passenger cars.

The agreements

The parties eventually agreed to terminate the Dealership Agreement and to effect a “clean break” between them. To achieve this, the parties entered into four written agreements (collectively, the “**four agreements**”):

- (i) An agreement between the appellant and the first respondent to terminate the Importer Agreement (the “**Termination of Importer Agreement**”)
- (ii) An agreement between the appellant and the second respondent to terminate the Dealership Agreement (the “**Termination of Dealership Agreement**”)
- (iii) A Sale of Assets and Volkswagen Parts Agreement made between the appellant, the second respondent and a third party company (the “**Sale of Assets and Parts Agreement**”)
- (iv) An assignment of the lease of the appellant’s business premises made between the appellant, the second respondent and a third party company.

Each of the agreements provided that upon payment of an agreed sum, neither party was to have any claim against the other party for any “breach, default, contravention or other non-observance of any nature whatsoever of any term...”.

The appellant made it clear to the court that it had always regarded, and continued to so regard, these four agreements as a single, indivisible arrangement. The second respondent considered that each of the four documents were standalone agreements.

The dispute

The appellant was to receive certain sums from the first respondent and the second respondent under the Termination of Importer Agreement and the Termination of Dealership Agreement respectively. The respondents were late in making both payments.

In its main action (the “**suit**”), the appellant alleged that the first respondent’s late payment constituted a repudiation of all four agreements upon which its rights against both respondents before the four agreements were concluded were restored. The appellant argued that it could therefore make claims against both respondents as the terms of the four agreements were no longer effective. Accordingly, the appellant made a claim for loss and damages arising from breach of the Importer Agreement.

The second respondent made an application before an Assistant Registrar (the “AR”), prior to the commencement of the suit, for a stay of the suit in favour of arbitration. The second respondent relied on clause 6 of the Termination of Dealership Agreement (the “**arbitration clause**”) which stated as follows (emphasis added):

“This agreement herein shall be governed by and its provisions interpreted in accordance with the law of Singapore. Any disputes arising out of or in connection with this agreement herein shall be referred to arbitration in the Singapore International Arbitration Centre in accordance with the Rules of the Singapore International Arbitration Centre *for the time being in force*”.

Decision of the AR

The AR interpreted the arbitration clause as meaning that the rules of the Singapore International Arbitration Centre (the “**SIAC**”) in force at the time of the commencement of the arbitration (that is, the SIAC Rules 2007) was applicable rather than the rules in force when the Termination of Dealership Agreement was concluded (that is, the SIAC Domestic Arbitration Rules or the SIAC Rules 1997, both of which have been repealed).

Rule 32 of the SIAC Rules 2007 provides that where the seat of arbitration is Singapore, the law of the arbitration shall be the International Arbitration Act (the “**IAA**”). The AR therefore held that the IAA was applicable and the grant of the stay sought by the second respondent in favour of arbitration was mandatory and he therefore granted the application.

Importance of determining if AA or IAA applies

The High Court started its inquiry into the dispute by considered which statute governed the arbitration clause. The court noted that which statute was applicable was significant due to the level of judicial intervention permitted in relation to an application to stay court proceedings in favour of arbitration.

The court observed that the IAA, as the AR also noted, makes the granting of a stay mandatory, if the proceedings concern a matter which is the subject of the arbitration agreement, unless the agreement is null and void, inoperative or incapable of being performed. None of these exceptions were alleged in this case and the subject of the main dispute falls within the scope of the arbitration agreement. On the other hand, the Arbitration Act (the “**AA**”) provides the court with the discretion to grant or refuse an application for a stay of proceedings in accordance with section 6(2) of the AA.

Interpretation of “for the time being in force”

The meaning of the phrase “for the time being in force” in the arbitration clause was disputed by the parties with the appellant arguing that it meant that the SIAC Rules in force at the time of the conclusion of the contract applied and the second respondent stating that it referred to the SIAC Rules in force at the time of the commencement of the arbitration.

In considering which option was correct, the court considered the Singapore Court of Appeal judgment of *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2009] SGCA 45 where the court found *prima facie*, the rules for the time being (as opposed to the rules applicable at the time the contract was made) are applicable where the contract provides that disputes are to be decided in accordance with the rules of a particular tribunal. The court in the present instance found this to support its view that the parties meant to refer to the rules in force at the time of the

commencement of the arbitration, i.e. the SIAC Rules 2007. Were it the intention of the parties to the agreement to refer to rules existing at the date of the contract, there would not have been a need for the arbitration clause to be in general words and the name of the rules not spelled out. There were two sets of rules in force at the date of the agreement - the SIAC Domestic Arbitration Rules and the SIAC Rules 1997 - and a choice would have had to be made if the parties intended one of these rules to apply at the time of the conclusion of the agreement.

