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Exercising an Option to Arbitrate and the Right to a Stay of National Court Proceedings

The Privy Council has unanimously held that an arbitration clause stating that *'any party may submit the dispute to binding arbitration'* amounts to a binding commitment to arbitrate if either party chooses to rely on it. Such a clause amounts to an option to arbitrate, which, if exercised, requires the party that has brought a dispute before a national court to refrain from taking further steps in that litigation and instead to commence arbitration. The decision is likely to be influential in the construction of arbitration clauses with similar language in popular arbitration jurisdictions such as England, Singapore, and Hong Kong.

In *Anzen and Others v Hermes One Limited* [2016] UKPC 1, parties to a shareholders agreement concerning a company (**Everbread**) registered in the British Virgin Islands agreed to an arbitration agreement that provided that *'any party may submit the dispute to binding arbitration'*.

Following a dispute between the shareholders, Hermes One commenced litigation in the commercial court in the British Virgin Islands alleging unfairly prejudicial conduct in the management of the affairs of Everbread. Anzen and the other appellants (**Anzen**) applied for a stay of those court proceedings on the basis that the claims ought to be arbitrated. They did not themselves, however, commence arbitration proceedings. The application for a stay was rejected and that rejection was upheld on appeal for essentially the same reasons, namely that (1) the arbitration clause conferred an option upon any party to the agreement to submit a dispute arising under or relating to the agreement to arbitration; (2) if one party commenced litigation in respect of a dispute, the option to arbitrate was only exercisable by the other party by referring the identical subject matter to arbitration; and (3) because Anzen had not done this, but had merely sought a stay of the proceedings, it could not rely on mandatory stay provisions in the British Virgin Islands' arbitration law.

On further appeal, the Board of the Privy Council (**Board**) considered there were three ways to construe the phrase *'any party may submit the dispute to binding arbitration'*:

- (1) The words are not only permissive but exclusive if a party wishes to pursue the dispute by any form of legal proceedings. In other words, arbitration was the exclusive means by which the parties could pursue a dispute;
- (2) The words are permissive, leaving it open to a party to commence litigation but giving the other party the option of submitting the dispute to binding arbitration *either*:
 - (a) by commencing arbitration;

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or

- (b) by requiring the party that has commenced the litigation to submit the dispute to arbitration by making an unequivocal request to that effect and/or by applying for a corresponding stay.

After a detailed review of cases from Canada, England, Singapore, and the United States, as well as academic writings, the Privy Council rejected the first analysis. It held that clauses depriving a party of the right to litigate should be clearly worded. Consistent with authorities from a range of jurisdictions, it held that there is an obvious and important linguistic difference between 'may' and 'shall'. In line with cases such as *Lobb Partnership Ltd v Aintree Racecourse Co Ltd* [2000] CLC 431 (England), *Canadian National Railway and Others v Lovat Tunnel Equipment Inc* (1999), 174 DLR (4th) 385 (USA), and *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603 (Singapore), the word 'may' was construed to confer on the parties an option to arbitrate. Once that option is exercised, a binding arbitration agreement comes into existence.

Having rejected the first analysis, the Board considered how a party who was a defendant in litigation could exercise the option to arbitrate: was it required itself to commence arbitration for determination of the issues that the other party had sought to litigate (the second analysis), or could it request that the dispute be arbitrated and/or seek a stay of litigation (the third analysis)?

The second analysis was ultimately rejected because it required the party that wished to arbitrate the matter, but that was a defendant in litigation in a state court, to incur the expense of commencing an arbitration merely for a declaration of no liability. Those expenses would include paying a nonrefundable filing fee to an arbitral institution on commencement of arbitration proceedings, plus further advances on costs as ordered by the institution, plus the legal costs of preparing the arbitration claim. Furthermore, the party electing to arbitrate may be required to satisfy various escalation provisions prior to commencing arbitration (in this case, the arbitration clause required the parties to negotiate for 20 days). The Board concluded that requiring the party that was a defendant to litigation but that wished to arbitrate the dispute to incur these costs and undertake such steps did not make commercial sense.

The Board was left with the third analysis. It concluded that this reflected the consensual approach to arbitration, recognising that such consent was the acknowledged hallmark of arbitration. On this analysis, a dispute could be pursued through the courts if neither party elected to submit it to arbitration. However, notice by either party would trigger a mutual agreement to arbitrate, at which point the claimant who had commenced litigation in court would have to either commence identical proceedings in arbitration or drop the suit. The defendant to such litigation would be entitled to a stay of the proceedings and would not be obliged to commence arbitration proceedings.



