

LEGAL UPDATE

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It is fitting for us to round up this year with a selection of articles which herald some significant legislative changes that will be coming in 2006. In *“The Year Ahead: A Special Focus on Cartels and Price-Fixing”*, we take a look at the impact of the Competition Act on cartel activities. The provisions affecting these will come into effect on 1 January 2006 and the Competition Commission of Singapore is expected to concentrate its enforcement activities on such anti-competitive agreements, decisions and practices. The article also discusses some practical regulatory measures designed to combat cartels.

As our economy grows more vibrant, the number of cross-border transactions will increase. Consequently, international dispute resolution and litigation will become more common. In such cases, our courts and arbitral tribunals may find themselves having to contend with foreign law and their experts. Our article on *“International Litigation: Foreign Law in Local Courts”* will use the recent case of *Gregory Laurence Kaufman & Ors v Datacraft Asia Ltd & Anor* [2005] SGHC 174 to shed some light on how local courts may deal with matters governed by foreign law. It will also discuss some important considerations relating to expert witnesses.

In *“Upcoming Changes to the Singapore Companies Act”*, we bring you a brief overview of the key amendments, which are proposed to come into effect on 30 January 2006, and discuss their implications. These amendments represent some of the most progressive changes to our corporate legislation in recent years and aim to encourage a more competitive economy for Singapore by simplifying capital restructuring and making it less costly for companies to comply with capital maintenance rules.

We hope you have enjoyed reading our articles in *Legal Update* as much as we have enjoyed putting them together for you. Here's wishing you a Merry Christmas and a Happy New Year.

Season's Greetings,

Directors
Drew & Napier LLC

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RECENT APPOINTMENTS

We are pleased to announce the appointment of the following lawyers:

ASSOCIATE DIRECTORS



Henry Heng

Henry practices corporate and commercial litigation and advisory work. He is actively involved in trials and appeals at all levels of the Singapore Courts as well as in international and domestic arbitrations. Henry often handles large and complex cases involving cross-border and domestic commercial issues. Graduated from the National University of Singapore in 1997 with LL.B. (Hons), 2nd Upper Division, Henry joined Drew & Napier's Litigation and Dispute Resolution Department in 2003.

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Carolyn joined Drew & Napier LLC's Banking and Corporate Department in 2003. Her primary areas of practice include Mergers and Acquisitions, Corporate Restructurings, Joint Ventures, Venture Capital fundraising and Employment and Immigration matters. Carolyn also provides general advisory work for clients in a wide spectrum of industries, including those in manufacturing, pharmaceutical and life sciences. She was admitted to the Singapore Bar in 1997 and to the Roll of Solicitors, England and Wales in 2004.

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The Year Ahead: A Special Focus on Cartels and Price-fixing



EXECUTIVE SUMMARY

Hard-core cartel activities are the most likely to have an appreciable adverse effect on competition in Singapore. When the substantive provisions of the Competition Act 2004 (“Competition Act”) come into force next year, it is anticipated that such cartel activities are likely to occupy center-stage in the Competition Commission of Singapore’s (“CCS”) list of enforcement priorities.

INTRODUCTION

Come 1 January 2006, the provisions of the Competition Act on anti-competitive agreements, decisions and practices (Section 34) and the abuse of dominance (Section 47) will come into force. A slew of business activities, ranging from price fixing to predatory behavior to exclusivity agreements may potentially find themselves on the wrong side of the law. However, to make the best use of available regulatory resources, the

CCS is expected, for a start, to concentrate its enforcement activities on certain forms of conduct that are considered to be particularly injurious to the spirit of competition and harmful to the Singapore economy as a whole. This article will follow the clues from the authorities which shed some light on what these activities may be. For the purposes of analysis, this article will then focus on a particular example with the hope of giving readers a taste of what to expect. Before concluding, some practical regulatory measures designed to combat cartels will be discussed.

2006: THE LIKELY SUSPECTS

Speaking at the official launch of the CCS on 2 August 2005, Minister Lim Hng Kiang hinted that “...for a start, CCS will pay greater attention to hard core offences that are blatantly anti-competitive. This includes cartels that engage in price-fixing, market sharing, and bid-rigging”. Minister Lim further explained that such behavior is “against the spirit of competition, and must not be condoned”.

Further, in response to a “Frequently Asked Question” posted on the CCS website (www.ccs.gov.sg), the CCS indicated that, as a matter of priority, it will focus its enforcement on the types of anti-competitive activities, and the sectors, where such activities will cause more harm to the economy - some examples of cartel activities cited are “price fixing activities, market sharing arrangements and bid-rigging activities”.

CARTELS AND PRICE FIXING: BASIC CONCEPTS

The term “cartel” is not defined in the Competition Act or any of the guidelines published by the CCS thus far. However, for present purposes, it would suffice to think of a cartel as arising from an agreement between two or more undertakings to engage in one or more of the following activities:

- (i) direct and indirect price-fixing;
- (ii) limitation of supply or production;
- (iii) market sharing; or
- (iv) bid-rigging.

