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Preface

This year's edition of *The Banking Litigation Law Review* highlights that litigation involving banks and financial institutions shows little sign of slowing, driven by a number of global macroeconomic factors and social and technological developments.

The long-term economic effects of the covid-19 pandemic, conflicts in parts of the world and other macroeconomic disruptions have led to spiralling global interest rates and a downturn in the global economy. The financial sector has seen an increase in loan arrears and defaults, debt restructurings, bankruptcies and insolvencies affecting banks, their customers and counterparties. Courts in every major financial centre have been compelled to grapple with the scope and effect of increasingly broad and complex national and international sanctions regimes. These conditions have resulted in an increase in banking litigation.

In addition to legislators and regulators, courts have continued to consider the obligations placed on financial institutions to give sufficient protection to consumers, with a particular focus on fraud, which continues to rise as criminals seek to exploit the increasing use of technology by consumers of financial services. This edition of the *Review* shows that the UK Supreme Court's *Quincecare* decision has led to judicial decisions in a number of common law jurisdictions, with courts operating within different legal traditions also giving important judgments defining the limits of the responsibility of banks and other financial institutions to protect their customers from fraud.

Financial institutions have, as in recent years, continued to adapt to the increasing popularity of crypto-assets – and the risks they pose to investors, as demonstrated by the collapse of FTX and the recent conviction of Sam Bankman-Fried. Across the globe, regulators have made efforts to provide clarity on the regulatory framework of digital assets and courts have taken steps to intervene to prevent fraud in relation to crypto-assets. Courts will need to continue to adapt at pace to the unique challenges raised in disputes involving such assets.

This edition of the *Review* shows that in addition to these more thematic issues, the value and complexity of financial products, and the financial sector more generally, continues to give rise to litigation in the courts of every major financial centre. Looking ahead, the prevalence, value and complexity of banking and financial services disputes looks set to rise, fuelled by the current global economic environment.

Jonathan Clark
Slaughter and May
London
November 2023

Chapter 4

Singapore

Benedict Teo and Tham Feei Sy[1]

I OVERVIEW

The collapse of a number of oil traders in Singapore during the covid pandemic resulted in litigation that raised questions relating to an issuing bank's obligation to pay under a letter of credit. Among others, the Singapore Court of Appeal was asked to consider the validity of a sanctions clause in a letter of credit – the first time such a clause has been tested.

Other significant recent cases considered circumstances in which a joint bank account may be garnished, and when an accelerated payment clause and default interest rate under a loan may be unenforceable penalties.

II YEAR IN REVIEW

i Recent cases

Banking secrecy

Section 47(1) of the Banking Act 1970 imposes the duty of secrecy on banks in relation to customer information. Customer information may only be disclosed in certain circumstances, such as pursuant to an application under Section 175(1) of the Evidence Act 1893, which provides that the court may order disclosure of 'entries in a banker's book'.

In the 2003 decision of *Wee Soon Kim Anthony v. UBS* (*Wee Soon Kim*),[2] the Singapore Court of Appeal held that any form of permanent record maintained by a bank in relation to the transactions of a customer would fall within the scope of 'entries in a banker's book'.

More recently, in the 2022 decision of *La Dolce Vita Fine Dining Company v. Zhang Lan*,[3] the Singapore High Court clarified that the identity of the ultimate beneficial owner of an account would be an entry in a banker's book when it forms part of that transactional record.

Accordingly, information on ultimate beneficial ownership found in questions asked of a customer at a meeting or in general correspondence would not be considered an entry in a banker's book. However, a declaration of beneficial ownership for the purpose of regulatory compliance recorded by the bank as part of its identification of the customer would be an entry in a banker's book.

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2 [2003] 2 SLR(R) 91.

3 [2022] SGHC 89.

In the 2023 case of *Ong Jane Rebecca v Lim Lie Hoa*,[4] the private trustees of the estate of the deceased defendant applied for orders pursuant to Section 175 of the Evidence Act against three banks for the disclosure of bank statements of the estate's executor's personal bank accounts. When investigating the affairs of the estate, in particular a property known as 16 East Sussex Lane, Singapore, the private trustees discovered that 16 East Sussex Lane was sold by the executor, with the proceeds deposited into his personal bank accounts. The executor failed to provide the private trustees with the bank statements of his bank accounts to determine the whereabouts of the sale proceeds, while the banks stated that they were not able to provide the documents without the executor's consent or a court order.

