WONG PARTNERSHIP

LITIGATION & DISPUTE RESOLUTION HIGHLIGHTS 2017

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Litigation & Dispute Resolution Highlights 2017

2017 was another landmark year for our litigation and dispute resolution practice.

We remain ranked in Tier 1 for both Dispute Resolution, Singapore, and Restructuring & Insolvency, Singapore, by *The Legal 500: Asia Pacific – The Client's Guide to the Asia Pacific Legal Profession 2018* and we are also ranked in Tier 1 for Restructuring & Insolvency, Singapore in *IFLR 1000 – The Guide to the World's Leading Financial Law Firms, 2018*.

Our Chairman and Senior Partner, Alvin Yeo, SC, was honoured with the prestigious Chambers award for "Outstanding Contribution to the Legal Profession" at the *Chambers Asia-Pacific 2017* awards. This award is given to only two recipients each year who have had "significant and lasting impact on their market and who are outstanding lawyers in their own areas of practice", in recognition of their exceptional work in their respective fields and continued contribution to the Asian legal arena.

Among other highlights:

- in a highly publicised litigation between *Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2017] SGCA 42 on the construction of a rent renewal clause, the Court of Appeal applied the principles of contextual interpretation in ruling on the scope of the court's intervention in advance of an expert determination (eg, a valuation) and the proper configuration of the leased premises to be applied by the valuers in determining the "prevailing market rental value" of the leased premises;

- in the seminal decision of *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] SGCA 26, the Court of Appeal held conclusively for the first time that, as a general rule, punitive damages will not be awarded purely for breach of contract in the absence of concurrent liability in tort;

- in the landmark decision of *Quek Kwee Kee Victoria (executor of the estate of Quek Kiat Siong, deceased) and another v American International Assurance Co Ltd and another* [2017] SGCA 10, the Court of Appeal clarified, for the first time, the meaning of "accident" in personal accident insurance policies; and

- in an important decision for the drafting and negotiation of contracts, the Court of Appeal in *CIFG Special Assets Capital I Ltd (Formerly known as Diamond Kendall Limited) v Ong Puay Koon and others and another appeal* [2017] SGCA 70, held that the introduction of a boiler-plate indemnity that had not been specifically negotiated cannot override the negotiated commercial bargain, structure of deal and calibrated risk allocation reflected in the contractual documents,

where in each case, WongPartnership acted for the successful party.

We are pleased to share with you some highlights of 2017 which have contributed to our continued recognition in the market.

BUILDING AND CONSTRUCTION

No contractual entitlement to loss of profits where Public Sector Standard Conditions of Contract for Construction Works contract is terminated for convenience by employer

TT International Limited v Ho Lee Construction Private Limited **[2017] SGHC 62**

The High Court held that the "termination for convenience" of a building and construction contract entered into on the Public Sector Standard Conditions of Contract for Construction Works 2006 ("**PSSCOC**") does not entitle a contractor to recover for loss of profits on uncompleted work.

The decision confirms that a "termination for convenience" under Clause 31.4 of the PSSCOC does not entitle a contractor to recover for loss of profits.

However, the High Court left open certain questions: whether it is possible to imply a duty of good faith on an employer exercising its right under Clause 31.4, such that an employer may commit a breach of contract in purporting to terminate the contract under Clause 31.4 in some cases and a contractor thereby acquiring a right to recover for loss of profits upon such wrongful termination. Employers should therefore continue to maintain some caution in deciding whether to exercise its contractual right to "terminate for convenience" and to ensure that it complies strictly with the procedure for such exercise under the PSSCOC.

Our **CHAN Hock Keng** and **ONG Pei Chin** acted for the successful plaintiff, TT International Limited. A detailed note on the case is available here.

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Disputed unadjudicated set-off cannot be used to set aside or stay enforcement of adjudication decision

***AES Façade Pte Ltd v WYSE Pte Ltd* [2017] SGHC 171**

In a key decision for the construction industry, the High Court held that a disputed and unadjudicated set-off could not be raised against an adjudicated amount that was payable under an adjudication determination made under the Building and Construction Industry Security of Payment Act.

The decision also provides guidance on the interpretation of the widely used Singapore Institute of Architects Conditions of Sub-Contract ("**SIA Conditions**"). The High Court held that a main contractor could not invoke the right of contractual set-off under Clauses 11.4 and 11.5 of the SIA Conditions against an adjudicated amount that was payable under an adjudication determination.

Finally, the decision also affirms that a successful claimant would ordinarily be entitled to receive the adjudicated amount without undue delay, and courts will not readily grant a stay of enforcement of an adjudication determination pending either the determination of arbitral proceedings or an appeal.

