WONG PARTNERSHIP

LAW WATCH

SEPTEMBER 2023

In Brief

DEALS

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WONGPARTNERSHIP LLP IS ACTING IN …
The acquisition by Tower Capital Asia of a majority stake in electronic payment services provider, AXS

AXS Pte. Ltd. (**AXS**) is a leading payment platform which operates an Electronic Service Delivery Network in Singapore with over 650 AXS stations islandwide offering more than 600 services. AXS became a subsidiary of DBS Bank Ltd. (**DBS**) in 2006 and has expanded its digital payments and collections network, as well as online and mobile services.

Founded in 2016, Tower Capital Asia Pte. Ltd. (**Tower Capital Asia**) is a mid-market private equity firm that invests in various asset classes across a wide range of industries in Southeast Asia.

On 11 July 2023, Tower Capital Asia announced its acquisition of a majority stake in AXS from DBS and other shareholders including Network for Electronic Transfers (Singapore) Pte Ltd. Following the close of the transaction, Tower Capital PE Fund I, LP, a fund managed by Tower Capital Asia, will become the largest shareholder of AXS.

Tower Capital Asia intends to transform AXS into a regional cloud-based payment solutions provider, pledging investment in technological innovation and expansion of services to deliver a more powerful and seamless payments experience to both merchants and consumers, while enhancing existing business operations.

The partners involved in the transaction are Low Kah Keong from the Mergers & Acquisitions and the Asset Management & Funds Practices, and Lam Chung Nian from the Intellectual Property, Technology & Data Practice.

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Other recent matters that WongPartnership is or was involved in:

DESCRIPTION	PRACTICE AREAS
Acted as lead counsel in the refinancing of loan facilities granted by a syndicate of offshore lenders to the EC World REIT Group.	Banking & Finance
Acted as Singapore legal counsel in the acquisition by Omnicom Media Group, the media services division of Omnicom (NYSE: OMC), of Ptarmigan Media, a specialist agency that provides end-to-end media and marketing solutions to financial services brands. The combined capabilities from this acquisition will enable accelerated growth in the financial services industry and media buying scale, translating to better outcomes for their clients, and increased professional opportunities for their employees.	Corporate/Mergers & Acquisitions Intellectual Property, Technology & Data Tax Financial Services Regulatory
Acting in the sale by UOL Group Limited of Parkroyal Kitchener Hotel Pte Ltd, which owns the Parkroyal Kitchener Hotel, for S$525 million. The sale and purchase agreement between Pan Pacific Hotels Group, a wholly owned subsidiary of UOL, and Midtown Properties will see the disposal of five million ordinary shares of hotelier Parkroyal Kitchener Hotel Pte Ltd representing its entire issued and paid-up share capital. UOL Group Limited mentioned that the disposal will enable it to unlock the value of its investment in Parkroyal Kitchener Hotel at an attractive price and is part of the group's reconstitution of its overall property portfolio.	Corporate Real Estate Corporate/Mergers & Acquisitions
Acting in 65 Equity Partners and Seatown Private Capital Master Fund's investment by way of the purchase of callable convertible notes issued by Carsome Group Pte Ltd, a car e-commerce platform.	Corporate/Mergers & Acquisitions
Acted in the acquisition by The Brandtech Group, an enterprise-level marketing technology group and the largest global digital partner for some of the world's biggest brands, of Singapore-based generative artificial intelligence platform start-up Pencil's business and assets. Wavemaker Partners and Sequoia Capital were the existing shareholders and noteholders of Pencil.	Corporate/Mergers & Acquisitions WPGrow: Start-up / Venture Capital
Acting in the voluntary unconditional cash offer of a revised consideration of 60 cents per share by DigiTech Holding Limited, the offeror, for Challenger Technologies Limited. The offer is being made with a view to delist the company from the Singapore Exchange (SGX).	Corporate/Mergers & Acquisitions

DESCRIPTION	PRACTICE AREAS
Advising in the voluntary unconditional cash offer by the offeror, Aleph Tav Ltd, for Penguin International Limited, as well as the financings relating to such offer. This is a consortium made up of Penguin International's Executive Chairman, Managing Director and a special purpose vehicle under private equity firm Dymon Asia which is making its second attempt to take the company private. They are offering shareholders 83 cents per share, higher than the previous offer price of 65 cents per share.	Corporate/Mergers & Acquisitions Banking & Finance
Acted in the trading debut of the mechanical and electrical engineering service provider, Ever Glory United Holdings Pte. Ltd., at S$0.335 on the Singapore Exchange's Catalist board, which raised about S$3.1 million from the full subscription of 14 million placement shares at S$0.22 apiece. Ever Glory United Holdings Pte. Ltd. plans to use the S$3.1 million to scale its existing business to include the provision of mechanical and electrical maintenance service, while also venturing into property development and property investment.	Equity Capital Markets China

