

LEGAL UPDATE

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In this issue, we bring you more insights into pertinent areas of law which may impact on commercial transactions and concerns.

Outsourcing is increasingly gaining favour as a means for companies to keep their manpower lean. It may have its advantages but one should also be mindful of the implications and possible pitfalls of outsourcing. The article on “*Human Resource Issues in Outsourcing Transactions*” will look into these.

The introduction of business trusts, limited partnerships, limited liability partnerships and trust companies have brought about new ways in which businesses can be structured and run. They also bring along with them new income tax treatments. These will be explored in “*Recent Tax and Trust Developments*” which will also discuss the proposed introduction of current year taxation in Singapore.

In “*Master of the Cards*”, we bring you further legal developments on intellectual property law concerning oppositions to trade mark applications where the opponent’s mark is well-known.

For 2005, we aim to bring you insights on legal implications in regional business developments. We start off with “*Foreign Direct Investment in India*” which looks at foreign direct investment in the country. It discusses the current investment climate in India, the available avenues for bringing foreign direct investment into India, sectors in which such investment is allowed and recent foreign investment activities involving Singaporean investors.

Finally, we are pleased to inform you that we have been ranked the number one Intellectual Property (“IP”) practice (for both Patent and Trade Mark/Copyright categories) in Singapore by *Managing Intellectual Property*, a well respected and widely read publication in the IP industry, in the latest World IP Survey for 2004/2005. We would like to thank all our clients for their support.

We hope you will find this issue of *Legal Update* interesting. As always, we welcome any feedback which you may have, including topics which you may wish to see in future issues.

Directors
Drew & Napier LLC

MAIN OFFICE

20 Raffles Place
#17-00 Ocean Towers
Singapore 048620
ROC No. 200102509E

T +65 6535 0733
F +65 6535 4906

E mail@drewnapier.com
W www.drewnapier.com

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Human Resource Issues In Outsourcing Transactions

EXECUTIVE SUMMARY

Organisations often choose to outsource their operations on the grounds that this would help them to achieve savings by reducing the cost of operations and capital requirements, as well as enhancing flexibility in resource allocation and workforce management. While there are economic benefits to be gained, one has to be careful not to overlook the implications and possible risks of such a transaction.

In this article, we address some of the key human resource (“HR”) related issues that may arise during the transfer of employees in outsourcing transactions.

INTRODUCTION

This article focuses on the attendant employee-related issues that have to be considered in the classic case of outsourcing, where staff employed by one organisation are transferred (usually along with the associated assets) to a separate entity, but continue to perform substantially the same tasks as a service to their old employers. Whether or not the employees will need to be transferred to the outsourcing service provider (“outsourcing vendor”) will be governed by the contract between the outsourcer and the outsourcing vendor. In the event that the affected employees are not required to be transferred, the outsourcer will have to retrench those employees whose positions have been made redundant.

PUBLIC SECTOR AND PRIVATE SECTOR OUTSOURCING

The difference between public sector and private sector outsourcing lies mainly in the process involved in arriving at the final outsourcing contracts. A company in the private sector may negotiate with several outsourcing vendors that it is interested in, while a company in the public sector awards major contracts by opening tenders and inviting outsourcing vendors to bid for the project. Some examples of projects outsourced by the Singapore Government include the Registry of Companies’ eBizcore, the Supreme Court’s Technology Court, and the Land Transport Authority’s online COE bidding.

In law, the main distinction probably lies in the application of the Employment Act, Cap. 91 (“EA”) to

private and public sector employees. This is discussed in greater detail below.

THE APPLICATION OF THE EMPLOYMENT ACT

The EA does not cover employment of every nature. Employees who are covered under the EA include those who:

- have entered into or work under contracts of service with an employer;
- are workmen (generally, persons who are engaged in manual labour, including artisans and apprentices, and other similar occupations);
- are officers or employees of the Government included in a category, class or description declared by the President to be employees for the purposes of the EA;
- but are not seamen, domestic workers or persons employed in managerial, executive or confidential positions.

Currently, public sector employees do not fall within the scope of the EA. For the purposes of this article, employees who fall within the ambit of the EA will henceforth be referred to as “EA Employees” and those who fall outside the EA will be referred to as “Non-EA Employees”.

TRANSFER OF EMPLOYMENT ACT EMPLOYEES

Where employees have been transferred to an outsourcing vendor, their rights and entitlements may be protected under Section 18A of the EA.

As a preliminary point, Section 18A does require that in order for EA Employees to receive such protection, a “transfer of an undertaking or part thereof” from one person to another must take place. The terms “transfer” and “undertaking” are defined in the EA but they do not make a direct reference to outsourcing arrangements. Section 18A was modelled on its United Kingdom (“UK”) counterpart, the Transfer of Undertakings (Protection of Employment) Regulations 1981 (“TUPE”). It is significant that employees affected by public sector outsourcing in the UK have been accorded protection under TUPE.

Although the UK position is not binding on Singapore courts, Section 18A is based, to a large extent, on TUPE.

As such, the UK position should prove to be very persuasive authority.

Effect of Section 18A

Section 18A(1) of the EA preserves the contract of service and the period of employment of an EA employee. Under this provision, where an organisation's undertaking has been transferred to another entity, such transfer will not terminate the contract of service of the affected employees, and such contracts of service will continue as if originally made between the affected employee and the transferee (the outsourcing vendor in this case). Also, the transfer will not break the continuity of the period of employment.

On top of that, Section 18A(3) of the EA preserves the *status quo* in respect of the terms and conditions of service of a transferred employee by stipulating that the terms and conditions of service enjoyed by the affected employees must be the same as those enjoyed by them immediately prior to the transfer.

Thus, the outsourcing vendor must be prepared, at the outset, to factor in the outsourcer's wage schemes and benefits as part of the business costs of providing the outsourcing service. The obligation on the outsourcing vendor to provide the same, if not better, terms and benefits previously enjoyed by the employee will be a relevant point of consideration on the part of the outsourcing vendor.

In some situations, this could be an obstacle to the smooth transition of operations from the outsourcer to the outsourcing vendor. For example, civil service employees are often employed on remuneration schemes and benefits that are markedly different from those in the private sector. Some senior civil servants may also be on pension schemes that provide a steady stream of post-retirement income. Such pension schemes are rare in the Singapore private sector, especially in light of mandatory Central Provident Fund contributions. The outsourcing vendor and the outsourcer must therefore work closely to ensure that such schemes are adequately and appropriately dealt with in the outsourcing agreement.

