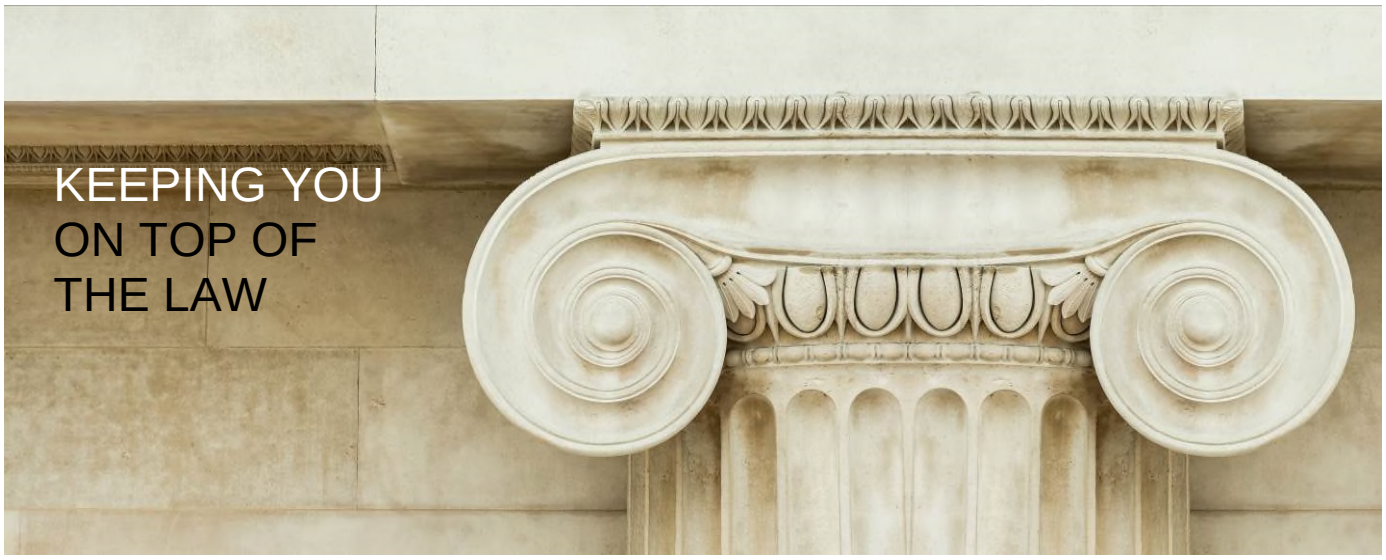

Litigation & Dispute Resolution Highlights 2016 | In Brief

LITIGATION | HIGHLIGHTS

APRIL 2017

Litigation & Dispute Resolution Highlights 2016


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2016 was a landmark year for our litigation and dispute resolution practice. Among other highlights:

- the Court of Appeal released its landmark decision concerning an investor-state arbitration in the case of *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57, which decision has wide-ranging implications for bilateral investment treaties (**BITs**) involving the People's Republic of China;

- the Court of Appeal upheld the High Court's decision that a bank's demand for payment pursuant to a chain of on-demand payment obligations was fraudulent in the reckless sense and delivered a potent reminder that, where demand guarantees are concerned, banks should not be recklessly indifferent to the validity of demands for payment in the case of *Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] SGCA 26; and

- the High Court, in a decision affecting the entire construction industry, clarified the extent and scope of liability of a developer, architect and main contractor of a construction project in a claim in tort for building defects in the case of *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd and others* [2016] SGHC 38,

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

We are honoured to have won Asia Legal Awards' 2017 Dispute Resolution Firm of the Year and Employment Firm of the Year, Asian-MENA Counsel In-House Community's 2016 Firm of the Year (in seven categories including Restructuring & Insolvency) and we are ranked Tier 1 in Dispute Resolution by *The Legal 500: Asia Pacific 2017*. We are pleased to share with you some highlights of 2016 which have contributed to our continued recognition in the market.