CONSUMER PROTECTION (FAIR TRADING) ACT 2003 (CPFTA)

Singapore High Court Provides Guidance on Applicable Principles for Granting of Accompanying Orders and Injunctions Under CPFTA

In *Nail Palace (BPP) Pte Ltd v Competition and Consumer Commission of Singapore and another appeal* [2023] SGHC 203, the General Division of the High Court of Singapore (**High Court**) upheld orders made by the District Court requiring two suppliers of nail services and foot-related treatments to inform the general public and their customers about the declarations and injunctions ordered against them under the CPFTA.

Our Comments

Prior to this decision and the decision of the District Court below, there were no reported local decisions on the relevant factors that a court should take into account in deciding whether to make accompanying orders (as well as whether to grant a final injunction) under the CPFTA.

In this decision, the High Court provided guidance on the applicable principles to be considered when a court exercises its discretion to make accompanying orders under the CPFTA.

In essence, bearing in mind the legislative intent of informing consumers, enhancing monitoring and general deterrence and the detriment and/or prejudice suffered by the supplier, the accompanying orders should be a proportionate response to the unfair practice and of an appropriate duration. Accompanying orders can be granted even if the underlying injunction has not been breached.

The High Court also set out in *obiter dicta* the applicable principles to be considered when a court exercises its discretion in deciding whether to issue an injunction under the CPFTA.

Background

The appellants in these appeals, Nail Palace (BPP) Pte Ltd (**NPBPP**) and Nail Palace (SM) Pte Ltd (**NPSM**) (collectively, the **Suppliers**), are related companies engaged in the provision of manicure and pedicure services and foot-related treatments under the business name "Nail Palace".

The respondent is the Competition and Consumer Commission of Singapore (**CCCS**) which administers, among other things, the CPFTA.

The CCCS brought proceedings in the District Court against each of the Suppliers on the ground that they had, in procuring their customers' purchases of nail fungal treatment packages, engaged in one or more unfair practices within the meaning of section 4 of the CPFTA.

Section 4 of the CPFTA provides, among other things, that it is an unfair practice for a supplier, in relation to a consumer transaction:

> (a) to do or say anything, or omit to do or say anything, if as a result a consumer might reasonably be deceived or misled; …
>
> (d) without limiting [paragraph] (a) … to do anything specified in the Second Schedule.

Paragraph 3 of the Second Schedule to the CPFTA lists the making of "*a false or misleading representation concerning the need for any goods or services*" as an unfair practice.

Before the District Judge, the CCCS sought under section 9 of the CPFTA:

(a) Declarations that the Suppliers had engaged in certain unfair practices in relation to fungal treatment packages;

(b) Final injunctions to restrain the Suppliers from engaging in such practices; and

(c) Various accompanying orders.

Section 9(1)(c) of the CPFTA states that, where a supplier has engaged, is engaging or is likely to engage in an unfair practice, the District Court or High Court may, on the CCCS' application, make one or more of the accompanying orders specified in section 9(4) of the CPFTA if a declaration of unfair practice or injunction restraining the supplier from engaging in unfair practice is made.

Section 9(4) of the CPFTA provides that the accompanying orders for the purposes of section 9(1)(c) include the following:

> (a) an order that the supplier must periodically publish, at the supplier's expense, for a specified period that the supplier continues to be a supplier, the details of the declaration or injunction in the form and manner and at the intervals as will secure prompt and adequate publicity for the declaration or injunction against the supplier;
>
> (b) an order that the supplier must, before any consumer enters into a contract in relation to a consumer transaction with the supplier during a specified period —
>
> (i) notify the consumer in writing about the declaration or injunction against the supplier; and
>
> (ii) obtain the consumer's written acknowledgment of the notice in sub-paragraph (i);
>
> …

The District Judge found that the Suppliers had committed unfair practices and granted most of the reliefs sought by the CCCS, including the declarations, injunctions and accompanying orders sought. The accompanying orders made by the District Judge included the following orders made pursuant to section 9(1)(c) read with section 9(4) of the CPFTA:

(a) That each Supplier publish, at its own expense, within 21 days from 2 September 2022, details of the declaration and injunction granted against it, by way of a full-page public notice in the Straits Times, Lianhe Zaobao, Berita Harian, and Tamil Murasu (**Publication Order**); and

(b) That each Supplier must, before any customer enters into a contract in relation to a customer transaction with it during a period of two years from 2 September 2022: (i) notify the customer in writing about the declaration and injunction in force against it; and (ii) obtain the customer's written acknowledgement of receipt of the notice (**CNC Order**).