TRANSFER OF NON-EMPLOYMENT ACT EMPLOYEES

Non-EA Employees would not be able to avail themselves of the statutory protection afforded by Section 18A of the EA in the event that they are transferred pursuant to an outsourcing arrangement. However, they may still receive proper compensation and/or preservation of benefits if such terms are incorporated into their contracts of employment and/or in their collective agreements (if any). Collective agreements are agreements made between an organisation and the trade union that represents the organisation's unionised employees, and would typically address operational issues such as working hours, annual leave and retrenchment benefits. Unionised employees and collective agreements will be covered in greater detail in the later segments of this article.

For most Non-EA Employees, their services with the outsourcer would, in most instances, be terminated. Given that they are not protected under Section 18A of the EA, they may thereafter be rehired by the outsourcing vendor on terms which may or may not be as favourable as before. However, an outsourcer that is considerate of the welfare of its former employees would leverage on its bargaining power to ensure that affected employees do not suffer any prejudice in terms of remuneration and benefits after the transfer is carried out.

TRANSFER OF UNIONISED EMPLOYEES

EA Employees

As discussed above, Section 18A(3) of the EA requires outsourcing vendors to meticulously consider the impact of relevant costs before entering into the tender for a particular outsourcing project. To add to these considerations, both the outsourcer and outsourcing vendor must handle unionised affected employees with an abundance of caution by virtue of Section 18A(5) of the EA. This provision prescribes a procedure that must be adhered to when dealing with the transfer of unionised employees, including notifying the affected employees and their trade union(s) of the following pertinent details:

- (i) the fact that the transfer is to take place, the approximate date on which it is to take place and the reasons for it;
- (ii) the implications of the transfer and the measures (if any) that the outsourcer will take *vis-à-vis* the affected employees in connection with the transfer; and
- (iii) the measures (if any) that the outsourcing vendor will, in connection with the transfer, take in relation to those employees who will subsequently become employees of the outsourcing vendor after the transfer.

This provision sets out the rights of an affected employee and it is clear that a consultation between the outsourcer and the affected employee is mandatory. The emphasis is on accountability to the affected employee. The fact that the affected employee is given the right to consult also means that the outsourcer must pay heed to the affected employee's opinion. Thus, HR practitioners involved in outsourcing should familiarise themselves with the directions of this provision and make the necessary logistical and preparatory plans.

An issue that may arise in the course of such consultations would be the status of benefits previously enjoyed by affected employees. While Section 18A(3) of the EA protects the terms and conditions of the contract of service, not every benefit may be enumerated in the contract and some "unspoken" or "unwritten" perks might be jeopardised. Further, in the case of civil servants, the need for them to cease civil service employment and join the private sector could be a psychological barrier. The "iron rice bowl" mentality, in contradistinction with a wholly performance-

based assessment, comes to mind when one considers the difference between public and private sector employees. There is also the question as to whether such a transferred unionised employee might lose membership, at least in the union.

Where there is a pre-existing trade union representing the affected employees, Section 18A(8) of the EA expressly preserves the status of the union by requiring the outsourcing vendor to recognise the union after the transfer takes place if, following the transfer, the majority of employees employed by the outsourcing vendor are members of the trade union. If there is no such majority, the union will be recognised for the purpose of representing the employee on any dispute arising from any pre-transfer collective agreement that was entered into between the outsourcer and the trade union, or for any dispute arising from the transfer of the affected employee's employment from the outsourcer to the outsourcing vendor.

If the particular situation falls outside the foregoing scenarios, then there is a chance that the affected employees will lose their membership in the union.

Non-EA Employees

In the case of Non-EA Employees, for example, those in the public sector, there is no automatic recognition of trade unions by the new employer. However, if there is a valid and subsisting collective agreement after the transfer is made, the outsourcing vendor may, for all intents and purposes, have no choice but to recognise the trade union in order for issues regarding collective agreements to be resolved.

COLLECTIVE AGREEMENTS

With respect to the status of collective agreements after a particular department or responsibility has been outsourced, the relevant statute to be considered is the Industrial Relations Act, Cap. 136 ("IRA"). The IRA ensures that the outsourcing vendor is bound by the terms of any collective agreement entered into by the outsourcer.

Just as the EA excludes certain classes of employees, a specific list of persons who qualify as employees is set out in the Industrial Relations (Employees for the Purposes of the Act) Notification ("Notification"). This is highly relevant for its delimitation of the classes of employees from the civil service and the various Ministries that fall within the ambit of the IRA.

From a HR practitioner's perspective, he will need to first ascertain whether the employees of the outsourcer are covered under the IRA (if necessary, by reference to the Notification). If they do fall within the scope of the IRA, the affected employees will continue to enjoy the benefits and privileges contained in their collective agreement. If not, the outsourcer may find himself in the unenviable position of having to explain to the affected staff how they have lost the privileges accorded to them by their previous employer.

CONCLUSION

This article has merely scratched the surface of the myriad of issues relating to outsourcing that can emerge. With the increasing popularity of outsourcing, there is no doubt that there will be more legal developments in the future on this front. We will keep you updated on these.

LIM WEE HANN is a Director with the Banking & Corporate Department. He was the Resident Partner in Drew & Napier's branches in Hanoi and Ho Chi Minh City for more than four years during which he provided legal consultancy services on corporate and banking matters to Vietnamese companies and foreign investors in Vietnam. Employment law is one of his main areas of specialty. He has advised numerous multinational corporations on all matters relating to employment including recruitment, retrenchment, transfer of employees and human resource policies. He has also advised on several private sector human resource outsourcing contracts. His other areas of practice include information technology, cross-border investments and acquisitions, corporate restructuring and biomedical sciences.

Wee Hann can be reached at **+65 6531 2244** or by email at **weehann.lim@drewnapier.com**



TERENCE QUEK is an Associate with Drew & Napier LLC's Banking & Corporate Department. He read law at the National University of Singapore and was admitted as an Advocate and Solicitor to the Supreme Court of Singapore in 2002. His main areas of practice include employment and industrial relations law, information technology and telecommunications law, corporate restructuring, as well as mergers and acquisitions. Terence has advised multinational corporations, foreign-based institutions, and SGX-listed companies on employment-related matters.