Although the CCS Guideline on the Section 34 Prohibition (“Section 34 Guideline”) goes as far as to state that any agreement involving price-fixing, bid-rigging, market-sharing or output limitations will have an appreciable adverse effect on competition even if the market shares of the parties are below the prescribed threshold levels (e.g., 20% of any of the relevant markets affected by the agreement where the agreement is made between competing undertakings), the CCS cannot be expected to focus on a situation where the competing undertakings’ aggregate market shares fall dramatically

short of the prescribed thresholds. Consistent with everyday usage, the term “cartel” tends to carry along with it the connotation of size and economic strength (otherwise two chicken-rice sellers operating in the same area who agree to fix prices would also be a “cartel”).

In this article, we will focus our discussion on one example of a common prohibited cartel behavior, namely, price-fixing.

In competitive markets, the constant battle for the hearts and minds of consumers necessitates constant product differentiation, innovation and efficiency. To command a higher price for a given product, an undertaking would have to offer something superior to what is currently offered by its competitors or risk being priced out of the market.

However, if undertakings are able to join forces to fix prices, the competitive paradigm would be completely distorted, for they would be able to bask in the security of a guaranteed level of prices, regardless of quality or the level of innovation involved. Such a practice will invariably harm consumers as manufacturers would no longer have strong incentives to outdo each other in terms of creativity and efficiency.

PRICE-FIXING: LAW AND PRACTICE

Section 34(1) of the Competition Act prohibits agreements which have, as their object or effect, the prevention, restriction or distortion of competition within Singapore. Section 34(2) includes the direct or indirect fixing of prices in the laundry list of activities which are considered to have an appreciable adverse effect on competition.

According to the Section 34 Guideline, the term “agreement” has a wide meaning and includes both legally enforceable and non-enforceable agreements, whether written or oral. All that is required is that parties arrive at a consensus on the actions each party will take. The Section 34 Guideline further explains that the fact that a party may have played only a limited part in the setting up of the agreement may not necessarily mean that it will not be deemed a party to the agreement.

The Section 34 Guidelines further elaborates that there are many ways in which prices can be fixed. It may involve fixing either the price itself, or the components of a price such as a discount, establishing the amount or percentage by which prices are to be increased, or establishing a range

“ As a policy call, the CCS has determined that the benefits of a policy granting lenient treatment to those undertakings who co-operate with the CCS outweighs the policy objectives of imposing financial penalties on such cartel participants. ”

outside which prices are not to move. Price-fixing may also take the form of an agreement to restrict price competition. This may include, for example, an agreement to adhere to published price lists or not to quote a price without consulting potential competitors, or not to charge less than any other price in the market. Recommendations of a trade association in relation to price, or collective price-fixing or price co-ordination of any product may be considered to be price-fixing, regardless of the form it takes.

In some circumstances, the exchange of certain information between competitors may have an appreciable adverse effect on competition, where it serves to reduce or remove uncertainties inherent in the process of competition. For example, the exchange of information on prices may lead to price co-ordination and therefore diminish competition, which would otherwise be present between the undertakings. As a general rule, the more recent or current the information exchanged, the more likely that the exchange could have an appreciable adverse effect on competition. The circulation of purely historical information, on the other hand, is less likely to have such an effect.

In practice, it is not always easy to discern whether the exchange of information had facilitated price-fixing between undertakings. In the United States, the application of §1 of the Sherman Act 1890 (the “Sherman Act”) to agreements to exchange information has produced some anomalous results. In *American Column and Lumber Co v U.S.* 257 US 377 (1921), the Supreme Court found that an agreement to exchange price information in a diverse market where conditions for collusion were hostile infringed the Sherman Act, whilst in *Maple Flooring Manufacturers’ Association v U.S.* 268 US 563 (1925) it reached the opposite conclusion where the market was oligopolistic and the opportunity for price-fixing much greater.

WHISTLE-BLOWING INCENTIVES

It is widely believed that leniency programmes can break the code of silence between cartel members. The experience in several Western competition law jurisdictions has shown that the leniency programmes that have been most successful are those that give complete amnesty to the first conspirator who comes forward to reveal the inner workings of the cartel to the authorities.

The CCS is mindful that participants of cartel activities who wish to terminate their involvement and inform the CCS of the existence of the cartel activity may be deterred from doing so because of the risk of incurring large financial penalties. To pierce the cloak of secrecy surrounding cartels, the CCS has similarly recognised that cartel participants should be given an incentive to come forward and inform the CCS of the existence of the cartel’s activities. As a policy call, the CCS has determined that the benefits of a policy granting lenient treatment to those undertakings who co-operate with the CCS outweighs the policy objectives of imposing financial penalties on such cartel participants.

Through the “*Draft Guideline on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases*” (“Draft Leniency Guidelines”), the CCS is now considering granting total immunity to the first cartel member to come forward with information before an investigation by the CCS has commenced, and the reduction of up to 100% in the level of financial penalties for the first to come forward after an investigation has commenced.

However, it remains to be seen whether such a leniency programme - one styled after Western models - will fit into Singapore’s culture. When the Japanese Fair Trade Commission engaged in a consultation process on whether to establish a leniency policy in late 2003, the

Japanese Business Federation (*Nippon Keidanren*), the most influential industrial organisation in Japan, opposed the adoption of such a policy. One of the main concerns raised then was that the concept of informing on one's fellow participants in exchange for a lower sanction may be an affront to Japanese culture.

