

# Legal Bulletin

New IRAS GST e-Tax Guides

A summary of developments in the law

---

## At a glance

<a href="#">New Futures Trading Rules and revised SGX-DC Clearing Rules effective from 22 September 2006</a>	3
<a href="#">MAS conducts public consultation on proposed amendments to the SFA and FAA</a>	5
<a href="#">MOF accepts CCDG's recommendations to maintain status quo relating to the mandatory quarterly reporting for listed companies</a>	7
<a href="#">MAS issues response to feedback received on proposals for the implementation of Basel II in Singapore – Phase 2</a>	8
<a href="#">MAS issues consultation on Draft Guidelines to Draft Notices on Prevention of Money Laundering and Countering the Financing of Terrorism</a>	9
<a href="#">MAS releases Draft MAS Notice 639: Exposures to Single Counterparty Groups and Draft MAS Notice 640: Minimum Asset Maintenance Requirements for Foreign Banks for consultation</a>	11
<a href="#">MAS releases consultation paper "Review of Regulatory Requirements for Sub-funds of Investment-Linked Life Insurance Policies"</a>	13
<a href="#">Singapore Court of Appeal: Liquidator personally liable to pay costs of proceedings ordered against insolvent company</a>	19
<a href="#">Allen &amp; Gledhill voted Asia's best advisory group in legal services in the Euromoney Awards for Excellence in Real Estate 2006</a>	25

---

[Click here for Table of Contents](#)

## In this issue

### Articles

- New Futures Trading Rules and revised SGX-DC Clearing Rules effective from 22 September 2006 3
- MAS conducts public consultation on proposed amendments to the SFA and FAA 5
- MOF accepts CCDG's recommendations to maintain status quo relating to the mandatory quarterly reporting for listed companies 7
- MAS issues response to feedback received on proposals for the implementation of Basel II in Singapore – Phase 2 8
- MAS issues consultation on Draft Guidelines to Draft Notices on Prevention of Money Laundering and Countering the Financing of Terrorism 9
- MAS releases Draft MAS Notice 639: Exposures to Single Counterparty Groups and Draft MAS Notice 640: Minimum Asset Maintenance Requirements for Foreign Banks for consultation 11
- MAS releases consultation paper "Review of Regulatory Requirements for Sub-funds of Investment-Linked Life Insurance Policies" 13
- MOF conducts public consultation on draft Goods and Services Tax (Amendment) Bill 2006 13

### Cases

#### Corporate & financial services

- Singapore High Court expounds on banking contract clauses that could preclude reliance 16

#### Insolvency

- Singapore Court of Appeal: Liquidator personally liable to pay costs of proceedings ordered against insolvent company 19

#### Real estate

- Singapore High Court examines a judgment creditor's interest in a property that has been bound by a registered writ of seizure and sale 22

### News

- Allen & Gledhill voted Asia's best advisory group in legal services in the Euromoney Awards for Excellence in Real Estate 2006 25
- HSBC Structured Notes (Cayman) Limited's note issuance programme 25
- New Partners 26

#### Editorial Team

Margaret Chew  
Elizabeth Wong  
Soo Seong Theng  
Hong Farn Ling  
Jo Ann Tabing

The contents of the Legal Bulletin are intended to provide general information. Although we endeavour to ensure that the information contained herein is accurate, we do not warrant its accuracy or completeness or accept any liability for any loss or damage arising from any reliance thereon. The information in this Legal Bulletin should not be treated as a substitute for specific legal advice concerning particular situations. If you would like to discuss the implications of these legal developments on your business or obtain advice, please do not hesitate to approach your usual contact at Allen & Gledhill or the editors of the Legal Bulletin, **Margaret Chew (+65 6890 7500 or [margaret.chew@allenandgledhill.com](mailto:margaret.chew@allenandgledhill.com))** and **Elizabeth Wong (+65 6890 7559 or [elizabeth.wong@allenandgledhill.com](mailto:elizabeth.wong@allenandgledhill.com))**.

## Articles

### New Futures Trading Rules and revised SGX-DC Clearing Rules effective from 22 September 2006

On 11 September 2006, the Singapore Exchange Limited (the “**SGX**”) released the following rules to meet new market initiatives:

- Futures Trading Rules
- Clearing Rules of the Singapore Exchange Derivatives Clearing Limited (the “**SGX-DC Clearing Rules**”)
- TSR 20 Rubber Futures Contract Specifications

#### Futures Trading Rules

The SGX has completed its two-phase review of the entire Derivatives Trading Rules of the Singapore Exchange Derivatives Trading Limited (the “**SGX-DT**”) and is replacing it with a new set of Futures Trading Rules. The new Futures Trading Rules came into effect on 22 September 2006.

The review was prompted by three factors, namely:

- changes in market structure and trading styles;
- a migration from floor to electronic trading of financial derivatives as well as the introduction of commodity contracts on the Joint Asian Derivatives Exchange (“**JADE**”); and
- revisions to the Securities and Futures Act (the “**SFA**”).

The key changes introduced by the Futures Trading Rules include:

- new membership architecture – the old membership structure is streamlined by classifying SGX members into the following:
  - Trading Members (Trading Members who do not handle customer funds are further categorised as Trading Members (Proprietary) and Trading Members (Individual)); and
  - Clearing Members;
- separate policies for trade matching algorithms and error trades for contracts traded on SGX-DT or JADE. The SGX-DT products (comprising cash settled financial futures) and JADE products (comprising deliverable futures contract on commodity underlying) are traded on different trading platforms;
- a new chapter dealing with a physical delivery and warehouse framework governing the delivery process of deliverable futures contracts traded on JADE; and
- refinements to the enforcement regime for members, registered representatives and approved traders.

## SGX-DC Clearing Rules

The SGX-DC Clearing Rules are revised with effect from 22 September 2006.

The SGX-DC Clearing Rules are amended to achieve the following:

- facilitate the clearing by SGX-DC of physical delivery contracts traded on JADE. The changes are intended to, among other things, outline the SGX-DC's role as an escrow agent in respect of the Performance Deposits (namely deposits paid as security, for the benefit of a buyer or seller who is a counterparty under a delivery contract, for the performance of the depositing party's obligations under the delivery contract) and the exchange of Title Documents (namely documents evidencing title to an underlying commodity) and payments between the buyer and seller; and
- set out expressly the procedures for determining the daily settlement price for Over-the-Counter Contracts.

## TSR 20 Rubber Futures Contract Specifications

TSR 20 Rubber Futures Contract is JADE's first futures contract and it begins trading on JADE from 25 September 2006. The TSR 20 Rubber Futures Contract Specifications set out the detailed delivery terms and other obligations of TSR 20 Rubber Futures Contract.

Please click on the title of each of the following Rules to view the full text of the Rules:

- [New Futures Trading Rules](#)
- [Revised SGX-DC Clearing Rules](#)
- [TSR 20 Rubber Futures Contract Specifications](#)

The following articles that were featured in the previous issues of the Allen & Legal Bulletin discuss the two-phase review of the Derivatives Trading Rules of the SGX-DT conducted by the SGX. Please click on the title of each article to read the article:

- [SGX issues consultation paper for Phase Two of proposed changes to the SGX-DT Trading](#) (June 2006)
- [SGX issues consultation paper on proposed changes to the SGX-DT Derivatives Trading Rules](#) (April 2006)

For a summary of the earlier consultation paper conducted by the SGX on the proposed amendments to the SGX-DC Clearing Rules, please [click here](#) to read an article entitled "SGX-DC releases consultation paper on proposed amendments to SGX-DC Clearing Rules" featured in May 2006 of the Legal Bulletin.

[Back to Contents Page](#)

For further information, please contact:

Francis Mok  
Tel: +65 6890 7786  
[francis.mok@allenandgledhill.com](mailto:francis.mok@allenandgledhill.com)

## **MAS conducts public consultation on proposed amendments to the SFA and FAA**

On 25 September 2006, the Monetary Authority of Singapore (the “**MAS**”) released a consultation paper entitled “Policy Consultation on Amendments to the SFA and the FAA”. The consultation paper represents the first of a series of amendments that the MAS will make to the Securities and Futures Act (the “**SFA**”) and the Financial Advisers Act (the “**FAA**”) following a review of the SFA and FAA.