Terence can be reached at **+65 6531 2218** or by email at **terence.quek@drewnapier.com**



Recent Tax And Trust Developments



EXECUTIVE SUMMARY

This article examines some of the recent tax developments in Singapore. It takes a close look at the tax implications of limited liability partnerships (“LLPs”). It also compares the income tax treatments of a trust registered under the Business Trusts Act 2004 and that of a trust company regulated under the Trust Companies Bill 2005. The article culminates with a discussion on the proposed introduction of current year taxation in Singapore.

TAX TREATMENT OF LIMITED LIABILITY PARTNERSHIPS

In Singapore, two additional business structures, namely the limited partnerships (“LPs”) and LLPs were introduced recently to provide greater flexibility and choice for doing business in Singapore. The tax treatment of the LLPs is set out in the Income Tax (Amendment) Act 2004, which came into force on 23 November 2004.

Advantages of the LLP structure

Unlike a general partnership, the LLP is treated as a separate legal entity. As such, the LLP can own property in its own name. Another unique feature of the LLP is that

the partners are accorded limited liability protection. The liability of an LLP partner is limited to the amount of capital contributed to the LLP. Apart from retaining the benefits of a general partnership and the preservation of privacy of its financial accounts, the LLP is also relatively cheaper to maintain from a compliance perspective.

Income tax implications

For income tax purposes, an LLP will be treated as a partnership notwithstanding that it is a separate legal entity from its partners. As such, the partners will be taxed individually in accordance with their proportionate interests in the LLP’s profits. If the partners are individuals, they will be subject to the graduated scale of 0 per cent to 22 per cent whereas a company will be subject to a flat 20 per cent corporate tax rate on every dollar after the first \$100,000 of chargeable income which is not imputed back to the shareholders. Therefore, using an LLP may be a tax-efficient structure through which business can be conducted.

In an LLP, the capital allowances and trade losses are allocated to the respective partners to be offset against their

personal incomes from all other sources but the quantum is capped at the partner's contributed capital in a particular Year of Assessment.

TRANSFERRING INTO AN LLP

There are income tax implications for businesses presently operating under a different vehicle but which wish to transfer its existing business to a newly established LLP. The tax treatment of capital allowances and losses must be considered. Generally, the unabsorbed capital allowances, losses and donations can be carried forward and utilised against future taxable income of the individual partner of the LLP. However, where the individual partner or transferor company does not become a partner in the transferee LLP, the unabsorbed capital allowances cannot be carried forward against future taxable income and will be lost. Other typical tax concerns when transferring an existing business between entities include the valuation of trading stock, transfer of debts and transfer of depreciable assets.

The separate entity status and limited liability protection for the LLP partners are two significant advantages of this business structure. In addition, the ability to have a more flexible internal arrangement of the partnership structure and the benefit of perpetual succession through an LLP enhances its attractiveness. The LLP encompasses the benefits of the structure of companies and partnerships and may prove to be a popular vehicle for future business ventures.

INCOME TAX TREATMENT OF A BUSINESS TRUST AND A TRUST COMPANY

The September 2004 issue of *Legal Update* considered the use of business trusts from a corporate and commercial law angle. The new Business Trusts Act ("BTA") was passed by Parliament on 1 September 2004 and came into force on 12 October 2004. In this section of the article, we will examine the income tax treatment of a trust registered under the BTA and compare it with the income tax treatment for trust companies.

Business trust

A business trust ("BT") is not a separate legal entity. It is essentially a business that is structured as a trust and is constituted by a trust deed under which the trustee has legal ownership of the assets of the BT. Typically, the trustee also manages the business for the benefit of the beneficiaries under the BT. BTs can be used to undertake business operations in Singapore under the BTA.

Tax treatment

Any trust registered as a business trust will not be taxed as a normal trust. Instead, it will be treated like a company

under the one-tier system. The income of a registered BT will continue to be taxable at the trustee level. However, the unit-holders of the registered BT will not be taxed on their share of the statutory income of the trustee to which they are entitled to and no credits will be allowed to them for the tax paid by the trustee of the registered BT.

The Inland Revenue Authority of Singapore ("IRAS") has released a circular to clarify and explain the income tax treatment for a BT. This circular was published on 14 December 2004 and also provides an explanation of how other features of the tax system, such as group relief provisions, double taxation relief for foreign-sourced income which has been subject to tax outside Singapore, apply to a registered BT. In applying the different features of the tax system to a registered BT, the units of a BT will be used in lieu of ordinary shares of a company in order for the BT to access group relief and claim deductions of unabsorbed capital allowances and industrial building allowances.

Trust company

In contrast, a trust company is one which engages in the business of acting as a trustee or administering trusts. Trust companies are commonly utilised to act as trustees of trusts set up by high net-worth individuals or to perform administrative services for foreign trustees in respect of non-Singapore trusts. They will be regulated under the Trust Companies Bill 2005 which had its second reading in Parliament on 18 February 2005 and was passed on the same day.

Tax treatment

The trustee will be subject to income tax based on the chargeable income derived from trust assets. A beneficiary of the trust is taxed on the share of the statutory income of the trustee for any year of assessment which corresponds to the share of the trust income to which the beneficiary is entitled for the year preceding that year of assessment. However, the beneficiary will be allowed to claim a credit for tax paid by the trustee on his share of the trustee's income to which he is entitled.

SWITCHING TO CURRENT YEAR TAXATION

At present, income tax payable in any year is based on income earned in the previous year. However, the Singapore Government is considering the merits of replacing the preceding year basis of assessment with a current year basis of assessment for taxation of income.

Under the proposed current year basis of assessment, tax will be charged based on the current year's income. For salaried individuals, the tax payable amount may be withheld by the employers on a monthly basis from their

salaries and then paid over to the tax authorities. For companies, tax may be paid in instalments. This Pay-As-You-Earn ("PAYE") system is adopted in many countries including Malaysia, Australia and the United Kingdom.

