



THE BIG BUSINESS OF BETTING

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JAN - JUN 2010

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SINGAPORE ACADEMY OF LAW

Chief Executive
Serene Wee

Editor
Eileen Khoo

Consultant Editor
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Editorial Committee
Anita Parkash
Bala Shunmugam
Foo Kim Leng
Ranald Or

SINGAPORE ACADEMY OF LAW
1 Supreme Court Lane, Level 6,
Singapore 178879.
Tel: 6332 4388 Fax: 6334 4940

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.....
Advertising Sales
Florence Long
Mobile 9382 0381
florence@mediactive.com.sg

Publishing Consultant
Lyon Low

Design
Eunice Gracilia
Nurzuli Sobahri

mediactive

Mediactive Pte Ltd
65 Ubi Crescent,
#06-07, Hola Centre,
Singapore 408559.
Tel: 6846 4168

THE opening of the integrated resorts this year – and more specifically, the casinos within them – have elicited enormous interest and attention from various fronts. The issues that will arise from legalised gambling, and the impact they will have on the community, will be closely watched. The legal fraternity too will not be immune to the changes afoot. Gambling law, a heretofore largely undeveloped aspect of legal practice in Singapore, will no doubt see growth and maturation.

In this issue, local practitioners provide timely insights into topics ranging from the intricacies of sports betting, how far casino patrons are protected when they try their luck at the tables, to the pitfalls of betting online. From the UK, a gaming law expert shares his experiences in the industry and discusses recent developments there.

Conveyancing practice is another area that will hardly remain static. As we await the finalisation of the new stakeholding rules in respect of conveyancing monies, a veteran conveyancer offers an opportune overview of how the nature and scope of mainstream real estate practice has evolved in the last decade or so, and what we can expect in the years ahead.

Inasmuch as law firms need to continually build up their “hard” law expertise, the visionary lawyer in today’s multi-faceted world should, at the same time, be focusing on the “how” as well as the “what” of practice. We take a look at corporate social responsibility (CSR) and the place – if any – it occupies in local firms, while a law academic advances a thought-provoking analysis of why CSR is increasingly important to the profession.

With all these, as well as an enlightening examination into the rightful role of Defence Counsel and ethical issues in the criminal court, plus a tongue-in-cheek explanation of why being in court trumps betting in a casino, we hope this issue will make for a full and fulfilling read. Enjoy.

Warm regards,

A handwritten signature in black ink, appearing to read 'Serene Wee'.

Serene Wee

SPORTS BETTING IN SINGAPORE

FROM FOOTBALL TO FORMULA 1, BETTING ON SPORTING EVENTS IS INCREASINGLY COMMONPLACE. LAU KOK KENG PROVIDES AN INSIGHT INTO THE HISTORY, LEGISLATIVE FRAMEWORK AND PERTINENT ISSUES IN THE DYNAMIC AREA OF SPORTS BETTING.



SPORTS betting involves making predictions of the outcomes of sporting events through wagering. Sporting events on which bets are commonly offered include football, motor racing, horse-racing, basketball, baseball, golf, rugby and boxing. Outcomes arising from these events on which bets may be offered may range from the final score and winner of the match or championship, to details such as first player to score and number of fouls committed during the game.

The legality of sports betting, and the extent of permitted sports betting activity, varies from country to country. Even in countries which have legalised sports betting, there nonetheless exists a huge parallel underground betting environment. In addition, the online sports bookmakers and betting exchanges who are licensed in offshore jurisdictions also provide additional avenues for sports betting in competition with state operators.

By Lau Kok Keng, Head of iTec & Sports, Rajah & Tann LLP

Proponents of legalised sports betting argue that having a flutter on a sporting activity is not only relatively harmless, but may also increase interest and fan support in the sport. In addition, the revenues from legalised sports betting may even be channelled back into funding the development of the sport. On the other hand, opponents of sports betting are concerned that it may compromise the integrity of participants in the sport (ie players, coaches and officiators), even if match fixing is equally prevalent (if not more) in countries which have refused to legalise sports betting.

HISTORY AND EVOLUTION

Gambling has existed in Singapore since the early colonial days. For instance, in the 1820s, the colonial police was said to have been funded using gambling revenue. However, illegal gambling was rife and dominated the gambling industry.

The Betting Act (Cap 21) was enacted in 1960 to suppress illegal common betting-houses, betting in public places and bookmaking, while the Common Gaming Houses Act (Cap 49) was passed in 1961 to suppress illegal common gaming houses, public gaming and public lotteries. In 1968, the post-independence Government established the state operator Singapore Pools¹ to counter illegal betting and to channel proceeds of sales to benefit the community.

Up to 1999, legalised gambling in Singapore was limited to the Singapore Sweep lottery, 4D and Toto games operated by Singapore Pools, horse-racing conducted by the Singapore Turf Club, and certain types of gaming in private clubs (eg jackpot machines). All other forms of gambling were illegal.

In 1999, to support and maintain the viability of Singapore's first local professional football league – the S-League – following Singapore's withdrawal from the Malaysia Cup tournament, Singapore Pools introduced legalised football betting on S-League games. Proceeds from betting on S-League matches are channelled back into the league to fund the development of its football clubs.

In 2002, sports betting was extended beyond local S-League games. In recognition of the popularity of betting on foreign football matches, Singapore Pools began to offer legalised betting on matches played in the World Cup 2002. Sports betting was subsequently further extended to allow for legalised betting on the English Premier League, other international matches, and to other European and Asian football leagues as well.

The opening up of sports bets was mirrored by other developments in gambling. In April 2005, in a Ministerial Statement made in Parliament, the Singapore Government announced its decision to lift its ban on casinos in the city state, and to allow for two casinos to be established as part of the "Integrated Resorts" in Singapore. These Integrated Resorts, the first of which is due for completion in early 2010,

1 Singapore Pools is currently the only legal lottery and sports betting operator in Singapore.

will be the first ever legalised casinos in Singapore, and will be significant milestones in the gambling landscape in Singapore. To pave the way for the operation of the two Integrated Resorts, the Casino Control Act was passed in 2006.

In September 2008, Singapore hosted a Formula One race for the first time. In line with this historic event, legalised sports betting was further extended to allow Singapore Pools to offer betting on the Formula One races beginning with the Australian Grand Prix held in Melbourne in March 2008.

Though not as prevalent and entrenched as mass appeal lottery games such as 4D and Toto, sports betting has today gained widespread acceptance in Singapore. A survey conducted by the Ministry of Community, Youth and Sports in 2008 revealed that about 9% of the respondents in Singapore engaged in sports betting on a regular basis, and that the average amount spent by each of them on this form of betting is about S\$160 a month². Legalised sports betting in Singapore is currently administered by the Singapore Totalisator Board.

SPORTS BETTING OPERATORS

As of 1 April 2004, the Singapore Totalisator Board (or Tote Board) acquired Singapore Pools from Temasek Holdings. Following this, the Tote Board holds the legal right to operate (a) horse-racing and totalisator

operations through its agent and proprietary club, the Singapore Turf Club; and (b) 4D, Toto, Singapore Sweep, football betting and motor racing through its agent and wholly-owned subsidiary, Singapore Pools. The Tote Board oversees the operations of Singapore Pools and the Singapore Turf Club. Surplus earnings are channelled by the Tote Board towards worthy causes that serve the needs of the community.

Under the Singapore Totalisator Board Act (Cap 305A), the functions of the Tote Board include, amongst others: (a) to operate totalisators in accordance with any approved scheme; and (b) to operate and conduct (by means of a totalisator or otherwise) such lottery or other betting or gaming activities as may be prescribed, in accordance with any scheme which the Minister may, subject to such conditions as he may impose, authorise. Accordingly, the Tote Board is empowered to provide assistance and advice relating to racing, betting and gaming in Singapore and to distribute moneys forming part of the fund of the Tote Board which is not required in the exercise of its functions for public, social or charitable purposes and for the promotion of culture, art and sport generally in Singapore.

LEGISLATIVE FRAMEWORK

Sports betting is prohibited in Singapore under the Betting Act (Cap 21), unless an exemption is granted by the Minister.

The Betting Act

The Betting Act is described as “[a]n act to suppress common betting-houses, betting in public places and bookmaking”. First enacted

2 Report on Survey of Participation In Gambling Activities Among Singapore Residents, 2008 at <http://www.mcs.gov.sg/MCDSFiles/Resource/Materials/GamblingSurveyReport2008.pdf>.

in 1960, it prohibits betting or wagering on any event or contingency relating to any horse-race or other sporting event.

Section 3(1) of the Betting Act provides that any person who is involved in certain ways (as defined in the Betting Act) in a “common betting-house” or “betting information centre” shall be guilty of an offence. The terms “common betting-house” and “betting information centre” are given very broad definition under the Betting Act, and they are intended to capture a wide range of activities relating to horse-race and sports betting in Singapore. However, the Betting Act does not contain any express provisions dealing with online sports betting, the legality of which is briefly discussed later in this article.

Exemptions from the Betting Act

Prior to the Tote Board’s acquisition of Singapore Pools from Temasek Holdings in 2004, Singapore Pools was granted the right to operate, *inter alia*, football betting in Singapore by way of statutory exemptions from the provisions of the Betting Act. Each type of football betting activity had to be separately exempted, as each new sports betting product had to be approved by the Minister before Singapore Pools was allowed to offer it to the public. The Singapore Turf Club on the other hand was granted the right to operate, *inter alia*, betting on horse-racing via the corresponding exemptions.

With the acquisition of Singapore Pools by the Tote Board, the Tote Board took over the rights to operate sports betting (including betting on horse-racing) in Singapore. Singapore Pools became an agent of the Tote Board in conducting sports betting operations, and new statutory exemptions under the Betting Act were gazetted to reflect this change. Under the Betting (Singapore Totalisator Board – Exemption) Notification 2004, the Tote Board and its officers were exempted from the provisions of the Betting Act in



respect of the promotion, organisation, administration or operation of betting on football matches, while Singapore Pools, its officers and authorised agents were similarly exempted where the betting is promoted,

organised, administered or operated for or on behalf of the Tote Board. Additional exemptions were gazetted subsequently to allow Singapore Pools to offer legalised betting on Formula 1 racing.

ONLINE SPORTS BETTING

Singapore Pools does not offer any online sports betting currently. However, there is a proliferation of private bookmakers such as Ladbrokes, William Hill, Sportingbet and Bwin with a presence on the internet who offer sports bets to a worldwide customer base. Although licensed offshore, these operators remain unlicensed in Singapore, as no exemptions have been granted for them to offer bets to Singapore residents. Nonetheless, this has not stopped residents here from accessing their websites to place bets on sports events with these operators. Indeed, as these private operators do not have any requirements to contribute to good causes, unlike state operators, they are able to offer better odds to the punter, and are viewed as providing more value for the betting dollar. Internet betting is also more convenient as compared with having to join the queues at physical betting outlets, although phone betting offered by Singapore Pools has gone some way to overcome any such inconvenience.

Despite the growing popularity of online betting in Singapore, the Betting Act does not appear to have any provisions which expressly prohibit online sports betting in Singapore. The stance taken by the Government appears to be that the playing and operation of online gambling websites is illegal in

Singapore.³ However, the provisions of the Betting Act may not necessarily support this position. There is some uncertainty as to whether an internet betting site hosted outside of Singapore would fall within the definition of a “common betting-house” or a “betting information center”, given that the definitions of the respective terms strongly suggest the involvement of physical premises and not virtual ones. Neither is it likely that a user’s home from which access to the betting website is gained can be said to be either a “common betting-house” or a “betting information center”. The mere act of accessing an internet betting website to place wagers from one’s own home would appear insufficient, by itself, to make one’s home either a common betting-house or a betting information center since under ordinary circumstances, a home is not primarily used for betting.

However, if a user places bets for various other persons as an agent, or frequently and habitually places bets or wagers, a court might find that the user’s home is a place kept or used for habitual betting, which may then fall within the offence provision. In addition, the definition of “bookmaker” in the Betting Act is arguably broad enough to include entities operating internet betting websites. As such, placing bets with an internet sports bookmaker from one’s own home may potentially amount to an offence under s 5(1), which states that any person who bets or wagers with

3 See for example: “Internet betting on S-league games illegal”, *The Straits Times* (31 May 2004).

a bookmaker in any place or by any means (a phrase potentially wide enough to include betting or wagering over the internet), shall be guilty of an offence. This is provided the act of betting is considered to have occurred in Singapore. One argument that can be made is that in the case of betting websites hosted outside of Singapore, betting does not occur in Singapore, but rather, is concluded at the place where the transactional server is hosted. The validity of such an argument however, remains untried and untested, and unaddressed by any legislation as yet.

ONLINE PAYMENT SERVICES

Even if online betting does not fall within any offence provisions of the Betting Act, there are other restrictions which may impact upon the operations of internet betting websites which are accessible to residents in Singapore. One such restriction would involve payment for bets and winnings.

The most significant developments relating to online payment restrictions affecting the gambling industry have occurred in the United States, a jurisdiction which boasts stringent gambling laws. In 2006, the US Congress passed the Unlawful Internet Gambling Enforcement Act ("UIGEA"), which makes it illegal for its financial institutions to transfer money to offshore gambling websites or to online payment service providers used by such websites. As a result of the UIGEA, many non-US based betting websites blocked access to US residents, and shifted their attention to Asian jurisdictions.

Notwithstanding that the UIGEA is US legislation, it has consistently been applied

against non-US residents since its enactment, prompting questions over its extra-territorial effect. For example, in August 2009, Canadian resident Douglas Rennick was indicted in the US on charges of bank fraud, money laundering and illegal gambling. Rennick was accused of having opened bank accounts in the US under various corporate names for purposes of using the accounts to receive funds from offshore internet gambling operators. In another case in January 2007, the co-founders of NETeller (considered by many online gamblers to be the best option for transferring, withdrawing and depositing funds and which is widely supported by major online casinos), John Lefebvre and Stephen Eric Lawrence, were arrested in the US and charged with the intent to promote illegal gambling by transferring billions of dollars for US internet gamblers. Both of them were Canadian citizens.

In Singapore, there is as yet no legislation equivalent to the UIGEA. However, many banks have a policy of disallowing the use of their credit cards for online gambling. These include United Overseas Bank, Citibank, HSBC, Amex, Maybank and OCBC Banks. Indeed, only DBS and Standard Chartered Bank do not block customer wagers.

ADVERTISING

Subtle forms of advertising for offshore internet sports bookmakers and betting exchanges have gained momentum in Singapore over the years – for example, Betfair and Ladbrokes have, in the past, taken to distributing complimentary products



such as beer mats and mugs, and displaying memorabilia such as team-autographed jerseys “kindly donated” by them, in pubs and bars. Both Betfair and Ladbrokes have also had representatives based in the country in the recent past, albeit performing marketing functions for the region without targeting Singapore residents. The current level of tolerance for offshore bookmakers’ marketing and publicity attempts here was highlighted when Betfair hosted the Asian Poker Tour 2006 in Singapore, not least because the event was supported by the Singapore Tourism Board, but also noticeably because it was held here during the same time that the World Lottery Association’s 2006 Convention was hosted by the state lottery Singapore Pools.

The advertising prohibitions in the Betting Act may be difficult to extend to online gambling for the reason that no gambling takes place in physical premises. Moreover, gambling advertisements online are not clearly prohibited by the Media Development Authority or the Broadcasting Act. In contrast, the state operator (the Singapore Totalisator Board) which upholds Responsible Gambling policies is heavily restricted by internal policies and

governmental restrictions from seeking to expand its customer base by way of advertising and product diversification.

CONCLUSION

Legalised sports betting forms an important source of revenue for the sports industry in Singapore. Indeed, the S-League is largely funded by the SCORE! betting business. Revenue derived from legalised sports betting can, in turn, be distributed and channelled to sports development, raising sporting standards and increasing the level of public awareness and interest in the beneficiary sports. Legalised sports betting revenue can also be used to fund community projects such as the building of arts/entertainment centres and stadia, especially where private funding and enterprise is wanting.