CONCLUSION

The year ahead is likely to be an exciting one for both the CCS and practitioners alike. While the Competition Act prohibits several forms of anti-competitive activity, the focus in 2006 is likely to be on cartel activity. It is hoped that, cultural differences aside, the measures that have generally worked in fighting cartels continue to apply with equal or more vigor in Singapore.

The Competition Law Group, co-headed by our Directors Andrew Ong, Cavinder Bull and Lim Chong Kin, consists of a dedicated and experienced team of lawyers who have handled competition law work in the media and telecom sectors in Singapore and overseas. The team has a wide range of local and international competition regulatory experience and broad-based knowledge of business concerns, making the group well-placed to advise on the full range of competition law matters, under sectoral as well as the soon-to-be implemented national competition regulatory regimes.



(from left) Eugene Phua, Edric Wong, Lim Chong Kin

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LIM CHONG KIN is a Director with the Banking & Corporate Department and co-heads the Competition Law Practice Group. He practices corporate and commercial law with emphasis in the specialist areas of info-communications, media and technology. He was the lead Singapore counsel that undertook the drafting of Singapore's first interconnection framework and played an instrumental role in the creation of IDA's Telecom Competition Code 2000 and 2005, IDA's regulatory framework for reviewing Consolidations and MDA's Media Market Conduct Code 2003. He recently assisted in several mergers in the telecommunications industry involving US and European carriers. Chong Kin is regularly called upon to advise on regulatory, licensing, competition and market access issues.

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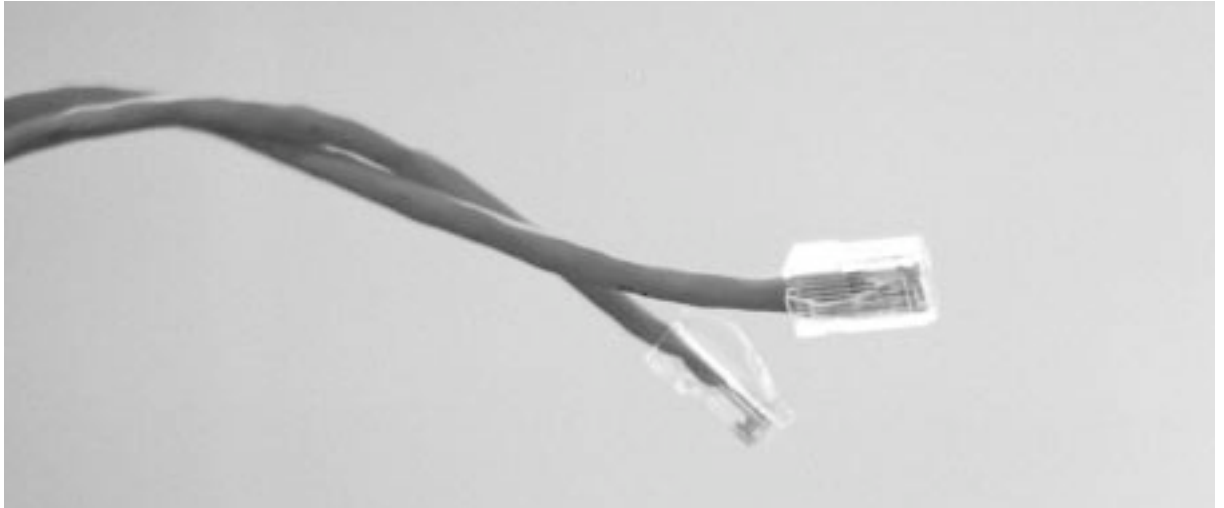
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EUGENE PHUA is an Associate with the Banking & Corporate Department and is a member of both the Competition Law and Info-communications Practice Groups. Just weeks before the final LL.B. examinations in 2002, he represented the National University of Singapore at the Vis Moot Arbitration Competition in Vienna and received the *Frédéric Eisemann Award* for the best team performance. In 2003, Eugene pursued his LL.M. at Columbia Law School on a *Kathryn Worth Foundation* Scholarship. There, he specialised in Telecommunications and Antitrust law, and was named *Harlan Fiske Stone* Scholar by the Columbia Faculty.

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International Litigation: Foreign Law in Local Courts



EXECUTIVE SUMMARY

In the recent case of *Gregory Laurence Kaufman & Ors v Datacraft Asia Ltd & Anor* [2005] SGHC 174, Drew & Napier’s Cavinder Bull, Johanna Tan and Lim Wei Lee successfully defended a claim of alleged breach of fiduciary duties under Japanese law. The case is an example of international litigation in Singapore and specifically provided guidance on how cases which are governed by foreign law should be dealt with by the Singapore Courts.

As business continues to be international in nature, cross-border disputes have become common. International arbitrations and international litigation are a fact of commercial life today. Judges and arbitral tribunals have to deal with issues of foreign law and the Singapore Courts and arbitrators are well acquainted with how this is done. *Gregory Laurence Kaufman* is just one recent example of this.