Comments on the proposals in the consultation paper must be submitted to the MAS by 22 November 2006.

The key proposals set out in the consultation paper are as follows.

### **New representative notification framework**

Financial institutions which intend to carry on business in any regulated activity under the SFA and/or FAA are required to be licensed or exempted from licensing under the SFA and/or FAA.

The representatives of these financial institutions who conduct the regulated activities on their behalf are also subject to the licensing requirement under the SFA and FAA. Under the current framework, these representatives are divided into the following two categories:

- licensed representatives, namely, representatives who act for financial institutions which are licensed under the SFA or FAA; and
- exempt representatives, namely, representatives who act for financial institutions exempted from licensing under the SFA or FAA.

In response to feedback that the current framework creates an uneven playing field between licensed representatives and exempt representatives, the MAS proposes to introduce a notification framework for all representatives.

The key features of the new representative notification framework include:

- the new framework will apply consistently to licensed representatives and exempt representatives;
- the relevant financial institution which intends to allow a representative to carry out any regulated activities on its behalf must do the following:
  - certify to the MAS that it has conducted reasonable checks and is satisfied that the proposed representative is fit and proper in accordance with the MAS Guidelines on Fit and Proper Criteria the “**MAS Guidelines**”);
  - notify the MAS of its intention to allow the proposed representative to act on its behalf and the specific types of activities which he would be carrying out on its behalf;
- notification fees will be payable for notifications made; and
- the time period between notification to the MAS and the commencement of regulated activities by a representative should be within seven to 14 days unless the MAS has reason to consider the proposed representative to be not fit and proper.

### **Public register of representatives**

The MAS suggests establishing a public register of representatives that would assist consumers in verifying that they are dealing with regulated representatives. All formal regulatory actions taken against a representative will also be reflected on the public register.

### **Criminal offence for providing false or misleading information**

As the financial institution will need to rely on the veracity of the information provided by a proposed representative when it carries out the fit and proper checks on the proposed representative, the MAS proposes to make it an offence for any individual to provide any false or misleading information concerning himself to the financial institution when he is required to furnish information to the financial institution for the purposes of probity checks.

### **Extending the new representative notification framework to temporary representatives under the SFA**

Under the SFA, an individual may apply for a temporary representative's licence to carry out any regulated activities under the SFA on a short term basis provided he satisfies the criteria specified by the MAS. The MAS proposes applying the new representative notification framework, the public register requirement and criminal sanctions against the provision of false information to temporary representatives under the SFA.

### **Provisional representative scheme**

The MAS is also considering whether to introduce a provisional representative scheme to accommodate the relocation of experienced individuals currently or previously licensed, authorised or otherwise regulated in an overseas jurisdiction with a regulatory regime that is comparable to the Singapore regulatory regime.

It is envisaged that a provisional representative, who satisfies certain qualifications and is fit and proper in accordance with the MAS Guidelines, will be allowed to deal with a client who is an accredited, expert or institutional investor upon notification and certification to the MAS of his qualifications and probity. He will be given a grace period to satisfy the examination requirements under the SFA and/or FAA.

The MAS is seeking comments on the proposal to introduce the provisional representative scheme and the application of the new representative notification framework to provisional representatives.

### **Appointment of advisers to approved exchange or designated clearing house**

Holding the view that the failure of an approved exchange or a designated clearing house would greatly undermine stability or public confidence in the Singapore financial system, the MAS highlights in the consultation paper the need to have additional statutory power to take action to salvage any mismanagement in such entity.

The consultation paper proposes to insert new provisions in the SFA to enable the MAS to appoint a person to advise an approved exchange or a designated clearing house in the conduct of its business if the entity, among other things:

- is likely to or has become insolvent;
- is carrying on its business in a manner detrimental to regulatory objectives;
- has contravened any of the provision in the SFA; or
- has failed to comply with any condition attached to its approval or designation as an approved exchange or a designated clearing house.

#### **Enhance MAS information gathering powers**

There is also a proposal in the consultation paper to enhance the information gathering powers of the MAS in circumstances where the MAS exercises its power to:

- prohibit trading in securities on a securities market of an approved exchange;
- direct an approved exchange to take the necessary action to maintain or restore orderly trading in securities or futures contracts when an emergency exists; or
- direct a designated clearing house to take the necessary action to maintain or restore safe and efficient operations of the clearing facilities operated by the designated clearing house when an emergency exists.

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

Please [click here](#) to view the MAS press release dated 25 September 2006 relating to the above development.

[Back to Contents Page](#)

---

## **MOF accepts CCDG's recommendations to maintain status quo relating to the mandatory quarterly reporting for listed companies**

On 1 September 2006, the Ministry of Finance (the “**MOF**”) announced that it has accepted all the recommendations of the Council on Corporate Disclosure and Governance (the “**CCDG**”), including retaining mandatory quarterly reporting (“**QR**”) for listed companies with market capitalisation exceeding S\$75 million, and continuing to exempt smaller companies from mandatory QR.

By way of background, the CCDG was requested by the MOF in September 2005 to review the QR requirement. The CCDG set up a Review Committee for this purpose and submitted its recommendations to the MOF in June 2006. The recommendations will take effect for Annual General Meetings held on or after 31 December 2006.

The recommendations of the CCDG include the following:

- retain mandatory QR for listed companies with a market capitalisation of S\$75 million or higher;

For further information, please contact:

Francis Mok  
Tel: +65 6890 7786  
[francis.mok@allenandgledhill.com](mailto:francis.mok@allenandgledhill.com)

- continue to exempt companies with a market capitalisation of under S\$75 million from mandatory QR (the “**exempt companies**”);
- review the market capitalisation of the exempt companies at the end of each year, starting 31 December 2006. A company that attains a market capitalisation of, or higher than, S\$75 million at each calendar year-end will have a grace period of a year to prepare for QR. Once a company is required to do QR, it will have to continue to do so in future, even if its market capitalisation falls below S\$75 million;
- retain the 45-day reporting deadline for Q1, Q2 and Q3 results, and 60 days for annual results; and
- retain the current arrangement of a prescribed and consistent format for all quarterly reports.

In essence, the CCDG recommends maintaining the status quo in relation to the QR requirement, except for the inclusion of a new requirement for the periodic reassessment of the market capitalisation of the exempt companies.

To view the full text of the final recommendations of the CCDG, please [click here](#).

To view the MOF’s press release dated 1 September 2006 announcing the acceptance of the CCDG’s recommendations, please [click here](#).

Please [click here](#) to view the letter from the CCDG to the MOF submitting the CCDG’s recommendations on the QR requirement for the MOF’s consideration. Please [click here](#) to view the MOF’s reply.

Developments on the public consultation on the QR requirement have been featured in previous issues of the Legal Bulletin. To view an article entitled “*CCDG releases summary of feedback from public consultation on quarterly reporting requirement*” (July 2006), please [click here](#). To view an article entitled “*CCDG calls public consultation on quarterly reporting requirement*” (January 2006), please [click here](#).

[Back to Contents Page](#)

---

## MAS issues response to feedback received on proposals for the implementation of Basel II in Singapore – Phase 2

On 8 March 2006, the Monetary Authority of Singapore (the “**MAS**”) invited Singapore-incorporated banks to comment on draft rules and guidelines for the implementation of the report of the Basel Committee on Banking Supervision on “International Convergence of Capital Measurement and Capital Standards: A Revised Framework” (commonly known as “**Basel II**”). The call for comments marked the second of several phases of consultation being conducted by the MAS on the proposed standards and requirements for the implementation of Basel II.

On 15 September 2006, the MAS issued its response to feedback received in respect of the March 2006 consultation (the “**MAS Response**”). The MAS will issue a revised draft guidance which will incorporate the comments that

For further information, please contact:

Christine Chan  
Tel: +65 6890 7647  
[christine.chan@allenandgledhill.com](mailto:christine.chan@allenandgledhill.com)

Christina Ong  
Tel: +65 6890 7700  
[christina.ong@allenandgledhill.com](mailto:christina.ong@allenandgledhill.com)

it agreed with, while comments that are of wider interest are addressed in the MAS Response.