While the anti-gambling movement may see sports betting as being no different from other forms of gambling and as equally detrimental to the moral fibre of society, the regulation of sports betting does go a long way in minimising any negative social impact it may have on its participants, while at the same time, serve to benefit the community in ways that would justify its continued endorsement by the Government. ¹⁵

PLAY ON

INTER SE approached Julian Harris of Harris Hagan, the first UK law firm dedicated to providing gaming industry legal advice in the UK and internationally, to share his views on gambling law. The gaming and licensing law expert, who has more than 20 years' experience in the industry, tells us about his experiences in practice, developments in UK gaming law, and his thoughts on the future of gambling.





How did you come to specialise in gambling law?

By accident! I would like to be able to say that I had a vocation for gaming law, but when I qualified in 1980, I had no idea that such a specialisation even existed. I joined a firm called Gregory, Rowcliffe and Co as a commercial litigator. The senior litigation partner, Anthony Hobbs, was the then

solicitor to the Gaming Board for Great Britain, at that time the regulatory authority for gaming.

Because of the pressure of work, with a number of high-profile casino licensing cases at that time, I became involved in work for the regulator. I became a partner in 1983, and, following Anthony Hobbs' retirement the following year, took over the Gaming Board work with my colleague Christopher Harper, who, since I left the firm in 1986, has remained solicitor for the Gaming Board and its successor, the Gambling Commission.

What is the most rewarding aspect of the practice of gambling law, and why?

I mentioned that I intended to practice as a commercial litigator, and indeed mixed litigation with gambling law for many years. However, gambling law has most of the advantages of litigation, without the disadvantages. It involves a substantial amount of advocacy, which I enjoy, and usually with much quicker results than in litigation. Given the expense of litigation, few cases come to trial, and I remember speaking to one senior litigation partner from another firm when we were in court together, who told me that the

case was his first to come to trial in 20 years of practice!

Gambling law also has the advantage of being a narrow speciality. Apart from the fact that this inevitably limits the knowledge base required, it enables one to become, in effect, a part of the industry one represents. With the knowledge of the industry gained over many years, we have become business advisors as well as lawyers.

As the first UK law firm specialising in legal services to the gambling and leisure industries, what have been a few of the major challenges that Harris Hagan has faced over the years?

The two principal challenges, in terms of work, which the firm has faced over the five years since our foundation in 2004, have been firstly, the very long process of development of the new gambling legislation. The resulting Gambling Act went through numerous stages of development, during which it changed remarkably from the original proposals. During this time, we worked with clients, representative industry bodies and the government advising on the various developments, and advising, lobbying and seeking to protect the interests of the various sectors of the industry.

Secondly, the limitations on numbers of new casinos proposed in the legislation led to an enormous increase in applications for new casino licences, which resulted in our involvement in often lengthy applications for, and objections to, licences.

Could you give us a broad introduction to the gambling legal industry in the UK? What are

the main pieces of legislation, and which are the regulatory or other bodies, that govern the industry?

Until 2005, gambling legislation was piecemeal and complex. Different sectors of the industry had separate, but often overlapping, legislation and regulatory regimes. In brief, casinos were governed by the Gaming Act 1968 and regulated by the Gaming Board for Great Britain. Betting was governed by the Betting, Gaming and Lotteries Act 1963 and regulated by magistrates' courts and the police. Lotteries were regulated by the Lotteries and Amusements Act 1976, save for the National Lottery which was governed by the National Lottery Act of 1993. Then, as now, the National Lottery was regulated by its own authority, whereas other lotteries fell within the jurisdiction of the Gaming Board.

The Gambling Act 2005 is now the governing legislation for all forms of gambling, with the exception of the National Lottery, and all forms of gambling falling within the Act are now within the jurisdiction of a single regulatory authority, the Gambling Commission. The great difficulty posed by the previous piecemeal legislation, apart from the fact that it was all drafted before the advent of the internet, was that there existed considerable overlap between the different forms of gambling, namely, betting, gaming and lotteries, with the result that there was substantial case law seeking to determine into which category different forms of gambling fell. Whilst these difficulties can still arise, consolidation and definitions have simplified the law considerably.

What have been a few of the significant or unexpected developments or issues, legal or otherwise, since the passing of the UK Gambling Act in 2005, and how have these impacted the practice of gambling law generally?

The most obvious significant issue since the Gambling Act was passed is that for the last three years, for the first time since 1968, it has been impossible to obtain a new casino licence in the UK. Previously, such an application could be made at any time in any one of the 53 permitted areas of the country. Although there were high barriers to entry, most significantly the need to prove demand for the new gaming facilities proposed, at least an application was possible. The new Act permits the grant of an arbitrary new 16 licences in specified locations, many of which already have casinos. It was for this reason that there was a flood of applications under the old legislation before the time limit expired.

The most significant development legally was the ability, for the first time, to obtain licences to operate online betting and gaming whilst, ironically, there was nothing in the old legislation to prevent foreign online operators taking play from people located in Great Britain, or even advertising here, as licences were not available in the UK. As the UK was the first major European state to offer licences for online gambling, it was anticipated that there would be a flood of applications. However, the government set the tax rate at 15%, making the UK seriously uncompetitive against jurisdictions such as Malta and Gibraltar in the European Economic Area and Alderney

and the Isle of Man, which are offshore British jurisdictions, all of which have the ability to advertise and market within the UK. This has resulted in a much smaller online industry in the UK than was anticipated.

The other unexpected development has been the very long delay on the part of local authorities in beginning the licensing and competition process for the grant of the 16 new licences, which have not started yet in any one of those areas. This is primarily due to two factors: firstly, the difficulties of setting up the process, coupled with the lack of experience from local authorities in addressing such issues and nervousness on their part about the possibility of extensive judicial review proceedings, if they make any mistakes. Furthermore, preparation for the process has coincided with the recession, and, almost certainly, a lack of enthusiasm on the part of operators for seeking to speed up the process.

All of these factors caused enormous fluctuations in the amount of licensing work, with the result that a greater percentage of current work relates to betting, commercial work for the industry and online gaming, particularly in offshore jurisdictions.

What has been the effect of the economic downturn on the UK gambling industry, and what changes in your practice have you seen as a result?

The economic downturn, technically now a full recession, has had a significant effect on the UK gambling industry. However, this has been coupled with other factors, such as the smoking ban in all public places, raised taxes



and low limitations on machine numbers and machine stakes and prizes than originally hoped for, all of which have together had a devastating effect, particularly on the casino and bingo industries. Given our closeness to and reliance on the industry, this has inevitably affected our practice.

Across countries, the social ills related to gambling are a common cause for concern. Could you comment on the “social responsibility” provisions in the Gambling Commission’s Licence Conditions and Codes of Practice (October 2008)? Have they created any problems, or been considered too burdensome by licensees? What is the general approach taken towards balancing the interests of gambling operators and customers?

We are not aware that the “social responsibility” provisions in the Gambling Commission’s Licence Conditions and Codes of Practice have caused any particular

problems. Nor do we believe that they have been found to be too burdensome by licensees. However, the requirement to contribute substantial sums of money to the treatment of problem gambling does add a substantial financial burden to an industry which is already suffering economically, and which is already taxed more heavily than any other industry.

In general, the Gambling Commission, in interpreting the law and in their own codes of practice, adopt a realistic approach in balancing the interests of gambling operators and customers, whilst, as they are required to do, seeking to protect children and other vulnerable persons from gambling.

The gambling legal industry is in a nascent state in Singapore. Given your experience, what do you think legal advisers here can expect when the casinos open, in terms of how this legal practice

area will develop and whether any specific issues will arise? What do you think the immediate challenges facing legal advisers in Singapore will be, and how can they equip themselves to prepare for them?

No legislation, regulations or codes of practice, however well thought out and carefully drafted can foresee and address every eventuality that may occur once the casino is open. For that reason, it was felt important, in drafting our new legislation, to give the Secretary of State and the regulator the ability to create regulations and codes of practice where the need arose. It is in the interests both of regulators and reputable operators to ensure that such flexibility exists to ensure that the objectives of the legislation are met. It is important at all times, but particularly during the early stages, that both regulator and operator have a good working relationship and are able to co-operate to iron out uncertainties and difficulties that will inevitably arise with new legislation.

Whilst the industry is new to Singapore, you have two experienced operators, with global interests. They have valuable experience to offer, and it is in both their interests that operations are conducted in such a way as not to prejudice the licences held in other strictly regulated jurisdictions.

It follows that legal advisers should always have in mind the objectives of the legislation and seek to achieve a balance between acting in the interests of their client on the one hand whilst, on the other, representing those interests in a way which is consistent with their professional standing,

in order to maintain the trust and respect of the regulator.

What do you feel is the potential of the gambling and related legal industries both in the UK and internationally, and how much is this likely to grow? Macau has overtaken Las Vegas in terms of gaming revenue, casinos are opening in Singapore, and other Asian countries are considering permitting legalised gambling – how will the developments in this part of the world impact on trends and tendencies internationally?

In recent years we have seen enormous growth in the gambling industry around the globe. This has reflected a change in attitudes to gambling; for example, in the UK in the 1960s, it was regarded as a vice which could not be stamped out, and would therefore be allowed, but strictly controlled and regulated. Now it is regarded as a legitimate form of adult entertainment, although one which should be regulated in order to protect the interests of children and other vulnerable people, and to ensure fairness.

The growth of gaming in South East Asia may be seen as having the potential to cause a downturn in business in traditional gambling venues, such as Las Vegas, London and Macau, but may in fact have the reverse effect: the increasing popularity of gambling, its legalisation in other Asian jurisdictions and the greater ability of people to travel long distances for holidays may in fact cause a growth in traditional markets as well as in new jurisdictions.

One thing is certain: gambling, and therefore gambling law, is here to stay! ¹⁵



PROTECTING THE PLAYER

THE GLITZ AND GLAMOUR OF THE CASINOS OFFER A WORLD OF PROMISE – AND PITFALLS – TO THE UNSUSPECTING PUNTER. DO SAFEGUARDS EXIST TO PROTECT THE CASINO PATRON, AND HOW FAR DOES THE SAFETY NET GO?

By Lawrence Quahe, Director, Lawrence Quahe & Woo LLC and Chiang Pak Chien (previously of Lawrence Quahe & Woo LLC)

ASIANS are some of the biggest gamblers in the world. The Chinese, in particular, have the notorious reputation of having the gambling habit deeply ingrained in their nature. As a testament to the inherent propensity to gamble in the Chinese, one has to look no further than the Macau Special Administrative Region. Until recently a small fishing enclave off mainland China's southern coast, Macau has already surpassed Las Vegas in terms of gaming revenue, largely due to the influx of Chinese gamblers eager to take on the houses.

Long aware of the social, law and order issues associated with compulsive gambling, Singapore has historically maintained broad and draconian prohibitions against unlicensed gambling. Save for some notable exceptions like the Singapore Pools and Singapore Turf Club, unlicensed gambling activities have been, and continue to be, outlawed under the Casino Control Act (Cap 33A), Betting Act (Cap 21), Common Gaming Houses Act (Cap 49) and other legislation.

Sometime in 2010, Singapore will turn a new chapter in its history when the doors to the two Integrated Resorts (or "IRs" as they are colloquially referred to) are flung open to the world. Many are worried that the advent of the easily accessible casinos will lead to disorder and erosion of the moral fabric because of increased cases of compulsive gambling, loan sharking, money laundering, prostitution and other crimes. Indeed, most players, including the majority of local ones, would hitherto have had limited experience in

dealing with casino operators. What then does legalised casino gaming mean for the amateur player, and is he protected?

LEGISLATION AND REGULATION

The Casino Control Act is the starting point for any consideration of the legal relationship between the player and the casino operator. This Act came into force on 1 June 2006 and took full effect in July 2008. Its primary objective is to implement a legislative and regulatory framework that enables the casinos to grow and thrive, and also mitigate any associated social and law and order issues.

According to the Minister of Home Affairs, Mr Wong Kan Seng, in the second reading of the Casino Control Bill in Parliament on 13 February 2006, the Casino Control Act is an amalgamation of best practices of notable casino jurisdictions around the world and adjusted for the environment in Singapore. The Casino Control Act was enacted with input from, and in consultation with, established gaming regulators, casino operations and enforcement agencies around the world.

To regulate the nascent gaming industry, the Casino Control Act led to the establishment of the Casino Regulatory Authority, whose aim is to ensure that the management and operation of a casino is free from criminal influence or exploitation, that casino gaming is conducted honestly, and to contain and control the potential of a casino to cause harm to minors, vulnerable persons and society at large. In addition, the National Council on Problem Gambling

was also set up under the Casino Control Act to promote responsible gaming, as well as to provide advice and counselling for compulsive gamblers.

REGULATORY SAFEGUARDS

To ensure the integrity and the reputation of Singapore as a world-class gaming destination, the Singapore Government has implemented a rigorous multi-layered framework to regulate the operations and compliance issues of a casino. For a start, the Casino Control Act only allows for the operation of two casinos for a period of ten years. Two gaming operator licences were awarded to Marina Bay Sands for the city casino and Resorts World at Sentosa on 26 May 2006 and 8 December 2006 respectively. The two operators underwent a very thorough and onerous probity and disclosure process in order to ensure that only fit and proper persons and organisations were awarded the prized licences.

The Casino Regulatory Authority also has wide-ranging powers to investigate a casino operator's background, financial accounts and business associations under the Casino Control Act, and similarly, any company that wants to be involved in Singapore's casino industry can expect to be subjected to probity investigations by the Casino Regulatory Authority.

Amongst the safeguards for ensuring that the gaming activities in the Integrated Resorts are conducted fairly, the suite of games offered and their accompanying rules, as well as the gaming equipment, must be approved by the Casino Regulatory Authority.

The Casino Regulatory Authority will review the game rules and game play to ensure that the game is fair to patrons and not overly skewed in favour of the operator, and ensure that the game is not easily manipulated.

The Casino Regulatory Authority is also empowered to conduct spot checks on the gaming equipment to ensure that they have not been tampered with. All gaming machines installed in the Integrated Resorts must be supplied from manufacturers that have been approved by the Casino Regulatory Authority. The Casino Regulatory Authority also determines the number of gaming machines that are permissible on the casino's premises. The Authority is also empowered with wide powers to investigate and deal with offences like cheating, forgery, and tampering with gaming equipment and gaming machines.

To ensure that the necessary safeguards and measures in a casino's operations are in place, the Casino Control Act further provides that a casino operator shall not operate the casino unless the Authority has approved in writing of a comprehensive set of internal controls and administrative and accounting procedures for the casino.

CASINO OPERATOR'S DUTIES

On the casino operator's part, it is obliged to protect its patrons by ensuring that prostitution and loan sharking do not take place on its premises. For instance, security and safety procedures and equipment installed on the casino premises have to be applied and operated in accordance with the directions of the Casino Regulatory Authority.

As compulsive gamblers tend to wager beyond their means, the casino operators are obliged by law to inform the patrons of the rules of the games offered (including advice or information concerning those rules, the mode of payment of winning wagers and the odds of winning each wager), as well as set up a voluntary loss limit system under which the patron may commit upfront such amounts that he is able to lose.

To ensure that the casino operators do not induce or attract the patrons with easy credit, casino operators are, in general, prohibited

from amongst other things, lending money to patrons, providing money or chips as part of a transaction involving a credit card, or extending any other form of credit. However, the Casino Control Act provides narrow circumstances whereby credit by chips may be extended by the casino operator to non-citizens or non-permanent residents of Singapore, or to premium players. Further measures to curb excessive gambling include the banning of automated teller machines within the casino premises so as to limit access to ready credit.