In further support of its view, the court went on to examine the decision of the Court of Appeal in *Black & Veatch Singapore Pte Ltd v Jurong Engineering Ltd* [2004] 4 SLR 19 where the court approved of the view taken in the English case of *Bunge SA v Kruse* [1979] 1 Lloyd's Rep 279 that there is a *prima facie* inference that where the rules contained mainly procedural provisions, then the rules in force at the time of the commencement of arbitration would be the ones that applied in arbitration. However, if the rules contained mainly substantive provisions, then those in force as at the date the contract was entered into would apply.

The appellant in the present case argued that there are substantive differences between the IAA and the AA regimes and if not for the repeal of the SIAC Domestic Arbitration Rules, the parties would have had their arbitration governed by the AA and that this was a change that the parties could not have intended. The court noted, however, that the arbitration clause did not refer to either the IAA or the AA but instead refers to the rules of the SIAC, which are procedural in nature.

The court endorsed *Black & Veatch* and held that the rules at the time of the commencement of the arbitration - the SIAC Rules 2007 - applied and therefore, by virtue of rule 32 of those rules, the IAA applied.

Four agreements were separate agreements

The appellant's main argument against granting a stay of court proceedings was that there would be a multiplicity of proceedings and a possibility that the court and the arbitration tribunal would reach inconsistent findings. The basis of this argument was that the four agreements entered into by the parties constituted a "global settlement" and the failure to pay the monies owed under that settlement amounted to a repudiation of all four agreements such that the appellant's prior rights were restored.

The court noted that a risk of multiple proceedings will not alone automatically render a stay granted or denied, especially when the parties have by contractual agreement deliberately provided for dispute resolution procedures. Even if the parties had entered into a "global settlement", they had expressly chosen to enter into four separate agreements, each with its own unique dispute resolution clause, worded differently from each other. The court noted that it was within the purview of the parties to foresee that there would be a risk of multiplicity and inconsistent decisions if disputes arose out of those four agreements. The parties should therefore be held to their contractual obligations and should proceed to arbitration under the SIAC.

In view of the above, the court dismissed the appeal against the stay of court proceedings in favour of arbitration.

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

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The decision of the Assistant Registrar in this case was featured in a previous issue of the Allen & Gledhill Legal Bulletin (April 2009). To read the article entitled “*Singapore High Court examines applicability of different sets of SIAC rules to determine issue of governing regime for arbitration agreement*”, please [click here](#).

[Back to Contents Page](#)

General

Evidence

Singapore Court of Appeal considers whether terms of agreement varied by “without prejudice” communications

Quek Kheng Leong Nicky & Anor v Teo Beng Ngoh & Another Appeal [2009] SGCA 33

In *Quek Kheng Leong Nicky & Anor v Teo Beng Ngoh & Another Appeal* the Singapore Court of Appeal held that certain “without prejudice” communications should be admitted as evidence and that they varied the terms of a sale and purchase agreement entered into by the parties.

The case concerned a residential property in Singapore. The vendors of the property sued the purchasers for repudiatory breach of the sale and purchase agreement relating to the property (the “**S&P Agreement**”). The purchasers, in turn, sought specific performance of the S&P Agreement. The trial judge allowed the vendors’ claim and dismissed the purchasers’. The purchasers appealed against both decisions.

Background facts

The purchasers entered into an option to purchase the property in May 2007. The terms of the option also formed the terms of the S&P Agreement. In June of the same year, the purchasers exercised the option by paying a proportion of the purchase price and took vacant possession of the property in August.

The option terms provided for payment of the remainder of the purchase price within 12 weeks from the date of the option’s exercise (the “**Deferred Payment**”). However, there were a number of irregularities with the property and the purchasers’ solicitors sent a letter marked “without prejudice” to the vendors’ solicitors proposing that payment of the Deferred Payment be postponed until a date falling three weeks after resolution of these issues (the “**First Letter**”). The vendors’ solicitors replied with an unmarked letter proposing a two week delay instead of three (the “**Second Letter**”). The purchasers’ solicitors acknowledged this in a final letter stating that, notwithstanding the postponement, they trusted that the vendors were working to resolve the issues (the “**Final Letter**”). The Court of Appeal stated that these three letters were pivotal in the determination of the appeal.

Work took place in relation to resolution of the issues but in November 2007 the vendors demanded payment of the Deferred Payment by a new date. When the Deferred Payment was made after this date the vendors’ rejected it, stating that the S&P Agreement had been terminated by their acceptance of the purchasers’ breach in failing to pay within the original timeframe and demanding that the property be reinstated and delivered back to them.

The “without prejudice” communications

The Court of Appeal reiterated the general principles relating to “without prejudice” communications, namely that:

- Generally, communications between parties made on a “without prejudice” basis in the course of settlement negotiations are not admissible;
- Even though a piece of correspondence is not marked “without prejudice”, it may still be excluded if it is made in the course of negotiations to settle a dispute; and
- Where correspondence is marked “without prejudice”, the presence of these words places the burden of persuasion on the party who contends that these words should be ignored.