Under the proposed current year taxation, it is likely that there will be better matching between income and tax expenditure. There will also be improvements in cash flow, particularly for companies. Where companies make lower profits, or even incur losses, during a downturn year, they will not have to pay tax based on the previous year's profits.

The shift from the preceding basis of assessment to the current basis will likely increase compliance costs for taxpayers. However, this issue must be weighed against the benefits which could be derived under the proposed current year basis of assessment. Also, transitional measures must be undertaken to ensure a smooth change in the basis of assessment.

The possibility of double taxation can be prevented by granting a waiver from tax in respect of the income (subject to some exceptions) for the transitional year. For example, Malaysia had granted companies and individuals a tax

waiver for the transitional year (i.e., 1999) when it adopted the current year taxation. After careful deliberation of the pros and cons in making the switch, the Ministry of Finance had decided not to implement current year taxation at this stage. The announcement was made in the Budget 2005 speech presented by the Prime Minister Lee Hsien Loong on 18 February 2005.

CONCLUSION

In line with the Government's efforts to enhance Singapore's role as an offshore financial centre and to develop a thriving private wealth management industry, it is essential for Singapore's tax regime to evolve in tandem with the commercial developments and realities in the market. This would ensure that our tax regime complements a sophisticated and vibrant financial centre in Singapore.

Editor's Note:

At the time of print, the Trust Companies Act had not come into operation as the commencement date was yet to be gazetted.

We are one of the few Singapore law practices with a specialist tax and trust practice and full-time tax and trust specialists. Led by **TEOH LIAN EE**, the Tax, Trusts, Estate Planning & Probate Business Group provide advice on all areas of income tax, goods and services tax, property tax, stamp duty, estate duty, customs and excise and other taxes, duties and impositions. Submissions and representations to Inland Revenue Authority of Singapore (IRAS), in respect of queries, disputes, advance rulings, settlements or investigations, are part of our practice. Our tax specialists are also familiar with criminal matters such as tax evasion, as with civil matters, and have strong trial experience in tax litigation and prosecution. The Group has represented clients in disputes with the IRAS.

The Group also handles the planning of estates and the use of trusts and multi-jurisdictional wills. We advise high networth individuals on the most efficient and effective structures for estate planning, asset preservation, provision for minors and descendants and tax planning. We are familiar with the concerns of settlors and testators. Our tax and trust lawyers assist clients in probate and administration matters, and in making submissions and representations to the Estate Duty Department in estate duty disputes and settlements.

For assistance, please contact:

Teoh Lian Ee at **+65 6531 2248** or by email at **lianee.teoh@drewnapier.com**

Christina Ng at **+65 6531 2250** or by email at **christina.ng@drewnapier.com**

Stacy Choong at **+65 6531 2337** or by email at **stacy.choong@drewnapier.com**

Ng Beng Kie at **+65 6531 2254** or by email at **bengkie.ng@drewnapier.com**

Wendy Yeo at **+65 6531 2298** or by email at **wendy.yeo@drewnapier.com**

Seah Ching Ling at **+65 6531 2389** or by email at **chingling.seah@drewnapier.com**

Mok Cui Ling at **+65 6531 2202** or by email at **culing.mok@drewnapier.com**

Lam Li Woon at **+65 6531 4164** or by email at **liwoon.lam@drewnapier.com**

Karen Tan at **+65 6531 2204** or by email at **karen.tan@drewnapier.com**



Back row (from left) Teoh Lian Ee (Director), Seah Ching Ling (Associate)
Front row (from left) Karen Tan (International Lawyer), Ng Beng Kie (Senior Associate), Stacy Choong (Associate Director), Wendy Yeo (Senior Associate)

Master Of The Cards



EXECUTIVE SUMMARY

In the English case of *Mastercard International Incorporated v Hitachi Credit (UK) Plc* [2004] EWHC 1623 (Ch), there was an action to defend the use and registrations of the mark “MASTERCARD”. Mastercard had launched an opposition to Hitachi Credit’s application to register the trade mark “CREDIT MASTER”. This case provides useful guidance on oppositions to trade mark applications where the opponent’s mark is well-known.

INTRODUCTION

This is an appeal from the decision of the Hearing Officer at the Trade Mark Registry in the United Kingdom. Hitachi Credit (UK) Plc (“Hitachi”) applied to register the trade mark “CREDIT MASTER” for goods and services falling within several classes. MasterCard International Inc. (“MasterCard”), the proprietor of the well-known “MASTERCARD” trade marks, opposed Hitachi’s application and based its opposition essentially on Sections 5(2)(b) and 5(3) of the UK Trade Marks Act 1994 (the “UK Act”).

RELEVANT LEGISLATION

Section 5(2) of the UK Act provides that:

“A Trade Mark shall not be registered if because -

...

- b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

Section 5(3) of the UK Act provides that:

“A Trade Mark which -

- a) is identical with or similar to an earlier trade mark, and
- b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is protected,

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community Trade Mark, in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

Section 5(2) of the UK Act corresponds to Section 8(2) of the Singapore Trade Marks Act (the “Singapore Act”) and Section 5(3) of UK Act corresponds to Section 8(3) and 8(3A) of the Singapore Act.

ISSUES BEFORE THE HEARING OFFICER

MasterCard’s Notice of Opposition was filed in 2001 before the landmark cases of *Davidoff v. Gofkid* [2003] FSR 28 and *Adidas Salmon AG v. Fitness World Trading Limited* (C408/01) were decided. These two decisions were important because the European Court of Justice (“ECJ”) extended the scope of Section 5(3) and held that it would equally apply in the situation where the goods or services compared were found to be “similar”.

MasterCard had relied on Section 5(2)(b) as the main ground of opposition, contending that Hitachi was seeking to register a “similar” mark (i.e., “CREDIT MASTER” being similar to “MASTERCARD”) for “similar” goods or services for which MasterCard’s earlier registered marks were registered or protected.

MasterCard had pleaded Section 5(3) only as an alternative ground. As such, MasterCard’s case under Section 5(3) was rather limited - it had pleaded that should the Hearing Officer decide that the goods or services concerned were “dissimilar”, registration and use of Hitachi’s “CREDIT MASTER” for such “dissimilar” goods or services would, without due cause, take unfair advantage of, or be detrimental to, the distinctive character or the repute of MasterCard’s marks and should be refused.