“ In Singapore, a substantial framework has been promulgated and implemented to safeguard patrons, as well as to minimise the effects of compulsive gambling by promoting responsible gambling. ”

COMPULSIVE GAMBLERS

As a separate layer of regulation, the Casino Control Act seeks to control the activities of casino patrons as well. The greatest danger posed to a casino patron is, often, his own compulsive conduct. To protect Singapore citizens and permanent residents and discourage compulsive gambling, an entry levy of S\$100 for every 24-hour period or an annual membership fee of S\$2,000 is imposed for admission to the casinos in the Integrated Resorts. This is to reinforce the notion that gambling is not quick means of enrichment, but a cost.

In cases where the patron becomes a liability to himself and his family as a result of compulsive gambling, under the Casino Control Act, various parties can apply to exclude a patron from the casino premises, including the patron or his family. A patron can lodge a personal exclusion order with the casino operators or the National Council on Problem Gambling to bar himself from the casino premises.

Further, it is a condition of its licence that a casino operator shall not, without reasonable excuse, permit an excluded person to enter or remain on the casino premises. The casino operator is entitled under the Act to use such reasonable force as necessary to exclude or remove the excluded person from the casino premises. On the receipt of an exclusionary order, the casino operator is obliged, if so directed by the National Council on Problem Gambling to close any deposit account of such excluded person.

UNDERAGED GAMBLERS

As minors are perceived to be particularly susceptible and vulnerable to the lure of gambling, casino operators are obliged to restrict and prohibit minors from its casino premises during the casino's operational hours. In the regard, minors are deemed to be any person below the age of 21. If there are reasonable grounds suspecting a patron is underage, the casino operator, inspectors and police are authorised to request evidence of his age, name and address.

RESOLVING DISPUTES

As a further safeguard for casino patrons, the Casino Control Act has promulgated a dispute resolution process where, if a casino operator and a patron are unable to resolve to the satisfaction of the patron any dispute as to alleged winnings, alleged losses or the manner in which a game is conducted, and the dispute involves at least \$1,000, the casino operator shall immediately notify an inspector; or, if the disputed amount is less than \$1,000, the casino operator shall inform the patron of his right to request that an inspector conduct an investigation. The inspector shall conduct investigations and determine whether payment should be made. Any party who is aggrieved by the decision of an inspector may appeal to the Authority requesting a hearing to reconsider the decision of the inspector.

JUDICIAL DECISIONS

Given the novelty of licensed casino gaming in Singapore, there is a dearth of domestic legal precedents in this area.

Important issues, such as whether casinos owe a duty of care to compulsive gamblers, have yet to be decided. However, there are anecdotal lessons and experiences that can be drawn from other jurisdictions with mature casino industries that are worth considering.

The crux of the issue is whether the casino operator has a duty of care to the player, and to what extent the player is the author of his own misfortune. In short, are casinos in breach of their duty by exploiting a player's known weaknesses, thereby causing his loss? When patrons walk into a casino, they know full well that they are dancing with lady luck. In common law tort, this would be analogous to the tortious concept of *volenti non fit injuria*. However, whether a patron's acts are "voluntary" is open to question, as it is common practice (some cynics may even say "industry practice") for casinos to study the playing patterns of their high-rolling patrons, and then strategically ply such patrons with free food, drinks and dangle other persuasive carrots to keep them returning to the gaming tables. In this respect, it is notable that casinos never consider paying a patron his winnings as a loss; the house "loss" is only realised if the patron does not return to play.

There is a series of interesting US cases that seek to discuss and define some of these issues, while not decisively, at least insightfully. In the case of *Merrill v Trump Indiana Inc* 320 F 3d 729 (7th Cir 2003) the court stated: "... a patron who drives while intoxicated, causing his own injuries, cannot recover from the tavern that served him alcohol ... Indiana law does not protect a drunk driver from the effects of his own

conduct, and we assume that the Indiana Supreme Court would take a similar approach with compulsive gamblers.”

In the case of *Annitto v Trump Marina Hotel Casino* 2005 WL 4344137 at 1 (App Div 2006), the court observed: “It is reasonable to suggest that plying a casino patron with free alcohol, when he is known to be a compulsive drinker and gambler, and then extending house credit or inducing that patron to borrow against his own bank card, is likely to cause the patron significant consequential damage.” But the court further observed: “On the other hand, that foreseeability applies to the casino patron himself, since he clearly has a duty of self-care given his knowledge of his own proclivities.” The court ultimately took the middle road and declined to create or rule out a common law cause of action; it found that the plaintiff’s own failure to abide by any standard of care contributed to his losses, and liability was apportioned at 50%.

In the recent case of *Taveras v Resorts International Hotel Inc* Civil No 07-4555, 2008 WL 4372791, *5, Slip op (DNJ September 19, 2008), the plaintiff Arelia Taveras, was a New York attorney who had a successful and lucrative practice. In 2003, Ms Taveras began gambling in Atlantic City where she wagered substantial sums of money at a number of casinos. Resorts International Hotel Inc (“Resorts”) was one of six casinos she brought a legal action against, for, *inter alia*, a breach of a common law duty of care owed to her to prevent her from gambling too much.

As a product of her frequent visits and the large sums wagered, Resorts’ staff

cultivated a relationship with her and plied her with inducements to gamble which included limousines, hotel suites, food and entertainment. It was alleged that before long, her gaming habits developed from recreational to compulsive and she began gambling for prolonged periods of time at a sitting, during which she exhibited noticeable disorientation and erratic behaviour. Her behaviour and addictive gambling habits were not lost on Resorts’ staff who, however, did nothing to discourage her from gambling. In addition to failing to take affirmative action, Resorts’ staff also allegedly exploited her compulsive behavior to Resorts’ benefit. It was also alleged in the course of the suit that Resorts’ staff turned away family members attempting to take her home.

In late 2005, Resorts refused her player rights at the casino owing to her refusal to sign a waiver of liability in favour of Resorts. As a result of her compulsive gambling, Taveras lost her licence to practice law (she was disbarred for taking money from clients’ accounts), her parents’ home, her car, her law practice, her reputation and spent almost a year in rehabilitation. She then sued Resorts for US\$20m.

In dismissing the action, Judge Bumb stated that Taveras did not prove that gambling was an “abnormally dangerous” activity that required special protection. The judge said that Taveras spent money on a *bona fide* chance that she would win more money. In short, she gambled. The learned judge went on to state that upholding her claim would in theory impose a duty

“The unique opportunity that gaming law has in Singapore to evolve without any legacy will enable the courts to be in the forefront of developing the law in this area.”



on shopping malls and credit card companies to identify and exclude compulsive shoppers.

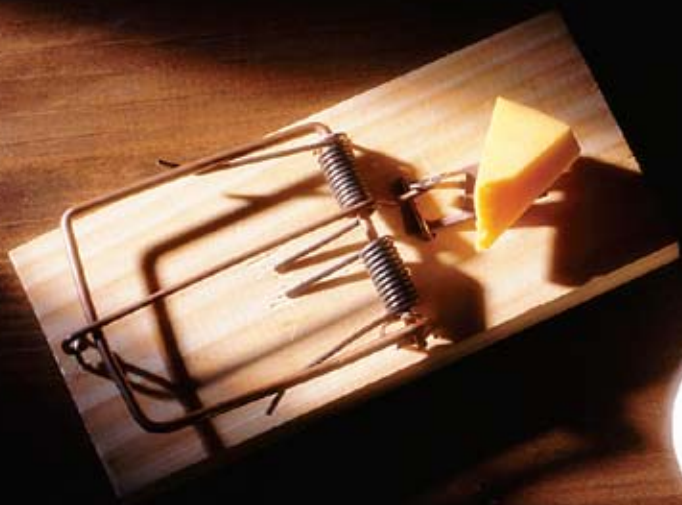
One reason why the US courts are reluctant to create common law jurisprudence in the casino gambling area is because the gaming industry is already heavily regulated there. The US courts seem to take the view that balancing public policy considerations are best left to the legislature rather than the judiciary. Of course, the counter argument to that is that reliance on the legislative route is naively optimistic, given that state legislatures are often hungry for casino tax revenues and are therefore likely to be slow to create legislation that may impact on their tax revenues.

THE FUTURE

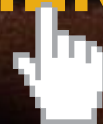
In Singapore, a substantial framework has been promulgated and implemented to safeguard patrons, as well as to minimise

the effects of compulsive gambling by promoting responsible gambling. Whilst Singapore appears to have a comprehensive and robust legislative and regulatory regime in place, based on best practices and lessons learnt around the world, it will be interesting to observe how effective the systems and processes are when translated into the complex and dynamic environment of the gaming industry.

The commencement of operations of the IRs will also, without doubt, give rise to our courts having the opportunity to decide the issues discussed here, no mean feat given the need to balance the various interests of all the stakeholders in the industry. The unique opportunity that gaming law has in Singapore to evolve without any legacy will enable the courts to be in the forefront of developing the law in this area. ¹⁵



**CLICK HERE
TO BET**



WHICH LAWS GOVERN
ONLINE GAMBLING
IN SINGAPORE? AND
WHEN WOULD AN
ONLINE PUNTER OR
INTERNET CONTENT OR
SERVICE PROVIDER FALL
FOUL OF THE LAW?

A number of jurisdictions, such as Australia and Russia, have in place legislation that specifically deals with online gambling, by which we refer to gambling on the internet. Some prohibit this activity altogether, while others allow it so long as the providers are licensed. Singapore does not have such legislation. This may therefore raise questions such as whether an individual commits an offence by engaging in online gambling, whether an internet content or service provider breaches the law by setting up an interactive gambling website or server in Singapore or abroad, and whether advertising online gambling services is illegal. To try to answer these questions, existing gambling-related legislation needs to be examined.



By Khaleel Namazie, Director,
G R Law Corporation

APPLICABLE LAWS

Pursuant to s 5 of the Civil Law Act (Cap 43), all contracts or agreements by way of gaming or wagering shall be null and void, and no action shall be brought or maintained in court for recovering any sum alleged to be won upon any wager or deposited with any person to abide the event on which any wager has been made. Exceptions include, but are not limited to, contracts which are exempted under the Common Gaming Houses Act (Cap 49), the Betting Act (Cap 21) and the Private Lotteries Act (Cap 250).

The Common Gaming Houses Act, Betting Act and the Private Lotteries Act were passed in 1961, 1960 and 1952 respectively, long before the advent of the internet. However, the language therein is, in this writer's view, wide enough to address certain aspects of internet gambling. Besides these pieces of legislation, the more recently enacted Casino Control Act (Cap 33A) is also applicable and will be discussed briefly. There are, in addition, other statutes that govern particular aspects of gambling in Singapore, such as the Betting and Sweepstake Duties Act (Cap 22) and the Singapore Totalisator Board Act (Cap 305A), but these will not be discussed in this article as they are not directly relevant to the issues raised here.

THE BETTING ACT

Broadly speaking, the Betting Act makes it an offence to use a place as a common betting-house or betting information centre, or to bet with or act as a bookmaker. Regarding the former, the relevant sections are s 3(1) and the definitions of "common betting-house" and "betting information centre" under s 2(1). Section 3(1) provides that it is an offence for any person to keep, use, assist in the management of or advertise any place as a common betting-house or betting information centre. Neither should any person benefit from having made a bet or wager in a common betting-house or betting information centre.

A "betting information centre" is defined as a place used or kept for receiving or transmitting by telephone or by other means, any information relating to a horse-race or other sporting event for betting or wagering in contravention of the Betting Act, while a "common betting-house" is a place kept or used for betting or wagering or relating to any horse-race or other sporting event to which the public or any class thereof has access, or any place used for habitual betting or wagering whether or not the public has access, or a place used by a bookmaker for the purpose of receiving or negotiating bets or wagers.

In relation to betting or acting as a bookmaker, s 5(1) states that anyone who bets or wagers with a bookmaker in any place by any means, is guilty of an offence. In addition, s 5(3) makes it an offence to act as a bookmaker in any place. In this respect, a “bookmaker” is a person who, whether on his own account or agent for any other person, receives or negotiates bets or wagers whether on a cash or on a credit basis and whether for money or money’s worth, or who in any manner holds himself out or permits himself to be held out in any manner as a person who receives or negotiates those bets or wagers.

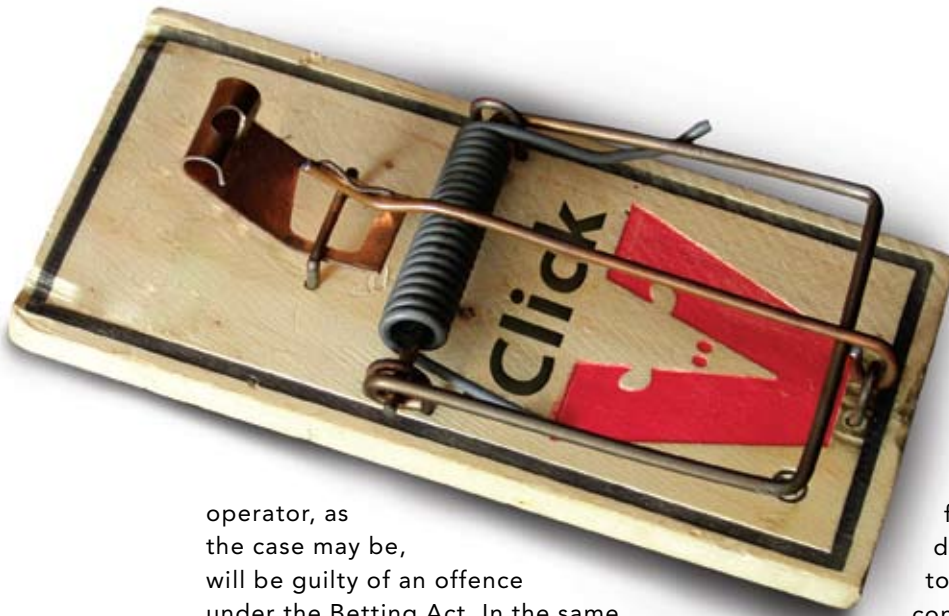
From an examination of these sections, it would seem that several conclusions can be drawn. First, it does not appear that there is any provision allowing for an action to be brought against a person or entity that is in breach of the Betting Act and is located overseas. As such, an internet provider maintaining a gambling website based overseas, or with its server located overseas, would probably not be liable to prosecution under the Betting Act, even if such website is accessible to Singaporeans.

Second, it is arguable that the scope of the Betting Act is limited to only horse-races and to sporting events which, as defined, include any “race, fight, game, sport or exercise”. The scope of the Betting Act, therefore, may not extend to poker,

blackjack or casino-type transactions. In that sense, such casino-type gambling websites (as opposed to sports betting-related websites) would appear to fall outside the purview of the Betting Act, and individuals or internet providers who visit or maintain such websites would probably not be open to prosecution under the Act.

Third, liability under the Betting Act is largely conditional on an individual having engaged in a prohibited act in a common betting-house or betting information centre. Under s 3(1), it is generally the owner, occupier or any person who permits the use of a place as a common betting-house or betting information centre that is guilty of an offence. Therefore, it appears to be unlikely that if, for example, an individual accesses a gambling website from the comfort of his home, or from the office, or at an internet café, he would fall foul of the provisions of the Betting Act.

An offence may, however, be committed if a particular location is used as the centre of an operation for the taking of bets or wagers, such as an internet café in which a significant number of the terminals are dedicated to or used for the taking of such bets or wagers, or even a place of residence which is used for that purpose. In such cases, the said location may come under the definition of a common betting-house or betting information centre and the owner, manager or



operator, as the case may be, will be guilty of an offence under the Betting Act. In the same way, it is probable that the provider of an interactive gambling website based in Singapore can be said to be a "bookmaker", and will come under the purview of the Betting Act.