INTRODUCTION

In *Gregory Laurence Kaufman*, the Defendants had acquired two computer networking companies in Japan and merged them. The Plaintiffs were shareholders of one of the acquired companies. After the acquisition and merger, the Plaintiffs were retained as employees in the merged entity.

Some time later, the Plaintiffs discovered evidence in the course of their work that suggested that the vendors of the other acquired company (the “Second Company”) had executed sham contracts to inflate the value of their

company prior to the sale to the Defendants. The Plaintiffs told the Defendants of the existence of the evidence but refused to provide it to the Defendants unless they were paid a portion of any recovery the Defendants might obtain from pursuing a claim against the vendors of the other company. The Defendants reluctantly agreed and an agreement (the “Agreement”), governed by Japanese law, was signed to document this arrangement.

The Defendants eventually reached a settlement with the vendors of the Second Company. The Plaintiffs were paid their portion of the settlement amount pursuant to the terms of the Agreement. A breakdown of their entitlement to the settlement sum was also provided. Some time later, the Plaintiffs commenced an action alleging that the Defendants owed them a fiduciary duty under Japanese law and asked for an account of all monies owed to them under the Agreement. The Plaintiffs based their claim on the concept of “entrustment” under the laws of Japan (or “*Inin*” in Japanese). The Defendants argued that there was no entrustment under Japanese law. Thus, the case turned on an issue of Japanese law.

As the central issue was whether the arrangement gave rise to fiduciary duties or an “entrustment” under Japanese law, both parties called experts in Japanese law who testified at the trial. The Singapore High Court had to determine the applicable Japanese law and decide the dispute in accordance with Japanese law.

CROSS-BORDER DISPUTES

A number of the difficulties that arose in this case are typical in cross-border disputes. Due to regionalisation and globalisation in business, cross-border disputes are quickly becoming the norm rather than the exception. Often, cross-border transactions involve companies and transactions from numerous countries, and agreements governed by laws of different jurisdictions. Cross-border transactions lead to cross-border disputes when things do not go according to plan.

Over the years, the Singapore Courts have, with increasing frequency, dealt with cross-border disputes. They have even been called upon to apply laws foreign to the local legal system. This is due largely to parties frequently choosing Singapore as the forum for international dispute resolution due to the efficiency and neutrality of its legal system.

The background facts to this dispute occurred mainly in Japan and related to a Japanese company. The agreement was governed by Japanese law. The witnesses were resident in a number of different jurisdictions outside Singapore. The only significant connection to Singapore was the fact that one of the Defendants is a company incorporated in Singapore. Yet, the Plaintiffs chose to commence their action in Singapore and to have it tried in the Singapore High Court.

A number of problems often arise in cross-border disputes and handling these problems requires a comparative perspective. In international litigation, lawyers need to familiarise themselves not only with the foreign law and foreign legal system, but also the practice in the foreign countries involved, different legal traditions and procedures, and different cultural values.

A frequent source of confusion in cross-border disputes is the language in which the parties, counsel and witnesses communicate. In our case, both parties had to engage experts on Japanese law. The experts' first language was, for obvious reasons, Japanese. During trial, interpreters were used to facilitate communication between cross-examining counsel and the Japanese expert witnesses. Whilst communicating through an interpreter can be tricky enough, special difficulties arise in trying to explain and communicate legal concepts and terms of art. These bear special and specific meanings which are often influenced by the legal traditions of the jurisdiction. As Japan is not a common law jurisdiction while Singapore is, care had to be taken to ensure that the expert's testimony was accurately translated and communicated.

EXPERT WITNESSES

The learned Justice GP Selvam once said that "*foreign law, by a legal fiction, is treated as a fact*". The rules of Singapore

law require the relevant principles and provisions of the applicable foreign law to be proved as a matter of fact which means that evidence had to be given on Japanese law. While there are several methods of proving foreign law, the most common method of proof is by calling expert evidence.

As the Plaintiffs' case essentially hinged on certain principles under Japanese law, the judgment of the Singapore High Court dealt extensively with the evidence of the expert witnesses. The judgment serves to highlight several important considerations relating to expert witnesses. These considerations will arise in any dispute involving an expert witness in litigation and arbitration:

- (i) the qualifications and extent of experience of the expert in similar work;
- (ii) the independence of the expert;
- (iii) the expert's level of thoroughness in preparing his evidence; and
- (iv) the credibility of the expert.

i. Qualification of the Expert

While this may sound obvious, it is important to ensure that the expert you are engaging is an expert. He must be sufficiently qualified. Singapore law looks to the qualifications, standing and experience of the expert to determine whether he is qualified to testify and give evidence of the laws of another country.

The choice of experts of both parties reflected this consideration. Both parties engaged Japanese lawyers from large, reputable law firms.

ii. Independence of the Expert

One of the issues which the High Court explored at length was the independence of the expert witnesses. Expert witnesses occupy a special and at times paradoxical, position. Experts are, in law, officers of the Court and have a duty to give their evidence impartially. Further, experts are oftentimes professionals who will be keen to safeguard their reputations. However, these duties are undertaken in the context of the expert having been engaged by one party to a dispute.