The Suppliers appealed to the High Court against the Publication Order and the CNC Order. They did not appeal against the District Judge's findings that they had engaged in unfair practices, or against the injunctions ordered against them.

The High Court's Decision

The High Court dismissed the appeals against the Publication Order and the CNC Order.

In doing so, the High Court considered the principles that should apply when a court exercises its discretion in making an accompanying order (such as the Publication Order and the CNC Order) under section 9(4) of the CPFTA.

Principles applicable to the granting of accompanying orders under the CPFTA

The High Court summarised the principles that should be applied when a court is considering whether to make an accompanying order as follows:

(a) The legislative intention behind the introduction of the accompanying orders is to achieve three purposes: (i) to inform consumers, (ii) to enhance monitoring, and (iii) to (generally) deter errant suppliers. In deciding whether to make an accompanying order, a court should strive to give effect to this legislative intention.

(b) Accompanying orders can be granted even if the underlying injunction has not been breached.

(c) Accompanying orders should be granted by taking into account the detrimental effect on a supplier's business such that a proportionate response is made in relation to the supplier's unfair practice. The accompanying orders made should be necessary to address the harm caused by the unfair practices in question and they must be a reasonable means of achieving these purposes, in the sense that the effect of the accompanying orders must not significantly exceed what is necessary.

(d) Given that the accompanying orders in sections 9(4)(d) to 9(4)(f) which oblige the supplier to notify the respondent of certain events are less prejudicial to it, the courts may grant such orders more readily.

(e) In contrast, given that the accompanying orders in sections 9(4)(a) to 9(4)(c) which oblige the supplier to notify its consumers can be more prejudicial to it, concerns of proportionality are more strongly engaged for such orders and these should be granted more judiciously, according to the circumstances of each particular case. The following factors can be considered in deciding whether to do so:

    (i) the risk of harm and risk of repetition of the unfair practice;

    (ii) the extent of the public's awareness of the supplier's unfair practice; and

    (iii) the proportionality of imposing a blanket consumer notification and consent order.

(f) As for the duration of the accompanying orders, subject to the requirement in section 9(6), the appropriate duration should be to enable the purpose behind the order to be met. The relevant factors include: (i) the severity of harm caused by the unfair practice; (ii) the level of public awareness in relation to the errant supplier's conduct; (iii) the size and scale of the supplier's business; and (iv) the supplier's trading cycles. A longer period for consumer notification and consent order may be justified for a supplier who enters into fresh transactions with new consumers less frequently. This is to ensure that a proportionately sufficient number of consumers are notified.

Application of principles to the facts

Applying those principles to the facts of the case, the High Court found that the Publication Order and the CNC Order were not disproportionate. In this connection, the High Court noted, among other things, the following:

(a) There is a need to inform consumers of the Suppliers' unfair practices as the two occasions in question were deliberate attempts at misleading customers, which made the nature of the contraventions "*moderately severe*". This is to enable customers to protect themselves, especially in the light of the repeated instance of unfair practice by NPBPP several months after the initial instance by NPSM.

(b) There is a need to specifically deter the Suppliers insofar as they have not complied with the District Judge's orders despite not having applied for a stay of execution of the orders. There is also a need to generally deter other businesses so that future cases would, in the words of the then Minister of State for Trade and Industry, Dr Koh Poh Koon, be resolved at "*the front end of the spectrum – towards education, towards awareness, towards mediation and towards voluntary compliance agreements*".

The High Court further held that the Publication Order and the CNC Order are appropriate because the Suppliers' unfair practices relate to their misleading representations to consumers and the orders directly address the Suppliers' conduct by informing consumers about the declarations and injunctions issued against them.

In addition, the High Court found that the detrimental effect of the Publication Order and the CNC Order on the Suppliers did not significantly exceed what was necessary to inform consumers – the Suppliers' own evidence showed that adherence to the orders had not been significantly detrimental to them. The High Court further did not consider the Publication Order to be significantly excessive since each Supplier was required to publish the details of the declaration and injunction granted against it only once in each of the four specified newspapers.

In the circumstances, the High Court affirmed the District Judge's decision to grant the Publication Order and the CNC Order and dismissed the appeals.