In granting the application, the court noted the banks' concern about being in breach of banking secrecy requirements if they were to disclose the bank statements without a court order and found that this constituted a factor in favour of making the orders sought, since any potential liability of the banks would be adequately resolved by the application of the bankers' books exception.

Exclusion and non-reliance clauses

In the 2017 decision of *Tradewaves Ltd v. Standard Chartered Bank*,[5] the Singapore High Court recognised that a bank may be able to exclude a duty of care owed to customers for advice on investments, by relying on exclusions, non-reliance clauses or both.

The court held that a bank may rely on contractual terms to negate a duty of care, in two broad ways. First, by relying on a term providing that the customer agrees that the bank owes no duty of care to the customer, or that the bank is under no liability to the customer for any act, omission or step taken (i.e., an exclusion term). Second, by relying on a term providing that the bank has not made any representation or recommendation or that the customer does not rely on any such representation or recommendation and relies solely on their own judgement (i.e., a non-reliance term).

The court also held that non-reliance terms may give rise to contractual estoppel (which the court confirmed applied in Singapore), such that a customer may be estopped from raising true facts that are contrary to the contractual term.

Letters of credit

In the 2021 decision of *Bank of China Ltd v. BP Singapore* (*Bank of China*),[6] the Singapore High Court held that while a bank may not be able to rely on the autonomy principle to avoid honouring a negligent presentation for payment under letters of credit, the bank may still potentially have a claim in negligence against the beneficiary.

The court was of the view that it was arguable that BP owed the bank a duty of care in relation to the commercial invoices and letters of indemnity that it had issued and presented to the bank. However, it ultimately left open the question of whether a beneficiary owes a duty of care to an issuing bank, particularly in relation to documents prepared by the beneficiary, holding that it should not be summarily determined in a striking-out application.

In the 2022 decision of *Crédit Agricole Corporate & Investment Bank v. PPT Energy Trading* (*Crédit Agricole*),[7] the Singapore International Commercial Court held that a

4 [2023] SGHC 33.
5 [2017] SGHC 93.
6 [2021] 5 SLR 738.
7 [2022] SGHC(I) 1.

beneficiary owes no duty of care to an issuing bank, and reiterated the strict formula of the fraud exception (i.e., that a bank is only entitled to refuse payment out under letters of credit where the beneficiary acts dishonestly in the presentation of documents for payment). A reckless failure on the part of the beneficiary to determine the truth of the representations in the presented documents, which were made in the honest belief that they were true, will not allow the bank to invoke the fraud exception, as there is no duty of care owed by a beneficiary to a bank when presenting documents for payment. Unfortunately, *Bank of China* was not referred to in *Crédit Agricole*.

In a subsequent decision of *UniCredit Bank AG v. Glencore Singapore Pte Ltd*,[8] the High Court endorsed the principles in *Crédit Agricole* and held that the parties' motives for entering into a simultaneous sale and buyback of goods transaction is not determinative of whether the transaction is a sham. Specifically, the High Court found that circular trading or 'round-tripping' or 'financing' transactions could be genuine. The High Court also confirmed the traditional position that only fraud by the beneficiary would relieve an issuing bank of its duty to make payment upon receiving documents in conformity with the letter of credit.

Garnishing of joint bank accounts

In the 2020 decision of *Timing Ltd v. Tay Toh Hin* (*Timing*),[9] the plaintiff had applied for a garnishee order, requiring the garnishee bank to show cause why the judgment debtor's joint accounts should not be garnished. At first instance, the Assistant Registrar relied on the 2016 decision of *One Investment and Consultancy Ltd v. Cham Poh Meng* (*One Investment*), in which the court accepted that joint accounts could not be garnished, and dismissed the summons.

On appeal, the High Court did not follow *One Investment*. The court had regard to the fact that, in *Timing*, there was strong prima facie evidence that all the monies in the joint account belonged to one party. The court reasoned that if the garnishee need not show cause in such a scenario, this would permit debtors to insulate their assets by holding them in joint accounts, and would result in an unsatisfactory position where the recoverability of a judgment debt would turn on the how the debtor organises his or her personal finances.