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Comment

This case confirms the consensual approach to arbitration between commercial parties. The decision is noteworthy not only for its findings on how an option to arbitrate may be exercised, and how such an election gives rise to the right for a stay of litigation in favor of arbitration, but also because of the range of cases analyzed in support of the Board's conclusion, which were drawn not only from English authorities, but also from the United States and Singapore. Such an approach is consonant with an increasing harmonization of international arbitration jurisprudence, thereby promoting predictability and certainty for commercial parties.



INVESTMENT MANAGEMENT

Japan FSA Finalizes Amendments to the Article 63 Exemption

On February 3, 2016, the Financial Services Agency of Japan (**Japan FSA**) promulgated the final text of the Enforcement Orders, Cabinet Ordinances, and Supervisory Guidelines Incorporating Amendments to the 'Special Business Activities for Qualified Institutional Investors' (**Article 63 Exemption**) as set forth under Article 63 of the Financial Instruments and Exchange Act of Japan (**FIEA**). The new amendments (**Amendments**) introduce a significant overhaul with respect to the Article 63 Exemption filing process and the ongoing obligations of filers under the Article 63 Exemption (**Article 63 Exemption Operators**). The Japan FSA has also circulated its responses (**Responses**) to public comments it had received regarding the proposed amendments to the Article 63 Exemption, which provide important clarification on a number of matters, including the requirement for offshore Article 63 Exemption Operators to maintain a 'Japan representative'.

Background

On May 27, 2015, the National Diet of Japan passed a bill setting forth the Amendments. They are generally seen as a response by the Japan FSA to scandals involving significant losses and damages to unsophisticated individual investors in Japan who subscribed to investment funds marketed under the Article 63 Exemption. The Amendments seek to narrow and limit the circumstances under which the Article 63 Exemption can be used while increasing the Japan regulators' oversight on Article 63 Exemption Operators.

On November 20, 2015, the Japan FSA released its drafts of the Enforcement Orders, Cabinet Ordinances, and Supervisory Guidelines in connection with the Article 63 Exemption (collectively, **Supplemental Regulations**). The Supplemental Regulations provide further details and information with respect to the precise manner by which the Amendments will be effected, as well as certain interpretative information.

New Filing Requirements for Article 63 Exemption Operators

Historically, the notification process for Article 63 Exemption Operators had been relatively simple, as an applicant was only required to provide general information about itself (e.g., name, address, telephone number, capital amount). However, under the Amendments, the required information for Article 63 Exemption notifications would be substantially increased such that each applicant will be required to provide additional information, including, but not limited to, the following:

- Telephone number of its office and website address
- Summary/contents of the target investments of the limited partnership



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- Name and type of all Qualified Institutional Investors (**QIIs**) as well as the total number of QIIs anticipated to subscribe to the limited partnership
- Whether the interests of the limited partnership are being offered to non-QIIs
- If an applicant is a foreign entity, the address and telephone number of its 'Japan representative'¹

Currently, only general information is listed on the Japan FSA website regarding registered Article 63 Exemption Operators. However, subsequent to the Amendments, significantly more information regarding each Article 63 Exemption Operator will be available to the public (e.g., name of representative, target investments, address and telephone number of the office, number of QIIs).

In addition to the information described above, each applicant under the Article 63 Exemption will be required to submit various deliverables with its Article 63 Exemption notification, including, but not limited to, the following:

- Résumés of each of the directors/officers of the applicant as well as 'important' employees
- Affidavit of each of the directors/officers and important employees to confirm address, legal competency, no criminal/administrative sanctions that would disqualify his/her status, and no affiliation with any antisocial forces (i.e., criminal organizations)
- Oath of each of the directors/officers affirming his/her status and suitability under Japanese law

Under the Amendments, Article 63 Exemption Operators will be required to file annual business reports and create, maintain, and disclose to the public explanatory documents concerning the annual business reports. The Supplemental Regulations provide details about the items that should be described in annual business reports, such as the contents/summary of the target investments of the limited partnership, financial status, and status of investors. Article 63 Exemption Operators are required to file such annual business reports within three months of the end of the business year.

As can be noted from the various changes described above, the Article 63 Exemption registration process under the Amendments is significantly more burdensome in terms of practical documentation requirements than under the prior regime.