Principles applicable to the granting of injunctions under the CPFTA

Although this was not an issue on appeal, the High Court went on to consider, in extensive *obiter dicta*, the applicable principles for the exercise of the court's discretion to grant an injunction under sections 9(1) and 9(2) of the CPFTA.

Under section 9(1)(b) of the CPFTA, where the court finds that a supplier has engaged, is engaging or is likely to engage, in an unfair practice, it may injunct the supplier from engaging in the unfair practice.

Section 9(2) of the CPFTA clarifies that the court's power to grant a declaration or injunction under section 9(1) may be exercised:

(a) If the court is satisfied that the supplier has engaged in the unfair practice, whether or not it appears to the court that the supplier intends to engage again, or to continue to engage, in the unfair practice; or

(b) If the court is satisfied that, in the event that a declaration or an injunction is not granted, it is likely that the supplier will engage in the unfair practice, whether or not the supplier has previously engaged in the unfair practice and whether or not there is any likelihood of irreparable harm to any consumer or class of consumers if the supplier engages in the unfair practice.

In summary, the High Court opined that the following principles are relevant in relation to injunctions granted under sections 9(1)(b) and 9(2) of the CPFTA:

(a) The purposes of an injunction include not only the prevention of future harm, but also include the marking of the court's disapproval of the unfair practice, along with punishment and deterrence.

(b) An injunction can be granted as the norm alongside a declaration under the CPFTA.

(c) In the context of the three situations listed under sections 9(1)(b) and 9(2):

(i) Where a supplier is found to have engaged in or is engaging in an unfair practice, an injunction should be granted as a norm rather than the exception;

(ii) Where, however, a supplier is found to be likely to engage in an unfair practice in the future, the court could be more circumspect in granting a final injunction; and

(iii) To the extent that they may apply in a given case, a court, in deciding whether to grant an injunction, may consider factors such as the nature and extent of the contraventions at hand, the underlying causes of contravention, and the amount of harm that the contraventions may cause. The court may also vary or discharge the injunction once it is shown that the unfair practice, which forms the factual basis of the injunction, will no longer be committed.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:

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BREACH OF CONFIDENCE

Plaintiff in Breach of Confidence Claim May Concurrently Seek Remedies for Both Wrongful Gain Interest and Wrongful Loss Interest, Singapore High Court Rules

In *Amber Compounding Pharmacy Pte Ltd and another v Lim Suk Ling Priscilla and others* [2023] SGHC 241, the General Division of the High Court of Singapore (**High Court**) affirmed that a plaintiff bringing a claim for breach of confidence is entitled to plead and claim the infringement of both its wrongful gain interest and wrongful loss interest. The plaintiff may therefore seek both the broad range of remedies under the principles set out in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (***Coco***) as well as equitable damages under the principles laid down in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130 (***I-Admin***).

Our Comments

With advances in technology, wrongdoers are able to copy and steal substantial amount of data with increasing ease. They often do not misuse all of the data stolen; only a portion of the most valuable data would be misused. In that case, a plaintiff would have suffered an infringement of both its wrongful gain interest (an interest preventing wrongful profits) and wrongful loss interest (an interest in protecting the confidentiality of the information *per se*).

The difference in the plaintiff's interests would also mean that the remedies it is entitled to differs depending on the wrong that has been caused by the defendant. This decision clarifies the scope of remedies available to a plaintiff. The plaintiff can, where applicable, elect between the I-*Admin* approach and *Coco* approach but it can also concurrently seek both sets of remedies if the facts allow for it.

It is therefore important for plaintiffs to first determine whether a defendant's actions are an incursion to the wrongful gain interest or the wrongful loss interest, or both, to avoid a situation where an erroneous election is made in the course of proceedings.

This update takes a look at the High Court's decision.

Background

This decision arose from an application filed by the parties under Order 33 rule 2 of the Rules of Court (2014 Rev Ed) prior to a trial for assessment of damages to preliminarily determine the question whether the plaintiffs were entitled to claim for both damages under the principles laid down in *Coco* and equitable damages for breach of confidence under the principles laid down in *I-Admin*.

The first plaintiff was engaged in the compounding of medical and pharmaceutical products. The second plaintiff was a company providing, among other things, support services to the first plaintiff. The plaintiffs claimed to have, over the years, amassed confidential information and trade secrets such as pharmaceutical formulations, price lists and client lists.

The first, third and fifth defendants were former employees of the first or second plaintiff. The second defendant was a compounding pharmacy which provided services and products very similar to that offered by the first plaintiff. The first and fourth defendants were directors of the second defendant. The sixth defendant, who was the husband of the first defendant, was later joined to the action.