Our **Ian DE VAZ** acted for the successful plaintiff, AES Façade Pte Ltd. A detailed note on the case is available here.

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CONTRACT

Court of Appeal upholds Takashimaya's win in rent calculation dispute with Ngee Ann Development

***Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2017] SGCA 42**

The Court of Appeal dismissed Ngee Ann Development Pte Ltd's appeal on the rent payable by its anchor tenant, Takashimaya Singapore Ltd. The dispute centred on the construction of a rent review clause in the lease ("**Lease**") with Takashimaya and the proper configuration of the leased premises ("**Premises**") to be applied by the valuers in determining the "prevailing market rental value" for the Premises, in accordance with the provisions in the Lease. The parties disagreed on whether the lease intended for the rent valuation to be based on:

- the existing configuration; or
- a hypothetical configuration yielding the "highest and best use" of the Premises.

Two key issues arose in the appeal:

- the scope of judicial intervention in advance of an expert determination (e.g., a valuation); and
- the approach to contractual interpretation.

The Court of Appeal found that the scope of the expert's jurisdiction was clearly a matter within the purview of the court, and it was appropriate, in the circumstances of the case, for the Court to intervene in advance of the valuers' determination of the "prevailing market rental value" of the Premises. The Court of Appeal then construed the rent review clause and found that, taking into account the provisions of the Lease and context of the parties' agreement, it was the parties' intention for the prevailing market rental value to be determined based on the existing configuration of the Premises.

Our **Alvin YEO, SC** and **LIM Wei Lee** acted for the successful party, Takashimaya Singapore Ltd, in the appeal and in the court below. A detailed note on the Court of Appeal's judgment is available here.

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The introduction of a boiler-plate indemnity clause that had not been specifically negotiated cannot override the negotiated commercial bargain, structure of the deal and calibrated risk allocation reflected in the contractual documents

CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and others (Chris Chia Woon Liat and another, third parties) **[2017] SGHC 22**
CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal **[2017] SGCA 70**

A bondholder / lender brought a claim against the initial shareholders of the issuer / borrower, pursuant to an indemnity clause found under a series of convertible bond subscription agreements ("**CBSAs**").

The High Court examined the text and the context of the indemnity clause, and found that the clause was not so wide as to enable the lender to claim the entirety of its losses arising from the borrower's default against the initial shareholders of the borrower.

The Court of Appeal upheld the High Court's findings.

The Court noted that although the ambit of the indemnity clause was extremely broad, both as to the class of beneficiaries as well as to the matters conceivably covered by the indemnity. This made it absurd to construe the clause on its plain language, without regard to the relevant context. In particular, the Court paid attention to the specific allocation of risks under the CBSAs, the term sheets which reflected parties' intentions in entering into the agreements, as well as the circumstances in which the indemnity clause was introduced into the CSBAs (where the indemnity clause was introduced as a boiler-plate provision to complete the contractual documentation).

Applying the relevant principles in the construction of contracts, the Court of Appeal ruled that the indemnity clause, construed against the relevant context, clearly could not – even though the plain words on their own might allow this – render the initial shareholders liable for all of the borrower's debts under the CBSAs.

This case is a valuable reminder to exercise caution in the use of, and reliance on, standard or common form boiler-plate provisions.

Our **Tan Chee Meng, SC**, acted for the successful respondents in the appeal, and the successful defendants in the court below. A detailed note on the Court of Appeal's judgment is available here.

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Court of Appeal holds that, as a general rule, punitive damages cannot be awarded purely for breach of contract

PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] *SGCA 26

The Court of Appeal held conclusively for the first time that, as a general rule, punitive damages cannot be awarded purely for breach of contract, in the absence of concurrent liability in tort.

Under the sale and purchase agreement ("**SPA**"), PH Hydraulics was to design and supply a reel drive unit ("**RDU**") to Airtrust. After delivery, the RDU malfunctioned and Airtrust commenced action against PH Hydraulics for breach of the SPA for not delivering an RDU of merchantable quality and fit for its purpose.

The Court of Appeal reversed the High Court's findings of fraud, holding that, because of the serious implications of fraud, cogent evidence is required to establish such an allegation and there is no room for a finding that it might have happened. In the present case, the evidence did not justify any findings of fraudulent conduct. The Court of Appeal also declined to award punitive damages, holding that the present case was not a situation which merited an award of punitive damages.

The decision emphasises that "the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance" and that the general aim for damages for breach of contract is to compensate by putting the aggrieved party in the same position as if the contract had been performed, and giving effect to the standard set by the contracting parties. This is in contrast to the availability of punitive damages in tort, which are awarded against a wrongdoer as a form of punishment.