COMMON GAMING HOUSES ACT

In a March 2005 article in WWLegal. Com titled "Online Gambling Laws in Singapore", (see www.wwlegal.com) the prohibitions under the Common Gaming Houses Act were summarised as follows:

(a) any person is prohibited from gaming in a common gaming house (s 7). Section 2 defines "common gaming house" to include any place kept or used for gaming to which the public or any class of the public has or may have access, and any place kept for habitual gaming, whether the public or any class of the public has or may have access thereto or not, and any place kept or used for the purpose of a public lottery whether the public has access thereto or not;

(b) any person is prohibited from gaming in a public place (s 8); and
 (c) any person is prohibited from buying or depositing money to or with any person concerned in the business of a common gaming house, or buying a lottery ticket (s 9). Section 9 further states that every lottery ticket bought or introduced into Singapore will be forfeited to the Government.

In relation to the above sections, s 4(1) specifically makes it an offence to "announce or publish or cause to be announced or published, either orally or by means of any print, writing, design, sign or otherwise, that any place is opened, kept or used as a common gaming house, or in any other manner invites or solicits any person to commit a breach of section 7, 8 or 9." This means that the act of advertising a common gaming house or encouraging a person to engage in the acts set out above is an offence.

In addition, under s 3(1), it is an offence for any person to keep, use, permit the use of, assist in the care and management of, or advertise any place as a common gaming house. These prohibitions are primarily

directed to owners, occupiers (however temporarily of the premises) and persons who have the care and management of the relevant premises. The basis for liability under the CGHA is then, primarily, the existence of a common gaming house. In the case of an individual accessing a gambling website from his home or office, it is therefore unlikely that he would be said to have done so from a common gaming house, unless the home or office in question is a place used for habitual gaming or which comes under the definition of the term "common gaming house". However, such a place (even if it be a home) may be said to be a common gaming house if the resident habitually places wagers on behalf of one or more persons from there.

In the same way, it is likely that an internet café in which a number of terminals are dedicated exclusively to internet gambling will be held to be a common gaming house, and the owner, manager or a person who has the care and management of such a café would probably have committed an offence under the Act.


The case of *Public Prosecutor v Peh Chye Heng* [2009] SGDC 100 supports the above. There, a raid had been conducted on a cyber café located in Geylang. Mr Peh was the sole proprietor of the cyber café. He had rented the premises from

the owner. The cyber café provided online casino gaming to customers. Mr Peh had employed one Mr Foo as a cashier, to man the counter and to operate the online casino. These games were games of chance which did not require skill. The cyber café was open to the public and anyone could enter it to bet on online casino games via the computers there.

Mr Peh was convicted of a robbery offence punishable under s 394 of the Penal Code (Cap 224) after a trial. He then pleaded guilty to another charge, that of being the occupier of a particular place and having used the said premises as a common gaming house, specifically, a place for the purpose of online casino gaming, to which any class of the public had access, an offence punishable under s 4(1)(a) of the Common Gaming Houses Act.

In the above case, the cyber café in question was clearly used for the purpose of online casino gambling. It is arguable, however, whether an internet café that simply had a set of links to online gambling websites on one or more of its terminals would be considered a common gaming house.

Even in circumstances where a "common gaming house" is absent, it should be noted that an individual can still be guilty of an offence if he is found "gaming in a public place" (for example, an



internet café), as provided under s 8. Also, there are circumstances where an individual may be guilty of an offence even if he accesses a gambling website from his own home, if he contravenes s 9 by paying or depositing any money or money's worth to or with an internet gambling website as a stake in a public lottery or buys a lottery ticket.

Under s 5, it is also an offence for any person to assist in the carrying on of a public lottery, or act in certain ways in relation to a public lottery (including selling, giving, delivering, collecting, writing, printing or publishing any lottery ticket). Based on the definition of "lottery ticket" in the Act, it is unclear whether or not print-outs of internet gaming websites could be considered "lottery tickets". If they are, this could be a means by which individuals or internet providers who handle such print-outs might be made liable under the Act.

Finally, like the Betting Act, there does not appear to be any provision under the Common Gaming Houses Act making acts committed outside Singapore offences, if these were offences when committed in Singapore.

PRIVATE LOTTERIES ACT

Under the Private Lotteries Act, a private lottery promoted or

conducted without a permit is unlawful. However, in the definitions of "lottery" and "private lottery", and the other provisions of the Act, there are no prohibitions on a private lottery being conducted online. As such, it is probable that this Act does not create any offences in respect of online gambling.

CASINO CONTROL ACT

The Casino Control Act was passed in 2006. Section 2 defines "casino" to mean any premises, or part of premises, within a designated site where persons may participate in one or more approved games. Section 40 of the Casino Control Act makes it clear that ss 5(1) and 5(2) of the Civil Law Act shall not apply to transactions taking place in the casino or which are incidental to the business of the casino. The Casino Control Act, therefore, does not give a blanket approval to online gambling such as playing at internet casinos, but licences approved gambling activities at certain premises.

THE BROADCASTING ACT (CAP 28) AND THE MEDIA DEVELOPMENT AUTHORITY ("MDA")

To examine the question of whether supplying data or advertising in relation to online gambling is legal, the Broadcasting Act and its attendant subsidiary legislation needs to be considered. In 1996,

pursuant to the Broadcasting Act, the Broadcasting (Class License) Notification 2001 ("the Notification") was issued.

The Notification provides that certain licensable broadcasting services (as defined in the Broadcasting Act, which term includes the supply of data over the internet) are subject to a class license. These include audiotext services, videotext services, teletext services, broadcast data services, value added network computer online services, and computer online services that are provided by internet content providers ("ICPs") and internet service providers ("ISPs").

Briefly, ICPs and ISPs (which terms are defined in the Notification) who provide licensable broadcasting services as specified in the Notification are automatically licensed and subject to the terms of the licence which include, but are not limited to, their being



required to comply with the laws of Singapore, co-operate with the MDA with respect to investigations into breaches of the BA and use their best efforts to ensure that services provided comply with any MDA codes of practice and do not contain any programme that is against the public interest, public order or national harmony. The Broadcasting Act defines “programme” to mean, generally, any matter the primary purpose of which is to entertain, educate all or part of the public, or any advertising whether commercial or not but not any private communication.

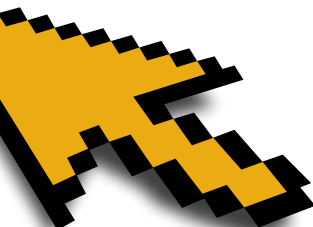
Paragraph 15 of the Notification states that a licensee shall, amongst other things, ensure that its service is not used for, or in furtherance of, games and lotteries, the conduct of which is an offence under the Common Gaming Houses Act, unless the licensee is exempted from the provisions of that Act and, further, shall avoid the broadcast of horse-racing analyses, commentaries or tips, other than horse-racing results, for the purpose of gambling. If, by providing such services, the licensee assists in a public lottery (an offence under s 5 of the Common Gaming Houses Act), he will not only be in breach of the Notification but of the Common Gaming Houses Act. As such, it appears that contravention of the Notification is

based on whether or not there would be any liability under the Common Gaming Houses Act (a topic discussed earlier).

No sanctions are provided in the Notification for a breach of any of the conditions set out therein, but s 12 of the Broadcasting Act provides that the MDA may, if deemed appropriate, cancel or suspend a licence or impose a fine for any breach of the conditions of a licence. Also, the MDA has the authority under Part VIII of the Broadcasting Act to deem a foreign broadcasting service unacceptable if the MDA considers it to include matter that, *inter alia*, prejudices the public interest or order, or offends against good taste and decency, and it is an offence under s 30 of the Broadcasting Act to advertise or promote such a service, or to supply equipment or programming for such service. However, it is not clear whether gambling comes under any of the above categories.

CONCLUSION

Until there is legislation dealing specifically with online gambling, there are no absolute answers as to whether and when liability arises for such activity. In each case, it will be necessary to examine whether the particular or potential activities fall within the different types of gambling-related legislation discussed above. ¹⁵



THE EVOLVING FACE OF REAL ESTATE PRACTICE

CONVEYANCERS TODAY FACE A SIGNIFICANTLY DIFFERENT MARKET FROM A DECADE OR TWO AGO. NORMAN HO IDENTIFIES THE NEW AND DEVELOPING AREAS OF REAL ESTATE PRACTICE, AND SHARES HIS VIEWS ON THE RELATED EXPERTISE REQUIRED OF LAWYERS AND WHAT PRACTITIONERS CAN EXPECT IN THE YEARS AHEAD.

By Norman Ho,
Partner, Rodyk
& Davidson LLP



CONVEYANCING

Once only associated with residential and mass-market retail transactions, has evolved quietly over the years and the change has accelerated over the last 20 years or so. It has now developed into a sophisticated practice area with a growing emphasis on complex structures, involving complicated arrangements and associated financing instruments. Many transactions now involve work that is outside the realm of usual retail conveyancing matters, and which is focussed instead on corporate clients and large building transactions.

NEW AREAS

Institutional real estate

Due to the growing global economy, there has been a sharp increase in the number of institutional investors, global property funds, public-listed real estate companies, government-linked companies and onshore and offshore special purpose vehicles purchasing properties in Singapore. These institutional clients have poured their resources into acquiring whole buildings and parcels of land for development in Singapore, and they rely on lawyers to protect their interests. The real estate properties which they acquire include commercial buildings, office units, residential properties, warehouses, industrial plants, hotels, resorts and power plants, among others.

Such projects are usually high-profile and complex. Lawyers acting in these projects should be armed with expertise in an array of conveyancing matters, including being familiar with the compliance of regulatory

requirements, deal structuring, drafting and negotiating management agreements, funding and divestment activities, land use, planning regulations, government land tenders, investigation of title and property due diligence.

The complexity of these projects also mean that in order to deliver an integrated solution to clients, the law firm involved will have to work across legal disciplines to deal with the wide-ranging legal issues that may arise. For example, in an acquisition of an uncompleted building, conveyancing lawyers will have to work closely with construction lawyers to negotiate and draft the Sale and Purchase Agreement with regard to terms like the appointment of project consultants, treatment of defects and assignment of various building works contracts. Also, issues like assignment of intellectual property rights to a building's name, trademark and goodwill will involve intellectual property lawyers.

More particularly, when assisting a client to acquire land parcels for development or re-development, the lawyer usually further assists the client in the development of the project on the same land, together with all aspects of subdivision. Often, he or she would have to assist the client in applying for its Housing Developer's License and consult with the Controller of Housing on the client's behalf. In relation to planning and land use issues, lawyers have to advise on land use conditions, permissible gross floor area, change of use and re-zoning, if any.

Where the property involved is a leasehold property (for example, land that

is leased from government bodies such as Urban Redevelopment Authority, Jurong Town Corporation (“JTC”), Housing Development Board (“HDB”) and Sentosa Development Corporation), there may also be issues in relation to the upgrading of the lease tenure and uplifting of lease conditions for the purposes of development or re-development.

A law firm’s information technology and management procedures are crucial to the handling of these projects to complement its legal expertise so that its lawyers can deliver large volumes of work in a short time, to provide high-speed information retrieval capabilities and up-to-date progress reports. This enables the lawyers to effectively manage mega-sized and complex projects and quickly respond to clients’ business needs in a fast-moving market.

It is likely that we can expect to see sustained growth in this area of practice. As land in Singapore continues to be considered valuable and profitable to possess, institutional clients will no doubt continue to be attracted to acquire properties here.

Real Estate Investment Trusts (“REITs”)

REITs first made its appearance in Singapore’s financial market through the debut offering in 2002 and over the years, there are many REITs that have been set up in response to the public’s fervent demand. Whilst still a burgeoning industry, this is widely

acknowledged to be an important growth area in the legal domain.

REITs are governed by a wide spectrum of legislation and guidelines. The lawyer involved in a REIT transaction must be familiar with the regulatory framework governing the trustees and the fund, including the Securities and Futures Act, the Listing Manual of SGX-ST, the Code on Collective Investment Schemes and the Property Funds Guidelines, the Code of Corporate Governance 2005 and the Companies Act.

The REIT lawyer also has to be familiar with a various aspects of corporate real estate practice, namely sale, acquisition and leasing. For REITs that acquire industrial properties situated on sites owned by JTC or HDB, numerous applications have to be made to obtain consents from these government bodies for the purchase. The documents to be drafted in a usual REIT transaction include the Put and Call Option Agreement, Sale and Purchase Agreement and Lease-back Agreement, and there are usually extensive negotiations between the seller and the REIT in the preparation of these documents.

In this regard, commercial sense is also expected of the REIT lawyer. As such, the lawyer should be aware of the operational and management structure of the REIT, and more importantly, its commercial concerns so that clauses addressing the same can be

incorporated into the legal documents. For example, sellers are usually obliged under the terms and conditions of the Lease-back Agreement to take up maintenance works to the building. This is a strict requirement, as REITs often require that only buildings of a certain grade and quality be bought. A non-REIT buyer may not be as concerned about this requirement.

The pace of growth of REITs has been described by those in the industry as phenomenal and it has evolved to become a significant asset class in our financial landscape. As the government continues to promote Singapore as an attractive and competitive jurisdiction for establishing REITs, this area will no doubt continue to expand.

Collective sales

In 1994, the first en-bloc sale was transacted, paving the way for many more developments. Due to Singapore's severe land constraints, en-bloc sales are the main source of prime freehold land. Collective sales are a creative way of freeing up land and utilising increased plot ratios to realise the full developmental potential of such land.

The lawyer involved in a collective sale transaction has to take his or her client through the entire sale process from the appointing of the property consultants, to forming and advising the sale committee of their responsibilities, drafting and negotiating the Collective Sale Agreement (with the owners) and

the Sale and Purchase Agreement (with the purchaser), appearing before the Strata Title Board, to successful completion of the transaction. He or she must be aware of the many issues and concerns specific to that particular project.

The sheer volume of the transaction should also be noted when the lawyer acts for the sellers. As most projects consist of numerous units, the usual checks on title and bankruptcy/winding up searches done in one traditional conveyancing transaction has to be multiplied, and in some projects, several hundred times over. To raise the standards of governance and disclosure in such transactions, the government also introduced new amendments to the legislation in 2007, thereby increasing the responsibilities of the lawyer. Amongst others, he or she must now witness the signing of the collective sale agreement by each owner, explain the legal terms and liabilities of the agreement to each owner, and also address any issues raised by the owners.

One special feature of collective sale transactions is that they can become particularly acrimonious. As such, litigation lawyers are often involved. In the first half of 2007 we saw the collective sale frenzy reaching a fever pitch, with an unprecedented and unparalleled 58 deals closed. Amid the exuberance fuelled by

sky-rocketing prices, high-profile legal tussles between owners and purchasers became a common feature. Hostility is often created between consenting owners and non-consenting owners or owners who have consented but sought ways to rescind their consent to the sale agreement. Many who were set against the sale raised objections by relying on legal technicalities to thwart the sale. Dissenting voices also complained that rights of minorities were often railroaded in a transaction where “tyranny of the majority” operated.

To avoid such situations, extra care must therefore be taken by the lawyer from the outset to comply strictly with all legislative requirements under the governing Land Titles (Strata) Act, and to advise on the rights and responsibilities of all owners (regardless of whether they are for or against the sale) clearly and fairly.

Whilst en-bloc waves ebb and flow with market conditions, with a projected population of 5.5 million in the future and the urgent demand for more land, collective sales will no doubt continue to play a crucial role in urban land renewal in Singapore.

Real estate finance

The practice of real estate financing has changed drastically over the years. No longer do conveyancers only deal with traditional mortgage securitisation relating to the sale and

purchase of residential properties. These days, there is a broad spectrum of securitisation and structured real property related financing transactions. This is closely tied to the increased servicing of institutional clients as aforementioned. In their acquisition of buildings and land parcels, lawyers will represent the corporate borrowers or the domestic and foreign banks, finance companies and institutions.

Such clients usually require advice relating to syndicated loan facilities, and the lawyer’s expertise should include advising on bridging loans, compliance and regulatory issues, land and construction loans, loan structuring and restructuring and project management. The security documents that the lawyer will draft and negotiate upon are usually the Facility Agreement, Sale and Lease-back Agreements, Mortgage, Assignment of Rental Proceeds/ Maintenance Contracts/ Insurance, and others. Tax and revenue issues are addressed as well in a typical transaction.