The plaintiffs claimed that the defendants had acted in breach of confidence by, among other things:

(a) Copying confidential documents from the plaintiffs and using the confidential information and/or trade secrets to set up and run the second defendant and sell identical products;

(b) Attempting to communicate with and solicit business from contacts listed in the first plaintiff's confidential list of clients; and

(c) Revealing confidential information of the plaintiffs to a third party.

A consent judgment was entered against the first, second, third, fourth and sixth defendants by which the first and second defendants, among other things:

(d) Unconditionally admitted to the unauthorised copying and breach of confidence in relation to the plaintiffs' confidential information as listed in paragraph 5 of the statement of claim (**Confidential Information**);

(e) Unconditionally admitted to the unauthorised receipt, access and use of the Confidential Information; and

(f) Agreed that they were jointly and severally liable to the plaintiffs in damages in respect of, and that damages would be assessed for, the matters stated in sub-paragraphs (a) and (b) above.

However, despite the first and second defendant's admissions in the consent judgment, the defendants maintained, in their supplemental defence filed in relation to the assessment of damages, that the extent of use and dissemination of the Confidential Information was a matter to be adjudicated on.

The Parties' Positions

The plaintiffs claimed that the law of confidence can concurrently protect both:

(a) Their interest in preventing wrongful gain or profit from their confidential information (**wrongful gain interest**); and

(b) Their interest in avoiding wrongful loss (**wrongful loss interest**), i.e., to protect the confidentiality of the information *per se*. Wrongful loss is suffered where a defendant's conscience has been impacted in the breach of the obligation of confidentiality. The protection of wrongful loss interest is limited to cases involving unauthorised acquisition of the confidential information, that is, the "taker" cases (see *Lim Oon Kuin and others v Rajah & Tann Singapore LLP and another appeal* [2022] 2 SLR 280 at [41] and [42]).

As each interest gives rise to its own remedies, the plaintiffs contended that they were entitled to claim both:

(a) Damages under the principles laid down in *Coco* which explicitly protect the wrongful gain interest and in respect of which the law has produced a "*formidable armoury*" of remedies, including injunctions and delivery up as well as monetary remedies, whether termed equitable compensation or damages (see Tanya Aplin *et al*, *Gurry on Breach of Confidence* (Oxford University Press, 2nd Ed, 2012) at para [17.01]) (***Coco* Approach**); and

(b) Equitable damages for the infringement of wrongful loss interest under the principles laid down in *I-Admin* (***I-Admin* Approach**).

The defendants, on the other hand, contended that the plaintiffs were not entitled to make such a claim because the interests are very distinct.

The High Court's Decision

Ruling in favour of the plaintiffs, the High Court held that a plaintiff in a claim for breach of confidence is entitled to plead that it is proceeding on both the wrongful gain interest and the wrongful loss interest. Therefore, within a claim for breach of confidence, the court may award both damages under the *Coco* Approach as well as equitable damages under the *I-Admin* Approach.

In reaching its decision, the High Court, following a review of the jurisprudence on breach of confidence as well as the parties' submissions, noted that:

(a) There was no conflicting binding precedent that precludes a plaintiff from claiming that both its wrongful loss and wrongful gain interests have been affected by the defendant's breach of confidence.

(b) There was no conflicting *dicta* in High Court decisions on breach of confidence that suggested that plaintiffs are not entitled to simultaneously claim damages under the *Coco* Approach as well as equitable damages under the *I-Admin* Approach.

(c) The position that a plaintiff may plead and claim both the wrongful gain interest and wrongful loss interest is reinforced by the Court of Appeal's rationale for declaring the existence of both forms of interest in *I-Admin*. In *I-Admin*, the Court of Appeal acknowledged that even where defendants wrongfully access or acquire confidential information but do not use or disclose it, their actions nevertheless compromise the confidentiality of the information. The Court of Appeal then pointed out that the policy objectives behind the early law of confidence may have extended beyond safeguarding against wrongful gain and that the existing legal framework did not adequately safeguard the wrongful loss interest or offer recourse where it has been affected. The recognition of the wrongful loss interest was therefore intended to fill the lacuna in the law and bolster and enhance protection for confidentiality.