At the hearing of the opposition in 2004, the Hearing Officer dismissed both grounds of oppositions and his decision in this regard may be summarised as follows:

- (i) The opposition under Section 5(2) failed because the Hearing Officer was of the view that the marks “MASTERCARD” and “CREDIT MASTER”, considered in their respective whole, had “a very low level of similarity”. There were visual and aural differences and the overall impressions conveyed by the marks were significantly different. Moreover, the “MASTERCARD” marks had a substantial reputation in the United Kingdom and there was thus no likelihood of confusion. This was because the average consumer was likely to “pay more than a minimal degree of attention when selecting” the relevant goods or services concerned and this was not the proverbial “bag of sweets” case.

The Hearing Officer did not consider Section 5(3) as regards the majority of the goods or services he had held to be “similar” since MasterCard had pleaded Section 5(3) only as an alternative ground. In this

regard, the Hearing Officer also refused MasterCard’s application to amend the Notice of Opposition at the hearing. He had considered the various factors and took the view that to allow an amendment at such a late stage of the proceedings would prejudice Hitachi’s case as it did not have the opportunity to address MasterCard’s amended claim.

Applying the “link” test under Section 5(3), the Hearing Officer found that the two marks “MASTERCARD” and “CREDIT MASTER” were not so similar that the average consumer was likely to make a “link” between the two.

He further held that even if he was wrong and the average consumer would in fact make such a “link”, the evidence was insufficient to show that registration marks would result in Hitachi’s “CREDIT MASTER” marks taking unfair advantage of, or registration was detrimental to, the distinctive character or repute of the “MASTERCARD” marks as far the goods or services which he deemed “dissimilar” were concerned.

MasterCard appealed against the Hearing Officer’s decision on these points:

- (i) The Hearing Officer should have allowed MasterCard to amend its Notice of Opposition so that Section 5(3) would be fully considered as regards most of the goods or services which the Hearing Officer had deemed to be “similar”;
- (ii) The Hearing Officer applied the wrong tests and had confused the test between Section 5(2) and 5(3) in his decision. In this regard, MasterCard also argued that the Hearing Officer was wrong to have held that for a case to be made out under Section 5(3), some evidence would be required to show that registration and use of the later mark would “take unfair advantage of, or be detrimental to, the distinctive character or the reputation of the earlier trade mark”.

DECISION OF THE HIGH COURT

The High Court held that it would not readily infer “detriment” under Section 5(3) even if substantial reputation of the earlier mark and the “link” or “association” between the later mark and the earlier mark could be established. There must be a real possibility, supported by evidence, of such detriment. The Judge at the High Court found as follows:

Refusal of amendment

The Judge held that the Hearing Officer was not wrong in refusing the amendment. The Hearing Officer had considered all relevant factors and given eight reasons for his refusal. Among these was the fact that MasterCard did

not seek to have the Notice of Opposition amended earlier when it had ample time to do so. A party did not have an absolute right to seek to amend its claim to bring in a new claim at any time.

The appellate court would not interfere unless the Hearing Officer had exercised his discretion under the wrong principles. Here, the Hearing Officer's refusal was not so flawed that he came to a decision that no reasonable Hearing Officer could have arrived at in the circumstances.

Substantive grounds

The Hearing Officer did not apply the wrong test for Section 5(3). He had set out the legal principles for both Sections 5(2) and 5(3) separately and considered them carefully and correctly. The Hearing Officer had reviewed the same set of evidence for both grounds of opposition and clearly applied the correct tests, i.e., whether there was a "likelihood of confusion" on the part of the average consumer under Section 5(2)(b) and whether the average consumer was likely to "link" the marks concerned and such a "link" would cause detriment, or take unfair advantage of the earlier mark or its repute under Section 5(3).

Having reviewed the evidence, the Hearing Officer was of the view that not only was the "link" tenuous, but there was insufficient evidence to show that registration of "CREDIT MASTER" would take unfair advantage of, or be detrimental to the distinctive character or repute of the "MASTERCARD" marks.

The appellate judge also did not accept MasterCard's contention that where reputation and "link" of the marks

were established, the tribunal should readily infer, by reason of the "dilution" principle encapsulated by Section 5(3), that there would be detriment.

He considered decided cases like *General Motors Corporation v. Yplon SA* [C0375/97] and *DaimlerChrysler AG v. Alavi* [2001] RPC 42, *Intel Corporation v Kirpal Singh Sihra* [2003] EWHC 17 (Ch) and *Adidas-Salmon v. Fitness World Trading Limited* (C408/01) and found that the authorities favoured a requirement of evidence rather than an assumption of detriment or taking of advantage.

There may be instances where marks with substantial repute may find it easier for the courts to be willing to infer detriment or taking of advantage. However, in most instances, detriment will not be assumed but must be proven by real, as opposed to theoretical, evidence.

CONCLUSION

It is interesting to note that the court in this decision appears to have taken the same approach as the United States Supreme Court in the case of *Victor Moseley v. Secret Catalogue Inc.* (2003) US Lexis 1945, where the Supreme Court held that use of the mark "Victor's Little Secret" did not infringe the famous mark "Victoria's Secret" because there was no evidence of "actual dilution". The relevant US provisions state that "actual dilution" is required and not merely "a likelihood of dilution". In Singapore, the court is likely to adopt a similar approach and would require the owner of a well-known mark, relying on Section 8(3A) as a ground of opposition, to provide some evidence of actual dilution of its well-known mark or that such dilution will result.

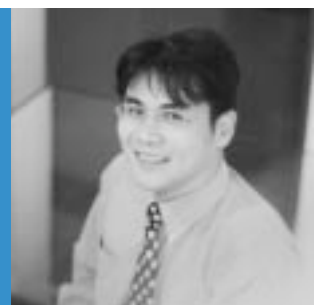
DEDAR SINGH GILL is a Director of the Intellectual Property Department and heads the Trade Mark Business Group. He has been recommended as a leading individual in Singapore for Intellectual Property work in *Asia Pacific Legal 500 2004/2005 Edition*. Drew & Napier LLC has been listed as the leading trade mark firm in Singapore for seven consecutive years in the World IP Survey conducted by *Managing Intellectual Property*. Dedar joined Drew & Napier in 1984 and was made a Partner in 1989. He handles pre and post trade mark registration and oppositions as well as rectification actions. He also conducts all aspects of intellectual property litigation including patent, trade mark, copyright and design infringements, passing off cases and breach of confidential information disputes.

