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Case Note

RECENT DEVELOPMENTS ON THE PROTECTION OF CUSTOMERS' MONEYS THROUGH SEGREGATION AND TRUST OBLIGATIONS

Vintage Bullion DMCC v Chay Fook Yuen
[2016] 4 SLR 1248

A key plank of the regulatory regime for the protection of customers' moneys in Singapore is the requirement to segregate customers' moneys and the imposition of a statutory trust on such segregated moneys. There have been significant recent developments in this area of law. In particular, the Court of Appeal has recently interpreted, for the first time, the scope of the segregation and statutory trust obligations of capital market services licence holders and commodity brokers. The Monetary Authority of Singapore has also released a consultation paper proposing various enhancements to the regulatory regime governing the protection of customer moneys. This article seeks to explain and comment on these recent developments.

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I. Introduction

1 The importance of protecting customers' moneys has come into the spotlight following the collapse of international financial institutions such as Lehman Brothers and MF Global. One key plank of how customers' moneys is protected in various jurisdictions is the requirement for segregation of customers' moneys, coupled with the imposition of a statutory trust over such segregated moneys.[1] The twin concepts of segregation and the imposition of a statutory trust complement each other, and it is only when "both elements are present"

1 See, *eg*, "FCA Handbook: CASS Client Assets", *UK Financial Conduct Authority*, CASS 5.3 and 5.5 <https://www.handbook.fca.org.uk/handbook/CASS/> (accessed 27 March 2017); see also Australian Corporations Act 2001 (Cth) ss 981A–981H and Corporations Regulations 2001 (Cth).

that they "give the complete protection against the risk of the firm's insolvency that the [customer] requires".[2]

2 Locally, there have been two significant recent developments which impact on the scope of the segregation and trust obligations of capital market services ("CMS") licence holders and commodity brokers. The first concerns the interpretation of the law as it currently stands. In *Vintage Bullion DMCC v Chay Fook Yuen*[3] ("*Vintage v MFGS*"), the Court of Appeal interpreted, for the first time, the segregation and trust obligations imposed by the Securities and Futures Act[4] ("SFA"), Securities and Futures (Licensing and Conduct of Business) Regulations[5] ("SFR"), Commodity Trading Act[6] ("CTA") and Commodity Trading Regulations[7] ("CTR"). The second relates to proposals to change the law. In its *Consultation Paper on Enhancements to Regulatory Requirements on Protection of Customer's Moneys and Assets*[8] ("MAS Consultation Paper"), the Monetary Authority of Singapore ("MAS") set out various proposed enhancements to the regulatory regime governing the protection of customer moneys, which take into account the international standards promulgated by the International Organization of Securities Commission[9] ("IOSCO") and the Financial Stability Board,[10] and several of the proposed enhancements would change the scope of the segregation and trust obligations imposed on CMS licence holders.[11] This article seeks to explain and comment on these two recent developments.

2 *Re Lehman Brothers International (Europe)* [2012] UKSC 6 at [3].
3 [2016] 4 SLR 1248.
4 Cap 289, 2006 Rev Ed.
5 Cap 289, Rg 10, 2004 Rev Ed.
6 Cap 48A, 2009 Rev Ed.
7 S 578/2001.
8 P008 – 2016, July 2016.
9 International Organization of Securities Commissions, *Recommendations Regarding the Protection of Client Assets* (FR01/14, January 2014).
10 Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (October 2011); Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions* at Appendix II, Annex 3 (15 October 2014).
11 The proposals in Monetary Authority of Singapore, *Consultation Paper on Enhancements to Regulatory Requirements on Protection of Customer's Moneys and Assets* (P008 – 2016, July 2016) only relate to the obligations on CMS licence holders, and will not impact commodity brokers.

II. Overview of recent developments

A. Court of Appeal's decision

3 *Vintage v MFGS* involved two applications under s 310 of the Companies Act[12] for the court to "determine any question arising in the winding up of a company". The central question to be determined in both applications was how three forms of profits which arose from over-the-counter leveraged foreign exchange ("LFX") and leveraged commodity ("LC") transactions which customers had conducted with MF Global Singapore ("MFGS") should be treated, namely, whether each form of profits constituted proprietary moneys belonging to customers or mere unsecured claims provable against MFGS' estate. In the main application, Vintage Bullion DMCC ("Vintage") acted as representative of all customers who had profits arising out of LFX and LC transactions conducted with MFGS.