BANKING

Court of Appeal upholds High Court decision that a bank's demand for payment under an indemnity clause was fraudulent in the reckless sense

***Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] SGCA 26**

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Indemnity clause in Credit Facility Agreement and counter guarantees

A credit facility agreement ("**CFA**") entered into between Arab Banking Corp (B.S.C.) ("**Arab Bank**") and Boustead Singapore Ltd ("**Boustead**") contained an indemnity clause under which Boustead agreed to pay Arab Bank (upon receipt of a written demand by Arab Bank) the sum specified in the demand. The indemnity was given in support of a chain of on-demand payment obligations provided in support of, ultimately, the obligations of Boustead's joint venture company ("**JVC**"), as contractor of a housing development in Libya. The payment obligations included the issuance of counter guarantees by Arab Bank in favour of a third party bank ("**CGs**") who had furnished a performance bond and guarantee on behalf of the JVC as required under the construction contract entered into between the JVC and the Organisation for Development of Administrative Centres ("**ODAC**").

Demand under the CFA

When civil war broke out in Libya, ODAC sent notices to the third party bank to extend the validity term of the guarantees issued by the third party bank and the third party bank consequently made formal written demands to Arab Bank for payment under the CGs. Boustead took the view that the war amounted to an act of *force majeure* and that the JVC was relieved of its obligations to perform under the construction contract. Boustead successfully obtained an *ex-parte* injunction from the High Court to restrain Arab Bank from making payment under the CGs. Arab Bank separately made a demand under the CFA ("**CFA Demand**") and commenced a suit against Boustead, claiming the sums due, among others.

CFA Demand made fraudulently

The High Court granted a permanent injunction and restrained Arab Bank from making payment to the beneficiary third party bank under the CGs, on the basis that the CFA Demand was made both fraudulently and unconscionably. The Court of Appeal upheld the High Court ruling that Arab Bank had acted fraudulently in the reckless sense, in making the CFA Demand and held that the demands by the third party bank on the CGs were fraudulent in the reckless sense and Arab Bank was

recklessly indifferent as to whether it had an obligation to pay the third party bank when it made the CFA Demand.

Our Tan Chee Meng SC and Josephine Choo acted for the successful respondent, Boustead. A detailed note on the case is available here.

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BUILDING AND CONSTRUCTION

High Court clarifies extent and scope of liability of developer, architect and main contractor in a claim in tort for building defects

***Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd and others* [2016] SGHC 38**

Claim in tort against developer, main contract and architect

The Management Corporation of The Seaview Condominium ("**MCST**") claimed against the developer, Mer Vue Developments Pte Ltd ("**Mer Vue**") in respect of a list of defects in the development's common property. The main contractor and architect were joined in the suit, together with the mechanical and electrical engineer. Mer Vue argued that it could rely on the defence of "independent contractor" to the claim in tort by the MCST, as it could show that it had delegated or entrusted the duties of design and construction to independent contractors to design and build the development.

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"Independent contractor" defence may be relied on by developer, architect and main contractor

In a landmark decision that affects the entire construction industry, the High Court held that the developer, architect and main contractor of a construction project could rely on the defence of being independent contractors in a claim in tort against them for building defects, such that they were not liable for the alleged defects in tort.

Our Christopher Chuah and Nikki Ngiam acted for Mer Vue, one of the successful defendants. A detailed note on the case is available here.

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High Court clarifies that a repeat claim which has been adjudicated upon on its merits does not form the basis for a valid payment claim under SOPA; and that post-termination claims cannot be the subject of adjudication under SOPA

***Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd* [2016] SGHC 85**

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Payment claims and adjudication reviews

CKR Contract Services Pte Ltd ("**CKR**") was awarded a contract by Asplenium Land Pte Ltd ("**Asplenium**") for the construction of a residential development. The contract was terminated by Asplenium and 2 months later, CKR issued a payment claim. CKR applied for adjudication. Asplenium lodged an adjudication review which resulted in a reduced adjudication amount.

Subsequently, CKR served a new payment claim which contained the same claims as the earlier payment claim plus a claim for work purportedly done after the termination of CKR's contract. Asplenium provided its payment response. As CKR was not satisfied with the payment response, CKR lodged a new adjudication review.

Under section 10(4) of the Building and Construction Industry Security of Payment Act ("**SOPA**"), a claimant is entitled to include a sum which has been subject to a previous unpaid payment claim in a subsequent payment claim.