Dedar can be reached at **+65 6531 2507** or by email at dedar.singh@drewnapier.com



IAN OEI is a Senior Associate with Drew & Napier LLC's Intellectual Property Department. He read law at the University of London and holds a LL.M. from the National University of Singapore. Ian's main area of practice is in contentious and non-contentious intellectual property matters. He also handles pre and post trade mark registration matters, trade mark oppositions, revocation and invalidation actions. He has extensive experience in trade mark registration and oppositions, as well as representing major international corporations.

Ian can be contacted at **+65 6531 2518** or by email at ian.oei@drewnapier.com



Foreign Direct Investment In India



EXECUTIVE SUMMARY

Competitive businesses and investors have India firmly in their sights; and India's Government acknowledges that a key driver of its future growth will be foreign investment. Foreign investment in India is permissible via:

- (i) Foreign Direct Investment ("FDI"): this involves foreign investors buying equity in private Indian companies, or setting up new companies which issue them equity; or
- (ii) Foreign Institutional Investment ("FII"): this involves institutional investors (e.g., pension funds), registered with the Securities and Exchange Board of India ("SEBI"), investing in the Indian capital markets.

This article focuses on FDI. It provides a snapshot of the current investment climate, available avenues for bringing FDI into India, sectors in which FDI is permitted, and recent foreign investment activity involving Singaporean investors. The article ends with a survey of some likely growth sectors of the Indian Economy.

CURRENT INVESTMENT CLIMATE

The current investment climate is marked by encouraging reforms though some concerns remain for foreign investors.

Preferred investment destinations

India is a confederation of states. A 2004 World Bank study reports that the Indian States with the best "investment climate" (in order of preference) are Maharashtra, Delhi, Gujarat, Andhra Pradesh, Karnataka, Punjab, Tamil Nadu and Haryana.

Noteworthy encouraging reforms

- (i) Increased foreign investor autonomy as a result of allowance of up to 100 per cent foreign ownership of an investee company's equity in some sectors, such as non-bank financial companies (e.g., financial consulting and asset management), and infrastructure development projects (e.g., road and highway construction projects).
- (ii) Foreign investors are now allowed to invest in the same or related field in which they have an existing joint-venture ("JV") subject to them justifying such a decision to the Central Government. Such justification is not required in the case of insolvent JVs or domestic venture capital funds registered with SEBI. Such "diversification investment" was previously permissible only with the consent of the local JV partner.

Investor concerns

A 2004 survey conducted by the Federation of Indian Chambers of Commerce & Industry amongst foreign investors in India, cited “ground-level hassles”, “rigidity of labour laws” and infrastructure as continuing concerns. Despite such concerns, India has already witnessed approximately US\$390 million in FDI inflows in the first two months of 2005, and total FDI inflows in 2005 are expected to exceed US\$10 billion.

PROCEDURE FOR BRINGING FDI INTO INDIA**Government structure**

India is jointly governed by the Central Government and State Governments. FDI proposals require clearance or notification at both levels of Government.

FDI clearance - Central Government level

Two avenues exist depending on the proposed investment: the Automatic route or the Government approval route.

Automatic route

FDI proposals qualifying under the Automatic route only require Central Government notification as follows:

- (i) the regional office of the Reserve Bank of India (“RBI”), the Indian central bank, must be notified within 30 days of FDI inflow;
- (ii) the FDI inflow must be compliant with the Foreign Exchange Management Act 1999 and must be via normal banking channels;
- (iii) the RBI office must be informed of any issuance of shares by the investee company to the foreign investor within 30 days of the said share issue; and
- (iv) only for FDI in industrial undertakings with no licensing requirements, an Industrial Entrepreneur Memoranda (“IEM”) form needs be filed with the Indian Secretariat for Industrial Assistance.

Government approval route

Central Government approval is required for FDI proposals concerning:

- (i) ventures requiring an industrial license. Industrial licenses are required for ventures concerning:
 - (a) industries under the compulsory licensing regime;
 - (b) manufacture of items reserved for the small scale sector (currently not open to FDI); and
 - (c) ventures in locations subject to specific laws and regulations such as land use and pollution control legislation.
- (ii) ventures in sectors in which the foreign investor has an existing JV;

- (iii) acquisition of shares in existing Indian companies; and
- (iv) FDI which would result in foreign investors exceeding prescribed foreign ownership ceilings. For instance, a proposal to own 51 per cent of a domestic airline when the prescribed foreign ownership ceiling is 40 per cent.

Central Government approval is sought by filing prescribed forms and documents with the Foreign Investment Promotion Board of India (“FIPB”). Current FIPB policy is to convey decisions within 30 days of receiving applications.

FDI clearance - State Government level

FDI proposals require State level clearance regardless of whether they qualify under the Automatic or Government approval route. The process usually consists of obtaining necessary clearances from multiple state and district level agencies. For example, obtaining land acquisition permission from one state agency while securing utilities connections from separate state water and electricity boards. This process can be tedious and may cause delays in the implementation of an FDI proposal.

“Single-window” concept

To facilitate the FDI process, Indian states have begun to implement “single window” schemes whereby all the necessary documentation for state and district level clearances can be submitted to a single state agency.

For instance, the state of Andhra Pradesh has passed the Andhra Pradesh Infrastructure Development Enabling Act 2001; which vests Andhra Pradesh’s Infrastructure Authority with power to grant all necessary clearances for FDI ventures in Andhra Pradesh.

Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the “Takeover Regulations”)

Foreign investors may be required to comply with the Takeover Regulations when their FDI in unlisted companies results in them indirectly acquiring:

- (i) 15 per cent or more of the voting equity in Indian listed companies; or
- (ii) “control” of a listed company, as defined in the Takeover Regulations.

In such cases, the Takeover Regulations require the foreign investor to make a public offer to acquire an additional minimum of 20 per cent of the voting equity of the said listed company. The foreign investors usually make such public offers conditional on the requisite government approvals for the FDI being obtained.