The court therefore held that a show cause order could be made against joint accounts where the following criteria were met:

- *a* a strong prima facie case that the whole of the monies in the joint account belongs to the judgment debtor;
- *b* notice is served on the other holder of the joint account; and
- *c* an undertaking is given by the applicant to bear the costs and reasonably foreseeable losses of the garnishee or the other holder of the joint account, should it be shown that the monies sought to be garnished were not in fact payable in whole or in part to the judgment debtor.

Subsequently, at the 'show cause' hearing, the High Court held[10] that notwithstanding a strong prima facie case had been made out at first instance, the plaintiff still bore the burden of proving that the monies in the joint account belonged solely to the judgment debtor at the 'show cause' hearing. The High Court found that the plaintiff failed to show on a balance of probabilities that the judgment debtor solely owned the monies in the joint account, as

8 [2022] SGHC 263.
9 [2020] 5 SLR 974.
10 [2021] SGHC 5.

the evidence showed (among others) that the judgment debtor and his wife both used the joint accounts as and when needed on jointly incurred expenses such as utility payments and household maintenance, and the wife had used the monies therein for her own purposes. The High Court also found that the nature and closeness of the relationship between the judgment debtor and his wife gave rise to a strong presumption of advancement that the judgment debtor intended to gift his wife a beneficial interest in the monies transferred to the joint accounts. Accordingly, the High Court declined to grant a final garnishee order.

Liability of co-mortgagor under 'all moneys' clauses

In the 2020 decision of *Oversea-Chinese Banking Corp Ltd v. Lim Sor Choo*,[11] the plaintiff bank had granted the defendant and her husband (the Borrowers) a loan facility, secured by a mortgage executed by them. The mortgage required them to pay all outstanding sums of money owed by the mortgagor to the mortgagee 'either as principal or as surety and either solely or jointly' and 'whether on the said Accounts or otherwise in any manner whatsoever or for all liabilities'.

The defendant's husband subsequently furnished a guarantee to the bank's Hong Kong branch to secure loan facilities to two companies. The bank called on the guarantee and obtained default judgment against the defendant's husband for a sum of US$131 million. The bank then commenced an action to claim the judgment debt from the defendant.

The Singapore High Court, applying the Singapore Court of Appeal's decision in *Re Tararone Investments Pte Ltd*,[12] found that the defendant was liable for a range of liabilities including the judgment debt, and an 'all moneys' clause could hold the Borrowers jointly and severally liable for the outstanding sums.

As the court noted, it is not uncommon for banks to draft clauses in the widest possible terms, and while the defendants could not have known that the defendant's husband would incur a liability of US$131 million, the Borrowers were bound by the mortgage.

Trade finance – competing contracts

In the 2021 decision of *CIMB Bank Bhd v. World Fuel Services (Singapore) Pte Ltd*,[13] CIMB Bank Bhd (CIMB) provided banking facilities to Panoil Petroleum Pte Ltd (Panoil). World Fuel Services (Singapore) Pte Ltd (WFS) purchased marine fuel from Panoil. Panoil then issued invoices to WFS in respect of the transactions between them, and assigned to CIMB its rights under the transactions via a deed of debenture. When CIMB sought payment under the transactions from WFS, WFS refused.

The parties disputed which contractual documents applied to the transactions. CIMB contended that it was Panoil's sales confirmations, which incorporated Panoil's terms and conditions for the sale of marine fuel terms and conditions (the terms and conditions) and the corresponding invoices issued by Panoil, which applied. In this regard, Clause 8.2 of the terms and conditions provided that contracting parties must pay Panoil for invoices free of set-off.

WFS asserted, however, that three contracts between WFS and Panoil (the umbrella contracts) should apply instead. The umbrella contracts contained a provision entitling WFS

11 [2020] 5 SLR 463.

12 [2001] 1 SLR(R) 352.

13 [2021] SGCA 19.

to a right of set-off. WFS also relied on an offset agreement providing for the mutual setting off of certain payable sums. WFS claimed that under the umbrella contracts and the offset agreement, WFS was entitled to set off sums due under the invoices to Panoil.