4 The three forms of profits at issue arose in the following manner. The customers would initiate an LFX or LC transaction by entering into an initial trade. While the position remained "open", if the underlying currency or reference commodity favoured the customer, the customer would have the first form of profit, "Unrealised Profits". Subsequently, when the customer closed out his position by entering into a final trade, any Unrealised Profits he had would crystallise into the second form of profit, "Forward Value". The Forward Value came with a "Value Date", which was contractually defined as the date on which "the respective obligations of the parties … [were] to be performed". On this Value Date, the customer would be entitled to the third form of profit, "Ledger Balance", which the customer was contractually entitled to withdraw. The three forms of profits were recorded in statements of account which MFGS issued on a daily basis to its customers ("daily statements"). The aggregate of a customer's Unrealised Profits, Forward Value and Ledger Balance was described in the daily statements as the customer's "Total Account Equity".

5 It was common ground between the parties that Ledger Balance (as well as any margin which MFGS received from its customers) constituted proprietary moneys belonging to the customers. However, it was found as a fact that MFGS had segregated not just its customers' Ledger Balance (and margin) in the customer segregated bank accounts,[13] but it had also placed its own funds in these bank accounts to

12 Cap 50, 2006 Rev Ed.

13 Bank accounts which MF Global Singapore Pte Ltd was required to maintain for holding customers' moneys pursuant to the Securities and Futures Act (Cap 289, 2006 Rev Ed), Securities and Futures (Licensing and Conduct of Business)

(*cont'd on the next page*)

ensure that, at all times, there were sufficient funds to cover its customers' Unrealised Profits and Forward Value. Put another way, moneys equivalent to all of its customers' Total Account Equity was, at all material times, maintained in the customer segregated bank accounts. MFGS ensured this by preparing daily segregation fund statements ("Seg Fund Statements") which compared the actual funds segregated and the Total Account Equity of all of its customers to determine if there was an excess or deficiency of funds in segregation. The Seg Fund Statements prepared by MFGS were modelled on one page from an MAS prescribed form, "Form 1".[14]

6 The legal issue which the court had to determine was whether a statutory trust arose over the moneys segregated by MFGS to cover its customers' Unrealised Profits and Forward Value.[15] Liquidators of MFGS contended that these moneys were MFGS' own residual financial interest, which was simply an "operational float" it maintained in the customer segregated bank accounts, whereas Vintage contended that a statutory trust arose over these moneys by virtue of the SFR and CTR. In this regard, it is important to distinguish between the physical moneys segregated and the choses of action which the customers had against MFGS in respect of their Unrealised Profits and Forward Value. The liquidators of MFGS had sought to contend that what Vintage was seeking was a trust over the choses of action (which they contended was not possible under Singapore law as it would require the trustee to sue itself to enforce the chose), but this contention was rejected by the Court of Appeal. The Court of Appeal held that the real question was whether MFGS held the "subject matter" of the choses in action in trust, which was the physical moneys in the customer segregated bank accounts sufficient to cover the aggregate value of the customers' Unrealised Profits and Forward Value.[16]

Regulations (Cap 289, Rg 10, 2004 Rev Ed), Commodity Trading Act (Cap 48A, 2009 Rev Ed) and Commodity Trading Regulations 2001 (S 578/2001).

14 Page 6 of Form 1 (Statement of Assets and Liabilities) available at http://www.mas.gov.sg/regulations-and-financial-stability/regulations-guidance-and-licensing/securities-futures-and-funds-management/forms/securities-and-futures-financial-and-margin-requirements.aspx (accessed 27 March 2017); CMS licence holders are required to submit this form to MAS on a quarterly basis pursuant to regs 27(1)(*a*), (3)(*a*), (9)(*b*) and (9)(*e*) of the Securities and Futures (Financial and Margin Requirements for Holders of Capital Markets Services Licences) Regulations (Cap 289, Rg 13, 2004 Rev Ed).

15 Another legal issue which the court had to determine was whether an express trust arose over the customers' Unrealised Profits and Forward Value as a result of MF Global Singapore Pte Ltd's conduct prior to liquidation (and it was held that no such express trust arose), but a discussion of this issue is outside the scope of this article.