The High Court also observed that it made sense in principle for a plaintiff to be entitled to plead and claim both forms of interests. It gave the following illustration: In a "taker" situation, party A may have (without authorisation) acquired ten confidential documents belonging to party B. It may be that only three of the ten documents were used by party A (to satisfy the third limb of the *Coco* Approach). There might not be any evidence that there was actionable use by party A of the remaining seven documents, i.e., what party A did

with the remaining documents do not fulfil the third limb of the *Coco* Approach. Nevertheless, the fact remains that the documents were wrongfully "taken". In such an event, party B may claim for its wrongful gain interest and its wrongful loss interest, the latter being distinct from the former, with the *Coco* Approach and the *I-Admin* Approach each seeking to protect different wrongs committed by the defendant against the plaintiff.

The High Court therefore concluded that a plaintiff in a breach of confidence claim should be allowed to seek remedies under both the *Coco* Approach and the *I-Admin* Approach. The traditional *Coco* Approach should be applied for confidential documents involving harm to the plaintiff's wrongful gain interest. Where there is no basis for such a finding of harm, only the *I-Admin* Approach should be applied.

It should be noted that the plaintiffs did not argue before the High Court that they should be entitled to claim for both the wrongful gain interest and the wrongful loss interest *for the same document*. The High Court's judgment in this application therefore did not decide that issue.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:

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CIVIL PROCEDURE I STAY OF PROCEEDINGS

Singapore High Court Affirms Significance of Arbitration Agreement as Connecting Factor in *Forum Non Conveniens* Analysis

In *Chang Chee Kheo v Fatfish Investment Partners Pte Ltd and others* [2023] SGHCR 12, the General Division of the High Court of Singapore (**High Court**) affirmed that an arbitration agreement can, in light of its contractual nature, constitute, and carry significant weight as, a connecting factor *vis-à-vis* the jurisdiction identified as the seat of the arbitration in the *forum non conveniens* analysis.

Our Comments

The High Court decision assumes particular relevance where parties have entered into an arbitration agreement but, for some reason, court proceedings are commenced instead (for example, due to the opposing party's refusal to participate in the arbitration proceedings, as was the case in this decision). The question that may arise, especially in the context of a multi-jurisdictional contract or one involving parties from various jurisdictions, is: which is the more appropriate forum for the dispute to be determined?

This question has long been regarded as involving a highly fact-sensitive inquiry turning on the court's consideration and balancing of various connecting factors. The High Court's observation that an arbitration agreement can not only constitute, but also carry significant weight, as a connecting factor *vis-à-vis* the jurisdiction identified as the seat of the arbitration in the *forum non conveniens* analysis is a significant one because, prior to this decision, there did not appear to be a direct Singapore authority on this point.

It should be highlighted that the arbitration agreement in this High Court decision follows the wording of the Singapore International Arbitration Centre (**SIAC**) Model Clause, which is commonly and widely adopted by contracting parties. The High Court's decision will thus have ramifications for all contracts adopting the SIAC Model Clause (or, for that matter, which stipulate Singapore as the seat of the arbitration).

Following the High Court's decision, one should be mindful that an arbitration clause designating disputes to be resolved by arbitration administered by the SIAC or with Singapore as the seat of the arbitration would be construed as a key factor pointing towards Singapore as the more appropriate forum for a dispute. Should there be any concern that the Singapore courts might not have jurisdiction to hear the matter if the matter proceeds to court, it would be prudent to seek legal advice on the inclusion of an appropriately worded clause to ensure that the arbitration agreement is not taken as the parties' acknowledgment that Singapore is the appropriate forum for any court proceedings that may be commenced.

This update takes a look at the High Court's decision.

Background

The claimant, Chang Chee Kheo (**Chang**), was a Malaysian citizen residing in Johor Bahru.

The first defendant, Fatfish Investment Partners Pte Ltd (**FIPL**), was a Singapore-incorporated company and subsidiary of the second defendant, Fatfish Group Limited (**FGL**), a listed company registered in Melbourne, Australia. The third defendant, Fatfish Capital Limited, was a company incorporated in the British Virgin Islands and also a subsidiary of FGL (collectively, **Defendants**).

Chang loaned monies to FIPL pursuant to three sets of promissory loan notes (**PNs**). The PNs' terms provided, among other things, that:

(d) Any disputes arising out of or in connection with the PNs "shall be referred to and finally resolved by arbitration in Singapore" (**Arbitration Clause**);

(e) The PN as well as "all acts and transactions" pursuant to the PN and the "rights and obligations of the parties … shall be governed, construed and interpreted in accordance with the laws of Singapore" (**Governing Law Clause**); and

(f) On maturity, Chang was entitled to the principal and interest from FIPL within seven days upon request.

Although FIPL's director promised that payment of the principal and interest would be forthcoming, Chang never received any repayment or reply from the Defendants to his letter of demand for the sums owing.