The Plaintiffs objected to the Defendants calling the witness the latter had chosen. They alleged that the Defendants' expert was not independent because the Defendants' expert's firm had represented the Defendants in the negotiation and drafting of the agreement and of the settlement agreement in question in this case. The Defendants' expert's firm had an ongoing business relationship with the Defendants and the expert himself had done work for them. Most importantly, prior to the

commencement of this action, the Defendants' expert's firm had taken a position on the meaning and effect of the provisions in the agreement and the Plaintiffs alleged that the expert could not take a contrary position in the interests of his firm.

The Singapore High Court dismissed the Plaintiffs' objections and allowed the expert to testify after considering the cases of *Fields v Leeds City Council* [2001] 17 EG 165 and *Armchair Passenger Transport Limited v Helical Bar Plc* [2003] EWHC 367. Those cases established that even where the expert witness has a connection with one of the parties or otherwise has an interest in the outcome of the proceedings, such interest does not automatically render his evidence inadmissible. The Court further distinguished the case of *In Re Continental Assurance Company of London plc* [2001] BPIR 733, (which held that the expert witness in question did not have the independence to be acceptable as an expert as he was part of a professional team that was instructing the lawyers) on the basis that the Defendants' expert "*did not give instructions to counsel and his role was isolated to the giving of an expert opinion*". While the expert's evidence was admissible, these cases left open the question of the weight which the Court should give to the expert's testimony.

The Defendants argued that even though the expert's firm had taken a position on the meaning of the settlement agreement, there was no real conflict of interest. This was because there would have been no loss to the Defendants even if the expert's firm was wrong in their advice. Thus, there was no danger of the expert affirming an opinion he did not truly believe in simply to protect his firm's interests. Further, the expert himself had not been involved in the matter previously and would certainly not have put his personal reputation at risk by professing an opinion, in open court, that he did not believe in.

In making these arguments, the Defendants were asking the Court to examine the allegation of conflict of interest in specific detail and not to simply err on the side of caution. The Court took up that suggested approach and examined in detail the specific allegation of conflict that had been raised.

The Singapore High Court agreed that the independence of the Defendant's expert could not be impugned but held that it should be borne in mind that the "*possibility*" of a conflict still existed. The Court would accordingly scrutinise his evidence with care where it conflicted with that of the Plaintiffs' expert. The Court acknowledged that objections are frequently raised when an expert or the organisation he belongs to has repeatedly been engaged by the same party or counsel; the allegation being that there is almost a commercial relationship between expert and party or expert and counsel. Nevertheless, the Courts

recognised that this cannot *per se* lead to the conclusion that the expert is not objective.

Bias may be apparent from other factors, including the expert's unwillingness to reasonably concede anything that might support the other party's case, or his insistence on the rightness of his opinion even when contrary facts or authorities are brought to his attention. An expert should not be seen as an advocate; he cannot be seen as partisan or viewed as a "*hired gun*".

If an expert is proved wrong or has good reason to correct himself or change his opinion, he should do so. Otherwise he will lose credibility and will be seen as being partisan. For example, the Defendants' expert was asked to consider a reasonable alternative interpretation of a clause in the agreement. His reply conceded that the clause could theoretically be interpreted in that way but pointed out that such an interpretation would contradict another provision in the agreement. His demeanour and the impression of impartiality that he gave was a factor that the Court considered. In fact, the Court commented that it was "*sure that [he] believed fully in the opinions that he expressed*".

In contrast, the Plaintiffs' expert had tried to support his conclusion that there was an entrustment agreement by asserting that the Plaintiffs had agreed to fund a portion of the Defendants' legal costs. However, the Court held that this reasoning was not supported by the terms of the agreement and found that he was "*stretching a point in order to bolster his opinion in favour of the Plaintiffs' case*". Further, when the Plaintiffs' expert was shown a document damaging to his opinion during cross-examination, he refused to accept that the document would even affect his opinion. The judgment pointed out that his behaviour "*did not help things in Court*".

iii. Level of Thoroughness

The validity of the expert's testimony is largely linked to the level of thoroughness in the preparation of his expert report, in canvassing the relevant facts, documents and authorities. The expert has an independent duty to enquire into relevant facts so as to ensure that his opinion has covered all possible grounds. The omission of an important fact could have serious repercussions on the expert's testimony.

As an illustration, the Court found it difficult to accept the Plaintiffs' expert's opinion on a crucial point as the evidence in Court showed that he was less than thorough in preparing his expert report. First, the Plaintiffs' expert had not seen a consultancy agreement which was part of the main agreement and hence, did not consider the effects of the consultancy agreement on the agreement. Under cross-

examination, the Plaintiffs' expert admitted that he had not seen the consultancy agreement before, nor did he ask to see it, even though it was referred to in the main agreement. The Court found that he had "*rendered his opinion without perusing all the relevant documentation*" and his opinion "*cannot therefore be considered to be well founded*". This, ultimately, was fatal to his testimony.