Limitation on the Scope of Investors for Article 63 Exemption

Although the Article 63 Exemption has always required that at least one QII be subscribed to the relevant limited partnership fund, there are no explicit requirements as to the QII itself. In response to a concern regarding the lack



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of substance of certain QIIs that were used by Article 63 Exemption Operators to satisfy the minimum QII requirement, under the Amendments, if the QII is a domestic investment limited liability partnership (*toushi yugen sekinin kumiai*, **ILLP**), such ILLP would be required to have at least JPY 500 million (excluding loans) in invested assets. There are no additional qualifications on other types of QIIs or any minimum subscription amount.

It should be further noted that the scope of the non-QIIs seeking to subscribe to the limited partnership fund is limited to certain types of investors (such as listed companies, legal entities with JPY 50 million or more of paid-in capital, legal entities with JPY 50 million or more of net assets, and foreign entities) or persons who are closely related to Article 63 Exemption Operators (such as officers or employees of Article 63 Exemption Operators and their family members, and subdelegates or investment advisers of Article 63 Exemption Operators or their officers or employees) at the offering.

The Japan Representative

Among other important matters covered in the Responses, the Japan FSA provided further information with respect to the requirement that offshore Article 63 Exemption Operators maintain a 'Japan representative'. This issue has been a source of great concern to many offshore fund managers that have relied on the Article 63 Exemption to engage in both their 'self-offering' and 'self-asset management' activities with respect to Japan investors.

Concerning the Japan representative, the Japan FSA commented that offshore Article 63 Exemption Operators will be expected to have a Japan representative that is responsible for proper and efficient communications with Japan regulators. The Japan FSA noted, however, that it will not be necessary for the offshore Article 63 Exemption Operators to establish a physical presence or situate personnel in Japan. Thus, as long as the regulators can immediately and adequately communicate with an offshore Article 63 Exemption Operator through such Japan representative, any person who is a resident in Japan may serve as the Japan representative for the offshore Article 63 Exemption Operator.

The Responses also noted that an appropriate professional service provider, such as a lawyer or certified public accountant, as well as an affiliated company with a presence in Japan, a financial instruments business operator, an independent adviser, and a translator might be appointed to serve as a Japan representative of the offshore Article 63 Exemption Operator.

Effective Date

According to the Japan FSA, the Amendments will become effective on March 1, 2016, and any new applicants filing under the Article 63 Exemption subsequent to March 1, 2016 and any existing Article 63 Exemption Operator that starts solicitation on or subsequent to March 1, 2016 must do so under the new regime. Existing Article 63 Exemption Operators can continuously provide self-asset management services to existing clients. However, with



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respect to those Article 63 Exemption Operators that have filed prior to March 1, 2016, there is a grace period ending August 31, 2016 in which Article 63 Exemption Operators must supplement any existing notifications with respect to the additional information required by the Amendments.

This is a summary of the series of client alerts authored by Christopher Wells, Tomoko Fuminaga, Koji Yamamoto, Yoshiyuki Omori, and Rie Nitta in Tokyo. The investment management practice in Tokyo anticipates issuing further client alerts with greater details regarding the Amendments and how managers intend to comply with them later this year.



¹ With respect to many offshore Article 63 Exemption Operators, the need for a Japan representative under the Amendments is particularly significant, as most of such filers are general partners of limited partnership funds and sensitive to potential tax ramifications of identifying a 'representative' individual resident in Japan. The Amendments, however, have not provided any further information or details regarding the exact requirements for the 'Japan representative' (e.g., who may act as the Japan representative, the individual's qualifications) and whether an 'agent' representative (e.g., a law firm, accounting firm, or similar professional organization or an affiliate in Japan of the general partner) could take on this role.

LABOR & EMPLOYMENT

Hold Your Horses—Simple Questions to Ask Before Issuing That Dismissal Letter

In September 2015, *Time* published an online article about the most sought-after doctor in the world: Dr. Google¹. Self-diagnosis using the Internet has been gaining steam and, like it or not, easy access to information on the Internet means that an increasing majority of the public are turning to their trusty keyboards to obtain a first diagnosis for symptoms—never mind that Dr. Google does not actually have a medical degree.

The same is true about the human resources (HR) industry. With the advent of the Internet, sample templates of employment and dismissal letters are widely available online. It has become common for HR professionals to populate their own precedents with templates of dismissal letters obtained online and issue letters as and when management requires.