To view the full text of the MAS Response, please [click here](#).

The March 2006 consultation was discussed in a previous issue of the Legal Bulletin (March 2006). To view the article entitled "*MAS conducts public consultation on proposals for the implementation of Basel II in Singapore – Phase 2*", please [click here](#).

Phase 1 of the public consultations on Basel II was also featured in previous issues of the Legal Bulletin. To view the article entitled "*MAS consults on proposals for the implementation of Basel II in Singapore*", please [click here](#). To view an article entitled "*MAS issues response to feedback received on 'Proposals for the implementation of Basel II in Singapore – Phase 1'*", discussing the response issued by the MAS to feedback received on the consultation paper for Phase 1, please [click here](#).

For further information, please contact:

Lucien Wong  
Tel: +65 6890 7702  
[lucien.wong@allenandgledhill.com](mailto:lucien.wong@allenandgledhill.com)

[Back to Contents Page](#)

---

## MAS issues consultation on Draft Guidelines to Draft Notices on Prevention of Money Laundering and Countering the Financing of Terrorism

On 28 August 2006, the Monetary Authority of Singapore (the "**MAS**") released a public consultation (the "**Consultation Paper**") on Draft Guidelines to Draft Notices to financial institutions on Prevention of Money Laundering and Countering the Financing of Terrorism (the "**Draft Guidelines**").

Prior to the Consultation Paper, the MAS had on 4 August 2006 issued an earlier consultation paper seeking feedback on Draft Notices on Prevention of Money Laundering and Countering the Financing of Terrorism (the "**Draft Notices**"). The earlier consultation sets out Draft Notices for banks, finance companies, merchant banks, money changers and remitters, life insurers, capital markets intermediaries, financial advisers, approved trustees and trust companies.

The Draft Guidelines which are the subject of the Consultation Paper are meant to supplement the Draft Notices and should be read in conjunction with the respective Draft Notices. The Draft Guidelines provide further guidance on the requirements set out in the Draft Notices.

Comments on the Draft Guidelines must be submitted to the MAS by 27 September 2006.

The Draft Guidelines for the various financial institutions are generally similar in substance. This article focuses on the key issues addressed in the Draft Guidelines for banks and they include the following.

### **More rigorous customer due diligence measures**

The Draft Notices will require the banks to perform more detailed customer due diligence ("**CDD**") measures to verify the identities of their customers.

The new CDD measures include an express requirement on the banks to complete CDD measures before establishing business relations with any customer unless the following conditions are satisfied:

- it is essential for the banks not to interrupt the normal conduct of business; and
- the risks of money laundering and terrorism financing have been effectively managed by the banks.

The Draft Guidelines provide that an example where it may be essential not to interrupt the normal course of business would be with respect to securities trades, where market conditions are such that a bank has to execute transactions for the customer very rapidly. In addition, the Draft Guidelines may treat a bank as having effectively managed the risks of money laundering and terrorism financing if it has adopted internal policies, procedures and controls that set appropriate limits on the financial services available to the customer before completion of CDD measures.

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

#### **Definition of “customer”**

The Draft Guidelines expanded the definition of “customer” in paragraph 2.1 of the Draft Notices and advise the banks to perform CDD as widely as possible on persons that they deal with in the course of their banking operations and not just on “the person in whose name an account is opened or intended to be opened, or to whom a bank undertakes or intends to undertake any transaction without an account being opened”. For example, banks should consider whether CDD measures should be applied to the underlying investors of portfolio managers (where the latter are the customers of the banks) or persons who are customers of the banks in Singapore even though their accounts are held with the banks’ offices in another country or jurisdiction for book-keeping purposes.

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

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

Examples of when a bank might adopt lesser or reduced CDD measures are set out in the Draft Guidelines and they include situations where reliable information on the customer is publicly available to the bank (like publicly listed companies) or where the bank is dealing with another bank whose anti money laundering/countering the financing of terrorism controls it is well familiar with by virtue of a previous course of dealings.

The Draft Notices specifically identify “politically exposed persons” (“**PEPs**”), their immediate family members and their close associates as a category of customers to which the banks must perform the enhanced CDD measures. The Draft Guidelines explain that the MAS recognises that the process of determining whether an individual is a PEP may not always be straightforward and would generally consider it acceptable for a bank to refer to databases of PEPs either compiled commercially or by official authorities. Other customers who are identified as high risk categories in the Draft Guidelines are non-resident customers, private banking customers, body corporates set up as personal asset holding vehicles, or companies that have nominee shareholders or that issue shares in bearer form.

For further information, please contact:

Francis Mok  
Tel: +65 6890 7786  
[francis.mok@allenandgledhill.com](mailto:francis.mok@allenandgledhill.com)

Andy Yeo  
Tel: +65 6890 7833  
[andy.yeo@allenandgledhill.com](mailto:andy.yeo@allenandgledhill.com)

### Including originator information in cross-border wire transfers

The Draft Notices will require banks which are the ordering institutions in a cross-border wire transfer, where the amount to be transferred exceeds S\$2,000, to include the originator's information in the message or payment instruction that accompanies or relates to the wire transfer. The Draft Guidelines recommend that the banks should consider not accepting incoming wire transfers from or terminating business relations with, overseas ordering banks that, to their knowledge, are required to provide originator information but fail to do so.

### Examples of suspicious transactions and suspicious transactions reporting forms

Some examples of suspicious transactions are identified in Appendix II of the Draft Guidelines and the suspicious transactions reporting forms are set out in Appendix III of the Draft Guidelines.

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

[Back to Contents Page](#)

---

## MAS releases Draft MAS Notice 639: Exposures to Single Counterparty Groups and Draft MAS Notice 640: Minimum Asset Maintenance Requirements for Foreign Banks for consultation

On 13 September 2006, the Monetary Authority of Singapore (the "MAS") released, for public consultation, draft MAS Notice 639 on Exposures to Single Counterparty Groups and draft MAS Notice 640 on Minimum Asset Maintenance Requirements (the "draft notice" or "draft notices" as appropriate). The draft notices came about as a result of an earlier public consultation in July/August 2006 on some proposed changes to the Banking Act.

An article in a previous issue of the Legal Bulletin (August 2006) discusses the proposed changes to the Banking Act. To read the article entitled "*MAS issues consultation paper on proposed changes to Banking Act*", please [click here](#).

The public consultation closes on 13 October 2006.

### Draft MAS Notice 639: Exposures to Single Counterparty Groups

This draft notice sets out limits on exposures by a bank to single counterparty groups. It specifies:

- the types of exposures to be included in these limits;
- basis for computing the exposures;
- approach for aggregating exposures to counterparties that pose a single risk; and
- recognition of credit risk mitigation techniques.

A “counterparty” is defined in the draft notice to refer to an entity which has an obligation to the bank or to whom a bank is exposed to as a result of the bank’s contractual or other arrangements or investments. This includes an issuer of a security. A “single counterparty group” refers to any counterparty, a director group, a financial group, a substantial shareholder group or any third party single counterparty group.

Generally for a Singapore incorporated bank, the aggregate of its exposures to a single counterparty group should not exceed 25 per cent. or such other percentage of its eligible total capital as may be approved by the MAS. For a bank incorporated outside Singapore, the aggregate of its exposures to a single counterparty group should not exceed 25 per cent. or such other percentage of its capital funds as may be approved by the MAS.

There are also provisions in the draft notice on the exclusion of one or more exempt exposures when a bank in Singapore is computing its aggregate exposures. For instance, a bank incorporated in Singapore may exclude from the computation of its aggregate exposures, its capital investments in a company or its securitisation exposures if these are deducted from eligible total capital for purposes of computation of regulatory capital. The draft notice also imposes limits on the provision of aggregate unsecured credit facilities (other than credit card and charge card facilities) by the bank to any director group, officers or employees.

In view of potential changes to the shareholding structure of a counterparty and its financial relationship with other entities, the draft notice recommends that a bank in Singapore should review the profile of its counterparties at least once every 12 months, but in any case, a review must be conducted by the bank no later than 15 months from the last review.