Secondly, the Court held that "*it was also striking that although [the Plaintiffs' expert] said that he read [the Defendants' expert's] expert opinion, he did not read Appendix 2 to that opinion*". Appendix 2 contained copies of various documents that were relevant to the analysis but the Plaintiffs' expert saw fit to simply disagree with the Defendants' expert's opinion without even reading the documents that his opinion was founded on.

The damaging effect of this lack of thoroughness is clear when the Court described the Plaintiffs' expert's evidence to be "*of no assistance to the Plaintiffs in their effort to establish ... that an entrustment obligation on the part of [the Defendants] was thereby created*".

iv. Credibility

"Credibility" means that the expert's evidence must be believable and well founded on logical analysis and relevant authorities. To determine this, the Court will always look to the rationale behind an expert's opinion. An expert should

always set out the reasons for his opinion in his expert report to make it clear that his conclusions are credible. Asserting an opinion or conclusion without backing it up with logical analysis or authorities can cause considerable damage to the expert's opinion. For instance, the Court did not accept a portion of the Plaintiffs' expert's testimony as he had "*twice conceded that his opinion did not contain any reason or rationale whatsoever*" for his conclusion.

Further, it is important to ensure that the expert has a correct understanding of the facts. The expert can only reach the conclusion he does on the basis of a certain understanding of the facts and circumstances. In the present case, the Plaintiffs' expert had based one of his conclusions on an erroneous assumption that only the Defendants had access to important information. The Court found that the Plaintiffs' expert "*had made a fundamental mistake in his assessment of the factual situation*" and found in favour of the Defendants on that point.

CONCLUSION

The *Gregory Laurence Kaufman* case illustrated the willingness and competence of the Singapore Courts to deal with cases governed by foreign law. The case ultimately turned on the relative merits of the two expert witnesses' testimony and it demonstrated the significant importance of selecting a qualified, thorough and credible expert when foreign law is in issue.

CAVINDER BULL is a Director with Drew & Napier LLC's Litigation and Dispute Resolution Department. He was made a partner of Drew & Napier in 1998 and a Director of Drew & Napier LLC in May 2002. He graduated with First Class Honours in law from Oxford University in 1992. Called to the Bar of England & Wales the following year, he was placed fourth in the Bar exams. He passed the Singapore Bar exams, winning the prize for top candidates. Before joining Drew & Napier in 1994, Cavinder clerked for the Chief Justice of Singapore. In 1995, he was awarded the Lee Kuan Yew Scholarship and left for Harvard Law School where he received an LL.M. He passed the New York Bar Exams and was admitted to practice in New York. He practices corporate and commercial litigation and is actively engaged in trial and appellate advocacy at all levels of the Singapore Courts. Building on his professional qualifications from the United States and the UK, Cavinder's practice includes a substantial amount of cross-border litigation and international arbitration.

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LIM WEI LEE is an Associate with Drew & Napier LLC's Litigation & Dispute Resolution Department. She graduated from the National University of Singapore in 2004 and represented NUS in several international moot competitions. In 2003, she represented NUS in the Willem C. Vis International Arbitration Moot Competition in Vienna, and won a prize in the Martin Domke Award for Best Oral Advocate. She was also part of the NUS team in the 2nd HKRC International Humanitarian Law Moot in Hong Kong and won the Best Mooter Award, with NUS emerging as champions that year. Wei Lee's principal areas of practice are in corporate and commercial litigation, as well as both domestic and cross-border arbitration.

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Upcoming Changes to the Singapore Companies Act

EXECUTIVE SUMMARY

The Singapore Companies Act (Cap 50) (“Companies Act”) has been amended over a few phases since 2002 to implement various recommendations of the Company Legislation and Regulatory Framework Committee (“CLRFC”) as outlined in their report published on 22 October 2002 (“CLRFC Report”). The Companies (Amendment) Act 2005 (“Amendment Act”) which seeks to implement some of the remaining recommendations of the CLRFC was gazetted in June 2005. The proposed date of implementation is 30 January 2006.

The Amendment Act will make some of the most significant changes to our corporate legislation in recent years. The key amendments relating to capital provisions seek to simplify companies’ share structures, increase flexibility for companies to structure or restructure their capital and reduce the cost for companies to comply with capital maintenance rules.

In this article, we seek to give a brief overview of these key amendments and their implications.

THE KEY AMENDMENTS

1. ABOLITION OF THE CONCEPTS OF “PAR VALUE” AND “AUTHORISED CAPITAL”

The CLRFC recognized that the concept of “par value” is a meaningless one in today’s business environment as investors or creditors no longer rely on it to measure a company’s value. The concept also creates an artificial divide between the nominal share capital and share premium of a company. The CLRFC also accepted that the concept of “authorized capital” as a ceiling is artificial as a company is free to amend and increase its authorized share capital with shareholders’ approval. The abolition of both concepts will simplify companies’ share structures and introduce greater flexibility for fund raising.

Come appointed day, all shares of a company (whether issued before, on or after the appointed day) will have no par or nominal value (New Section 62A). Consequentially, the concepts of share premium and share discount will be removed. The Companies Act will also be amended so that a company will no longer be required to state the amount of share capital it proposes to be registered with or the division thereof into shares

of fixed amounts. In short, there will be no statutory minimum on the issue price of new shares or statutory limit on the issue of new shares.