Whilst still rare in Singapore, Islamic banking is an up and coming niche area that some real estate financing lawyers have been involved in. The Islamic banking industry is now worth almost an estimated US\$1 trillion and is widely considered to be one of the fastest growing sectors in the world of finance. Even in the midst of a global economic crisis, Islamic banks have weathered

the storm thanks to strict regulations administered by Islamic law, or *Shari'ah*. The Islamic banking industry is expecting growth rates of 15% annually.

The lawyer in such transactions should have the expertise to help clients finance projects through *Istisna'a* (contract of exchange with deferred delivery) and *Ijara Mawsufah fi al Dhimmah* (forward leasing) tranches; advise them on credit facilities and real estate acquisitions involving a *Musharakah* agreement (joint enterprise or partnership structure with profit/loss sharing implications that is used in Islamic finance instead of interest-bearing loans) with conventional debt providers and Islamic investors; guide them through the introduction of Islamic mortgage products and insurance policies abiding by Islamic insurance concepts, and make sure that all terms and conditions are *Shari'ah* compliant.

DOES SIZE MATTER?

While any conveyancer can practice in these new developing areas as long as he or she possesses the requisite expertise, one possible obstacle to such practice would be the nature and size of the law firm he or she is at. First, some firms may not have sufficient insurance coverage for such complex and large deals. The stakes are high in these transactions, which are typically worth millions or even

billions. Additionally, most banks have policies of only appointing law firms with the requisite minimum amount of insurance coverage.

Second, manpower problems, already a reality even for larger legal practices, are made more acute in smaller ones. As mentioned, such high-end transactions entail multiple layers of checks, cross-disciplinary legal services and large volumes of documentation. Unlike their bigger counterparts, it would be a disadvantage if the smaller firm does not have as many specialised lawyers practicing in different fields, or sufficient secretarial support, legal executives and junior lawyers at their disposal. Third, emphasis on high-technology in a fast-moving market could pose a problem to small firms with less resources to invest heavily in information technology.

This, however, does not mean that the bigger law firms face no competition in these areas of work. Globalisation and Singapore's membership in the World Trade Organisation has opened the floodgates to free movement of goods and services, including legal services. In the same vein, the government has recently allowed



qualifying foreign law firms (“QFLF”) to practice in Singapore. In the area of conveyancing, these QFLFs are prohibited only from the practice of retail conveyancing. With their vast experience in dealing in high-end real estate transactions, there is no doubt that these large international firms would compete for a bite of the pie when there is further liberalisation of legal services in Singapore.

Notwithstanding that size does matter in such cases, all is not lost for small firms which can focus their energies in building a niche practice in mass-market retail conveyancing.

THE WAY AHEAD

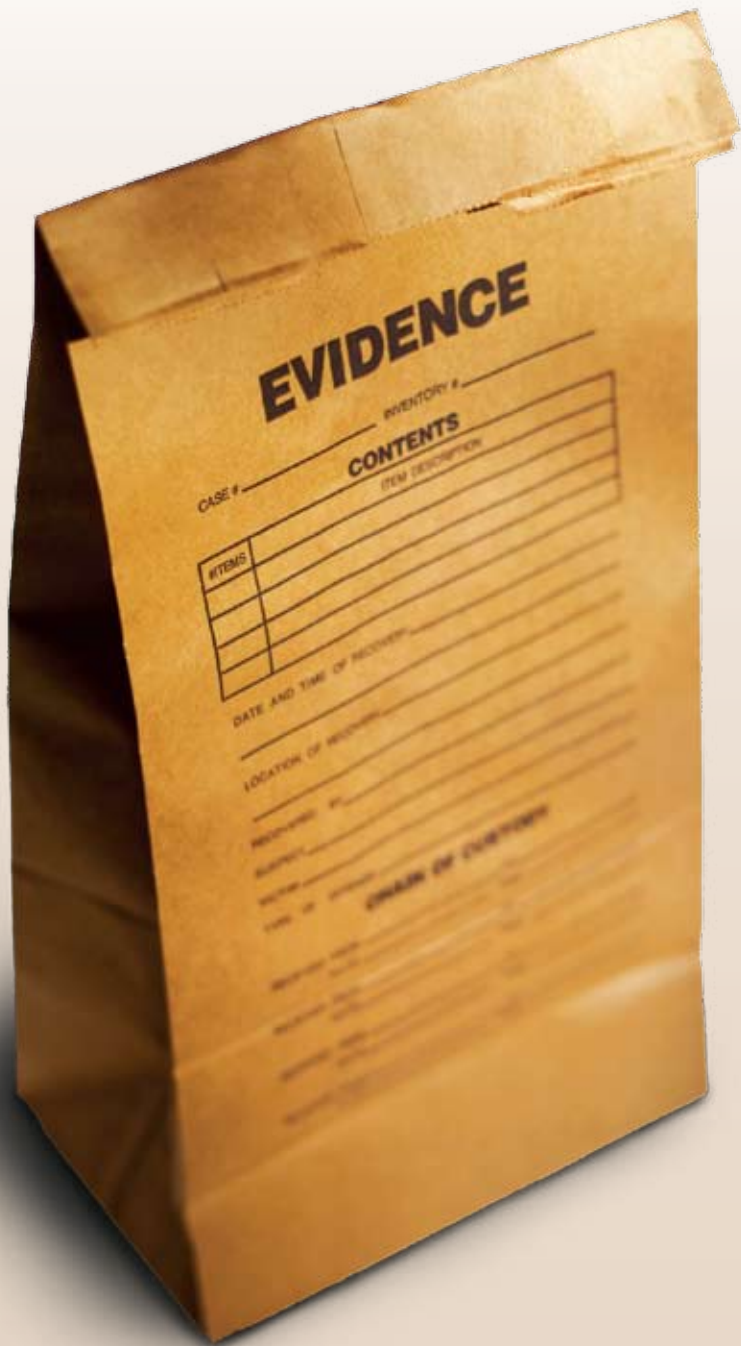
For years, the public perception of conveyancing practice has been that it is a sunset industry. The abolishment of scaled fees in 2003 saw a dramatic decline in legal fees of conveyancers.

The recent practice direction by the Law Society of Singapore has gone further to withdraw the recommended fee guidelines for conveyancing transactions with effect from 1 October 2009 and with the complete liberalisation of conveyancing fees, it is no wonder that many conveyancers find it a struggle to sustain a business in pure mass-market retail conveyancing. In fact, with our UK and Australian counterparts already going the “do-it-yourself” way, some Singaporeans are questioning why we are not moving in a similar direction.

However, one should pause before labelling conveyancing a sunset practice area. It is erroneous to view the practice as straightforward, simple, or work that can be carried out by a secretary or a real estate agent. Even for the simplest and most typical of transactions – that of an individual setting out to sell or purchase a single property – the responsibilities and risks involved for the lawyer are numerous. His or her expertise cannot be replaced by an individual who is not legally trained.

With the entry of the new developing areas, even more is demanded in the skill of the lawyer. The growth of these areas have indeed reinforced the vital significance of conveyancing practice. As explained above, every one of these areas have evolved to become a vibrant and important part of the real estate industry. It would not be a stretch to say that these are just early days. There is still much room for these areas to grow and develop, and as it does, the expertise of the conveyancing lawyer will continue to be sought after.

The future of conveyancing practice remains bright – the demand for experienced conveyancing lawyers with sound knowledge of laws relating to real estate practice far exceeds supply. In land scarce Singapore with a rapidly growing and upwardly mobile population, property transactions are definitely here to stay. *is*



ETHICS IN THE CRIMINAL COURT

“The First Thing We Do,
Let’s Kill All the (Criminal)
Lawyers!”

– William Shakespeare, Henry VI,
Act IV, Scene 2

By Shashi Nathan, Partner, Harry Elias Partnership
and Tania Chin, Associate, Harry Elias Partnership



LAWYERS who defend criminal cases have often been regarded by non-lawyers, and sometimes even other lawyers, as being somewhat on the shady side of the practice of law. This is because many lay people often (whether rightly or wrongly) associate lawyers with their clients. The role of Defence Counsel in the criminal justice process is commonly misunderstood. When discussing the notion of “criminal defence ethics”, views are more often than not laced with a little sarcasm and cynicism.

The standards of professional ethics that Defence Counsel are obliged to maintain, however, are no less exacting than those by which Prosecutors and other practitioners are bound, even though they are sometimes different. In this article, we seek to dispel several myths about Defence Counsel and, in doing so, discuss some of the common ethical issues that arise in our criminal justice system.

Myth #1: It is wrong for Defence Counsel to represent guilty clients

“How can you defend your client if he tells you that he is guilty?”

If we had a dollar for every time we have been asked this question, we would be sitting on a small fortune today. It’s often surprising

why people think that a person who is guilty of an offence cannot or need not be given legal representation.

First, guilt or innocence is something that is to be determined by a court of law and not by a lawyer. Under r 72 of the Legal Profession (Professional Conduct) Rules (the “LP(PC)R”), a lawyer is under the duty to defend any person on whose behalf he is instructed on a criminal charge, irrespective of any opinion which he may have formed as to the guilt or innocence of that person. A criminal lawyer’s role is thus to present his client’s case as best as he can, and to ensure that his rights as an accused person are protected.

Second, if a client clearly admits his guilt to his lawyer after legal proceedings have begun, the lawyer ought to continue to act for his client and must take this on board as part of his instructions: r 74(b) of LP(PC)R states that “[a]n advocate and solicitor to whom a clear confession of guilt has been made by a client ... *should*, if the confession is made during the proceedings, continue to act but shall not set up an affirmative case inconsistent with the confession by, for example, asserting or suggesting that some other person committed the offence charged or calling evidence in support of an alibi [emphasis added]”.

The lawyer is, of course, always at liberty to refuse to act at the outset should a confession of guilt be made

by the client before legal proceedings have commenced, in which case the relationship of advocate and solicitor and client does not come into play to start with: r 74(a) of LP(PC)R states that “[a]n advocate and solicitor to whom a clear confession or guilt has been made by a client ... may, if the confession is made before the proceedings have commenced ... continue to act but shall not set up an affirmative case inconsistent with the confession by, for example, asserting or suggesting that some other person committed the offence charged or calling evidence in support of an alibi [emphasis added]”.

Rule 72 of the LP(PC)R would apply after Defence Counsel has agreed to act for the person charged with an offence. It is not the lawyer’s role to judge the accused as the finding of guilt or innocence is constitutionally for the court, and the court alone, to make. Based on the instructions given to them by clients, Defence Counsel are under a professional and ethical duty to act in the best interests of their clients and to put forward their case as best as they can, subject of course to a lawyer’s paramount duty to the court (see r 2(2) of the LP(PC)R)).

“It’s often surprising why people think that a person who is guilty of an offence cannot or need not be given legal representation.”

The lawyer is therefore bound by two duties: his paramount duty to the court, and a secondary duty to the client. Insofar as lawyers are bound to keep all information disclosed by the client confidential as it is subject to professional privilege, Defence Counsel must not set up an affirmative case inconsistent with a confession. Thus, Defence Counsel must remember that he cannot

assist his client to give evidence which is different from what was recorded in the interview as he has a duty not to mislead the court: r 56 of the LP(PC)R states that “[a]n advocate and solicitor shall not knowingly deceive or mislead the Court, any other advocate and solicitor, witness, Court officer, or other person

or body involved in or associated with Court proceedings”.¹

In *XP v Public Prosecutor* [2008] 4 SLR 686, the Honourable V K Rajah JA affirmed the presumption of innocence as the cardinal principle upon which was founded the most elemental rule of the criminal justice system.

¹ See also Rajah J’s decision in *Public Trustee v By Products Traders Pte Ltd* [2005] 3 SLR 449 at [35].

The principle requires that the Prosecution must establish guilt and prove its case against an accused beyond reasonable doubt. The criminal justice system permits the State to intrude into the life of an individual citizen only if it is able to establish legal guilt by discharging the onus of proving allegations of criminal wrongdoing beyond a reasonable doubt. Therefore, the criminal defence lawyer's function is not limited to protecting the innocent from a wrongful conviction, but also includes protecting those who are deemed to be "factually guilty" (that is, where a prosecution is unsustainable because of any weakness in its case theory or as a consequence of inadequate and poor evidence from its witnesses) against any overreaching of the law by the State. The role of the Defence Counsel is to identify and highlight these deficiencies to the court.

Thus, despite a clear confession of guilt by an accused, the defence lawyer must still test the evidence adduced by the Prosecution and contend, if necessary, that the case against the accused is not made out. The lawyer may also raise defences which do not deny the accused's commission of the *actus reus*.

Interestingly enough, clients who come to us confessing to everything they have been accused of are few and far between. The majority of clients tend to say "it wasn't me" or

they would try to explain that they never intended to commit an offence. Sometimes, the truth comes out in the course of taking instructions from your client, and it is important for Defence Counsel to test his own witnesses' evidence in private before the trial begins. If such evidence cannot hold up in the meeting room of your office, what chance does it have in the courtroom?

Myth #2: It is wrong for lawyers to exert pressure on the accused to plead guilty

The issue of the plea-bargain comes into play on occasions when this would provide the best result for the accused, as well as save valuable time and expense for the State. Before advising a client to accept an offer by the Prosecution, Defence Counsel must advise him on the various options open to him. This includes the chances of success should he claim trial, the benefit he would obtain by taking an early plea of guilt, and the different costs which would apply as a consequence of his decision.

Costs are an important consideration, and it is sometimes sad to see an accused person pleading guilty to a charge simply because he has no money to claim trial. We certainly believe that one should never plead guilty for the sake of convenience or because one is unable to obtain legal services that would assist one in the conduct of a trial. We have

in Singapore schemes like the Criminal Legal Aid Scheme ("CLAS") and the Legal Assistance Scheme for Capital Offences ("LASCO") to help accused persons who are in need of representation. These schemes, however, do not apply to all cases and to all accused persons. There are many accused persons who fall outside these schemes and who often take the easier and convenient option to plead guilty because they cannot afford to claim trial.

Defence Counsel certainly knows this, and must from the outset, advise his client properly on the costs of taking the matter all the way to trial. He should not push the client to take a guilty plea because he feels that the client would not be able to afford full trial fees. If a criminal lawyer recognises that the accused has a valid defence and a reasonable chance of succeeding at trial, he should do his best to take the matter to trial or at the very least, assist the accused by recommending another lawyer who may be able to take over conduct of the case for reduced fees. Telling the accused to plead guilty simply on account of costs is ethically wrong and a disservice to the client.

The flipside of this ethical issue is when Defence Counsel has to tell a client that he is likely to fail in his



matter were to go for trial. Lawyers should never advise a client to take his case to trial only to earn higher fees. Having assessed the strength of the evidence, a lawyer should be able to ascertain if an accused has a reasonable prospect of success at trial. In many cases where Defence Counsel has utilised the Criminal Case Management System ("CCMS"), and has had the opportunity of discussing the evidence with a Deputy Public Prosecutor, the likelihood of success or failure of the accused's case becomes even more evident.

If, for example, Defence Counsel has had sight of the accused's long statements (statements made to and recorded by the police) incriminating him, or is apprised of other incriminating evidence obtained through

the CCMS process, it would be best for Defence Counsel to obtain from the Prosecution an offer of a reduced charge or number of charges for his client. Defence Counsel should then discuss this information in detail with his client and advise him accordingly – that claiming trial is likely to result in his being convicted.

Sometimes, of course, clients take a stubborn stance and insist on claiming trial in any case. Again, the duty of Defence Counsel is to put his client's case as best as he can before the court. This is notwithstanding the fact that he might have seen a confession from the accused or be privy to any other incriminating evidence against him. What Defence Counsel cannot do is to lie to court or put forward a case that is contrary to the evidence he has been shown. If he does, the danger of doing so would be that the Prosecution may then apply to admit the documents shown to him as evidence, which if the court so orders, is likely to be disastrous for his case.