Repeat claims previously adjudicated upon not permitted

The High Court held that the subsequent payment claim was invalid and the adjudicator did not have jurisdiction to adjudicate upon CKR's claims. This was because the bulk of the payment claims by CKR were repeat claims which had previously been adjudicated upon on their merits and did not form the basis of a valid payment claim. Similarly, the post-termination claims could not be the subject of a payment claim under SOPA.

Our Christopher Chuah and Candy Agnes Sutedja acted for the successful plaintiff, Asplenium Land Pte Ltd. A detailed note on the case is available here.

COMPANY LAW

Court has no power to restrain the extra-territorial commencement or continuation of proceedings by creditors subject to its jurisdiction

***Pacific Andes Resources Development Ltd and other matters* [2016] SGHC 210**

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Moratoria against proceedings

The applicants ("**Applicants**"), part of a cluster of companies known as the Pacific Andes Group, had successfully applied under section 210(1) of the Companies Act for moratoria against proceedings brought or to be brought against them by their creditors in Singapore and elsewhere. On application to further extend the moratoria, certain of their creditors, who were all financial institutions, applied to set aside the moratorium orders granted.

No power to restrain extra-territorial commencement or continuation of proceedings

The interim orders granted to the Applicants provided that the moratoria were as regards "actions or proceedings in Singapore or elsewhere". The High Court held that section 210(10) of the Companies Act could not be construed as conferring extra-territorial jurisdiction, nor should the Court's inherent jurisdiction generally be exercised to restrain proceedings elsewhere, as to do so would be to interfere with the jurisdiction of another court.

Our Andre Maniam SC and Tan Mei Yen acted for Cooperatieve Rabobank U.A., Hong Kong Branch, Standard Chartered Bank (Hong Kong) Limited and DBS Bank Ltd. A detailed note on the case is available here.

CONTRACT LAW

Takashimaya wins rent calculation dispute with Ngee Ann Development

***Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2016] SGHC 194**

"Prevailing market rental value"

The plaintiff, Ngee Ann Development Pte Ltd brought proceedings against its tenant, Takashimaya Singapore Ltd ("**Takashimaya**") seeking specific performance, namely to compel Takashimaya to complete the rent valuation process of the premises at Ngee Ann City that had been leased by Takashimaya since 1993 ("**Demised Premises**"). The valuation process had stalled as the parties were in dispute over the meaning and effect of the phrase "prevailing market rental value of the Demised Premises" as contained in the lease agreement between the parties. The High Court agreed with

Takashimaya's interpretation that the rent must be determined with reference to the layout and configuration that was actually applied at the Demised Premises and that this was what the parties had intended and agreed upon.

Our Alvin Yeo SC and Lim Wei Lee acted for the successful defendant, Takashimaya. A detailed note on the case is available here.

INSOLVENCY LAW

High Court allows appointment of foreign bankruptcy trustee in Singapore for the purpose of foreign insolvency proceedings

***Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108**

Recognition of foreign bankruptcy proceedings in centre of main interests

The High Court allowed an application for the appointment in Singapore of a foreign bankruptcy trustee pursuant to foreign insolvency proceedings. In doing so, the High Court recognised the status of the Tokyo District Court-appointed bankruptcy trustee over companies incorporated in the British Virgin Islands without requiring separate liquidation or recognition proceedings to be brought in the BVI and affirmed, for the first time, that bankruptcy proceedings in a company's centre of main interests, but outside its place of incorporation, can be recognised in Singapore.

Our Smitha Menon and Stephanie Yeo acted for the successful applicant, Opti-Medix Ltd. A detailed note on the case is available here.

INTERNATIONAL ARBITRATION AND INTERNATIONAL LAW

Historic win for investor in landmark apex court decision concerning investor-state dispute

***Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57**

Claim of wrongful expropriation under BIT

Macau-incorporated Sanum Investments Ltd ("**Sanum**") commenced UNCITRAL arbitration proceedings in August 2012 alleging (among other things) that the Government of the Lao People's Democratic Republic ("**Lao Government**") had wrongfully expropriated Sanum's gaming investments in Laos. Sanum's claims where brought on the basis of Article 8(3) of a BIT signed by the Government of the People's Republic of China and

the Lao Government. In December 2013, the UNCITRAL tribunal ("**Tribunal**") dismissed the Lao Government's jurisdictional challenge.