A common summary termination template found online may take the following form:

This letter serves as notice that your employment as a [position] of [Employer Company] (the 'Company') is terminated pursuant to the terms of the employment contract dated [date] (the 'Employment Contract').

The termination takes effect immediately.

Subject to such deductions as the Company is entitled to make, the Company will arrange payment of such monies that may be due to you. In this respect, the Company is looking into the amount, if any, to be paid to you on account of the termination of your employment. Any amount to which you are entitled will in any case be subject to deductions to be determined by the relevant authorities.

The Company reserves the right to withhold any payment which may otherwise be due to you on account of any breach of contract and/or any misconduct or non-observance of the Employment Contract and/or breach of any of your fiduciary duties and/or in the event that a claim is to be made against you, whether for misrepresentation or otherwise or in relation to your non-performance/inadequate performance of your duties.

But what happens when subsequent to the issuing of the template letter a fraud or a breach of employment duties is discovered? Can the employer refuse to abide by the terms of the termination (stated as the basis for termination) and refuse to pay either salary in lieu of notice or the requisite severance package on the basis that there has been a repudiation of the employment agreement by the employee through acts of misconduct?

The Case

The answer to this precise question was decided in the seminal decision of *Piattchanine, Iouri v Phosagro Asia Pte Ltd* [2015] SGHC 259 (*Piattchanine*), where the Singapore Courts held that the answer was an emphatic 'no'.

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In *Piattchanine*, the former managing director of Phosagro Asia Pte Ltd (the **Employer**) was terminated with 'immediate effect' via a standard termination letter. Subsequent to the termination letter—almost three weeks later—the Employer sent another letter purporting to summarily terminate the managing director's employment on the basis of misconduct and breach of the employment agreement. On this basis, the Employer sought to withhold salary and bonus payments, which were contractual entitlements due under the employment agreement even if there was a termination with 'immediate effect'.

The problem was that the Employer had already terminated the employment of the managing director via the termination letter.

As the employment agreement provided for a minimum one-off payment of a year's salary if the managing director was terminated prior to an initial three-year period, the managing director brought claims for wrongful dismissal, expenses incurred, and contractually vested bonus. The Employer sought to rely on the managing director's misconduct to argue that the managing director had repudiated the employment agreement and therefore should not be entitled to any payments.

The Singapore Court held that the Employer was wrong. The key findings can be put simply:

- 1) As the Employer had already terminated the employment agreement via a termination letter, one had to look at the terms of the termination letter; and
- 2) As the termination letter relied on the contractual provisions for summary termination, the Employer could not then argue that there was a repudiation by the managing director—i.e., the Employer cannot go back, investigate, and find another basis to justify termination and nonpayment of sums due under the contractual termination provisions.

Although it reduced the quantum, the Singapore Court upheld the managing director's claim for wrongful dismissal.

Previous Cases

The scenario that arose in *Piattchanine* is not uncommon. It arose in some similar form in the earlier decision of *Cousins Scott William v The Royal Bank of Scotland plc* [2010] SGHC 73 (*CSW*), where an employee who had been made redundant and who had signed a redundancy agreement was found after investigations to have misconducted himself. The employer in that case then sought to invalidate payments under the settlement agreement on the basis of the later discovery of misconduct and raised a counterclaim.

The Singapore Court in *CSW* had also ruled that the employer's refusal to pay under the redundancy agreement and its counterclaims could not be supported in law.



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Learning Points

It is incomplete and superficial to simply take away from the cases of *Piattchanine* and *CSW* that one must 'draft termination letters with precision and caution'.

The basis for the rulings in *Piattchanine* and *CSW* is more fundamental and more basic—an employer cannot simply terminate or end an employment on one basis and then seek to renege on that termination in favor of another basis discovered later. Both *Piattchanine* and *CSW* dealt with a situation where the contract of the employee had been validly terminated by the employer through earlier documents—through a termination letter or a redundancy agreement. After validly terminating those contracts, and triggering liability or obligations through such a termination, the employer cannot wind back the clock to then assert another basis of termination with different liabilities and obligations even if the employer subsequently discovered earlier misconduct.

The key points are really to ensure that a decision to terminate has been made properly after careful consideration and to be prepared to live by the termination.