Our **TAN Chee Meng, SC** and **Josephine CHOO** acted for the successful appellant, PH Hydraulics & Engineering Pte Ltd. A detailed note on the case is available here.

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Foreign illegality: Distinction between an agreement that is "directly affected by foreign illegality" and one that is "tainted by foreign illegality"

EFG Bank AG, Singapore Branch v Teng Wen-Chung **[2017] SGHC 318**

In this case, the High Court addressed the issue of foreign illegality in Singapore and made a distinction between contracts that are "directly affected by foreign illegality" and those not directly affected by foreign illegality but "tainted by foreign illegality", and the circumstances in which a contract tainted by foreign illegality would be unenforceable in Singapore.

Where a contract was not in itself illegal but was tainted by foreign illegality, the court should apply the test in *Euro-Diam v Bathhurst* [1990] 1 QB 1, namely:

(1) whether the illegal transaction from which the "taint" is said to arise is enforceable in Singapore on the application of the appropriate connecting factor (*viz*, forum, proper law and place of performance). If it is enforceable in Singapore, then the claim is enforceable.
(2) If the illegal transaction is unenforceable in Singapore, the court will then have to further consider whether (i) the plaintiff needs to plead or prove illegal conduct to establish his claim, or (ii) the claim is so closely connected with the proceeds of crime to offend the conscience of the court.

This decision is a reminder that for transactions governed by Singapore law which also involve a foreign jurisdiction element, it is important both to seek appropriate foreign legal advice to ensure that the transaction is not illegal under the laws of that foreign jurisdiction, and to consider the factors that the Singapore court would take into account when determining whether the transaction would be held to be unenforceable for being tainted with foreign illegality (even if it were legal under Singapore law).

Our **Andre MANIAM, SC, Lionel LEO** and **Russell PEREIRA,** acted for the successful plaintiff/respondent, EFG Bank AG, Singapore Branch. A detailed note on the case is available here.

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EMPLOYMENT

High Court sets out guide on the conduct of "due inquiry" prior to termination of an employee

***Long Kim Wing v LTX-Credence Singapore Pte Ltd* [2017] SGHC 151**

The High Court held that "due inquiry" prior to the termination of an employee requires a process where the employee concerned is clearly informed of the allegation(s) and the evidence against him so that the employee has an opportunity to defend himself by presenting his position, with or without other evidence.

The "due inquiry" process does not necessarily need to be formal, but where no formal process is undertaken, there is a greater risk that "due inquiry" was not conducted and the court would be more careful to ensure that the employee's right is protected.

If "due inquiry" is required but not conducted, the employer would be liable to pay damages to the employee based on the reasonable amount of time it would have taken the employer to conduct "due inquiry". The burden of proof is on the claimant employee to establish the amount of reasonable time.

The case is a clear guide for both employers and employees on how "due inquiry" should be conducted prior to termination. Where "due inquiry" needs to be conducted, the process whereby the employee is informed of the misconduct and evidence and is afforded an opportunity to respond, while not necessarily formal, should be clearly recorded.

Our **Jared CHEN** acted for LTX-Credence Singapore Pte Ltd. A detailed note on the case is available here.

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INSURANCE

Court of Appeal looks into the definition of "accident" in the context of personal accident insurance policies

Quek Kwee Kee Victoria (executor of the estate of Quek Kiat Siong, deceased) and another v American International Assurance Co Ltd and another **[2017] SGCA 10**

The landmark decision sets out the general principles and framework for construing the definition of "accident" in the context of personal accident insurance policies. This was the first time that the issue came before the courts and the Court of Appeal took the opportunity to review the authorities in other jurisdictions, and to set out the general principles and framework.

The Court of Appeal preferred the view that the use of phrases such as "accidental means" (as opposed to "accidental death"), would not restrict the policy coverage to those situations where the proximate cause of the insured's injury or death was not a deliberate or voluntary action on the part of the insured. In doing so, the Court of Appeal moved away from the 'means-result' distinction that "was not in harmony with the understanding of the common man".

Our **Melanie HO** and **CHANG Man Phing** acted for the successful appellants, Ms Quek Kwee Kee Victoria and Mr Ker Kim Tway (the executors of the estate). A detailed note on the case is available here.

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SOME OF OUR OTHER UPDATES …

DATE	TITLE
4 April 2018	LawWatch: Issue 1 of 2018
29 March 2018	LegisWatch: Implementation of Deferred Prosecution Agreements
27 March 2018	CaseWatch: Stage Set for First Virtual Currency Trial
8 March 2018	LegisWatch: Infrastructure Protection Act | The New Regulatory Framework for Security-by-Design

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