BIT applies

The Tribunal's affirmative jurisdictional ruling was overturned by the High Court in January 2015 but in the Court of Appeal's landmark judgment of 29 September 2016, the Court of Appeal restored the Tribunal's ruling and agreed with Sanum that (among other things): (i) the pieces of evidence the Lao Government sought to rely on did not displace the default rule of state succession and the BIT applied to Macau, and (ii) Article 8(3) of the BIT covered Sanum's expropriation claims and was not limited to issues of quantum.

Our Alvin Yeo SC and Koh Swee Yen acted for the successful appellant, Sanum Investments Ltd. A detailed note on the case is available here.

TRUSTS

Court of Appeal considers nature of client moneys held by commodity broker and whether a statutory trust is created

***Vintage Bullion DMCC (in its own capacity and as representative of the customers of MF Global Singapore Pte Ltd (in creditors' voluntary liquidation)) v Chay Fook Yuen (in his capacity as joint and several liquidator of MF Global Singapore Pte Ltd (in creditors' voluntary liquidation)) and others and other appeals* [2016] SGCA 49**

Whether statutory trust created over client moneys depends on nature of such sums

MF Global Singapore ("**MF Global**"), a commodity broker and a capital markets services licence holder, went into liquidation on 1 November 2011. The Court of Appeal held that where MF Global had, in accordance with regulations 21(1) and 22 of the Commodity Trading Regulations 2001 and regulation 16 of the Securities and Futures (Licensing and Conduct of Business) Regulations ("**Regulations**"), segregated sums representing the "Forward Value" (i.e., profits which arise from transactions that had been closed out) arising out of leveraged foreign exchange and leveraged commodity transactions entered into between MF Global and its customers, a statutory trust was impressed on such sums pursuant to the Regulations. However, segregated sums representing "Unrealised Profits" (i.e., marked to market profits which arise when a transaction remained open but the underlying currency or referenced commodity favoured the customer) were not impressed with a statutory trust as these profits were notional

figures. The key difference was that the customers were legally entitled to the "Forward Value" even though they could not withdraw these profits until several days later on the contractual "Value Date", whereas there could be no legal entitlement to notional and uncertain profits such as "Unrealised Profits".

Our Lionel Leo acted for the successful appellant, Vintage Bullion DMCC.

UNJUST ENRICHMENT

Court of Appeal orders reimbursement of sums paid pursuant to an indemnity resolution on grounds of unjust enrichment and breach of fiduciary duty

***Singapore Swimming Club v Koh Sin Chong Freddie* [2016] SGCA 28**

Indemnity Resolution

The management committee of the appellant, Singapore Swimming Club ("**Club**"), passed a resolution in 2009 ("**Indemnity Resolution**"), pursuant to which the Club bore the legal costs of defending defamation proceedings brought against the respondent, the former President of the Club. The Club subsequently sought a refund of the monies paid on the basis that the Indemnity Resolution was invalid, or alternatively, that the monies had been paid under the Club's mistaken belief that the respondent had acted in the discharge of his duties and responsibilities to the Club when he made the two defamatory statements.

Indemnity Resolution valid but claim of Singapore Swimming Club upheld

The Court of Appeal found that the Indemnity Resolution was valid, but upheld the Club's claim that the payments to the respondent (i) prior to the outcome of the defamation proceedings had been made under a mistake of fact and the Club was therefore entitled to repayment from the respondent on the ground of unjust enrichment; and (ii) after the outcome of the defamation proceedings had been procured by the respondent in breach of his fiduciary duty to the Club, as such payments were not in the Club's interest to be made.

Our Tan Chee Meng SC and Chang Man Phing acted for the successful appellant, Singapore Swimming Club. A detailed note on the case is available here.

SOME OF OUR OTHER UPDATES …

DATE	TITLE
31 March 2017	SGX Listing Manual Update: Amendments to SGX Listing Rules effective on 31 March 2017
24 March 2017	SGX Listing Manual Update: Provisional Waiver – Rule 806(2) Limit for Pro Rata Renounceable Rights Issue Raised from 50% to 100% until 31 December 2018
22 March 2017	LegisWatch: Common Seals – Heading to Extinction
16 March 2017	LegisWatch: Additional Conveyance Duties on Residential Property – Holding Entities and Other Stamp Duty Changes With Effect from 11 March 2017

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25 YEARS