The Court of Appeal held that the offset agreement was to be construed as a master contract that applied to all contractual transactions between WFS and Panoil. In the court's view, it was not necessary for subsequent contracts between these parties to explicitly refer to the offset agreement, for that agreement to apply to them. The court had regard to the fact that the offset agreement was a one-page document covering one substantive issue only – the right of set-off. In the court's view, this suggested that the parties had focused on this sole issue and entered into a contract encapsulating their agreement on it, intending for the right of set-off to apply to their transactions. On the other hand, Clause 8.2 of the terms and conditions was merely one provision in a set of terms canvassing multiple issues. The court also relied on the fact that Panoil's sales confirmations and terms and conditions were standard terms that were pre-printed and unilaterally issued by Panoil, whereas the offset agreement had been signed by both parties. The court therefore held that WFS was entitled to a right of contractual set-off under the offset agreement.

The court has inherent powers to consider a claim on its merits against a defendant who has not entered a defence

In the 2023 case of *UCO Bank, Singapore Branch v. Green Mint Pte Ltd*,[14] the claimant bank commenced a claim against a corporate customer and its director for sums due under credit facilities granted to the customer and secured by a guarantee from the director. Although the director entered an appearance in the proceedings, he subsequently confirmed that he would not be filing a defence. Although the bank was entitled to a judgment in default of defence, the bank applied for a judgment on the merits because India, where it intends to enforce the judgment against the director's assets, does not recognise a foreign judgment that has not been given on the merits of a claim as being conclusive.

The court held that it has the power to consider a claim on its merits in default of a defence. The fact that there was no prescribed procedure in the Singapore Rules of Court 2014 for obtaining judgment on its merits was not an obstacle to issuing a merits judgment under its inherent powers. The court also considered it appropriate to exercise its inherent powers to consider the claim on its merits because not doing so would cause serious injustice to the bank, given that it would not be able to enforce the judgment in India against the director. The court was satisfied that the bank had discharged its burden of proving its claim for judgment to be entered on the merits. In particular, the court held that the bank could rely on a clause in its facility agreement that renders its determination of the sums payable as conclusive.

Claim for investment loss

In the 2022 case of *Wang Fumin v. Citibank Singapore Ltd*,[15] a customer commenced action against the bank in respect of investment loss, alleging misrepresentation and breach of duty on the bank's part. The claims were dismissed as the High Court found that there was no evidential basis for the customer's claims in misrepresentation, and there had been no

14 [2023] SGHC 72.
15 [2022] SGHC 106.

breach of the alleged duties even if they existed. The High Court observed that the bank had provided the customer with monthly statements of his accounts that would correct any misunderstanding he may have of his accounts and inform him on the state of losses in his accounts. That was sufficient to fulfil any duty that the bank owed to the customer to keep him informed of the state of his accounts. The customer's case was later dismissed on appeal by the Appellate Division of the High Court.

Accelerated repayment clause and default interest under loan

In the 2023 case of *Ethoz Capital Ltd v. Im8ex Pte Ltd*,[16] the Court of Appeal considered the enforceability of an obligation that required a borrower to pay the full amount of interest on the principal borrowed for the whole tenor of the loan, even if the loan was repaid early or in the event of default. The Court found that the acceleration of interest payments upon breach was an unenforceable penalty, as that accelerated obligation was a secondary obligation and not a primary obligation since it only arose upon default. The Court also found that the amount to be paid was not a genuine pre-estimate of damages, as the remaining total interest had to be paid regardless of whether the breach was a single late payment or a complete refusal to pay the principal. The Court further held that the default interest rate was a penalty, as the increase between the default interest rate and the contractual interest rate (the contractual interest rate was 6.444 per cent per annum while the default interest rate was 26.08 per cent per annum) was extravagant and the lender failed to show that the default interest rate was a genuine pre-estimate of its loss.

Lenders should be aware that demanding the full payment of interest immediately after a default carries a real risk of having the obligation classified as a secondary obligation and, consequently, an unenforceable penalty. In the context of default interest rates, an exorbitant interest rate or an exceptionally large increase between the regular interest rate and the default interest rate may be struck down as a penalty if such increase cannot be justified on the basis that this is reflective of the loss to the lender.

Sanctions clause

The decision of *Kuvera Resources Pte Ltd v. JPMorgan Chase Bank, NA*[17] represents the first time a Singapore court was asked to consider the validity and enforceability of a sanctions clause.