16 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [24].

7 Whether a statutory trust arose over each of the three forms of profits essentially turned on an interpretation of the scope of reg 16 of the SFR (in the case of the LFX transactions) and reg 21 of the CTR (in the case of the LC transactions); and in particular an interpretation of the words "received on account of" (as used in reg 16 of the SFR) and "accruing" (as used in reg 21 of the CTR). Regulation 16(1)(*a*) of the SFR provided that a CMS licence holder "shall treat and deal with all moneys received on account of its customer as belonging to that customer";[17] and reg 21(1)(*a*) of the CTR provides that a commodity broker shall "treat and deal with all money … received by him from a customer … or accruing to a customer as a result of trading, as belonging to that customer".[18]

8 In the High Court, it was held that the Unrealised Profits and Forward Value, which arose from the LFX and LC transactions were not moneys "received on account of" the customers or moneys "accruing" to them as these moneys had not "come home" to the customers given that they did not have a right to receive actual money from MFGS prior to the Value Date.[19] In contrast, as a customer's Ledger Balance was due and payable such that he had a "right to receive money immediately from MFGS", in so far as there was segregation of moneys corresponding to a customers' Ledger Balance, these moneys would be impressed with a statutory trust.[20]

9 On appeal, the Court of Appeal held that, contrary to the High Court's ruling, Forward Value did fall within the scope of the terms "received on account of" and "accruing". The crux of the court's reasoning was that a sum is "received on account of" a customer or "accrues to" a customer within the meaning of the SFR and CTR respectively when the customer is "legally entitled" to the sum in question.[21] A customer will be "legally entitled" to a sum when he has completed what he needs to do to earn the sum, and this does not turn on whether the sum is due and payable.[22] The customers were legally entitled to their Forward Value as these were "crystallised" profits premised on transactions that had been closed or concluded.[23] As such, the customers were already legally entitled to these sums notwithstanding

17 Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) reg 16(1)(*a*).
18 Commodity Trading Regulations 2001 (S 578/2001) reg 21(1)(*a*).
19 *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [120], [122], [158] and [160]; see further (2015) 16 SAL Ann Rev 615 at 620.
20 *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [128]–[129] and [163].
21 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [37].
22 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [42] and [47].
23 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [46].

that they could not withdraw the same until the Value Date. The Court of Appeal thought that the High Court had conflated the concept of "accrual" and "payment" in holding that Forward Value was not subject to a statutory trust.[24] The Court of Appeal went on to find that MFGS had segregated funds to cover both the Forward Value and Ledger Balance of its customers "such that the [c]ustomers would be able to assert proprietary rights to those funds against [MFGS] in the context of liquidation".[25]

10 As for the customers' Unrealised Profits, the Court of Appeal agreed with the High Court that no statutory trust could arise over these profits. It held that there can be no legal entitlement to a sum that is "notional or uncertain". The Unrealised Profits were both notional and uncertain given that they would only be finalised or crystallised upon closure of the underlying transaction.[26] The moneys segregated by MFGS to cover these Unrealised Profits, therefore, constituted MFGS' residual financial interest, which it was allowed to maintain in the customer segregated bank accounts pursuant to reg 23 of the SFR and reg 21(4) of the CTR.[27]

11 It is important to highlight that the LFX and LC transactions which MFGS conducted with its customers were on a principal-to-principal basis.[28] For its other products (for example, futures and contracts-for-difference), MFGS acted as its customers' agent. Where MFGS acted as agent, the liquidators of MFGS accepted that any moneys segregated to cover Unrealised Profits, Forward Value and Ledger Balance would be held on trust for the customers; therefore, the issue before the Court of Appeal was limited to the segregation and trust obligations imposed by the SFR and CTR, where MFGS transacted as principal.[29] It should also be mentioned that the Seg Fund Statements were prepared across all products such that MFGS would compare its total funds in segregation in various locations against the Total Account Equity of all its customers, regardless of whether it acted as principal or agent in the transactions.[30]

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24 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [46].
25 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [51].
26 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [44]–[45].
27 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [52]; Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) reg 23; Commodity Trading Regulations 2001 (S 578/2001) reg 21(4).
28 See *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [10]. To hedge its own exposure, MF Global Singapore Pte Ltd engaged in back-to-back hedge transactions with hedge counterparties, which transactions it funded with its own funds.
29 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [4].
30 *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [212] and [214]; *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [11]–[13].