Consequential amendments to provisions throughout the Companies Act will be made to reflect the abolitions and provisions will also come into effect to set out the transitional provisions for the new Section 62A.

Under the transitional provisions, any amount standing to the credit of a company’s share premium account and capital redemption reserve shall be deemed to become part of the company’s share capital. The provisions will also make clear that the liability of shareholders for calls in respect of moneys unpaid on shares issued before the appointed day will not be affected and preserve permitted uses of amounts standing to the credit of a company’s share premium account immediately before the abolition. Interpretation provisions will also come into effect to preserve the effect of corporate constitutive and other contracts and documents.

2. LIBERALIZATION OF OUR CAPITAL MAINTENANCE REGIME

The general rule of capital maintenance is that a company may not return its assets to its members while it is a going concern except in the form of dividends paid out of distributable profits or reduction of capital in a manner permitted under the Companies Act. The rule of maintenance of capital also prevents a company from providing financial assistance or purchasing its own shares save in accordance with the provisions of the Companies Act.

The next host of amendments relate to the liberalization of some of these rules. The CLRFC recognized that current restrictions on the use of a company’s capital are not necessarily effective in protecting creditors and that what is important is to address the real concerns of creditors. The CLRFC therefore proposed that restrictions against capital reduction, financial assistance and share buy-backs be liberalized to some extent, provided creditors’ interests are appropriately safeguarded.

(a) *Alternative capital reduction process without Court sanction*

The Companies Act will be amended to introduce an alternative capital reduction process that does not require

Court sanction provided the solvency requirement is met. Publicity and other procedural requirements, including time frame and procedure for creditor objection, will also have to be complied with.

The new provisions will be introduced via a proposed new Division 3A in Part IV of the Companies Act, setting out the reduction process for private and public companies without Court sanction and the reduction process for companies with Court confirmation. The current Section 73 will be repealed and the process of reducing capital with Court confirmation will be comprised in new provisions that basically update the current Section 73 to bring it in line with the processes to reduce capital without Court sanction.

The new procedure for a private company reduction without Court sanction will be largely similar to that for a public company, subject to differences in time frame and publicity requirements. All the directors of the company will have to make a solvency statement. This, together with the creditor objection period and accompanying publicity requirements to be met, will serve to safeguard creditors' interests *in lieu* of the Court's confirmation. The exception to the solvency requirement is if the capital reduction is solely by way of cancellation of paid-up capital which is lost or unrepresented by available assets.

(b) Liberalisation of the financial assistance restrictions to allow financial assistance to be given in additional circumstances

The CLRFC recognized that the current statutory formulation relating to financial assistance is "*fraught with uncertainty*". This is illustrated by the case of *Intraco v Multipak* [1995] 1 SLR 313 where the Singapore Court of Appeal went beyond the literal wording of our current Section 76 to introduce a test of whether the assistance was in the commercial interest of the company.

The Companies Act will be amended to allow for additional circumstances under which financial assistance will be permitted. The liberalization is intended to give companies more flexibility to support transactions that make commercial sense, again, provided safeguards are in place to protect the interest of creditors.

Under the new regime, financial assistance will be permitted where the aggregate amount of financial assistance does not exceed 10% of a company's paid up capital and reserves (new Section 76(9A)) or where unanimous shareholders' approval is obtained (new Section 76(9B)).

Briefly, under the new Section 76(9A), a company can give financial assistance for the purpose of, or in connection

with, an acquisition of shares in the company or its holding company of an amount, together with any other financial assistance given under the same section and remaining outstanding, not exceeding 10% of its paid-up capital and reserves provided:-

- (i) the company receives fair value;
- (ii) a board resolution is passed to approve the assistance and sets out, amongst other things, the directors' grounds for concluding that the terms and conditions under which the assistance is given are fair and reasonable to the company;
- (iii) all the directors make a solvency statement;
- (iv) notification is sent to shareholders containing requisite information within the prescribed time; and
- (v) the notification and solvency statement is lodged with the Registrar of Companies (the "Registrar") within the prescribed time.

Under the new Section 76(9B), a company can give financial assistance for the purpose of, or in connection with, an acquisition of shares in the company or its holding company where unanimous shareholders' approval is obtained provided:-

- (i) a board resolution is passed to approve the assistance and sets out, amongst other things, the directors' grounds for concluding that the terms and conditions under which the assistance is given are fair and reasonable to the company;
- (ii) all the directors make a solvency statement;
- (iii) notification is sent to shareholders within the prescribed time, containing requisite information, including such information and explanation as necessary to enable a reasonable member to understand the nature and implications of the transaction;
- (iv) the shareholders' resolution and the solvency statement is lodged with the Registrar within the prescribed time; and
- (v) the assistance is given not more than 12 months after the shareholders' resolution.

Where a company cannot fall within the provisions of the new Sections, the longer and more tedious route of a "whitewash" procedure, as currently contained under Section 76, remains available.

(c) Allowing share buy-backs to be funded out of profits or capital or both and for repurchased shares to be held as treasury shares

The Companies Act will be amended to allow a company to fund share buy-backs out of its capital or profits or both provided the company is solvent (new Section 76F).