The plaintiff was the beneficiary of two letters of credit for the purchase of coal. The letters of credit were issued by a Dubai bank (the Issuing Bank) and confirmed by the defendant. The defendant's confirmations contained a clause which provided that the defendant was not liable for any failure to pay against a complying presentation of documents if the documents involved a vessel subject to sanctions laws and regulations of the US (the Sanctions Clause). The plaintiff made a complying presentation of documents, but the defendant's standard post-presentation sanctions screening revealed that the coal was shipped on a vessel which was likely to be beneficially owned by a Syrian entity and therefore fell within the scope of US sanctions on Syria. The defendant therefore did not pay on the letters of credit and the plaintiff sued on the same.

The High Court dismissed the plaintiff's action and held that the Sanctions Clause was duly incorporated as a contractual term of the defendant's confirmation even though

16 [2023] SGCA 3.
17 [2022] SGHC 213.

the clause did not appear in the letters of credit issued by the Issuing Bank. The Court also considered the Sanctions Clause as valid and enforceable, which entitled the defendant to refuse to pay the plaintiff against a complying presentation because the defendant was subject to US sanctions laws and regulations, and paying the plaintiff would have exposed the defendant to a penalty for breaching US sanctions laws and regulations.

However, on appeal, the Court of Appeal ruled in favour of the plaintiff.[18] While the Court of Appeal did not disagree with the High Court's approach on the validity of the Sanctions Clause, the Court held that the defendant failed to provide sufficient evidence to prove that the vessel was in fact owned by an entity subject to the sanctions.

ii Recent legislative developments

The Financial Services and Markets Act

The Financial Services and Markets Act (FSMA) is an omnibus legislation which enhances the Monetary Authority of Singapore (MAS)'s regulatory and enforcement framework across the financial sector, and consolidates the MAS's powers on issues that were previously spread across various statutes.

Key features of the FSMA include prohibition orders, technology risk management and the regulation of digital token service providers.

Prohibition orders

The FSMA expands the MAS's powers to impose prohibition orders on persons who have shown themselves to be unfit to perform key roles, activities and functions in the financial industry.

The categories of persons who may be subject to prohibition orders have now been broadened.[19] The grounds for the issuance of prohibition orders have also been changed from a list of specific criteria to the Guidelines on Fit and Proper Criteria issued by the MAS.[20] The FSMA also extends prohibition orders to prohibit persons from performing a wider range of activities than before, such as the handling of funds or assets, risk-taking, risk management and control, critical system administration and any other function critical to the integrity or functioning of financial institutions that the MAS may prescribe.[21]

These revised powers of the MAS are broadly aligned with the regulatory regimes in Australia, Hong Kong, the United Kingdom and the United States.[22]

Technology risk management

The FSMA consolidates existing technology risk management requirements under various MAS-administered statutes by introducing powers that apply to any financial institution or class of financial institution.[23]

18 [2023] SGCA 28.

19 Section 7(1) of the Financial Services and Markets Act 2022 (FSMA).

20 Section 188 of the FSMA.

21 Sections 6 and 7(2).

22 Financial Services and Markets Bill – Second Reading Speech by Mr Alvin Tan, 4 April 2022 (Second Reading of the Financial Services and Markets Bill).

23 Section 29(1) of the FSMA.

The MAS may issue directions as it considers necessary for the management of technology risks, as well as the use of technology to deliver financial services and protect data.[24]

The maximum penalty for each breach of a technology risk management requirement is S$1 million.[25] Where multiple breaches of technology risk management requirements are established, for example, in relation to a cyberattack or disruption to essential financial services impacting a financial institution's customer or other industry participants, the financial institution is liable to further fines.[26]

Digital payment token service providers

Previously, digital payment token (DPT) service providers that were operating from Singapore, but which only provided DPT services outside of Singapore, were unregulated as far as anti-money laundering and terrorism financing matters were concerned. This created reputational risks for Singapore, and the FSMA aims to address this regulatory lacuna.[27] Now, such DPT service providers require a licence.[28]

In addition, a licensee must have a permanent place of business if it wishes to provide any type of DPT service, and it must appoint at least one person to be present at its permanent place of business to respond to queries relating to anti-money laundering and terrorism financing matters.[29]

The Payment Services Act

The Payment Services Act (PSA), which commenced on 28 January 2020, provides for the licensing and regulation of payment systems and payment service providers in Singapore.