However, the Court of Appeal stated that the rule against admission of “without prejudice” communications is subject to a number of exceptions. The court stated that a key exception, which was critical to the determination of this appeal, is “where ‘without prejudice’ communications are admitted to determine whether a compromise was reached and, if so, what the terms of that concluded compromise were”.

On this basis the Court of Appeal held that both the First Letter and the Second Letter should be admitted because they were necessary to establish (when read with the Final Letter):

- Whether the parties had reached an agreement to vary the terms of the S&P Agreement and;
- The terms of this agreement.

In the court’s view, there was a variation and the S&P Agreement therefore had to be interpreted in accordance with what was contained in the First Letter and the Second Letter. As a result, the S&P Agreement was varied so as to render the Deferred Payment payable only two weeks after resolution of the property’s issues (the “**New Payment Date**”).

Purchasers not in repudiatory breach of contract

As the vendors had requested payment of the Deferred Payment on a date that fell before the New Payment Date, the purchasers’ failure to pay by that other date did not constitute a repudiatory breach of the S&P Agreement. Both appeals were therefore allowed.

[Back to Contents Page](#)

News

Harmony Convention Holding Pte Ltd’s S\$129.5 million loan facilities

Harmony Convention Holding Pte Ltd (“**Harmony**”), an indirect wholly-owned subsidiary of a joint venture company owned by Suntec Real Estate Investment Trust and certain private financial investors, was granted a senior loan facility of S\$89.5 million from Standard Chartered Bank and a mezzanine loan facility of S\$40 million from Credit Suisse, Singapore Branch

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to finance the acquisition of the Suntec Singapore International Convention & Exhibition Centre.

Advising Harmony are Allen & Gledhill LLP Partner Jafe Ng and Associate Gillian Cheong and advising Credit Suisse, Singapore Branch are Allen & Gledhill LLP Partners Margaret Chin and Magdalene Leong and Associate Marcus Lim.

[Back to Contents Page](#)

Completion of offering of second series of notes guaranteed by Temasek Holdings (Private) Limited

Temasek Financial (I) Limited (“**Issuer**”) has completed the offering of US\$1.5 billion 4.3 per cent. Guaranteed Notes due 2019 under the Issuer’s US\$5 billion Guaranteed Global Medium Term Note Program (“**Program**”). These notes are unconditionally and irrevocably guaranteed by Temasek Holdings (Private) Limited (“**Temasek**”). This marks the second issuance by the Issuer under the Program of US\$-denominated Guaranteed Notes following the inaugural US\$1.75 billion 4.5 per cent. Guaranteed Notes due 2015 issued under the Program in 2005. Temasek is rated AAA by Standard & Poor’s and Aaa by Moody’s Investors Service.

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

[Back to Contents Page](#)

Initial public offering of Avago Technologies Limited

Avago Technologies Limited launched its initial public offering (“**IPO**”) on the Nasdaq Global Select Market, raising gross proceeds of approximately US\$745 million. This was the second largest IPO in the United States in 2009 at the time the company was listed.

Advising Deutsche Bank Securities Inc, Barclays Capital Inc, Morgan Stanley & Co Incorporated and Citigroup Global Markets Inc (as representatives of the several underwriters in connection with the IPO) as to Singapore law are Allen & Gledhill LLP Partners Au Huey Ling, Sharon Wee, Rhys Goh, Sophie Lim and Lim Pek Bur, Senior Associate Ng Shen Li and Associates Delphie Ann Gomez and Tan Shengjie.

[Back to Contents Page](#)

Acquisition of shares in Bharti Telecom Limited

Singapore Telecommunications Limited's ("**SingTel**") wholly-owned subsidiary, Pastel Limited ("**Pastel**"), entered into a conditional share purchase agreement with a Bharti Group entity to purchase an additional 730,000 ordinary shares in the capital of Bharti Telecom Limited ("**Bharti Telecom**"), for approximately INR18,073 million (S\$538 million) to INR30,084 million (S\$895 million).

Advising SingTel are Allen & Gledhill LLP Partners Andrew M. Lim and Michele Foo and Associates Tan Teng Sen, Poh Shi Qi and Samantha Ong.

[Back to Contents Page](#)

Perennial Katong Retail Trust acquires Katong Mall

Perennial (Singapore) Retail Management Pte Ltd ("**PSRMPL**"), as manager of Perennial Katong Retail Trust, has announced the acquisition of Katong Mall for S\$247.55 million. PSRMPL is a subsidiary of Perennial Real Estate Pte Ltd ("**PREPL**").

Advising PREPL and PSRMPL are Allen & Gledhill LLP Partners Margaret Soh and Jerry Koh and Senior Associates Long Pee Hua, Lynn Ho and Teh Hoe Yue.

[Back to Contents Page](#)

Allen & Gledhill electronic communications

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[Back to Contents Page](#)

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