The Companies Act will also be amended to allow ordinary shares bought back by a company to be held in treasury (new Sections 76H to 76K). Ordinary shares bought back by a company will therefore no longer be deemed cancelled immediately on purchase if the company elects to hold the shares in treasury.

The new concept of holding of shares in treasury involves the company holding the shares as a member without rights. Briefly, the company shall be entered in the register as the member holding the treasury shares. However, as a safeguard against abuse, the company shall not have the right to exercise any right (including the right to attend or vote at meetings or the right to dividends or other distributions) in respect of the treasury shares. The aggregate number of shares of any class which may be held as treasury shares shall not at any time exceed 10% of the total number of shares in that class at that time and any “*excess shares*” will be required to be disposed of or cancelled by the company.

The company will at any time be able to:–

- (i) sell the shares for cash;
- (ii) transfer the shares for purposes of employees’ share schemes;
- (iii) transfer the shares as consideration for acquisition of shares or assets;
- (iv) cancel the shares; or
- (v) apply the shares for such other purposes as the Minister may prescribe.

With the amendments, companies will be able to restructure their capital through share buy-backs with greater ease and the holding of shares in treasury will facilitate future capital raising by companies without their having to issue new shares.

SOLVENCY REQUIREMENT

The solvency requirement is the common safeguard that runs throughout the amendments to the capital maintenance rules. In the case of the new capital reduction and financial assistance provisions, directors are required

to give a statement of solvency within the requirements of the new Section 7A, which basically requires a statement by the directors of the company that they have formed the opinion that:–

- (i) there is no ground on which the company could then be found to be unable to pay its debts;
- (ii) the company will be able to pay its debts as they fall due during the next 12 months; and
- (iii) the value of the company’s assets is not less than the value of its liabilities (including contingent liabilities) then-and after the capital reduction or financial assistance, as the case may be.

Such a statement will have to be made by statutory declaration (if the company is exempt from audit requirements) and statutory declaration or shall be accompanied by a report from its auditors that the statement is not unreasonable given all the circumstances (if the company is not exempt from audit requirements). Penal provisions will be introduced to make it an offence for a director to make a solvency statement without reasonable grounds for the opinions expressed in it.

In the case of share buy-backs, the test of solvency is largely modelled with modifications from the new Section 7A test but a statement need not be made. Penal provisions will however make it an offence for any director or manager to approve or authorize the buy-back knowing that the company is not solvent.

At the end of the day, the price of greater efficiency and lower costs in complying with the capital maintenance rules is the greater onus placed on directors of companies in making the solvency statements or approving the buy-backs.

3. THE INTRODUCTION OF A MORE EFFECTIVE AND EFFICIENT STATUTORY FORM OF MERGER AND AMALGAMATION PROCESS NOT REQUIRING COURT SANCTION

New Sections 215A to 215J will allow for voluntary amalgamation by companies without the need for a Court order. The current Court approved amalgamation process under Section 212 and amalgamation by any other law will remain available.

The amendments will introduce four modes of voluntary amalgamation:–

- (i) long form amalgamation by 2 or more companies to continue as one of the amalgamating companies (new Section 215A);

- (ii) long form amalgamation by 2 or more companies to continue as a new company (new Section 215A);
- (iii) vertical short form amalgamation by holding company with one or more of its wholly-owned subsidiaries to continue as an amalgamated holding company (new Section 215D(1)); and
- (iv) horizontal short form amalgamation by two or more wholly-owned subsidiaries to continue as one company (new Section 215D(2)).

Under the new provisions, companies will be required to comply with various requirements and procedure, including the making of solvency statements, to effect the voluntary amalgamations. The requirements to be fulfilled to document and effect short form amalgamations are simpler on the basis that short form amalgamations are essentially intra-group in nature.

There will be an automatic transfer of property, rights, privileges, liabilities and obligations of each amalgamating company to the amalgamated company upon the amalgamation becoming effective under the provisions of the new Sections. To safeguard the interests of creditors, a creditor is open to making an application to Court any time before the date on which the amalgamation takes effect and the Court shall have

the power to intervene if it is satisfied that the giving effect to an amalgamation proposal would unfairly prejudice a member or creditor of an amalgamating company or person to whom an amalgamating company is under an obligation.

CONCLUSION

The upcoming amendments to the Companies Act are poised to make some of the most forward-looking changes to our corporate legislation in recent years. The changes were eagerly awaited and are expected to promote a more competitive economy for Singapore generally by giving Singapore companies greater flexibility to structure or restructure their capital and reducing the costs of compliance with capital maintenance rules.

Going forward, in terms of housekeeping, companies may wish to embark on a document review process to amend and update their constitutive documents and existing share related contracts or agreements to reflect the changes in the law and where applicable, to enable them to take advantage of the liberalized rules. Companies should also, within six months of the appointed day, file with the Registrar a notice in prescribed form of its share capital failing which the Registrar may, for purposes of the records maintained by it, adopt as the share capital of the company, the aggregate nominal value of its shares immediately before the appointed day.

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