The PSA has two regulatory frameworks: a designation regime to designate payment systems for financial stability or to ensure efficiency or competition in the financial systems; and a licensing regime that is modular and risk-based, and right-sizes the regulation of payment services to mitigate risks according to the scope and scale of payment service providers.[30]

Under the designation regime, a payment system may be designated under the PSA if it is considered a systematically important payment system (SIPS) or system-wide important payment system (SWIPS), or where it is otherwise in the public interest to do so. A disruption in the operation of a SIPS could trigger further disruption to participants or cause systemic disruption to the financial system of Singapore. A disruption in the operation of a SWIPS could affect public confidence in payment systems or the financial system of Singapore.[31]

The licensing framework regulates seven main payment services:

a account issuance services;
b domestic money transfer services;
c cross-border money transfer services;

24 ibid.
25 Section 29(2) of the FSMA.
26 ibid.
27 Second Reading of the Financial Services and Markets Bill.
28 Section 137(1) and 137(2) of the FSMA.
29 Section 143 of the FSMA.
30 *A Guide to the Essential Aspects of the Payment Services Act 2019*, the MAS.
31 ibid.

d merchant acquisition services;
e e-money issuance services;
f DPT services; and
g money changing services.[32]

All payment service providers are required to hold one of the following licences to provide payment services in Singapore (unless exempted):
a a money changing licence;
b a standard payment institution licence; or
c a major payment institution licence.

Payment Services (Amendment) Act 2021

The Payment Services (Amendment) Act 2021 was passed on 4 January 2021, to align Singapore's regime with the Financial Action Task Force's enhanced standards for virtual asset service providers in June 2019.[33]

The definition of DPT services in the PSA will be expanded to include the transfer of DPT, the provision of custodian wallet services for DPT and the facilitation of the exchange of DPT for Singapore currency or other DPT, which the MAS recognised should be regulated for anti-money laundering/terrorism financing.[34]

The definition of cross-border money transfer services will also be widened to cover service providers that actively facilitate cross-border money transfers between entities in different countries although monies are not accepted or received in Singapore. A cross-border money transfer service provider that carries on a business in Singapore of providing such services will need to be licensed and subject to the MAS's anti-money laundering/terrorism financing regulations.[35]

MAS Consultation Paper on Proposed Amendments to the Payment Services Regulations

On 3 July 2023, the MAS announced new requirements for DPT service providers to safekeep customer assets under a statutory trust before the end of the year. This will mitigate the risk of loss or misuse of customers' assets, and facilitate the recovery of customers' assets in the event of a DPT service provider's insolvency.

The MAS also issued a consultation paper on proposed amendments to the Payment Services Regulations to seek feedback on new draft provisions which aim to implement requirements to safeguard (1) moneys received from customers; and (2) customers' assets. The proposed safeguards include depositing customers' money in a trust account maintained with a 'safeguarding institution', which must be a bank, merchant bank, finance company or financial guarantee insurer regulated in Singapore; and segregating customers' assets from any other assets of DPT service providers.

32 Section 6(4) of the Payment Services Act 2019 (PSA).
33 Explanatory Brief for Payment Services (Amendment) Bill (Explanatory Brief).
34 ibid.
35 ibid.

III CHANGES TO COURT PROCEDURE

The Rules of Court 2021 (ROC 2021), which came into effect on 1 April 2022, are intended to modernise the litigation process, enhance the speed of adjudication, and keep costs at reasonable levels.

The ROC 2021 is centred around five ideals:

a fair access to justice;
b expeditious proceedings;
c cost-effectiveness;
d the efficient use of court resources; and
e fair and practical results suited to the needs of the parties.[36]

In making orders, the court must seek to achieve these ideals, and parties have a duty to assist the court and to conduct their cases in a manner that helps to achieve the ideals.[37] Other features of the ROC 2021 include the following:

a A party must consider an amicable resolution of the dispute prior to the commencement of proceedings and during the course of any action or appeal, unless it has reasonable grounds not to do so.[38]
b An originating claim or originating application is now valid for three months beginning from the date of its issue.[39]
c The court must, as far as possible, order a single application pending trial to be filed by each party.[40] This is to deal with all interlocutory matters necessary for the case to proceed expeditiously. No other interlocutory application may be filed thereafter without the approval of the court, save for certain exceptions.
d The court may order the filing of the affidavits of evidence in chief prior to the discovery stage.[41]
e Only one expert may be appointed upon the agreement between the parties, and the court's approval must be sought prior to the appointment. The parties must agree on the list of issues for the expert.[42]