Pursuant to the Arbitration Clause, Chang commenced arbitration proceedings against the Defendants in the SIAC. When the Defendants refused to participate, Chang did not pay the SIAC the requisite deposit and the arbitration was deemed withdrawn.

Thereafter, Chang commenced proceedings in the High Court (**OC 163**) against the Defendants, who then filed applications to stay the action on the ground that Singapore was *forum non conveniens* and that Malaysia was the more appropriate forum for the dispute to be tried (**Stay Applications**). The applications raised, among other things, two questions for determination:

(a) Whether the connecting factors identified by the Defendants – namely, the personal connections of the parties and the witnesses, and the location of the events and transactions – pointed to Malaysia as the more appropriate forum?

(b) Whether the connecting factors identified by Chang – namely, the Governing Law Clause in the PNs and the Arbitration Clause – pointed to Singapore as the more appropriate forum?

The High Court's Decision

The High Court noted that, at the first stage of the test laid down in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (***Spiliada***), it is for the applicant seeking a stay of proceedings based on *forum non conveniens* to show that there is another available forum which is clearly or distinctly more appropriate than Singapore, i.e., there are connecting factors pointing *away* from Singapore and *towards* a foreign jurisdiction as the more appropriate forum.

Here, the High Court held that the connecting factors relied on by the Defendants did *not* point to Malaysia as the more appropriate forum. Accordingly, the Defendants failed to discharge their legal burden at the first stage of the *Spiliada* analysis. For this reason alone, the High Court dismissed the Stay Applications.

The Arbitration Clause gave rise to connecting factor carrying significant weight

The High Court observed in *obiter* that, if an exclusive jurisdiction agreement which identifies a foreign jurisdiction features at the first stage of the *Spiliada* analysis as a connecting factor, its weight must be significant because the parties' agreement therein is not only that the chosen forum is *an* appropriate one, but that it is *the* appropriate forum.

With this in mind, the High Court held that an arbitration agreement *can* give rise to a connecting factor *vis-à-vis* the jurisdiction identified as the seat of the arbitration in the *forum non conveniens* analysis. This is because the arbitration agreement not only reflects the parties' intention as to the exclusive mode of resolving disputes coming within the scope of the agreement, but also identifies where the parties intend for their disputes to be resolved. Put another way, an arbitration agreement identifies a jurisdiction that, by virtue of the parties' agreement, has a relevant and substantial association with disputes coming within the scope of the arbitration agreement.

The High Court also highlighted that any connecting factor to which an arbitration agreement gives rise would ordinarily carry significant weight at the first stage of the *Spiliada* analysis. This is due to the arbitration agreement's "*derogation function*" by "deselecting" all other venues of dispute resolution save for that specified in the arbitration agreement. The arbitration agreement therefore also reflects the parties' intention that disputes should *not* be resolved in any jurisdiction other than that which has been designated as the seat of the arbitration.

The High Court also noted that, like a jurisdiction agreement, an arbitration agreement's effect in the *Spiliada* analysis is founded on its contractual nature and the parties' intentions. This has two consequences. First, the dispute for which a stay is sought on *forum non conveniens* grounds must fall within the arbitration agreement. Second, the arbitration agreement must have been in force and binding on the parties when the court proceedings were commenced. That is, the claimant's commencement of court proceedings must not have constituted a repudiation of the arbitration agreement that was subsequently accepted by the defendant so that the arbitration agreement was brought to an end.

On the facts of this case, the High Court found that Chang had no repudiatory intent in commencing OC 163 and the arbitration agreement in the Arbitration Clause was not repudiated.

The High Court also found that the Arbitration Clause had the effect of identifying Singapore as a more appropriate forum at the first stage of the *Spiliada* analysis and was to be given significant weight as a connecting factor.

The Governing Law Clause, together with the Arbitration Clause, constituted a connecting factor

The High Court held, in the particular circumstances, that the Governing Law Clause, when viewed with the Arbitration Clause, constituted a connecting factor pointing towards Singapore at the first stage of the *Spiliada* analysis.