The following general tips may be useful:

- 1) Prior to termination, always conduct a thorough assessment on the basis for termination;
- 2) If an employee is in a high-risk role where there may be a chance of misconduct, try to postpone issuing a termination until the investigations are complete and, in the interim, suspend or 'garden leave' the employee until such time as the investigations are over;
- 3) If the employee is a low-level employee with minimal risks, it may be better to terminate with notice or salary in lieu of notice to prevent claims for wrongful dismissal; and
- 4) Any final letter of termination to a high-risk employee should be carefully worded and constructed setting out all the bases for the termination. Although precise details are unnecessary, setting out the precise breach of obligation would place an employer in good stead before the Singapore Courts.

¹ Online at URL: <http://time.com/4025756/google-health-issues-doctor/>.

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A Flip Flop

In the case of *Haneda Construction & Machinery Pte Ltd v Huttons Asia Pte Ltd and Another* [2015] SGHC 294, the Singapore High Court had to decide on a claim for damages as a result of an unsuccessful attempt to 'flip' eight warehouse units for a quick profit.

In the property market, the term 'flipping' is used to describe buying a property and then quickly reselling it for a profit. Sometimes repairs or renovations are done to make the property more attractive before it is flipped, but not always. Although there may sometimes be ethical and legal issues involved with flipping a property, it can be a lucrative venture. However, flipping is easier said than done.

Haneda

The plaintiff in *Haneda* was a logistics and transportation company and the second defendant was a registered real estate salesperson with the first defendant, a company involved in the estate agency business.

The plaintiff had obtained, through the second defendant, options to purchase all eight remaining units of a freehold commercial warehouse development named 'Novelty Bizcentre'. The development was unique because it came with facilities such as a swimming pool, a gymnasium, an aromatic garden, and other attractive features not commonly found in commercial warehouse developments. Moreover, the plaintiff was also given a developer discount of 16%.

The plaintiff's case was that it only purchased the eight units to flip for a quick profit because of the second defendant's representations and because those representations were false, it was entitled to damages.

The plaintiff said that it relied on the second defendant's fraudulent representations that she had ready subpurchasers for four warehouse units (the **initial representation**) as well as the second defendant's further fraudulent representation that she would procure subpurchasers for the remaining four warehouse units (the **further representation**). Because the representations included attractive minimum subsale prices, the plaintiff would be able to resell the eight units quickly and at a premium of at least 19% above their purchase prices to reap a total profit of at least S\$2 million within less than one month.

As things turned out, a day after the plaintiff exercised its options to purchase, the Singapore government announced new cooling measures to discourage short-term speculation in properties. This was the seventh round of cooling measures for the Singapore property market and they were widely considered the most comprehensive yet. Among other things, the measures included the introduction of a Seller's Stamp Duty on industrial properties to discourage speculative activity in the industrial property market. Consequently, the eight warehouse units that the plaintiff had just bought were caught by the measures.

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Although the second defendant found subpurchasers for four units before the cooling measures were announced, only one of them eventually completed the purchase. Because the plaintiff could only manage to obtain financing to purchase two of the unsold units, it forfeited the monies it had paid for the remaining five units.

After a series of amendments to the statement of claim, which included adding a claim based on an alleged oral contract, the only claim remaining before the court at the trial was of fraudulent misrepresentation. This was in substance the plaintiff's original claim.

The judge was of the view that in assessing the factual veracity of a plaintiff's claim, especially one based on oral representations, the court is entitled to examine the previous versions of the pleadings and draw any necessary inferences from the significant shifts in or additions to the factual accounts stated.

At the end of the trial, the judge found several contradictory inconsistencies in the plaintiff's pleaded case as it evolved as well as the fact that the plaintiff's case was entirely inconsistent with the objective evidence before the court. As a result, he found that the plaintiff had failed to discharge its burden of proving that the second defendant had made either the initial representation or further representation as pleaded in the statement of claim. The judge also added that even if he had found the second defendant to be liable, he would still have dismissed the claim against the first defendant because of insufficient evidence for the purposes of an employer-employee relationship necessary for vicarious liability.

Although the plaintiff's claim was dismissed, the judge went on to set out his views in relation to three unusual heads of damages the plaintiff claimed.

Atypical Heads Damages

The plaintiff had essentially claimed for all the monies it expended and forfeited as a result of its purchase of the warehouse units (save for one unit that was sold above the price allegedly promised by the second defendant) as well as for its loss of profits had the second defendant's representations been true.