In appropriate cases, a lawyer *may* advise a client to plead guilty but he must ensure that the client can freely choose to plead guilty or not: r 75 of the LP(PC)R. In order for the freedom of choice to be meaningful, clients must be given sufficient information to make their decision. Defence Counsel has a duty to ensure that the accused is able to make an informed choice on whether to plead guilty. Rule 40 of the LP(PC)R states that “[a]n advocate and solicitor shall in appropriate cases evaluate with a client whether the consequence of a matter justifies the expense or the risk involved”.

Clearly, if Defence Counsel is of the view that the accused is unlikely to escape conviction, Defence Counsel should explain his reasoning and advise the accused in strong terms to plead guilty. At the same time, Defence Counsel must

reassure the accused that Defence Counsel would adequately represent the accused at trial and the ultimate decision as to whether to plead guilty is up to the accused.

Defence Counsel must also properly advise his client of the nature and consequences of the plea. Section 180(b) of the Criminal Procedure Code (Chapter 68) requires that the accused understands the nature and consequences of his plea and intends to admit without qualification the offence alleged against him. The consequences of a guilty plea are that the accused may be subjected to the maximum punishment prescribed by law upon conviction. The nature of the plea relates to the nature of the offence for which the accused is charged, therefore Defence Counsel must ensure that the accused does not intend to plead guilty on the basis of his mistaken assumption that he has committed an offence.

Defence Counsel has a duty to explain the advantages of a guilty plea to the accused. He should also advise the accused that a plea of guilt is generally regarded by the court as a mitigating factor. Where the accused claims to be innocent but wants to plead guilty to obtain a more lenient sentence, Defence Counsel should also explain that the relevance and weight to be placed on a guilty plea must depend on the circumstances of each case.

Myth #3: The case of *Defence Counsel v Deputy Public Prosecutors*

A myth or assumption that is often heard is that Defence Counsel and Deputy Public Prosecutors (“DPPs”) don’t get along, and that there is a deep sense of mistrust and animosity between the two sides. This is a myth that should be dispelled once and for all.

Both Defence Counsel and DPPs play an extremely important role in the criminal justice system. Both have a duty to the court which is paramount to any other duty they have in respect of their clients or their office.

When one talks about ethics in the criminal justice system, one must include the relationship between Defence Counsel, the Public Prosecutor, and the court. Whilst in an adversarial system, it is of course the aim of any party to come away victorious or successful at the end of a trial, there should not, however, be a “win at all costs” stratagem.

It is worth highlighting that whilst both Defence Counsel and the Public Prosecutor have a duty to put forward the best case possible for the client or the state, this cannot be done at the expense of concealing the truth.

In every jurisdiction in the world, there will be some Defence Counsel and some Prosecutors who don’t play fair. Amongst the many tricks in the book are concealing evidence, and being less than honest with the court and the opposing party. In our

view, there is no place for this in our system. At the end of the day, experienced Defence Counsel and Prosecutors will and should develop a healthy mutual respect for each other and their practice.

Defence Counsel should not forget that the Public Prosecutor is a representative of the state and is there to present evidence on its behalf. The role of the Public Prosecutor is certainly not to secure a conviction in every case that it prosecutes. The role of the Public Prosecutor is to present its case as best as he can on behalf of the State, and if that presentation is based on evidence which is good enough to secure a conviction, then he has done his duty.

The role of Defence Counsel is to defend his client to the best of his ability and to test the Prosecution's evidence. This testing of the Prosecution's evidence is extremely important because the burden has always remained on the Prosecution to prove its case against an accused person beyond a reasonable doubt.

In High Court cases in Singapore, there is usually a Preliminary Inquiry at which all evidence which the State intends to rely upon in a trial is presented to the court before an accused person can be committed to stand trial. This system gives Defence Counsel full discovery of all documents and evidence in the possession of

the Prosecution. It has the effect of pre-trial discovery.

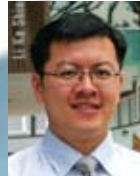
Unfortunately, we do not have the same option of discovery in criminal matters before the Subordinate Courts. This does not mean that parties should not share pertinent information which would assist in a fair trial. There are certainly benefits to this sharing of information at CCMS meetings as discussed above. Sometimes, the lack of information from one side and "surprises" that suddenly pop up at trial contribute to a feeling of lack of trust and amity between Defence Counsel and the Prosecution.

Our suggestion in moving forward is that both Defence Counsel and Public Prosecutors accept and appreciate that each has an important role to play in our system. If the Prosecution has strong evidence which is likely to convict an accused person, or indeed a confession from the accused, he should discuss and share this information with Defence Counsel. Defence Counsel will then be in a better position to assess the evidence and advise his client accordingly. This may save valuable days in trial and, indeed, achieve a fair and just result for all parties.

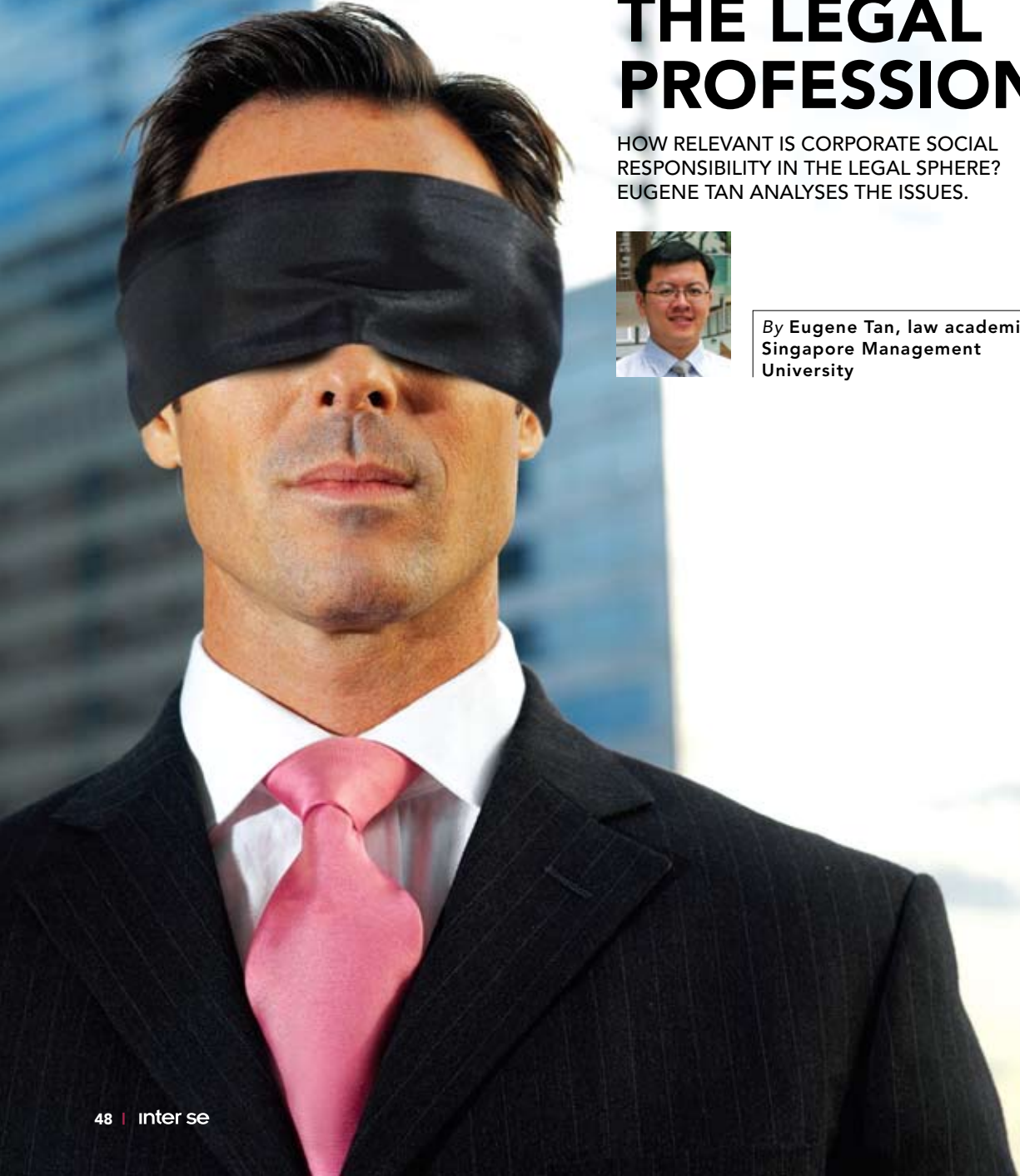
In short, if Defence Counsel and Prosecutors developed a healthy respect for the roles played by each other, then their own relationship and that with the court will be the ultimate benefactors. ¹⁵

CORPORATE SOCIAL RESPONSIBILITY AND THE LEGAL PROFESSION

HOW RELEVANT IS CORPORATE SOCIAL RESPONSIBILITY IN THE LEGAL SPHERE? EUGENE TAN ANALYSES THE ISSUES.



By Eugene Tan, law academic, Singapore Management University



LIKE the demise of Enron some years ago, the blue-chip financial institutions that went bust in the recent financial convulsions had one thing in common. All of them claimed to engage in corporate social responsibility (“CSR”) and subscribed to an ethical way of doing business. But, in truth, as things have turned out, responsibility was patently lacking in the way they operated. Their actions ultimately spoke louder than the corporate spiel that provided the feel-good cover for various vices, including irresponsibility, fraud, and greed.

The sub-prime mortgage crisis in the United States which shocked global markets in 2008 and triggered an economic depression was a manifestation of such abuse of trust, in which key stakeholders of the financial industry developed or allowed the sale of inherently-flawed financial instruments. Much attention has been focused on the bankers and financial advisers involved, but less discussed is the role of lawyers in providing the legal advice and sanction in the development of such toxic financial products. Surely, they could not claim ignorance of the immense moral hazards that were creatively packaged as financial ingenuity and sources of wealth and profitability.

WHAT IS CSR?

Issues relating to corporate accountability, social responsibility,

and ethical conduct are hardly new, and were certainly not alien to the forerunners of today’s modern corporate entities and multinationals. For example, the colonial-era British East India Company was morally exercised over the use of slaves in the West Indies sugar production.

So what is CSR today, and how important is it in the business world? Is it a fad, a myth, a luxury, or a must-have? Is it compatible with the financial bottom-line, and should it be used to boost an organisation’s reputation? More importantly for the legal profession, how concerned should law firms be about CSR?

CSR has become an omnibus term that covers many aspects of business activities and its relations with society at large. Yet despite its increasing popularity, saliency, and visibility, CSR remains a controversial subject and many definitions exist. It might be likened to the proverbial elephant being felt and interpreted differently by different people. Notwithstanding that, CSR embraces the following salient attributes:

- (a) Responsible/ethical conduct (*ie* the domain of ethics);
- (b) Balancing competing and even conflicting aims and aspirations of diverse shareholders and stakeholders (*ie* cross-sectoral involvement and partnership of business, society, and government);

- (c) Positive non-financial outcomes in addition to generating decent profits (*ie* triple bottom-line considerations with regards to financial, environmental, and social governance);
- (d) Sustainability (eg quality of life, environmentally sustainable, inter-generational equity); and
- (e) Generally voluntary in nature, and over and above what the law requires.

Thus, CSR, in essence, is the tangible expression of a business integrating economic, social, environmental and other concerns in its operations. It includes both the internal and external dimensions of a company's activities. Too often in practice, the internal dimension gets forgotten, resulting in CSR having a very strong external manifestation in which enhancing the corporate reputation is deemed more important than doing good. However, in many respects, it is artificial to separate the internal and external dimensions since they are intertwined and impact upon each other. In any case, responsibility has to begin "at home". Otherwise, the CSR efforts would be viewed only as "green wash" – a public relations exercise to enhance a company's reputation and visibility as a responsible corporate citizen.

NEW IMPETUS

Following developments in advanced economies in North America and Europe, CSR has acquired renewed vigor in the corporate landscape in Asia, where the notion of corporate credibility, linked with how a company conducts its business and makes profits, is of growing importance and urgency. Perhaps the most significant development on the CSR front is the ongoing efforts by the International Organization for Standardization ("ISO"), in collaboration with a variety of international partners, to provide a guidance standard for social responsibility.

The use of "social responsibility" rather than CSR is deliberate. Social responsibility applies universally not just to private companies but extends to governments, non-profit entities, and professional industries as well. Currently under development, the guidance standard is scheduled to be ready in 2010 as ISO 26000, and will be for voluntary usage. Unlike other ISO standards, ISO 26000 will not be a certification standard at the outset but may evolve into one.

What is noteworthy is that the ISO 26000 guidance standard seeks to help businesses, NGOs, governments, the labour movement, and other stakeholders internalise the desired norms and values of social responsibility. By virtue of its inherent flexibility and potential

discursive power, ISO 26000 can facilitate the setting of normative standards and enable social learning about social responsibility. This is particularly useful in the sphere of CSR where persuasion and reflexive adjustment, rather than rigid adherence or enforcement, are needed. The ideational standards or expectations enunciated in such guidelines and industry-wide codes of conduct can subsequently form the basis on which the practical application of the law can subsequently acquire effectiveness, efficacy, and legitimacy.

DEVELOPMENTS HERE AND ABROAD

Besides China, countries such as Indonesia and Malaysia have recently enacted legislation requiring local and foreign companies to behave responsibly. The salient worldwide trends suggest that CSR will take on greater importance, and it will impact upon how business is done at both domestic and foreign levels. Norms of responsibility, sustainability, and corporate citizenship are emerging. Civil society, with the aid of new media, is increasingly cognisant and demanding in this regard.

From a social contract perspective, CSR embodies the symbiotic relationship between businesses and their wider operating environment. Interestingly, this is very much in line with the communitarian ethos

espoused in many Asian societies. For instance, Article 5 of China's Company Law stipulates that: "In its business activities, a company must comply with laws and regulations, observe social morals and commercial ethics, act in an honest and trustworthy manner, subject itself to the supervision of the government and the public and assume social responsibility."

Not surprisingly, CSR has gained tentative prominence in Singapore, an important business hub, in the last few years. A key impetus for the nascent CSR movement in Singapore is the economic imperative. As the government is a significant player in Singapore's economy, it is perhaps not surprising that it has taken on the role of a promoter and practitioner of CSR. The government supports the CSR endeavour with an instrumental bent: adapting, incorporating and promoting CSR ideas and concepts in various sectors of the economy. The government also implicitly recognises that CSR has the potential to engender economic vitality and productivity through innovation, enterprise, competition, skills and investment. Operating in a trade-dependent, industrialising economy, Singapore businesses have also reflected an increasing cognisance of the growing CSR movement in the western, industrialised world.

Even then, the domestic CSR scene has acquired a somewhat ambivalent, if not patchy, presence in Singapore.

CSR IN THE LAW

The developments in CSR in the commercial sphere will increasingly impact upon the legal sector here. This is especially so when lawyering in Singapore has a strong business component, one that is also seeking new markets and new innovations. For example, we now talk of globalising Singapore law. Regardless of those ambitions, ultimately, law, the legal system, and lawyering are humanistic endeavours and human enterprises. This means that law, the legal infrastructure that supports it, and the practice of law have to give full expression to and enhance positive human values, instead of detracting from them.

Many law firms here and abroad are now paying attention to CSR – not just in terms of being practitioners of CSR, but also in acquiring and developing knowledge and expertise in CSR. Such law firms have acquired a first-mover advantage. Clients increasingly expect corporate lawyers to be familiar with and able to advise on CSR. In the UK, this development has been given impetus by s 172 of the UK Companies Act which codifies the fiduciary duty of a company director to promote the “success” of the company.