TURNING FDI INTO TANGIBLE BUSINESS OPERATIONS

The available avenues are:

- (i) local incorporation under the Companies Act 1956, as a wholly owned subsidiary (“WOS”) or a JV with a local Indian partner; or
- (ii) operating as a foreign company, in the form of:
 - (a) liaison/representative office;
 - (b) project office; or
 - (c) branch office.

Local incorporation

In this case the WOS or JV will be subject to all relevant Indian laws and will be entitled to unrestricted participation in the Indian economy. Special incentives are offered to export-oriented companies that undertake to achieve positive net foreign exchange earnings, thereby improving India’s net export position.

Liaison/representative office

Such offices can only serve as marketing and referral offices for their foreign parent company. They cannot undertake commercial activities or earn income in India.

Project office

Project offices can be established for executing specific projects (e.g., build-operate-transfer infrastructure projects) and can only engage in activities related to the specific projects. They may repatriate income from the said projects overseas.

Branch office

Foreign trading and manufacturing companies can establish such offices to carry on specific non-manufacturing activities in India, such as export/import of goods and acting as buying/selling agents. They may repatriate income earned from the permitted activities.

Branch offices can also be established in Special Economic Zones (“SEZs”). Such offices enjoy perks such as duty free imports and tax holidays but cannot do business outside the SEZ.

The RBI grants the requisite approvals for setting up the above offices except branch offices in a SEZ for which approval is sought from specific Central and State Government bodies.

RECENT FOREIGN INVESTMENT ACTIVITY

The following are noteworthy recent examples of FDI and FII involving Singaporeans:

Banking and finance

Government Investment Corporation of Singapore and **Temasek Holdings** recently acquired stakes in ICICI Bank, a high-performing Indian bank.

In January 2005, **DBS Bank** announced that it had

increased its investment in India to US\$122 million, with plans to expand lending and retail operations, and offer investment banking services.

Automotive

Aranda Investments (the Mauritius-based investment arm of **Temasek Holdings**) is reported to have agreed to invest US\$12.9 million in publicly listed battery maker **Exide Industries** in return for a 5.04 per cent stake.

Manufacturing

Singapore-based electronics manufacturing services firm **Flextronics** has reportedly acquired Bangalore-based telecom design firm **Deccanet Designs Ltd** in an all cash deal.

Infrastructure

Singapore-based infrastructure development firm **Ascendas Pte Ltd** has reportedly acquired Hyderabad based **Vanenburg IT Park Ltd** from Dutch technology firm Vanenburg Group. This is **Ascendas Pte Ltd**’s second deal in Andhra Pradesh, following its development of Phase I of “Cyber Perl” in Hyderabad.

Bharti Enterprises Ltd and **Singapore Changi Airport Managers & Partners** have formed a consortium to bid for the modernisation of Mumbai and Delhi airports.

FUTURE DIRECTION

Survey of sectors highlighted for their growth potential

Infrastructure

India’s greatest need is for infrastructure that can viably support the growth of its economy. From roads, ports and airports, to power generation and supply, forecasted investment in excess of US\$100 billion is required over the next five to ten years.

Communications infrastructure

India continues to require FDI in this sector. India currently has approximately 90 million mobile and fixed-line connections, and a target of 250 million connections is set for 2007. Meanwhile an upwardly mobile middle class and the information technology industry continue to drive internet bandwidth demand.

Business process outsourcing (“BPO”) and information technology (“IT”)

India leads the field in BPO, as well as low-cost and world class IT services. Its advantage of offering lower operating costs and a pool of skilled English speaking manpower should continue to fuel growth in these sectors on the back of global demand.

CONCLUSION

India’s FDI process appears to be relatively smooth, but investors continue to cite persistent concerns in practice. Despite this, interest in India remains strong. Furthermore, instances of Singaporean investment in India appear reflective of Singaporean confidence in India’s economic prospects. For all these reasons, investors and businesses seeking a competitive edge should look to developing commercial interests in India.

OVERVIEW OF CURRENT FDI POLICY

Sectors in which FDI is permitted via the Automatic Route	Virtually all industries in the Manufacturing, Infrastructure and Service Sectors, including information technology and business process outsourcing. Such FDI is subject to prescribed foreign ownership ceilings, local laws and regulatory body restrictions.
Sectors in which FDI is permitted with prior Central Government Approval	Atomic minerals (specific activities), Broadcasting, Courier Companies, Domestic Airlines, Defense & Strategic Industries, Integrated Townships and Settlements, Indian companies investing in the Infrastructure and Service Sectors, Natural Gas Pipelines, Petroleum (specific activities), Power (generation, transmission, distribution), Print Media, Satellite establishment and operation, Telecommunications and Internet hardware, Tea Plantations, Trading Companies (specific types). Also, FDI in sectors under the Automatic Route where foreign ownership would exceed prescribed ceilings.
Sectors in which FDI is prohibited	Agriculture (except tea plantations), Atomic Energy, Housing and Real Estate (except integrated townships and developments), Lottery, Gambling and Betting, Radio (except 20 per cent only for institutional investors), Trading in Transferable Development Rights, Retail Trading.

Note: FDI in most of the above sectors, including sectors under the Automatic route, is subject to detailed guidelines by the Central Government and industry regulators. For instance, while 100 per cent foreign ownership in certain telecom ventures is initially possible, 26 per cent of the equity has to be disinvested to the Indian public within five years of the venture starting.

CHRISTINA NG is a Director with the Banking & Corporate Department. She co-heads the South Asia Desk and is the Head of the Indonesian and Thai Desks. She is also a member of the firm's Structured Finance, and Energy and Infrastructure Business Groups. Christina has had extensive experience with mergers and acquisitions in the region, particularly in South East Asia as well as various energy projects. To each of these transactions, she brings her knowledge and experience in taxation which are particularly useful to clients in structuring cross-border transactions. In her tax practice, Christina specialises in structured finance and tax driven cross-border transactions. She also advises on individual and corporate taxation and structuring.

Christina can be contacted at **+65 6531 2250** or by email at **christina.ng@drewnapier.com**



MANOJ SANDRASEGARA joined Drew & Napier in 1994 and became a Partner in 1998. After corporatisation, he was made a Director of Drew & Napier LLC in 2002. His main area of practice is corporate litigation work and he has over seven years of experience as a trial advocate. He co-heads the South Asia Desk and is a member of the firm's Insolvency & Restructuring Business Group with an active practice in insolvency and restructuring, as well as commercial litigation. Manoj also co-authored the Singapore chapter on *Global Counsel Restructuring and Insolvency Handbook 2002*. He has been lead counsel on a number of complex international arbitrations involving joint ventures in India between Singapore and Indian parties.