The judge said that the rule in awarding tortious damages as stated by the Singapore Court of Appeal in *Wishing Star Ltd v Jurong Town Corporation* [2008] 2 SLR(R) 909 is to 'put the victim into the position in which he would have been, if the tort had not been committed'. This is unlike the rule in contractual damages that was to put the innocent party in the position it would have been in had the contract been performed.

Losses arising from the sub-purchasers' failure to complete the sub-sale

In the judge's view, the parties must have understood that 'ready subpurchasers' meant 'buyers who were prepared to buy the warehouse units by paying the option fees, and no more'. He added that 'whether these ready



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subpurchasers would subsequently exercise the options and complete the subsales is a matter entirely outside the second defendant's knowledge and control'. Consequently, it was unlikely for the second defendant's representations to include (or to be understood to include) a guarantee in relation to the future conduct of the subpurchasers in the absence of any express representation.

Personal loss of the two directors of the plaintiff

Although the plaintiff's counsel accepted that some of the losses claimed by the plaintiff (like the interest charged by another developer of one director's Malaysian properties for the delay in the completion of those properties) were actually the personal losses of the plaintiff's directors, they flowed directly from the plaintiff's reliance on the second defendant's misrepresentation. The judge disagreed and said the plaintiff cannot claim losses that were incurred personally by its directors. He also wondered if such a claim might be too remote to be recoverable because it related to different transactions from the case before the court.

Loss of profit from misrepresentation

The judge said the plaintiff's claim for the profits it would have earned had the second defendant's representations been true must fail because that was a claim for contractual damages and its contractual claim has since been abandoned.

Conclusion

Haneda highlights some of the risks involved in flipping properties, such as the dangers of sudden and unexpected changes in the law as well as in the property market. They also include the risks of not getting representations in writing and not having any guarantee properly documented.



NEWS

Chambers Asia-Pacific: Firm Receives Top Rankings

The 2016 *Chambers Asia-Pacific* guide has been released, recognizing Morgan Lewis lawyers as leaders among the world's top firms. We secured seven practice rankings in Singapore; three in Kazakhstan, including a Band 1 ranking for Energy & Natural Resources; and one in Japan, a Band 1 ranking for Investment Funds.

In Singapore, we were ranked for:

- Banking & Finance
- Capital Markets
- Corporate/M&A
- Dispute Resolution: Arbitration
- Dispute Resolution: Litigation
- Projects & Energy
- Restructuring & Insolvency

In Kazakhstan, we were ranked for:

- Energy & Natural Resources
- Corporate & Finance
- Dispute Resolution

In addition, 10 partners in Singapore, including two newly ranked, two in Kazakhstan, and one in Japan were recognized across 10 practice categories. In Japan, Christopher Wells was ranked in Band 1 for Investment Funds: Registered Foreign Lawyers. In Singapore, Suet-Fern Lee was ranked in Band 1 for Corporate/M&A, and Wai Ming Yap was ranked in Band 1 for Gaming & Gambling – Asia-Pacific. In the Almaty office, Aset Shyngyssov was ranked in Band 1 for two practices, Corporate & Finance and Energy & Natural Resources.

Our ranked partners in Singapore are:

- Suet-Fern Lee, Corporate/M&A
- Justyn Jagger, Insurance
- Bernard Lui, Capital Markets
- Joo Khin Ng, Capital Markets
- Wendy Tan, Shipping: Domestic: Litigation
- Wai Ming Yap, Corporate/M&A; Gaming & Gambling for the Asia-Pacific region
- Daniel Yong, Investment Funds
- Lian Seng Yap, Corporate/M&A
- Kelvin Aw, Construction
- Timothy Cooke, Dispute Resolution: Arbitration

In Kazakhstan, our ranked partners are:

- Aset Shyngyssov, Corporate & Finance; Energy & Natural Resources
- Klara Nurgaziyeva, Corporate & Finance; Energy & Natural Resources



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Singapore Office Hosts Seminar on US Tax Enforcement

The Singapore office hosted a seminar on 6 January titled 'Rendering Unto Caesar: FATCA and US Tax Prosecutions Come to Singapore,' in which participants discussed the global implications of the Foreign Account Tax Compliance Act (**FATCA**) and US enforcement reaching Singapore's shores. The 90-minute seminar examined some of the current trends relating to US authorities' global prosecution of tax offenders, the implications on financial institutions and asset managers, and the practical issues on the various exchange of information mechanisms and requirements.