Please [click here](#) to view the full text of the draft MAS Notice 639.

#### **Draft MAS Notice 640: Minimum Asset Maintenance Requirements for Foreign Banks**

The MAS has proposed, in an earlier consultation on the draft Banking (Amendment) Bill 2006, to amend the Banking Act to require foreign bank branches to maintain a minimum level of eligible assets in Singapore in proportion to their liabilities. Among other things, foreign banks will be required to hold not less than S\$5 million worth of assets in Singapore. In view of the fact that full and wholesale banks are allowed greater access to Singapore dollar deposits from non-bank customers, there are additional requirements relating to the banks’ asset maintenance ratio.

This draft notice sets out the detailed requirements for the establishment of an asset maintenance framework for foreign bank branches.

Please [click here](#) to view the full text of the draft MAS Notice 640.

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

[Back to Contents Page](#)

For further information, please contact:

Francis Mok  
Tel: +65 6890 7786  
[francis.mok@allenandgledhill.com](mailto:francis.mok@allenandgledhill.com)

## MAS releases consultation paper “Review of Regulatory Requirements for Sub-funds of Investment-Linked Life Insurance Policies”

On 30 August 2006, the Monetary Authority of Singapore (the “**MAS**”) released a consultation paper entitled “Review of Regulatory Requirements for Sub-funds of Investment-Linked Life Insurance Policies” (the “**Consultation Paper**”).

Currently, investment sub-funds of Investment-Linked Life Insurance Policies (“**ILP sub-funds**”) are subject to the various approval and disclosure requirements prescribed under MAS Notice 307: Notice on Investment-Linked Life Insurance Policies. The MAS recognises that these approval and post-sale disclosure requirements pose significantly higher costs for insurers offering ILPs with a large number of sub-funds. Such costs are usually passed on to policyholders.

The Consultation Paper sets out proposed changes to the existing requirements in MAS Notice 307 with the aim of facilitating the availability in Singapore of cost effective Investment-Linked Life Insurance Policies that meets policyholders’ needs for both broader investment choice and adequate post-sale disclosures.

The issues addressed in the Consultation Paper encompass the following:

- approval requirements for ILP sub-funds;
- audit requirements for ILP sub-funds annual reports;
- preparation of semi-annual and annual reports for newly launched or recently terminated ILP sub-funds; and
- acceptable mode of communication for post-sale disclosure documents to policyholders.

The consultation closed on 30 September 2006.

Please [click here](#) for the full text of the Consultation Paper.

[Back to Contents Page](#)

For further information, please contact:

Andrew M. Lim  
Tel: +65 6890 7706  
[andrew.lim@allenandgledhill.com](mailto:andrew.lim@allenandgledhill.com)

Francis Mok  
Tel: +65 6890 7786  
[francis.mok@allenandgledhill.com](mailto:francis.mok@allenandgledhill.com)

---

## MOF conducts public consultation on draft Goods and Services Tax (Amendment) Bill 2006

From 8 September 2006 to 6 October 2006, the Ministry of Finance (the “**MOF**”) is conducting a public consultation on a draft Goods and Services Tax (Amendment) Bill 2006 which sets out proposed amendments to the Goods and Services Tax Act (the “**GST Act**”).

The proposed amendments cover the initiatives announced in the Budget Statement 2006 as well as other changes or refinements to existing tax policies and administration resulting from on-going review of the goods and services tax (“**GST**”) system. The following is a summary of the proposed changes.

## **Budget 2006 Initiatives**

### ***Allowing insurers input tax claims based on the tax fraction of cash payments paid to qualifying policyholders under insurance contracts that are subject to GST***

Presently, insurers are not eligible for any input tax claims when they make cash payments to policyholders in the fulfillment of their obligations under insurance contracts as such payments are not treated as supplies under the existing provisions of the GST Act.

It was announced in Budget Statement 2006 that insurers would be allowed input tax claims based on the tax fraction of these payments paid under contracts that are subject to GST if they are made to:

- non-GST registered policyholders;
- GST registered policyholders who are disallowed by GST Regulations 26 and 27 from claiming the input tax incurred on the premiums of medical and accident insurance and passenger car insurance; and
- GST registered sole-proprietors who buy insurance policies in their private capacity.

This change is to capture the true value-added of insurance services which is conceptually not the entire value of premium received, but the difference between the gross premiums received and the claims met by the insurers under the insurance contracts.

The change will be applicable to insurance policies that start on or after 1 January 2007.

### ***Aligning the GST treatment of Islamic financing arrangements with the GST treatment of conventional financing arrangements that they are economically equivalent to***

The new GST treatment for an Islamic financing arrangement entered into for the purchase of non-residential property allows for any mark-up on the selling price of the non-residential property by the bank to the buyer to be exempt from GST, and the bank will be allowed to claim GST in full on the purchase of the non-residential property from the vendor.

This measure will ensure that the tax treatment of Islamic financing arrangements is aligned with the treatment of conventional financing arrangements that they are economically equivalent to.

These amendments affect the GST treatment of qualifying Islamic financial arrangements that are entered into between a financial institution and a purchaser on or after 17 February 2006.

### ***Zero-rating tools used in manufacturing of goods substantially for export supplied to overseas persons***

Presently, manufacturers are required to charge GST on tools (e.g. moulds) supplied to overseas customers if they are used in Singapore to manufacture goods for export. The local manufacturers usually absorb this GST as their overseas customers are often non-GST registered persons who are unable to claim the tax charged separately on the tools. This has adversely affected the cost competitiveness of local manufacturers.

It was announced in Budget Statement 2006 that the supply of a tool, including the development of its prototypes as well as any services rendered in relation to a tool (such as modification and repair), by any GST-registered person to an overseas customer can be zero-rated, subject to certain conditions to be prescribed. This step is taken in recognition of the fact that these tools are business inputs of overseas persons and do not constitute private end consumption per se, which is what a consumption tax regime like GST seeks to tax.

In the Budget Statement 2006, it was stated that this change would take effect from 1 April 2006. The change is currently being effected, and will continue to be effected, by way of remission until the amendment for the change takes effect.

### ***Revising the record keeping period from the current seven years to five years***

Currently, the GST Act requires all GST registered persons to keep business records for at least seven years. It was announced in the Budget Statement 2006 that the record keeping requirement in the GST Act will be shortened to five years, as measured from the end of the prescribed accounting period to which the record relates. The new five-year record keeping period will apply to prescribed accounting periods ending on or after 1 January 2007.

### **Non-Budget Statement 2006 Changes**

The draft Goods and Services Tax (Amendment) Bill 2006 also address the following changes, some of which are consequential upon the reduction in the recording keeping period from seven to five years:

- implementing an Advance Ruling System for GST;
- implementing revised GST rules for zero-rating of advertising services. The existing GST rules to standard-rate or zero-rate the supplies of advertising services are tied to the advertised subject. The advertising service can be zero-rated only if the advertised land or goods are situated outside Singapore. If the advertised subject is services, the advertising service can be zero-rated only if it is supplied contractually to an overseas person and for the benefit of overseas person/s, and the services are not supplied in connection with land or goods situated in Singapore at the time the services are performed.

Given the new business models in the advertising industry, the MOF has decided that for advertising services, including any incidental services, that specifically relate to the sale of media space or airtime to promulgate the advertisements in hardcopy or digital forms (e.g. TV, radio, internet, handphone), the place of circulation of the advertisement is the determining factor to standard-rate or zero-rate this service. Where the circulation of the advertisement is in Singapore, the sale of media space or airtime is a standard-rated supply attracting GST. Where the circulation of the advertisement is wholly or substantially outside Singapore, the sale of media space or airtime qualifies for zero-rating under the new Section 21(3)(u). The new treatment will take effect for supplies made on or after 1 January 2007.