This recent codification of the director’s duty to act in good faith in the company’s best interest necessarily means that the interests of stakeholders, who may not necessarily be shareholders, must be factored in decision-making. In turn, this requires a director to act in good faith with due regard to the probable long-term consequences, the interests of employees, suppliers and customers, as well as the implications for the environment and concerns of the community at large. This would obviously include maintaining high standards of probity, propriety and reputation in business conduct. This legislative provision underlines the importance of making decisions for the long-term and factoring how they affect shareholders and stakeholders alike.

While activities and programmes that demonstrate commitment to CSR are important, all too often, businesses and law firms fail to realise that genuine CSR is fundamentally about values, norms and attitudes towards a variety of stakeholders. These values, norms and attitudes speak to how business and lawyering is done. In many discussions on CSR, ethics is often





mentioned only in passing. This is problematic since CSR programmes and initiatives that lack an ethical backbone will not be sustainable and impactful.

PROFITS AND ETHICS

The fundamental CSR of law firms is to actively support and facilitate the firm's lawyers meeting their ethical and professional responsibility. Yet, we often hear of how law firms seem overly focused on billable hours and targets. To be sure, profits are important. Law firms are, after all, not charities. Profits are needed to make the practice sustainable and to deploy new talents, technology and resources in the service of clients. But it cannot be the be-all-and-end-all. Instead, profits should go towards ensuring that the practice of law is able to further and enhance positive human values instead of undermining them. In short, *how* earnings and profits are made in the legal practice is of great importance and deserves greater consideration.

In tandem with strong market and managerial logic, legal professionalism has tended to emphasise technical competency and rigour. This is legitimate but the danger in prioritising professional knowledge above professional values and ideals is the undermining of the ethos of professionalism. In providing legal counsel, lawyers know that they must provide lawful (what's legal) advice. But, often neglected, is the moral duty to provide ethical (what's right) advice as well. This is not about imposing one's moral scruples and rectitude but rather about helping clients appreciate how their decisions will affect others and what those effects will be. Put simply, a lawyer's ethical and professional responsibility is to use his professional skills, knowledge and values such that they respond fully to the needs and interests of the clients in a responsible manner.

A STRATEGIC APPROACH

Law firms in Singapore already engage in varying levels of CSR. But the CSR practised tends to be generic and bland, taking the form of donations to charitable causes, sponsoring book prizes and scholarships at the law schools, providing internship opportunities for law undergraduates, providing *ad hoc* legal advice to non-profit organisations, and supporting *pro bono* legal schemes. To be sure, these contributions are important, but more can be done to purposefully integrate CSR into a law firm's overall strategy.

In particular, the legal profession can begin to develop a strategic approach to CSR, one that leverages on opportunities to create "shared value" by integrating a social dimension to the profession's value proposition. This means insisting that meaningful social impact is integral to the legal profession's overall approach to lawyering. In that sense, social impact provides a vital competitive advantage because it creatively meets the needs of the profession, the lawyers, the law firms and society. More importantly, by building on the intricate interdependence of law and society, the long-term success of the legal profession is secured and sustainability is also assured.

This "shared value" approach to CSR signals the need for an attitudinal shift in which existing norms and

assumptions of legal practice are critically examined, challenged, and re-calibrated. In the process, beliefs will be changed, behaviour modified, and value systems at the individual, corporate and societal levels tweaked.

A strategic approach to CSR also yields another advantage: that of catalysing innovation. As strategic CSR is driven by the motivation and the imperative to generate shared value for both the profession and society, a genuine commitment to CSR will precipitate innovation that is potentially both economic and social value-giving. In turn, this will open new frontiers for business possibilities.

SOLID REASONS

There are various reasons why law firms should pay more attention to CSR, of which the following four are key. Firstly, a law firm has to be an advocate of its own ethical standard—one that meets not just community needs and standards but also goes beyond regulatory requirements and industry norms. This imperative infuses the law firm with a soul and a social purpose. A mission-driven law firm is more likely to practise law as a profession, rather than as a for-profit enterprise.

Secondly, CSR helps to differentiate one law firm from another. Law firms with a proven track record of being a good corporate citizen and having a supportive work environment

would enjoy an advantage in talent acquisition, retention and development. Generation Y lawyers are particular about post-material issues. While remuneration and other benefits are important, these younger lawyers hope to practise law in a setting that helps them attain their non-material objectives, such as doing good for society, and having a work-life balance. CSR helps generate employee loyalty through the creation of better employee morale.

Thirdly, CSR-committed law firms are more likely to attract CSR-conscious clients, who will be drawn to law firms that understand the intrinsic value of CSR, assured that their concerns and expectations will be addressed in the legal advice and service they obtain. Such clients would usually be willing to pay a premium for such value-added, innovative legal services.

Fourthly, CSR is an excellent vehicle for ethics and risk management. Law firms that care about how they practise law will be subjected to less regulatory risk and ethical breaches, and are less likely to succumb to conduct that is susceptible to generating a negative reputation.

CSR OF THE FUTURE

What then is the future of CSR in the legal profession? Can law firms think and creatively develop CSR such that it is not just a public relations exercise that generates short-term publicity

and feel-good effect, but leaves no sustainable and meaningful outcomes? With our profession suffering one too many a rogue lawyer in the last few years, CSR is, more than ever, relevant and needed.

CSR can help right-size the way the legal profession views its professional responsibility. For starters, the legal profession needs to embrace the community of which it is a member. The legal eco-system is not a zero-sum game. Goodwill, reputation, moral fibre, and profits are made inter-dependently over the long term, and CSR will be better appreciated if we truly recognise this interdependence. If Singaporeans at large feel that the legal profession is indeed honorable, that will have a multiplier effect: not just in terms of increased business opportunities, but also in attracting people to the profession.

Let us return to the foundational premise that law is a humanistic enterprise. If so, giving full expression to positive human values cannot simply be about maximising profits; instead, it has to be about ensuring that the legal enterprise is able to further and enhance those fundamental human values. In short, CSR for the legal profession begs a return to two fundamental questions: what is the purpose of law, and what is the mission of the legal profession? Hopefully, the profession will provide the right answers. *is*

WHITHER CSR AMONG LAWYERS?

IS CORPORATE SOCIAL RESPONSIBILITY NON-EXISTENT IN THE LEGAL FRATERNITY, OR HAS IT SIMPLY ESCAPED THE SPOTLIGHT? *INTER SE* FINDS OUT.



SPEAK to some lawyers about CSR, and they might just think it's the latest TV series. Although corporate social responsibility has been a corporate buzzword for a while, it hasn't attracted the attention or radiated the glamour that other commercial initiatives have. Even those to whom the acronym is not a complete mystery often have different ideas as to exactly what CSR is.

Stefanie Yuen Thio, Head, Corporate, at TSMP Law Corporation says candidly, "I hate the term 'CSR'. It sounds like a KPI [key performance indicator], something you have to tick the box for." What it boils down to, in her view, is giving back to the community, "something that should come from the heart and be hardwired into our DNA," she says. Her firm runs community programmes divided into three main areas: pro bono legal services; supporting charities that focus on the needs of children, the elderly and foreign workers



in Singapore; and cash donations to charities nominated by lawyers and staff, made up of 10% of certain partnership profits a year which are specifically set aside for this.

Other law firms, such as DLA Piper, define CSR by focusing on certain broad aspects. “CSR covers four key areas: Ethics, Environment, Employment and Engagement,” says Clare Pearson, the firm’s Corporate Social Responsibility Manager, Asia. The four refer to corporate governance, climate change, working conditions and contribution to the community, respectively. DLA Piper’s CSR activities have thus far taken on diverse forms in each of these areas, in disparate locations worldwide. For example, in China, the firm

has been involved in fundraising efforts to rebuild quake-torn Sichuan, and runs the Beijing Ethics Network, where managers from multi-national corporations meet to discuss how to improve their companies’ ethical operation. In the Singapore office, employees have contributed to Children’s Cancer Foundation’s Hair for Hope fundraising appeal, and also competed in the firm’s CSR Olympics, a competition across the firm’s Asian offices to design the best CSR projects in the areas of climate change and community engagement.



If good intentions be the defining element, it appears that CSR is alive and well; it may just be wearing a different label in each case. But though a rose by any other name may smell as sweet, having a gamut of monikers and appellations probably doesn’t

help in identifying the plume or raising its profile.

Moreover, on the local scene, CSR-type activities within the legal field that tend to attract publicity are either niche, one-off events by certain firms targetted at assisting a specific charity, or do-good efforts by individuals who happen to be busy, stress-prone lawyers by profession, rather than a concerted attempt by firms, or indeed the industry, to introduce a long-term, strategic approach to CSR. It’s not surprising then that the several ad-hoc initiatives that appear

sporadically in the spotlight seem like scattered pieces of a puzzle that never quite make up a complete or easily visible CSR picture.

While this may be due in part to uneven publicity and awareness – “lawyers tend to hit the press for all the wrong reasons and it’s just not sexy to report on something good that’s being done!” quips Stefanie – there’s no doubt that the CSR road ahead for law firms is long and winding.

Clare comments, “The legal sector in Asia has lagged behind the legal sector in Europe in getting involved in CSR.” Across industries, she notes that “sectors other than law have been more progressive in using CSR as a bridge between foreign companies and local governments. For example, Bill Gates has been able to register his [Bill & Melinda Gates] Foundation in China, which gives Microsoft a business edge in the country. Also, CISCO has donated over US\$45m to redeveloping the infrastructure in Sichuan since the earthquake, which has gained them great credibility with the Government. [And] banks like Citibank and JP Morgan are active in the field of microfinance.”

She feels that more can be done to promote and encourage CSR strategies in the legal fraternity. “Law firms can really help the charity sector develop the right infrastructure to efficiently apply funds



in Asia,” she says. “They can also help connect their clients to the best non-profits to apply funds efficiently. If law firms are not involved, they are missing an opportunity to help their clients and improve government relations, whilst helping those less fortunate than themselves.”

As much as there are valid business reasons supporting the case for CSR, it’s heartening to know that for many lawyers, the most motivating factor for involvement in these activities is simply the knowledge that they are making a positive difference. Whether it’s in arranging a lunch session for senior citizens at a day activity centre, holding a shopping spree at Toys R Us for kids of the Children’s Cancer Foundation, or spending time at the Outward Bound School with youth from Boys’ Town – all events that Stefanie’s firm has organised, “we come away feeling that we have received infinitely more than the little we were able to give,” she says. As she puts it, “There’s more to the profession than the profit target. Being directly responsible for putting a smile on a kid’s face or brightening up the day of an elderly person – that really puts a lot of fulfilment back into the life of a lawyer.” ¹⁵

WHY LITIGATORS DON'T NEED THE IR



"WOULD you like a divorce?" my partner asked me, as I was leaving.

"What?" I said. "On what grounds?"

"Adultery, cruelty, unreasonable behaviour," my partner said.

"No thanks," I replied. "I have enough of those at partnership meetings." I made my way to the lift lobby.

My partner was not amused. He followed me into the lift. "You aren't in a position to turn down work. You really ought to take a look at your billings," he advised. I said, "It's the recession. Times are so bad, a picture is only worth eight hundred words. Anyway, I'm doing fine, thank you."

Litigation is actually recession-proof.

I'm actually doing the work of three lawyers."



By **Adrian Tan**, Director,
Drew & Napier LLC

“Too bad you can’t do your own work first,” my partner said. “Anyway, I would like you to consider taking on a new matter. It concerns the IR.”

“The IR?” I asked. “What’s that? Infra red? International relations? Inland revenue? I wish you would just stop using high-tech acronyms. Why don’t you speak plain English? After all, that’s our lingua franca.”

“Doesn’t it strike you as odd that the phrase ‘lingua franca’ is itself not English?” my partner asked. “And IR stands for ‘integrated resort’, as you very well know.”

“I deplore such abbreviations,” I said. “Why can’t we call a spade a casino, and be done with it? And what does an IR have to do with a litigator?”

JUST then, the lift jerked. Then, it stopped moving. “Listen,”



my partner said. “Do you smell something?” I said, “The building shook. I think there must have been an earthquake in Indonesia. Either that, or our landlord is trying to renegotiate our rent.”

My partner pressed the red alarm button. Before long, a tired voice spoke over the lift’s intercom system, “Sir, please stop pressing the alarm bell.”

"Are you the security guard?" my partner asked. "Well, I'm sorry I woke you from your beauty sleep, but we are stuck in the lift."

There was no answer. My partner continued sounding the alarm. The security guard spoke again, "Sir, I told you please stop pressing the alarm bell."

"We are stuck!" my partner shouted. "The lift is not moving. You have two lawyers here idling away at \$600 per hour. That's \$10 a minute."

"Okay, sir," the security guard said. "I will telephone the lift technician. It should take him about 20 minutes."

There was a long silence. My partner said, "There's no reception here. My Blackberry doesn't work. But at least I have a chance to speak to you about my plan to pitch for IR work."

I said, "I don't know much about casinos. I doubt if you will find many litigators there when they open." My partner said, "Come off your high horse. What other place can offer you the chance of making a fortune or becoming bankrupt?"

"A courtroom," I replied. "Every time we go to trial."

My partner sighed, exasperated. "You're comparing apples with orange poker chips!" he exclaimed. "Gambling and going to court are entirely distinct experiences. Only lawyers go to court, but anyone can gamble. Anyone can buy a lottery ticket and become an instant millionaire. In fact, the divorce

I was telling you about? It all started because of gambling."

"Really?" I asked.

"Yes. The husband rushed home one day and yelled at his wife, 'Susie, pack your things! I just won the Singapore Sweep!' The wife said, 'Wonderful, shall I pack for warm weather or cold?' The husband replied, 'I don't care, just as long as you're out of this house by noon!'"

"Ah," I said. "Well, the lottery is basically the government's way of taxing the stupid. In fact, all forms of gambling are nature's way of ensuring that a fool and his money are soon parted."

My partner said, "Don't condemn what you haven't tried. Have you played blackjack before? That's much more thrilling than going to court."

"Blackjack?" I asked. "What is that?"

"Well, the objective is to get 21 points. You are given some cards, and you can ask for more and more until you reach 21 points, or until you are close to it. If you are close to 21 points, and you stop, you take a risk that your opponent, the dealer, has higher points. But if you ask and ask in the hopes of getting the perfect 21, but you inadvertently exceed 21 points, you lose instantly. You draw one card too many."

"Oh, we have the same game in cross-examination," I said. "It's called One Question Too Many. You ask and ask and ask until you get the witness give you an answer which is close to what you want. Then, you stop. And you

take a risk that your opponent will re-examine and make better points. But if you cross-examine continuously in the hopes of getting the perfect answer, and you inadvertently ask one question too many, you lose instantly. And, the sad thing is, the only way that you will ever know whether you have asked one question too many is when you've actually asked one question too many."

My partner looked puzzled. The only time he had been inside a courtroom was on the day he was called to the bar. That was three decades ago. I wasn't sure whether he even knew – let alone cared – that we had a new Supreme Court building.

"Well, look," my partner said. "The ultimate card game is poker. I'm sure that's something you won't have in court. You keep some cards open, and some closed. And you bet and you bet until one side folds or calls."

"Folds or calls?"

"Gives up or calls your bluff. Your opponent is basically betting that your cards won't turn out to be better than his."

"Ah," I waved my hand dismissively. "We have that in litigation too. It's called Order 22A."

"Order what of what?" my partner asked. "Is it something to do with summary judgment? Or probate?"

"Order 22A of the Rules of Court," I explained. "It allows us to make an offer to settle a case. If the opponent doesn't accept the offer, and the trial

result isn't better than our offer, then he has to pay our costs. So, the opponent is basically betting that the verdict will be better than our offer. That's waaaaay more exciting than poker."

My partner was flabbergasted.

"You can't be serious," he said.

"The courtroom is not a casino."

"You'll be surprised," I assured him. "Once Singaporeans realise how much excitement one can get in a trial, they will be queuing up to sue. Why bother going to an IR to bet money to see how a roulette wheel can spin, when you can go to court and bet money to see how a witness can turn? Let me tell you, if Singaporeans really knew what going to trial was like – the uncertainty, the stakes – they would be litigating like mad. The court would beat the casino hands down."