Litigation partner Nathan Hochman from the Santa Monica office, who was formerly the assistant attorney general in charge of the US Department of Justice's Tax Division, examined these issues from the US prosecution perspective. Singapore litigation partner Daniel Chia tied that in with a discussion on risk exposure and liability under various Singapore legislations, including Singapore's Anti-Money Laundering legislation. We welcomed more than 40 guests from financial institutions, including UBS, OCBC Bank, Merrill Lynch, The Bank of New York Mellon, BNP Paribas, Standard Chartered Bank, and Alphadyne Asset Management, as well as corporates such as Keppel Corporation and Fraser & Neave.



Above: Litigation partners Nathan Hochman (standing) and Daniel Chia (right) address seminar participants.

Singapore Partner Speaks at Japan External Trade Organization Event

Daniel Yong, Singapore investment management partner, spoke at a 22 February event titled 'Japan-Singapore Innovation Business Matching Mission', organized by the Japan External Trade Organization (**JETRO**). The event was held for eight Japanese start-ups, with Daniel presenting legal perspectives on doing business in Singapore. SPRING Singapore, a Singapore agency under the Ministry of Trade and Industry responsible for helping enterprises grow, gave a presentation on Singapore's push to create business incubation and a start-up hub with use of tax incentives, research grants, equity, and core investments support.

NEWS

Practical Tips on Patent Enforcement in China

On 28 January, Yalei Sun, an intellectual property (IP) partner in the Palo Alto office, gave a presentation on 'Practical Tips on Patent Enforcement in China'. This presentation is one of the serial marketing events known as 'First Cup of Coffee,' which has been held in Palo Alto for many years. David Hao, partner and general manager of SciHead, one of the largest IP firms in China, was the guest speaker.

Yalei introduced China's bifurcated legal systems for IP enforcement and practical tips for patent enforcement actions, e.g., how and where to choose a forum for an enforcement action, how to collect infringing evidence from a defendant, the roles of the judge and the technical appraisal agency in a patent case, possible defense strategy by the defendant, and the patent invalidity proceedings at SIPO, China's Patent Office. David discussed case studies about the unique challenges faced by foreign patentees when they try to enforce their patents against competitors/infringers in China.

This event attracted about 20 attendees from local companies, and many attendees asked specific questions about the patent enforcement legal course in China.

Singapore Office Hosts Japanese Executives, GCs

More than 25 senior executives and general counsel overseeing Southeast Asian operations gathered in the Singapore office for a 20 January luncheon to discuss legal issues facing Japanese corporations in the region. Former judge Shinjiro Takagi, an executive senior advisor at Nomura Securities who was a panelist at the recent Legal Convergence Asia conference chaired by Singapore office Managing Partner Suet-Fern Lee, exchanged views with the executives. In addition to Suet-Fern, partners Satoru Murase (New York), Lian Seng Yap (Singapore), Joo Khin Ng (Singapore), and Wendy Tan (Singapore) were among the Morgan Lewis lawyers who attended the gathering. Also in attendance were regional CEOs for Toshiba, Sumitomo Mitsui Banking Corp., Hitachi, and Japan Bank for International Cooperation, as well as senior executives and general counsel for Canon Inc., Toyota Motor Corp., Mitsui, Sumitomo Corp., Marubeni Corp., Itochu Corp., Sojitz Corp., Nippon Life Insurance Co., Bank of Tokyo-Mitsubishi UFJ, and Toppan Printing Co. Ltd. Representatives from the Japanese government included the Ministry of Economy, Trade, and Industry and the Japan External Trade Organization.



Above: More than 25 executives and general counsel gathered in our Singapore office to discuss legal issues facing Japanese corporations in Southeast Asia. 17

HEADLINE MATTERS

HT: Win in WikiLeaks Disclosure Case

In the first case of its kind, the Singapore High Court ruled on 15 February for our client, Italian-based IT company HT S.r.l., that privileged and confidential information obtained through cybercrime and posted on WikiLeaks is nonetheless privileged and confidential.

In *HT v. Woon*, HT sued a former employee, Wee Shuo Woon Serge, for breach of duties. After the lawsuit was filed, HT's servers were hacked by an unknown party, and its confidential information was posted on WikiLeaks. That included privileged correspondence between our firm and HT, which Woon exhibited in an affidavit. We applied to expunge Woon's affidavit on privilege and confidentiality grounds. Woon resisted the application, arguing that if documents are posted on WikiLeaks, they enter the public domain and are no longer confidential.