- revising the “subsequent specified period” under Section 19(15). Presently, a taxable person who has failed to pay his supplier but has nonetheless claimed input tax is required to repay the input tax to the Comptroller of Goods and Services Tax (the “**Comptroller**”). Should he subsequently pay his supplier during a “subsequent specified period”, he may re-claim the input tax. Section 19(15) defines the “subsequent

For further information, please contact:

Sunit Chhabra  
Tel: +65 6890 7735  
[sunit.chhabra@allenandgledhill.com](mailto:sunit.chhabra@allenandgledhill.com)

Nand Singh Gandhi  
Tel: +65 6890 7838  
[nand.gandhi@allenandgledhill.com](mailto:nand.gandhi@allenandgledhill.com)

Lim Pek Bur  
Tel: +65 6890 7096  
[lim.pekbur@allenandgledhill.com](mailto:lim.pekbur@allenandgledhill.com)

Rasida Mohd Salleh  
Tel: +65 6890 7782  
[rasida.salleh@allenandgledhill.com](mailto:rasida.salleh@allenandgledhill.com)

Yeoh Lian Chuan  
Tel: +65 6890 7720  
[yeoh.lianchuan@allenandgledhill.com](mailto:yeoh.lianchuan@allenandgledhill.com)

specified period” to be a period “commencing on the day immediately following the end of the initial specified period, and ending on a day six years from the end of the prescribed accounting period during which the relevant input tax was first credited”. In line with the reduction in record-keeping period, Section 19(15) will be amended to reduce the “subsequent specified period” from six to five years. This amendment will be effective for input tax credits relating to prescribed accounting periods ending on or after 1 January 2007.

- revising the time limit for raising of tax assessments by the Comptroller;
- providing a time limit for the Comptroller to accept returns that are submitted late for the purpose of revising assessments that have been made by the Comptroller; and
- revising the time limit for claiming refunds for tax overpaid or erroneously paid, and providing for a time limit for claiming refunds relating to over-declaration of output tax for repayable returns, and under-claiming of input tax.

To view the press release, please [click here](#).

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

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

[Back to Contents Page](#)

---

## Cases

### Corporate & financial services

#### Singapore High Court expounds on banking contract clauses that could preclude reliance

*Orient Centre Investments Ltd & Anor v Societe Generale & Anor*  
[2006] SGHC 164

In this recently released judgment, the Singapore High Court held that banking contract clauses which clearly exclude liability by the bank could serve to thwart claims of reasonable reliance on the representations and assurances that may have been received from the bank’s employees or officers.

#### The facts

The plaintiffs had opened two accounts with the first defendant Societe Generale (“**SocGen**”). The first account was opened with SocGen’s private banking division by the first plaintiff Teo Song Kwang (“**Teo**”) in the name of the second plaintiff Orient Centre Investments Ltd (“**Orient Centre**”). Teo was a shareholder and managing director of Orient Centre which was his *alter ego*. The second account (the “**investment account**”), also in the name of Orient Centre, comprised of structured products, foreign exchange/currency trades, securities trades and credit facilities. Under the terms of the investment account, SocGen had the right to terminate immediately the facilities it extended, at its absolute discretion, after which

Orient Centre would have to repay forthwith all outstanding sums owed to SocGen.

In addition to the investment account, the plaintiffs also entered into the following agreements with SocGen: an equity-linked deposit master agreement, a fund-linked deposit agreement, and an indexed deposit agreement.

The plaintiffs alleged that the decision to open the investment account and to enter into the above agreements was based on reliance on the representations and inducements of the second defendant Goh Tzu Seoh (“**Goh**”), a relationship manager of SocGen’s private banking division. Such representations allegedly included an investment strategy that assured the preservation of the plaintiffs’ capital and guaranteed returns of 10 per cent. per annum.

Subsequently, the plaintiffs alleged that Goh had, without their instructions, entered into several transactions under the investment account for the purchase of securities, entering into spot/forward exchange contracts, and taking loans from the facilities granted by SocGen. These transactions allegedly resulted in substantial losses on the investment account, hence Teo demanded full restitution of his deposits together with interest.

SocGen served a notice of termination of its relationship with the plaintiffs, and issued a letter of demand for sums owed under the plaintiffs’ accounts. Later, it gave notice that it was exercising its rights of set-off against securities, cash deposits and bonds charged to the bank under the deposit agreements. The outstanding sums were reduced as a result of the set-off.

### **Allegations and defence**

In the amended statement of claim, the plaintiffs alleged that the defendants owed a duty of care and fiduciary duties to, *inter alia*, ensure that the plaintiffs fully understood the nature, complexity and risk of the investments and not to introduce products unless they were appropriate to the plaintiffs’ specific needs and risk profile. The plaintiffs accused the defendants of, *inter alia*, making indiscriminate investments and utilising the investment account to facilitate “churning” activities (i.e. lending and refinancing debt to collect fees) for their own benefit.

In its defence, SocGen averred that the plaintiffs were precluded from asserting that any of the transactions on the investment account were not authorised. It pointed out that the investment account was a non-discretionary account which it was authorised to operate according to instructions received from Teo and his son, Teo Chien Howe (the “**authorised persons**”) by telephone, fax or telex. SocGen further pleaded that by the terms of the documentation executed by Orient Centre in support of the investment account, Orient Centre had accepted the risks in relation to the facilities extended by SocGen and had acknowledged that it did not rely on advice or representations made by Goh in entering into any transactions with or through SocGen.

In the alternative, SocGen alleged that Teo was an experienced and sophisticated investor and consequently, did not reasonably rely on the representations allegedly made by Goh.

### **The contract between the parties**

In setting out its defence, SocGen demonstrated from the documentation entered into between the parties that it did not assume fiduciary duties nor

act as a financial adviser to plaintiffs, and that the plaintiffs assumed the risks of the investments made by Orient Centre.

In its decision, the court highlighted the following from the contractual documentation:

- a Mandate document whereby Orient Centre authorised SocGen to act on any verbal or written instruction, confirmation or authority (including telex, teletype, facsimile or cable) sent by the authorised persons;
- a Declaration that required Orient Centre to collect the bank statements pertaining to the investment account, and to highlight any discrepancies/errors to SocGen within ten days of collection;
- an Indemnity which granted full authority to SocGen to follow authorised instructions and to indemnify in full SocGen's officers acting on said instructions;
- a Standard Terms document the risk management clause of which stated in part that "as part of the Customer's risk management policy, the Bank recommends that the Customer enter derivative product transactions only after having analysed (if necessary with the help of outside advisors) the specific risk they imply and the possible advantages to be obtained";
- another Standard Terms document specifically governing foreign exchange facilities, which stated in part that the Customer "is exercising its own business judgment independently of the Bank in entering into the FX Facilities and each Contract ...", that it is "acting for its own account" and is "not relying on communication (written or oral) of the Bank as investment advice or as a recommendation to enter into that Contract ...";
- an Investment Agreement with an excluded liability clause whereby the client's transactions shall be understood to be made solely in reliance of the client's judgment and not in reliance of the representation or advice which may have been expressed by SocGen; and
- a Risk Disclosure Statement which stated that SocGen was under no obligation to warn its customer if the instructions by the customer's authorised persons were inadvisable or likely to lead to loss. Neither was SocGen responsible for any advice or opinions by its employees or agents. The same statement also contained a warning that it did not purport to disclose all of the risks of the facility, and that the client should consult with its own legal, tax and financial advisers prior to making an investment.

Based on the foregoing, the court held that SocGen was entitled to carry out the oral and fax instructions of the authorised persons. As such, the allegation that SocGen was negligent in carrying out the trades could not stand.

Equally, the plaintiffs' allegation of breach of fiduciary duties and breach of duty as financial advisers went against the express disclaimers of liability and risk management clauses in the above agreements.

On the contrary, the documentation showed that SocGen had made every effort to warn the plaintiffs of the risks involved in the various products in which Orient Centre had invested. The documents rebutted the plaintiffs' allegation that they have been misled.

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

Suresh Nair  
Tel: +65 6890 7897  
suresh.nair@allenandgledhill.com

Citing the parole evidence rule in Section 94 of the Evidence Act, the plaintiffs were in any event precluded from asserting oral representations which contradicted the express terms of the written agreements they had signed, all of which were to the effect that SocGen did not assume fiduciary duties, was not a financial adviser to plaintiffs, and that the plaintiffs had assumed the risks of the investments made by Orient Centre. SocGen's terms even went further to recommend that plaintiffs seek advice from their own advisers.