THE lift door sprang open. A sweaty lift mechanic stood outside.

I said, "It's been an hour! What if there was an emergency?"

The lift mechanic shrugged his shoulders, and left.

My partner was pensive. "So the casinos can never win against the court?" I said, "Forget about casinos. Even the church can't win against the court."

"What do you mean?" my partner asked.

"Hey," I said. "When people pray in court, they REALLY mean it." ■

GEMS FROM THE UNIVERSITY OF LIFE

THE HONOURABLE CHIEF JUSTICE ANDREW LI CHIEF JUSTICE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

THE Honourable Andrew Li, Chief Justice of the Hong Kong Special Administrative Region, was in Singapore to deliver the 16th Singapore Academy of Law Annual Lecture. From the time he was a teenager, Chief Justice Li had set his mind on being a barrister, having been “captivated by the drama of the court room which one reads about and sees on television”. But before matriculating as a scholar at Fitzwilliam College at the University of Cambridge, he spent approximately nine months travelling the world and working

as a journalist in the Far Eastern Economic Review where he wrote on Hong Kong affairs. This was, in his words, a “very useful experience” and “a very good education in the university of life”, as the work exposed him to all sectors of society and a wide array of issues, and allowed him to develop his intellectual and communication skills.

ON BEING A LAWYER

Chief Justice Li was called to the Bar of the Middle Temple in 1970 and to the Hong Kong Bar in 1973. Practising in Hong Kong,



By Nathaniel Khng, Assistant Registrar, Supreme Court and Prem Raj Prabakaran, Justices' Law Clerk, Supreme Court

he quickly established himself as an outstanding barrister and was appointed Queen's Counsel in 1988. His success, in his view, could be attributed mainly to "hard work, hard work and hard work". In his view, there is "no shortcut in life; with hard work, one may have a chance to succeed but without hard work, one has no chance". For young lawyers, in particular, he had these words of wisdom:

As a young lawyer, you should work very, very hard. And you should be glad to have the opportunity to work very hard. This is the time when one learns as much as possible. One would have the stamina and energy to do so. Working very long hours today in the legal profession and indeed many areas of work has become the norm. It may even be said to have become the fashion. But, all lawyers including these young lawyers working long hours,

should ensure that they are working efficiently with high productivity. There is no point in working long hours for its own sake – one must work productively to ensure that those long hours yield results. It is important to maintain a work life balance. Indeed, maintaining this balance will enable a person to work more efficiently. This requires strong discipline and effective time management.

ON PUBLIC SERVICE

Despite his busy schedule as a top barrister, Chief Justice Li still found time to contribute to society, as exemplified by his illustrious record of public service. In fact, throughout his working life, he has always been engaged in some form of public service or other, and less than a decade after he had begun practice, he was already serving on a number of government advisory committees. This willingness, according to him, stemmed from



his belief in the importance of contributing to society and to the public good. This, he said, is “important for the individual, so that the individual can live a fulfilling and enriching life, and is also important for human progress”.

ON JUDGING

Chief Justice Li was appointed Chief Justice of the Hong Kong Special Administrative Region on 1 July 1997 after the reversion of sovereignty over Hong Kong to the People’s Republic of China. As Chief Justice, he is the president of the Hong Kong Court of Final Appeal, and also the head of the entire judiciary and charged with its administration. Under his helm, the Hong Kong judiciary has continued to be a leading judiciary in the region, praised by many for its independence and adherence to the rule of law. A well-liked and respected judge, Chief Justice Li was recently described by Lord Patten, the last British governor of Hong Kong, as “an exemplary leader of the independent judiciary”. The success of the Hong Kong judiciary could also be attributed to the general excellence of the judges of Hong Kong. On the qualities of a good judge, Chief Justice Li expressed the following opinion:

The most important quality for a judge is impartiality. When one puts on one’s robes and walks into court and sits on the bench, one must leave behind one’s personal views and prejudices. The judge must apply his mind to the case at hand impartially.

It goes without saying that the judge must have the utmost integrity and must be highly professionally competent. I believe that while judges must keep a firm control of his court, they should be courteous to those who are appearing before them and remember the courtesy that those in authority owe to those who are subject to that authority.

ON CHALLENGES FACED BY THE HONG KONG JUDICIARY

Due to the new constitutional order, it was necessary, according to Chief Justice Li, for the Hong Kong judiciary to have a mutual understanding of China’s judicial system. Thus, the Hong Kong judiciary has had a number of exchanges with the China judiciary. There have also been lectures and courses to enable Hong Kong judges to have a good understanding of China – its political system, its economic developments as well as its legal profession. In addition, there are also training courses for Hong Kong judges to upgrade their skills in Mandarin and judgment writing in Mandarin. The greatest challenge, however, in so far as his judicial responsibilities are concerned, has been to establish the Court of Final Appeal as Hong Kong’s own final appellate court and to develop the jurisprudence under the Basic Law in the new constitutional order. His aim has been “to achieve international recognition of the Court of Final Appeal and the quality of its jurisprudence, so that it is regarded as ranking amongst the top judiciaries of the common law world”.

As far as his administrative responsibilities as the head of the Hong Kong judiciary are concerned, it would be the challenge to modernise the judiciary so that it is in a better position to serve the community. In this regard, he pointed out that the Hong Kong judiciary has undertaken projects such as the Civil Justice Reforms which was launched in April 2009 and looked to improve the use of technology in courts (on which, in his view, there is much to learn from Singapore). He also mentioned that mediation is now being encouraged as an alternative method of dispute resolution to litigation in court because it is in the interests of the parties (and, ultimately, the public) for an amicable solution to be sought through mediation, which often results in a win-win solution, and less time and expenses being wasted in the process. He also pointed out that the Hong Kong judiciary has established a resource centre to help unrepresented litigants to obtain information about the court processes and has produced a guide to judicial conduct as well as implemented a complaints system to allow for greater responsiveness to the expectations of the community.

ON FOREIGN LAWYERS

Chief Justice Li was of the view that in an age of globalisation and international financial centres, foreign lawyers have “an important role to play” and “foreign lawyers with the requisite experience and expertise will have much to contribute to one’s jurisdiction”. He added that with increasing globalisation, it is “beneficial

for Hong Kong to attract top international legal talent with different backgrounds and experience”. He also expressed encouragement to Singapore lawyers who want to come to Hong Kong, stating that he is sure that “they will have much to contribute”. For those who come to Hong Kong, however, he cautioned that “it is very important for foreign lawyers when they come to Hong Kong to appreciate that they are functioning not in their own jurisdiction, but in Hong Kong’s own circumstances and conditions”.

ON THE SINGAPORE JUDICIARY

In Chief Justice Li’s view, the Singapore judiciary and the Hong Kong judiciary can be of benefit to each other. Referring to each other’s jurisprudence would be a starting point. Other than that, the judges of both jurisdictions can learn from each other in the conferences that they attend. In addition, he felt that there was much to learn from each other in matters relating to the administration of the judiciary. He gave the example of how the Singapore courts’ audio digital recording system was implemented after studying the courts in Hong Kong which have a similar system. Conversely, when the Hong Kong judiciary built a technology court, they studied Singapore’s courts. Singapore, he added, has since moved ahead “both in terms of the technology in the courts and electronic filing”, and the Hong Kong judiciary “will be learning from these developments with a view to deciding what we should do in Hong Kong”. ¹⁵

ON THE BOOKSHELF

UNDERSTANDING COMPETITION LAW IN SINGAPORE



IT was a pleasure to read this book, *Competition Law and Policy in Singapore*, which Mr William E Kovacic, Commissioner, US Federal Trade Commission, in the book's Foreword, says is "a timely and valuable contribution to the literature on competition policy, law reform, and institution

building" and provides "illuminating analysis" of the scope and interpretation of the Competition Act. I could not agree more. As I read the book, I relived the time I spent at the Competition Commission of Singapore ("CCS") from 2005 to 2009.

The book is written by active law practitioners with experience in competition law, a former senior economist from the CCS and a leading international academic and adviser in this area. The book is timely, as it has been almost four years since the Competition Act 2004 prohibitions against anti-competitive agreements and abuse of a dominant position by businesses came into force in 2006. It has also been more than two years since mid-2007, when the prohibition against mergers that substantially lessen competition came into force.

So far, the CCS has decided on a number of cases on agreements and mergers, to which there have been no appeals, as yet, to the Competition Appeals Board. The CCS has also made public statements, sometimes for

Title:	Competition Law and Policy in Singapore
General Editors:	Cavinder Bull SC and Lim Chong Kin
Contributors:	Cavinder Bull SC, Lim Chong Kin, Richard Whish, Ng Ee Kia, Chia Voon Jiet and Yu Ken Li
Publisher:	Academy Publishing
Extent:	340 pages

targeted "interventions", where it adopted what a contributor described as a pragmatic and flexible approach of engaging the parties directly to secure assurances that anti-competitive agreements would not be carried out or would be stopped, thus negating the necessity for the formal exercise of the CCS' investigative and enforcement powers.

The book covers in a broad sweep, yet in sufficient detail, the benefits of competition law, Singapore's approach towards competition, the objectives and scope of the Act and the CCS' enforcement philosophy and approach. It outlines how a typical competition analysis could start with a market definition (product and geographical) in order to provide the context to analyse the impact of an agreement, a business conduct or merger. There is also a comprehensive account of how the three prohibitions operate, including a review of statements made by the CCS on price and fee recommendations, the CCS' investigative and enforcement powers and related issues such as private rights of action, damages and judicial review.

The book's analyses of the CCS' decisions and its public statements in light of the CCS' published Guidelines, alongside its

By **Foo Tuat Yien**, Principal District Judge, Family and Juvenile Justice Division, The Subordinate Courts

review of relevant overseas case law, would be especially useful to practitioners. In a 2007 decision on whether a collaborative agreement between two airlines was anti-competitive, the CCS had said that whilst overseas case law may be persuasive or useful in deciding an issue, much would depend on the overall context, the extent to which the facts of those cases were applicable to Singapore and the facts of an instant case. The 2008 Thomson-Reuters merger decision, which is mentioned in the book, illustrates how competition concerns in a cross-border merger could be handled by competition authorities.

The contributors highlight the difference between the Act and the law in the United Kingdom and the European Community to explain the different approach in Singapore. These include the “net benefits” test for exemption of an anti-competitive agreement and for a merger found to substantially lessen competition. Whilst I acknowledge the points raised by the authors regarding a total welfare approach (consumer welfare and producer welfare) as compared to a consumer welfare approach, I thought that the CCS’ position on total welfare could have been characterised as a one that facilitates a broader and longer term perspective of total welfare, which means that the CCS could be more open to accepting efficiency arguments arising from restrictive agreements that may benefit producers, and which would produce benefits to consumers, albeit more indirectly and in the longer term.

The book outlines the historical events in the USA leading to the introduction of

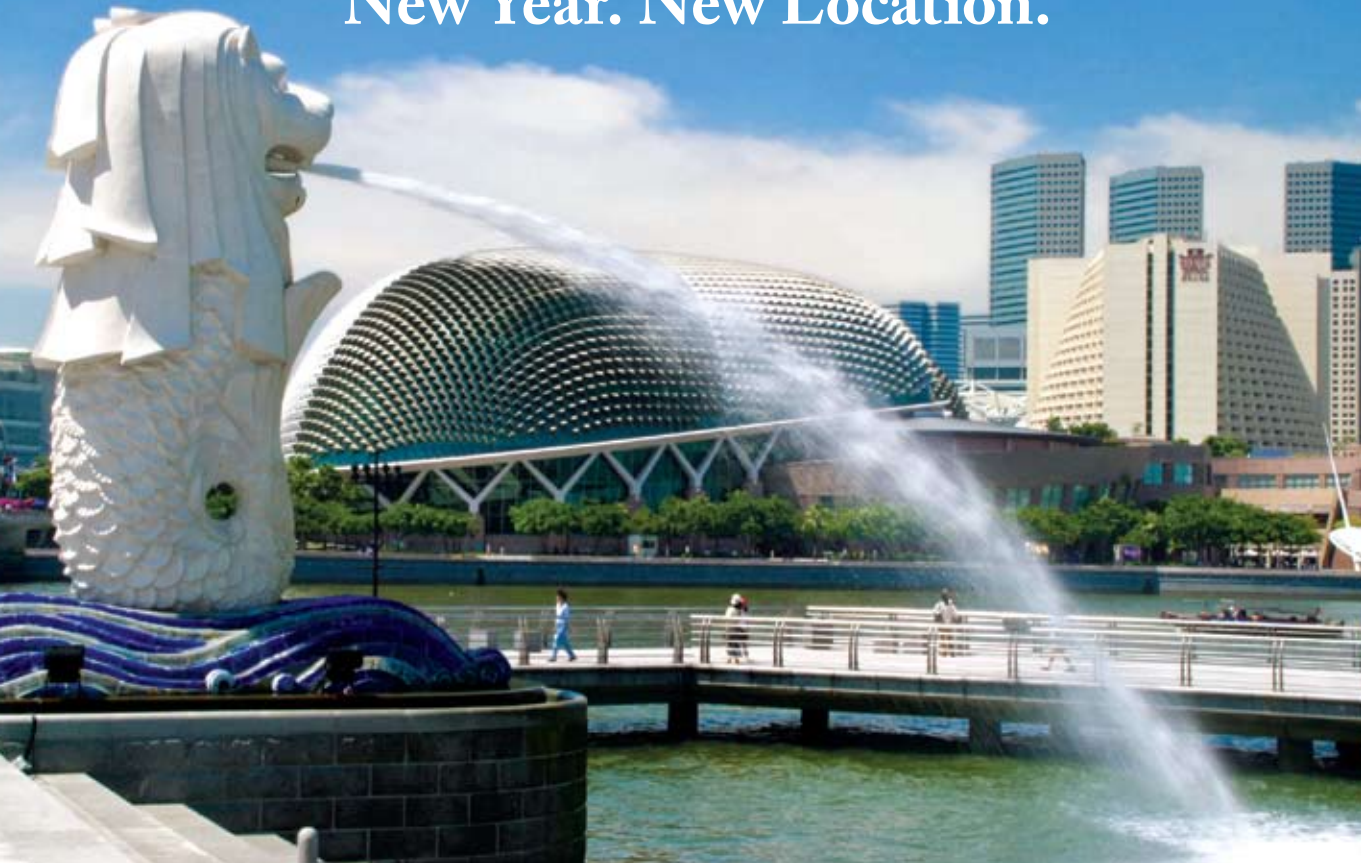
competition law in the late 19th century and developments in the European Community which focused on ensuring the integration of national markets. These are jurisdictions with large domestic markets. Singapore has been characterised as a “small open economy”. It would have been useful if there could have been some account in the book of how this difference has been reflected in the approach taken in the Act and in the Guidelines, particularly in, firstly, the setting of the indicative market share thresholds for determining appreciable adverse impact of anti-competitive agreements; secondly, whether a business is dominant with market power; and thirdly, the market power of a merged entity, all of which could pose competition concerns. In this respect, the topic of small economies was discussed at the International Competition Network’s 2009 Annual Conference in Zurich, Switzerland.

In the book’s Preface, Mr Cavinder Bull SC, one of the book’s General Editors and contributors, says that the contributors have attempted to highlight crucial economic concepts, which are essential in an introduction to competition law and indeed, any in-depth understanding of competition law, whilst keeping the text accessible to non-economists. This book achieves a good balance, one that recognises the complex interplay of law and economics and the increasing use of a competition law vocabulary rooted in economics. ¹⁵

Competition Law and Policy in Singapore is available for purchase through Academy Publishing’s online bookshop at www.sal.org.sg and major bookstores.

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Conyers Dill & Pearman Pte. Ltd.
9 Battery Road #20-01
Straits Trading Building
Singapore 049910

Our office numbers:
Phone: +65 6223 6006
Fax: +65 6223 7887

conyersdillandpearman.com