IV INTERIM MEASURES

In the 2022 decision of *CLM v. CLN*,[43] the plaintiff had commenced an action to trace and recover Bitcoin and Ethereum that were allegedly misappropriated from him by unidentified persons. He sought, among other relief, a proprietary injunction prohibiting the first defendants from dealing with, disposing of, or diminishing the value of the stolen cryptocurrency assets.

36 Order 3, Rule 1(2) of the ROC 2021.
37 Order 3, Rule 1(3) and 1(4) of the ROC 2021.
38 Order 5, Rule 1 of the ROC 2021.
39 Order 6, Rule 3 of the ROC 2021.
40 Order 9, Rule 9 of the ROC 2021.
41 Order 9, Rule 8 of the ROC 2021.
42 Order 12 of the ROC 2021.
43 [2022] SGHC 46.

The court had regard to authorities from the United Kingdom and Malaysia as to the making of orders against persons unknown, and held that such an order could be made in Singapore. This is subject to the caveat that the description of the defendants must be sufficiently certain as to identify persons who fall within and outside of the description.

The court also found that cryptocurrencies satisfied the definition of a property right, based on the case of *National Provincial Bank v. Ainsworth* (*Ainsworth*), because the right is definable, the right is identifiable by third parties, the right is capable of assumption by third parties, and the right and the asset have some degree of permanence or stability.

In *Janesh s/o Rajkumar v. Unknown Person*,[44] the High Court issued a freezing injunction against an unknown party only known by a pseudonym 'chefpierre.eth', to prevent him from disposing of a non-fungible token (NFT) that had been wrongfully transferred to his cryptocurrency wallet. The High Court applied the *Ainsworth* criteria and found that NFTs do give rise to property rights that are capable of being protected by an injunction.

V PRIVILEGE AND PROFESSIONAL SECRECY

In the 2016 decision of *ARX v. Comptroller of Income Tax*,[45] the Singapore Court of Appeal clarified that legal professional privilege protects communications with in-house counsel that were made before changes to the Evidence Act 1893 in 2012. These changes expressly extended legal professional privilege to communications with in-house counsel.

However, the Court of Appeal found that the common law had long protected confidential communications with in-house legal counsel. Therefore, such communications, even before the aforesaid amendments in 2012, were equally subject to legal professional privilege.

VI JURISDICTION AND CONFLICTS OF LAW

On 1 October 2016, the Choice of Court Agreements Act 2016 (CCAA) came into effect. The CCAA gives effect to the Hague Convention on Choice of Courts Agreement (the Convention), and provides a framework of mutual recognition and enforcement of foreign judgments from states that are parties to the Convention, thereby giving effect to exclusive jurisdiction clauses in contracts.[46]

In the 2022 decision of *6DM (S) Pte Ltd v. AE Brands Korea Ltd*,[47] the Singapore High Court gave effect to an exclusive jurisdiction clause in favour of the courts of England and Wales, and dismissed a Singapore suit.

The court noted that an application under Section 12(1) of the CCAA for a stay or dismissal of proceedings entailed a two-stage inquiry. The court has to first consider whether there exists an exclusive jurisdiction clause that does not designate Singapore as a chosen court and which applies to the case or proceeding in which the application is made. If the court is satisfied that there is such an exclusive jurisdiction clause, then it must stay or dismiss the case or proceeding, unless it is shown that one of the exceptions set out in Section 12(1) applies.

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44 [2023] 3 SLR 1191.

45 [2016] 5 SLR 590.

46 'Singapore Ratifies Hague Convention on Choice of Court Agreements', Ministry of Law Press Release, 2 June 2016.

47 [2022] 3 SLR 1300.

In this regard, the court also held that the effect of Section 12 of the CCAA is that the common law test has been displaced. It no longer suffices for a party resisting a stay of the Singapore proceedings to show that there is 'strong cause amounting to exceptional circumstances' for why he should not be held to an exclusive jurisdiction clause or that the applicant had submitted to the jurisdiction of the Singapore courts pursuant to Section 16(1)(b) of the Supreme Court of Judicature Act 1969, if he cannot bring himself within one of the exceptions specified in Section 12(1).