Accordingly, the court dismissed the plaintiffs' claims.

The first defendant in this case was successfully defended by Allen & Gledhill.

[Back to Contents Page](#)

---

## Insolvency

### **Singapore Court of Appeal: Liquidator personally liable to pay costs of proceedings ordered against insolvent company**

*Ho Wing On Christopher & Ors v ECRC Land Pte Ltd (in liquidation)*  
[2006] SGCA 25

*Ho Wing On Christopher & Ors v ECRC Land Pte Ltd (in liquidation)* is a significant case for liquidators and creditors of insolvent companies. Essentially, the Singapore Court of Appeal decided that if a company is unable to satisfy any costs order made against it, it would be advisable for a liquidator to refrain from commencing proceedings unless he has managed to obtain a creditors' indemnity. A liquidator who does otherwise may well find himself or herself out of pocket for the defendant's costs if the company's claim fails.

In the present case, the liquidators commenced proceedings in the name of a company in liquidation (the "**Company**"), seeking to recover moneys from the appellants based on allegations of fraud, breach of fiduciary duty, constructive trust and conspiracy to injure the Company. At both the first instance (the "**main suit**") as well as the appellate stage (the "**main appeal**"), the appellants successfully defended the action and costs was ordered against the Company ("**costs of proceedings**"). The appellants then applied to court for their costs of the proceedings to be paid in priority to all other claims against the Company. The judge ordered that subject to the liquidators' costs of getting in, maintaining and realising the Company's assets (the "**realisation costs**"), the Company should pay the costs of proceedings in priority to all other claims and expenses, including the liquidators' remuneration and the Company's legal costs for the same.

After setting off the amounts provided as security for costs and other relevant deductions, there was a shortfall in the payment of the costs of proceedings still owing to the appellants. The reason for the shortfall was because the liquidators remunerated themselves and also paid legal fees to the Company's lawyers. The payments to the Company's lawyers were made on various occasions after the main suit was commenced. The final two payments were made while the main appeal was pending and after costs were ordered against the Company in the main suit. Further, the two payments were made after the appellants had written to the liquidators twice, asking that they pay the appellants' costs in the main suit in priority to all other claims. All the sums paid to the Company's lawyers were not taxed

pursuant to Rule 173 of the Companies (Winding up) Rules. The payment by the liquidators to themselves and the Company's lawyers before settling the costs of proceedings was indisputably a breach of a common law rule of priority in the liquidation of companies: the estate costs rule.

The estate costs rule is a recognised common law rule of priority in the liquidation of companies which supplements Section 328(1)(a) of the Companies Act, which section provides that "the costs and expenses of the winding up" including the remuneration of the liquidator shall be paid in priority to all other unsecured debts. The estate costs rule clarifies the relative priority between the various types of liquidation expenses. In particular, the rule states that a successful litigant against a company in liquidation is entitled to be paid his costs in priority to the other general expenses of the liquidation, including the costs and remuneration of the liquidator.

The appellants asked the court for the following:

- **First prayer:** the liquidators pay the appellants the balance standing to the Company's credit as well as all sums previously paid to themselves as payment of the shortfall and the costs of the application; and
- **Second prayer:** the liquidators be held personally liable for the costs of the application and any part of the shortfall outstanding after payment is made under (a) (the "**outstanding shortfall**").

The appellant's application was granted with regards to the first prayer but was dismissed with regards to the second prayer. Hence the current appeal before the Court of Appeal to decide on the issue of whether the liquidators should be personally liable for the outstanding shortfall because they breached the estate costs rule. The Court of Appeal approached the issue on two varying levels of specificity:

- whether, as a matter of general principle, a liquidator who breaches the estate costs rule should be made to remedy the consequences of his breach; and
- whether it would be justifiable to impose personal liability upon the liquidators given the particular circumstances attending their breach of the estate costs rule.

The Court of Appeal's view is that case law clearly requires a liquidator who makes payments in breach of the estate costs rule to remedy his breach. The imposition of personal liability for a breach of the estate costs rule is a manifestation of the general approach towards breaches of priority rules in corporate liquidation. The Court of Appeal did consider the concerns raised by the judge at first instance in reaching this conclusion. Some of the concerns raised were that the imposition of personal liability for breaching the estate costs rule will deter future liquidators from commencing actions to recover companies' assets and the separate legal personality of a company suggests that a liquidator suing in the name of the company is technically a non-party to the suit and, as such, should only be ordered to pay the opposing party's costs in exceptional circumstances. However, the Court of Appeal's position is that such considerations must be balanced against the need to uphold the efficacy of the estate costs rule. Further, the law should refrain from placing too much emphasis on the consideration that a liquidator suing in the name of an insolvent company is a non-party as this is only a technical consideration.

Next, the Court of Appeal had to consider whether the imposition of personal liability on the present facts would breach any broader principle of corporate insolvency law. The question which needs to be addressed is “when a company in liquidation commences an action with limited funds, is the liquidator entitled to use the funds available to sustain the litigation and risk irreparably prejudicing the defendant in the event that the company loses the action and a costs order against the company is made?”. Based on the Court of Appeal’s analysis of the matter, where a liquidator has sufficient assets in his hands to fully discharge the defendant’s legal costs, the estate costs rule clearly prohibits a liquidator from jeopardising a defendant’s interest in this manner and requires the liquidator to preserve the company’s assets to ensure that the company will be able to meet any costs order made against it. The liquidator’s duty to recover the company’s assets is not absolute and is subject to the overriding question of whether the company’s existing assets are sufficient to enable him to do so. Such a position is consistent with Section 323(1) of the Companies Act which provides that a liquidator shall not incur any expense in relation to the winding up of a company unless there are sufficient assets or if the Official Receiver expressly directs. A Singapore liquidator has a positive duty to avoid subjecting a defendant to the unfairness of an unsatisfied costs order. A liquidator’s duty to get in corporate assets is no excuse for him to pay the company’s solicitors in breach of the estate costs rule. The practical effect would be to require liquidators to obtain an indemnity from the creditors if they wish to bring an action but the company has limited assets. An indemnity from the creditors would be the best form of protection for a liquidator when discharging his duty to recover the assets of the company for the benefit of the creditors. Security for costs, on the other hand, does not provide adequate protection. As such, a liquidator who chooses to sue knowing that the company will be unable to satisfy any costs order made against it should be held personally liable for a successful defendant’s costs.

In light of the above, the Court of Appeal held that the liquidators in the present case should be held personally liable for the secondary insolvency resulting from their breach of the estate costs rule. A liquidator should not pay himself until he is sure that the company will have sufficient assets to satisfy any potential claims of a higher priority under the estate costs rule. Similarly, he should not pay the company’s legal fees until he is sure of the same. If he is unsure, he should seek an indemnity from the creditors to meet any demand for legal fees by the company’s lawyers.

The Court of Appeal also discussed the discretionary power of the court under Section 283(3) of the Companies Act to override the application of the estate costs rule in appropriate circumstances. In other words, the court may have the power to exempt the liquidator from any personal liability even though there is a breach of the common law priority rules. The Court of Appeal emphasised that such powers should be sparingly exercised. In the present, the Court of Appeal was not asked to exercise its discretion under Section 283(3) of the Companies Act.

The Court of Appeal allowed the appeal against the judge’s decision with costs. The liquidators would be liable to compensate the appellants for the outstanding shortfall, which will be payable following the determination of the quantum of the realisation costs.

[Back to Contents Page](#)

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

Andrew Chan  
Tel: +65 6890 7556  
[andrew.chan@allenandgledhill.com](mailto:andrew.chan@allenandgledhill.com)

## Real estate

### Singapore High Court examines a judgment creditor's interest in a property that has been bound by a registered writ of seizure and sale

*United Overseas Bank Ltd v Chia Kin Tuck*  
[2006] 3 SLR 322; [2006] SGHC 87

In the case of *United Overseas Bank Ltd v Chia Kin Tuck*, the Singapore High Court provides an instructive discussion of the scope of a judgment creditor's interest in a property following registration of a writ of seizure and sale (“WSS”) where the property is subject to a prior mortgage. In particular, the High Court held that the fact that a mortgagee's power of sale arose only after a judgment creditor's WSS is registered does not affect or fetter the exercise of the mortgagee's rights *vis-à-vis* the judgment creditor as the latter could not claim or assert to be in a better position than the mortgagor/judgment debtor.