Manoj can be contacted at **+65 6531 4156** or by email at **manoj.sandra@drewnapier.com**



ABHISHEK SINGH is an International Lawyer with Drew & Napier LLC and is a member of the Insolvency & Restructuring Business Group. He studied law and economics at the University of Sydney and is admitted to practice as a solicitor in Australia. In addition, he is involved in dispute resolution work, including international arbitrations concerning capital and derivatives markets and developing technologies.

Abhishek can be reached at **+65 6531 2322** or by email at **abhishek.singh@drewnapier.com**



CONTACTS

BUSINESS GROUPS AND PRACTICE AREAS

BANKING/GENERAL FINANCE

David Ang
T +65 6531 2236
F +65 6535 4864
E david.ang@drewnapier.com

BUILDING & CONSTRUCTION

Tan Liam Beng
T +65 6531 4139
F +65 6533 3591
E liambeng.tan@drewnapier.com

CAPITAL MARKETS

Sin Boon Ann
T +65 6531 2206
F +65 535 4864
E boonann.sin@drewnapier.com

CHINA BUSINESS GROUP

David Chin
T +86 21 6335 1628
F +86 21 6335 0638
E david.chin@drewnapier.com

COMPETITION LAW

Andrew Ong (non-contentious)
T +65 6531 4106
F +65 6535 4864
E andrew.ong@drewnapier.com

Cavinder Bull (contentious)

T +65 6531 2416
F +65 6533 3591
E cavinder.bull@drewnapier.com

CORPORATE

Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

EMPLOYMENT & IMMIGRATION

Indranee Rajah, SC (contentious)
T +65 6531 4100
F +65 6532 7149
E indranee.rajah@drewnapier.com

Andrew Ong (non-contentious)

T +65 6531 4106
F +65 6535 4864
E andrew.ong@drewnapier.com

FAMILY & MATRIMONIAL

Raj Singam
T +65 6531 2400
F +65 6532 7149
E raj@drewnapier.com

Randolph Khoo

T +65 6531 2418
F +65 6532 7149
E randolph.khoo@drewnapier.com

FUND MANAGEMENT & PRIVATE EQUITY

Evelyn Wee
T +65 6531 2260
F +65 6535 4864
E evelyn.wee@drewnapier.com

TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

Andrew Ong
T +65 6531 4106
F +65 6535 4864
E andrew.ong@drewnapier.com

INSOLVENCY & REORGANISATION

Davinder Singh, SC
T +65 6531 2402
F +65 6532 7149
E davinder.singh@drewnapier.com

Sushil Nair

T +65 6531 2410
F +65 6532 7149
E sushil.nair@drewnapier.com

INSURANCE & REINSURANCE

Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

INTELLECTUAL PROPERTY

Morris John (Patents)
T +65 6531 2503
F +65 6533 0694
E mj@drewnapier.com

Dedar Singh Gill (Trade Marks)

T +65 6531 2507
F +65 6533 0694
E dedar.singh@drewnapier.com

LIFE SCIENCES

Lim Wee Hann
T +65 6531 2244
F +65 6535 4864
E weehann.lim@drewnapier.com

LITIGATION & DISPUTE RESOLUTION

Jimmy Yim, SC
T +65 6531 2504 / 6531 2505
F +65 6533 3591
E jimmy.yim@drewnapier.com

PROJECT FINANCE

Christina Ng
T +65 6531 2250
F +65 6535 4864
E christina.ng@drewnapier.com

PROPERTY

Chua Bee Lan
T +65 6531 2302
F +65 6535 1952
E beelan.chua@drewnapier.com

SHIPPING & INTERNATIONAL TRADE

Ian Koh
T +65 6531 2436
F +65 6533 3591
E ian.koh@drewnapier.com

TAX, TRUSTS, ESTATE PLANNING & PROBATE

Teoh Lian Ee
T +65 6531 2248
F +65 6535 4864
E lianee.teoh@drewnapier.com

TRANSNATIONAL & CROSS-BORDER WORK

Christina Ng
T +65 6531 2250
F +65 6535 4864
E christina.ng@drewnapier.com

OTHER OFFICES

Shanghai Office

#2501 Office Tower
Bund Center
222 Yan An Road East
Shanghai 200002
China
T +86 21 6335 1628
F +86 21 6335 0638
E china@drewnapier.com

Hanoi Office

Room 605 CFM Building
23 Lang Ha Ba Dinh
Hanoi
Vietnam
T +844 514 1995 / 514 1996
F +844 214 1972
E dnhn@hn.vnn.vn

Drewmarks Patents & Designs (Malaysia) Sdn Bhd

9th Floor Bangunan Getah Asli
(Menara)
148 Jalan Ampang
50450 Kuala Lumpur
Malaysia
T +603 2162 2522 / 2162 2529
F +603 2162 2804
E drewmark@tm.net.my

PT Drewmarks Konsultama

Correspondence Address:
20 Raffles Place
#17-00 Ocean Towers
Singapore 048620
T +65 6531 2503 / 6531 2504
F +65 6533 0694
E ip@drewnapier.com

DrewCorp Services Pte Ltd

20 Raffles Place
#09-01 Ocean Towers
Singapore 048620
ROC No. 200102492H
T +65 6531 2266
F +65 6533 1542 / 6533 7649
E services@drewcorp.com

Through a joint venture with Freshfields Bruckhaus Deringer in Singapore, we have associated offices in: Amsterdam, Barcelona, Beijing, Berlin, Bratislava, Brussels, Budapest, Cologne, Dusseldorf, Frankfurt, Hamburg, Hanoi, Ho Chi Minh City, Hong Kong, London, Madrid, Milan, Moscow, Munich, New York, Paris, Rome, Shanghai, Tokyo, Vienna, Washington.

PUBLISHER
Drew & Napier LLC
20 Raffles Place
#17-00
Ocean Towers
Singapore 048620

CREATIVE
**Raindance Corporate
Design Pte Ltd**

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