The court ruled in our favor, holding that because the documents were obtained by hacking, our client had not waived privilege or given consent. The documents should therefore continue to be privileged and confidential, and should be expunged from the record. Woon has appealed to the Singapore Court of Appeal, Singapore's highest court.

The team was led by litigation partner Adrian Tan (Singapore) and Singapore associates Pei Ching Ong and Jean Wern Yeoh.

Singapore O&G: Acquisition of Leading Skin Care Practice

Morgan Lewis Stamford served as transaction counsel in the acquisition of the businesses and medical practices of Dr. Joyce Lim, one of Singapore's leading dermatologists, by Singapore O&G Ltd. (SOG) through a newly incorporated subsidiary for an aggregate consideration of S\$26.5 million (US\$18.5 million). Dr. Lim's practices include JL Laser & Surgery Centre Pte. Ltd., JL Esthetic Research Centre Pte. Ltd., and JL Dermatology Pte. Ltd., as well as Joyce Lim Skin and Laser Clinic, which offers comprehensive skin and beauty treatments. The acquisition, which closed December 31, allows Singapore Exchange-listed SOG to provide a wide range of quality skincare services and products in addition to its current core services in obstetrics and gynecology. It is expected that both the earnings per share and the dividend per share of SOG will rise considerably this year due to the acquisition.

The team was led by securities partner Bernard Lui (Singapore). Other team members included Singapore associates Jeremiah Huang and Shermin Chen.



HEADLINE MATTERS

Home Away from Home at Foreign Workers' Dormitory



Morgan Lewis Stamford acted for S11 Capital Investments in relation to its collaboration with eight other investors for the construction, management, and operation of a foreign workers' dormitory, PPT Lodge 1B at Punggol, Singapore. The deal required us to draft, negotiate, and conclude the multiparty agreement to enable S11 Capital Investments to achieve its goal for this project. The dormitory is a first of its kind in Singapore, boasting several welfare features for resident foreign workers in the Singapore construction space. It started operations in early 2015, and is now almost at full capacity. Often there are reports of awful conditions in worker dormitories; however, the brightly painted dormitory of the PPT Lodge 1B is truly an innovative and unique space. It can accommodate up to 14,000 workers in 13 four-story blocks, and is equipped with a gym, game room with pool tables and video game consoles, and commercial cinema that screens Hindi and Tamil blockbusters. Other amenities include mobile phone shops, a food court, laundry services, and a supermarket stocked with products from the workers' home countries. The core belief is the importance of providing a pleasant living environment for migrant workers, resulting in better rest, job productivity, and safety. On 25 February, the *Straits Times* newspaper in Singapore published a two-page spread on the dormitory, highlighting this innovative project where the welfare of its residents is a priority.

The team was led by construction partner Kelvin Aw (Singapore). Other team members included Singapore partner Lynette Chew and associate Min Hui Tan.

THE LAST WORD

The Last Word is a regular segment giving you a tongue-in-cheek insight into the personalities in Morgan Lewis.

Year of the Pineapple

"Across Southeast Asia, countless millions have recently celebrated the lunar New Year and ushered in the year of the monkey, which began on 8 February 2016. The first 15 days of the New Year are celebrated with traditional food, lights, and decorative lanterns as far as the eye can see and the exuberance and cacophony of lion dances.



And pineapples.

Pineapples are lucky in Singapore, so I am told, because 黄梨 (the word for pineapple, pronounced "ong lai" in Hokkien, which is the most prevalent of the Chinese dialects in Singapore) sounds like the phrase "incoming wealth" (旺来, in case you were wondering). For this reason, I feel duty-bound each year to eat lots of pineapple tarts (but not pineapples). Some are modest pastry offerings with a dollop of pineapple jam on top. Others are presented in a neat lattice shape. Some even resemble pineapples. But the apotheosis in pineapple tart cuisine is undoubtedly a flaky pastry orb made by one particular shop, which is the size of a golf ball filled with squidgy pineapple magic. A steady diet of these tarts over two weeks is the perfect way to stock up on cholesterol until the next lunar New Year festivities begin."

Timothy Cooke, Partner, Singapore



Left: Heavenly pineapple golf-ball magic

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