The plaintiff mortgagee (the “**plaintiff**”) granted banking facilities to an individual (the “**mortgagor**”) secured by a legal mortgage over a house (the “**mortgaged property**”).

The mortgagor defaulted on the loan and received notice from the plaintiff that it intended to exercise its statutory power of entry into possession of the mortgaged property. Vacant possession of the mortgaged property was subsequently voluntarily surrendered to the plaintiff. The very next day, the mortgagor was adjudicated a bankrupt.

When the plaintiff attempted to sell the mortgaged property, it was challenged by the defendant, a judgment creditor of the mortgagor who had registered a WSS on a date prior to the plaintiff's entry into possession. As a result of the defendant's objections, the plaintiff did not proceed with a scheduled auction to sell the mortgaged property.

The plaintiff commenced the instant proceedings seeking a declaration acknowledging its prior right to conduct the sale of the mortgaged property notwithstanding the registration of the WSS. The application was heard by an assistant registrar who granted the plaintiff the relief it sought including an indemnity from the defendant intended to cover any losses sustained by the plaintiff between the date of the aborted auction and the date the bailiff returned possession of the mortgaged property to the plaintiff. The defendant appealed against the decision of the assistant registrar.

#### The interest of an execution creditor

The High Court, presided by VK Rajah J, held that the procurement of a monetary judgment, unless expressly provided by statute, does not create any property rights (ambulatory or otherwise), nor any security rights. It merely presages a process that could culminate in the issuance of a WSS. Pending execution against specific property, a monetary judgment merely operates *in personam*. A judgment creditor cannot, on the basis of the judgment alone, lodge a caveat against property belonging to the judgment debtor as no “interest in land” within the meaning of Section 115 of the Land Titles Act (the “LTA”) exists. To attach or bind the property of a judgment debtor, the judgment creditor must obtain a WSS.

Even when a WSS against specific property is issued, this does not have the effect of creating a security interest. The interest or property in the subject goods or land continues to reside in the judgment debtor pending sale;

notwithstanding, the judgment debtor may in certain situations be constrained from further dealings once attachment is effected.

### **The statutory scheme for execution under the LTA**

The High Court further explained that while a judgment creditor can only assume the precise residual interest that the judgment debtor has in the property, the LTA provides a statutory mechanism by which a judgment debtor can be restricted from further effective dealings of the subject property. Registration is made an essential prerequisite to “bind or affect” the land: See Section 132(1) of the LTA.

VK Rajah J highlighted that the common law position in relation to the interest(s) of a judgment creditor is not altered by the LTA and further that the registration of a WSS does not create a proprietary interest in the subject property. That a purchaser from the Sheriff or the bailiff can only obtain the judgment debtor’s (proprietor’s) interest subject to any earlier interests that have been created and notified on the relevant land title folio is now settled law. This general legal principle is statutorily embedded in Section 135(1) of the LTA.

Section 135 of the LTA reads as follows:

- “(1) *The interest in registered land which may be sold in execution under a writ shall be the interest which belongs to the judgment debtor at the date of the registration of the writ.*
  
- (2) *For the purpose of determining the interest in land which belongs to a judgment debtor:*
  - (a) *any interest in that land purported to be created subsequent to the date of the registration of the writ; and*
  
  - (b) *any interest in that land created prior to the date of the registration of the writ, and not notified in the land-register nor protected by caveat at least 3 clear days before the date of the sale,*

*shall be void against a purchaser of the land at the sale in execution under the writ.*
  
- (3) *Land shall not be sold in an execution under a writ until the expiration of 30 days from the date of the registration of the writ.”*

In summary, until a WSS is registered it cannot bind or affect the subject property nor can it constitute effective notice to third parties. Registration of a WSS is also necessary to confer on a judgment creditor priority *vis-à-vis* other competing execution creditors. Registration does not, however, make the judgment creditor a registered proprietor. Even after registration, the general property and interest in the property remains with the debtor until the execution sale takes place. The Sheriff or the bailiff himself has no interest in the property and is merely conferred the ministerial power to transfer the proprietor’s interest subject to any existing notified interests to a purchaser. The Sheriff/bailiff can do this as he is statutorily deemed to be able to act as a registered proprietor to effect the sale and execute an instrument of transfer.

### **The defendant's rights after registration of the WSS**

The High Court held that it was plain that, by registering the WSS, the defendant merely stepped into the shoes of the mortgagor. He could not claim to have any priority whatsoever over the plaintiff. The fact that the plaintiff's power of sale arose only after the WSS was registered did not affect or fetter the exercise of its rights *vis-à-vis* the defendant/judgment creditor as the latter could not claim or assert to be in a better position than the mortgagor/judgment debtor. In the absence of any provisions to the contrary, it is incontrovertible that a mortgagee can, upon the mortgagor's default, exercise its powers without the consent of and/or further reference to the mortgagor.

In the court's view, the defendant could only legitimately claim to have an interest in any surplus sale proceeds after the plaintiff's claim was satisfied: see Section 74 of the LTA. While conceptually the defendant could claim a statutory right to sell the property, such a sale must plainly be subject to the plaintiff's prior mortgage. Generally speaking, it would be meaningless for a judgment creditor to exercise such an arid right without the consent or co-operation of a prior mortgagee or other encumbrancer unless there is a substantial surplus of sale proceeds.

### **Conclusion**

In the circumstances, the court concluded that the plaintiff was entitled as of right to proceed with a sale of the mortgaged property. Once it was contractually entitled to exercise its power of sale, it was under no obligation to procure the consent or approval of the defendant, even though the latter had lodged a prior WSS. A purchaser from the plaintiff *qua* mortgagee would be entitled to lodge a transfer that would effectively take precedence over the defendant's WSS pursuant to the provisions of Section 73(2) of the LTA. Any rights that the defendant might have had as a judgment creditor would then be converted into an interest in the surplus sale proceeds (if any): See Section 105(2)(c) of the Bankruptcy Act which deems execution to be completed upon registration of the WSS.

The court also held that as the plaintiff could quite easily have proceeded to exercise its power of sale in spite of the unreasonable stance taken by the defendant, the assistant registrar had erred in awarding it damages.

[Back to Contents Page](#)

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

Edward Tiong  
Tel: +65 6890 7887  
[edward.tiong@allenandgledhill.com](mailto:edward.tiong@allenandgledhill.com)

## News

### **Allen & Gledhill voted Asia's best advisory group in legal services in the Euromoney Awards for Excellence in Real Estate 2006**

Allen & Gledhill has been ranked as the best real estate advisory group in legal services for Asia in the *Euromoney* Awards for Excellence in Real Estate 2006. The other law firms which were voted as second and third best real estate advisory group in legal services for Asia are a London-based international law firm and an Australian-based international law firm, respectively.

This is *Euromoney's* second annual real estate survey, which canvassed the opinions of real estate developers, advisors, financial institutions and investors.

[Back to Contents Page](#)

---

### **HSBC Structured Notes (Cayman) Limited's note issuance programme**

HSBC Structured Notes (Cayman) Limited (the "**Issuer**") has launched the first retail principal protected structured note in Singapore under a US\$5 billion retail note issuance programme which will be issued to the public in Singapore. The notes are guaranteed by The Hongkong and Shanghai Banking Corporation Limited (the "**Guarantor**").

Advising the Issuer and Guarantor are Allen & Gledhill Partner Yeo Wico and Associate Eunice Ng.

[Back to Contents Page](#)

## New Partners

Allen & Gledhill is pleased to announce the appointment of two new Partners.

### Dinesh Dhillon



Dinesh Dhillon joins the Firm with effect from 1 September 2006. A Partner in Litigation & Dispute Resolution, Dinesh's areas of practice encompass litigation, arbitration (domestic and international), insurance and employment law. He has successfully argued cases at all court levels in Singapore including its highest court, the Court of Appeal.