This was because the parties had, by their choice of governing law and also the Arbitration Clause, regarded Singapore as the jurisdiction with the most substantial and relevant connections with the dispute in OC 163. Thus, while the Governing Law Clause on its own did not have much weight as a connecting factor, when taken together with the Arbitration Clause, it had the effect of identifying Singapore as the more appropriate forum.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:

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HIGHLIGHTS

JULY 2023	
3 July 2023	**Proposed Enhancements to the Deposit Insurance Scheme in Singapore** The Monetary Authority of Singapore (**MAS**) recently published its Consultation Paper on Proposed Enhancements to the Deposit Insurance Scheme in Singapore on 27 June 2023 (**Consultation Paper**). In its Consultation Paper, the MAS has proposed to increase the deposit insurance (**DI**) coverage per depositor to S$100,000, and to improve the clarity and operational efficiency of the DI Scheme. The MAS is proposing to increase DI coverage from S$75,000 to S$100,000 per depositor with effect from 1 April 2024. The proposed increase will ensure that the vast majority of smaller depositors continue to be fully covered, keeping pace with the growth in average deposit balances. The proposed change will result in 91% of depositors being fully covered by deposit insurance and will ensure that the DI Scheme continues to fulfil its primary objective of protecting smaller depositors in the event of a bank failure. The MAS is also proposing to improve the clarity and operational efficiency of the DI Scheme through, among others, clarifying the computation of insured deposits and excluded amounts, providing greater flexibility on the mode of DI compensation to depositors and introducing a time limit for depositors to claim DI compensation. **Related information:** Consultation Paper on Proposed Enhancements to the Deposit Insurance Scheme in Singapore **Contact our Partners:** Elaine Chan | Rosabel Ng | Chan Jia Hui | Tian Sion Yoong
AUGUST 2023	
2 August 2023	**Proposed Framework for Single Family Offices** The Monetary Authority of Singapore (**MAS**) has published a consultation paper seeking feedback on a proposed regulatory framework for single family offices (**SFOs**) in Singapore. With the increasing number of SFOs being established in Singapore as well as the corresponding inbound wealth inflows, the MAS is focused on potential money laundering related risks that could arise. The proposed regulatory framework would harmonise the criteria

	for SFOs to be exempt from licensing under the capital markets services regime under the Securities and Futures Act 2001. The MAS proposes to introduce a structure-agnostic licensing class exemption for SFOs so that they no longer need to choose between relying on the "related corporation" licensing exemption or seek an ad-hoc exemption, depending on the structure of the SFO and assets which it manages. The proposed regulatory framework would also impose notification and period reporting requirements to allow the MAS to better monitor SFOs which are operating in Singapore. Existing SFOs which operate in reliance on the "related corporation" licensing exemption will be given a transitional period of six months to make the necessary notifications under the new regime (when it comes into force). SFOs which have applied for tax incentives under sections 13O or 13U of the Income Tax Act 1947 would also need to furnish new legal opinions confirming that they qualify under the proposed class exemption criteria. **Related information:** Consultation Paper on Proposed Framework for Single Family Offices **Contact our Partners:** Elaine Chan | Rosabel Ng | Chan Jia Hui | Tian Sion Yoong
SEPTEMBER 2023	
September 2023	**Year In Review 2022** 2022 was a special year as WongPartnership celebrated our 30th anniversary. We have much to be proud of, all of which has been possible with the support of our valued clients, business partners and friends. To you, we are grateful. To read this special edition of our Year in Review released earlier, click here.

OTHER UPDATES

DATE	TITLE
18 September 2023	Parties Remain Entitled to Documents Referred to in Pleadings Before Single Application Pending Trial, Singapore High Court Rules
4 September 2023	Letters of Credit: Banks Successfully Prove Fraud Exception Where Beneficiary Recklessly Made False Representations
21 August 2023	Cross-Border Restructuring and Insolvency in the SICC
11 August 2023	Cryptoassets Are Property and Can Be the Subject of a Trust — But Can They Be Enforced Against?
7 August 2023	CCCS Conducts Public Consultation on Draft Environmental Sustainability Collaboration Guidance Note
25 July 2023	Singapore Acquisition Financing: Trends and Developments
21 July 2023	Data Protection Quarterly Updates (April – June 2023)
6 July 2023	China's Regulations for Filing-based Administration of Overseas Securities Offerings and Listings by Domestic Companies: Impact on Listed Companies 中国境内企业境外发行证券和上市的备案管理规则：对已上市公司的影响
30 June 2023	Records of Arbitrators' Deliberations to be Produced Only in Very Rarest of Cases, Singapore International Commercial Court Rules
28 June 2023	Changes to Conduct of Meetings: Companies, Business Trusts and Other Bodies (Miscellaneous Amendments) Act 2023 and Listing Manual Practice Notes on General Meetings

RECENT AUTHORSHIPS

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31 August 2023	The Guide to Advocacy: Cultural Considerations in Advocacy: East meets West (Sixth Edition)	Alvin Yeo, Senior Counsel | Chou Sean Yu | Frank Oh Sheng Loong
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