VII SOURCES OF LITIGATION

In recent years, scams where bank customers are tricked into giving access to their bank accounts have become prevalent in Singapore. In the first half of 2023, over S$330 million was lost to fraudsters. The growing scam issue has increased public scrutiny of banks and the avenues of recourse for customers who suffer losses from scams. The UK Supreme Court has confirmed in *Philipp v. Barclays Bank UK Plc*[48] that a bank will not be liable where it has followed a customer's express instructions, even if the customer has been scammed. The Supreme Court observed that the question of whether banks should bear some or all liability for payment scams is a question of social policy for governments and regulators. It will not be surprising if a similar case comes before the Singapore courts in due course.

To protect themselves from potential liability to customers alleging negligence, Singapore banks are now introducing new security measures to protect customers against malware scams such as blocking mobile banking access on devices that are detected to carry potentially malicious apps. On 18 September 2023, the Singapore government announced that a consultation paper on a framework for an equitable sharing of losses among consumers and financial institutions arising from phishing scams should be completed in October 2023.

In August 2023, the Singapore Police Force conducted one of the largest anti-money laundering operations in Singapore and arrested 10 foreigners allegedly involved in laundering proceeds from criminal activities overseas. Assets worth more than S$2.8 billion were seized, including more than S$1.45 billion in bank accounts. The case has raised questions on whether banks are strictly following Singapore's stringent anti-money laundering rules. The MAS is investigating whether the banks involved had taken reasonable steps to mitigate risks. Any shortcoming in the banks' control may result in regulatory actions against the banks for breaching anti-money laundering rules.

VIII EXCLUSION OF LIABILITY

Singapore's courts have long upheld exclusion of liability clauses in banks' standard terms and conditions, subject to the test of reasonableness under the Unfair Contract Terms Act 1977 (UCTA). In the 2018 decision of *Major Shipping & Trading Inc v. Standard Chartered Bank (Singapore) Ltd* (*Major Shipping*), the Singapore High Court considered the principles to apply in determining the validity of such clauses.

In *Major Shipping*, the court noted that under Section 11(1) of the UCTA, the test for reasonableness was whether the term was 'a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the

48 [2023] UKSC 25.

contemplation of the parties when the contract was made'. The court found that the bank's exclusion of liability clause (Clause 10.1(a)) did not contravene the UCTA as it satisfied the test of reasonableness. The court had regard to, among other things, the fact that the plaintiff was a commercial entity which had entered into a contractual relationship with the bank in the course of its business, that Clause 10.1(a) was a clause commonly found in the account opening documents and standard terms of Singapore banks, and that it was reasonable for the bank to exclude liability for negligence given the volume of transactions it handled for various customers.

IX REGULATORY IMPACT

As discussed above, the FSMA and the PSA have enhanced and consolidated the MAS's powers concerning payment services and cryptocurrency service providers.

In light of the Russian invasion of Ukraine, the MAS issued Notice SNR-N01 (the Notice) on 14 March 2022 prohibiting financial institutions from dealing with the assets of, or entering into business with, certain designated entities. Financial institutions are also required to freeze the funds or financial assets of such entities in their possession, custody or control in Singapore. With the Russia-Ukraine conflict not showing signs of abatement, it remains to be seen whether Singapore will make any modifications to the existing sanctions against the relevant Russian financial institutions and their customers.

X OUTLOOK AND CONCLUSIONS

The current uncertain economic outlook underscores the likelihood that the year ahead will pose substantial challenges to the financial industry, giving rise to more disputes and litigation. Of particular significance are the authorities' efforts to clamp down on money laundering activities and scams, to protect the integrity of, and maintain trust and confidence in, the Singapore financial system. Among other things, greater regulatory oversight is likely to result in more stringent checks on funds flowing into financial institutions in Singapore, and potentially more regulatory and civil litigation.

In addition, as the fallout from failed oil traders continues to ripple through financial institutions involved in trade financing, this is another area that is likely to see more litigation and developments in the law. In general, it is likely that banks will find themselves engaged in more disputes on multiple fronts in the near future.