Sharon Wee joins the Firm with effect from 12 September 2006. A Partner in Financial Services, Sharon's areas of practice encompass capital markets, mergers and acquisitions, and general corporate law. She has advised a number of banks, financial institutions and corporations on cross border initial public offerings, fund-raising, securitisations and other capital markets matters.

### Sharon Wee



[Back to Contents Page](#)

# Contact Partners

<b>Managing Partner</b>	Lucien Wong	6890 7702	lucien.wong@allenandgledhill.com
<b>Corporate &amp; Commercial</b>	Christine Chan Christian Chin Sharmini Chitran Michele Foo Su Mei Lee Kim Shin Sophie Lim Pauline Ng Yoke Ping Vemala Rajamanickam Patricia Seet Steven Seow Daren Shiau Song Su-Min Tan Su May Tan Wee Meng Melissa Anne Teo Tham Kok Leong Kelvin Wong Yap Lune Teng Richard Young	6890 7647 6890 7616 6890 7600 6890 7614 6890 7699 6890 7696 6890 7641 6890 7645 6890 7650 6890 7610 6890 7612 6890 7667 6890 7606 6890 7518 6890 7608 6890 7526 6890 7644 6890 7665 6890 7635	christine.chan@allenandgledhill.com christian.chin@allenandgledhill.com sharmini@allenandgledhill.com michele.foo@allenandgledhill.com lee.kimshin@allenandgledhill.com sophie.lim@allenandgledhill.com pauline.ng@allenandgledhill.com vemala.raja@allenandgledhill.com patricia.seet@allenandgledhill.com steven.seow@allenandgledhill.com daren.shiau@allenandgledhill.com song.sumin@allenandgledhill.com tan.sumay@allenandgledhill.com tan.weemeng@allenandgledhill.com melissaanne.teo@allenandgledhill.com tham.kokleong@allenandgledhill.com kelvin.wong@allenandgledhill.com yap.luneteng@allenandgledhill.com richard.young@allenandgledhill.com
<b>Corporate Real Estate</b>	Noraini Aziz Penny Goh Ho Kin San Hoo Sheau Farn Margaret Soh Eudora Tan Tan Yah Piang Ernest Teo Lyn Wee	6890 7910 6890 7901 6890 7928 6890 7941 6890 7912 6890 7971 6890 7921 6890 7967 6890 7919	noraini@allenandgledhill.com penny.goh@allenandgledhill.com ho.kinsan@allenandgledhill.com hoo.sheaufarn@allenandgledhill.com margaret.soh@allenandgledhill.com eudora.tan@allenandgledhill.com tan.yahpiang@allenandgledhill.com ernest.teo@allenandgledhill.com lyn.wee@allenandgledhill.com
<b>Financial Services</b>	Au Huey Ling Bin Wern Sern Sunit Chhabra Chua Bor Jern Margaret Chin Leonard Ching Foong Yuen Ping Nand Singh Gandhi Mark Hudspeth Christopher Koh Jerry Koh Kok Chee Wai Gina Lee-Wan Lynette Lee Andrew M. Lim Lim Mei Lim Pek Bur Steven Lo Long Jek Aun Francis Mok Jafe Ng Christina Ong Eugene Ooi Harold Or Rasida Mohd Salleh Tan Jessie Tan Tze Gay Karen Tiah Prawiro Widjaja Sharon Wee Lucien Wong Yeo Wico Yeoh Lian Chuan	6890 7749 6890 7624 6890 7735 6890 7772 6890 7718 6890 7730 6890 7622 6890 7838 6890 7722 6890 7768 6890 7770 6890 7724 6890 7582 6890 7783 6890 7706 6890 7732 6890 7096 6890 7756 6890 7714 6890 7786 6890 7731 6890 7700 6890 7708 6890 7566 6890 7782 6890 7823 6890 7712 6890 7741 6890 7717 6890 7089 6890 7702 6890 7775 6890 7720	au.hueyling@allenandgledhill.com bin.wernsern@allenandgledhill.com sunit.chhabra@allenandgledhill.com chua.borjern@allenandgledhill.com margaret.chin@allenandgledhill.com leonard.ching@allenandgledhill.com foong.yuenping@allenandgledhill.com nand.gandhi@allenandgledhill.com mark.hudspeth@allenandgledhill.com christopher.koh@allenandgledhill.com jerry.koh@allenandgledhill.com kok.cheewai@allenandgledhill.com gina.leewan@allenandgledhill.com lynette.lee@allenandgledhill.com andrew.lim@allenandgledhill.com lim.mei@allenandgledhill.com lim.pekbur@allenandgledhill.com steven.lo@allenandgledhill.com long.jekaun@allenandgledhill.com francis.mok@allenandgledhill.com jafe.ng@allenandgledhill.com christina.ong@allenandgledhill.com eugene.ooi@allenandgledhill.com harold.or@allenandgledhill.com rasida.salleh@allenandgledhill.com jessie.tan@allenandgledhill.com tan.tzegay@allenandgledhill.com karen.tiah@allenandgledhill.com prawiro@allenandgledhill.com sharon.wee@allenandgledhill.com lucien.wong@allenandgledhill.com yeo.wico@allenandgledhill.com yeoh.lianchuan@allenandgledhill.com
<b>Intellectual Property &amp; Technology</b>	Stanley Lai Low Pei Lin Elaine Tan	6890 7883 6890 7516 6890 7507	stanley.lai@allenandgledhill.com low.peilin@allenandgledhill.com elaine.tan@allenandgledhill.com
<b>Litigation &amp; Dispute Resolution</b>	Ang Cheng Hock Vivian Ang Muthu Arusu Andrew Chan Chan Hian Young Christopher Daniel Dinesh Dhillon Ho Chien Mien Ashok Kumar Lim Wee Ming Bernice Loo Mak Wei Munn Suresh Sukumaran Nair William Ong Kenneth Jerald Pereira Ronnie Quek K. Shanmugam, SC Corina Song Christopher Tan Edward Tiong Edwin Tong Leona Wong Kenny Yap Yap Yin Soon Andrew Yeo Andy Yeo	6890 7832 6890 7564 6890 7865 6890 7556 6890 7813 6890 7888 6890 7822 6890 7502 6890 7873 6890 7504 6890 7868 6890 7885 6890 7897 6890 7894 6890 7815 6890 7639 6890 7805 6890 7570 6890 7845 6890 7887 6890 7867 6890 7849 6890 7572 6890 7598 6890 7833 6890 7850	ang.chenghock@allenandgledhill.com vivian.ang@allenandgledhill.com muthu.arusu@allenandgledhill.com andrew.chan@allenandgledhill.com chan.hianyoung@allenandgledhill.com christopherand.daniel@allenandgledhill.com dinesh.dhillon@allenandgledhill.com ho.chienmien@allenandgledhill.com ashok.kumar@allenandgledhill.com lim.weeming@allenandgledhill.com bernice.loo@allenandgledhill.com mak.weimunn@allenandgledhill.com suresh.nair@allenandgledhill.com william.ong@allenandgledhill.com kenneth@allenandgledhill.com ronnie.quek@allenandgledhill.com shanmugam@allenandgledhill.com corina.song@allenandgledhill.com christopher.tan@allenandgledhill.com edward.tiong@allenandgledhill.com edwin.tong@allenandgledhill.com leona.wong@allenandgledhill.com kenny.yap@allenandgledhill.com yap.yinsoon@allenandgledhill.com andy.yeo@allenandgledhill.com andrew.yeo@allenandgledhill.com
<b>Knowledge Management</b>	Margaret Chew	6890 7500	margaret.chew@allenandgledhill.com

Allen & Gledhill  
One Marina Boulevard #28-00  
Singapore 018989

Telephone	+65 6890 7188
Facsimile	+65 6327 3800
EFS mailbox Id	ale7001 ale7003
E-mail	<a href="mailto:inquiries@allenandgledhill.com">inquiries@allenandgledhill.com</a>
Website	<a href="http://www.allenandgledhill.com">www.allenandgledhill.com</a>

---