B. MAS consultation paper

12 The stated aim of the MAS Consultation Paper is to enhance the regulatory regime governing the protection of customers' moneys and assets held by CMS licence holders,[31] with the proposed changes to be effected via new rules.[32] To this end, the MAS Consultation Paper sought feedback on eight sets of proposals. This article will not discuss all the proposals, but will focus only on those which relate to and/or potentially impact the scope of the segregation and statutory trust obligations imposed on CMS licence holders.

13 Perhaps the most far-reaching proposal in the MAS Consultation Paper relates to the definition of customers' moneys. The current definition in the SFR covers only moneys "received from or on account of the customer", but does not include contractual rights arising from transactions entered into by an intermediary on behalf of or with a customer.[33] To ensure that all customers' moneys received and held by CMS licence holders are accorded protection under the SFR, MAS has proposed to expand the definition of customer moneys to include "contractual rights arising from transactions entered into by the CMS licensees on behalf of a customer (e.g. futures contracts) or with a customer (e.g. contract for differences)".[34]

14 Another proposed change relates to the obtaining of acknowledgments from financial institutions. Pursuant to regs 18 and 28 of the SFR, CMS licence holders are required to obtain an acknowledgment from domestic financial institutions[35] with whom they keep customers' moneys (and assets) confirming that the: (a) accounts in which the customer's moneys (and assets) are deposited are designated as customer's trust accounts; (b) moneys (and assets) are held on trust for the customers and segregated from the CMS licence holder's own moneys (and assets); and (c) domestic financial institution will not use the moneys (and assets) in these accounts to set-off against any debt

31 Monetary Authority of Singapore, *Consultation Paper on Enhancements to Regulatory Requirements on Protection of Customer's Moneys and Assets* (P008 – 2016, July 2016) at para 1.1.

32 Monetary Authority of Singapore, *Consultation Paper on Enhancements to Regulatory Requirements on Protection of Customer's Moneys and Assets* (P008 – 2016, July 2016) at para 1.2.

33 Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) regs 15 and 16.

34 Monetary Authority of Singapore, *Consultation Paper on Enhancements to Regulatory Requirements on Protection of Customer's Moneys and Assets* (P008 – 2016, July 2016) at paras 3.1–3.3.

35 These include banks, merchant banks, finance companies and depository agents.

owed by the CMS licence holder to the domestic financial institution.[36] These regulations currently do not apply to customers' moneys (and assets) placed with overseas financial institutions. To provide greater protection to investors, MAS has proposed to extend the applicability of regs 18 and 28 of the SFR to situations where customers' moneys (and assets) are placed with overseas financial institutions.[37]

15 The final proposed change that will be discussed in this article relates to the daily computations required under the SFR for trust accounts (and custody accounts). Under reg 37 of the SFR, a CMS licence holder that trades in futures or carries out leveraged foreign exchange trading is required to perform daily computations of the amount of its moneys (and assets) deposited in the customers' trust accounts (and custody accounts).[38] As regular reconciliation of customers' moneys (and assets) is a key control in ensuring that customers' moneys (and assets) are accounted for, MAS has proposed to extend the daily computation requirement to all CMS licence holders holding customer's moneys (and assets).[39]

III. Commentary on recent developments

A. Definition of customers' moneys clarified to include moneys segregated to cover forward value

16 Following *Vintage v MFGS*, it is now clear that where a CMS licence holder or commodity broker enters into transactions with its customers to which the SFR or CTR applies, from the point that profits are crystallised or finalised (for instance, when a transaction is closed out), subject to any legal impediments to the customers' entitlement[40] and assuming the CMS licence holder or commodity broker complies with its obligation to segregate funds to cover these profits, the moneys segregated will be protected by a statutory trust.

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36 Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) regs 18 and 28.

37 Monetary Authority of Singapore, *Consultation Paper on Enhancements to Regulatory Requirements on Protection of Customer's Moneys and Assets* (P008 – 2016, July 2016) at paras 3.8–3.9.

38 Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) reg 37.

39 Monetary Authority of Singapore, *Consultation Paper on Enhancements to Regulatory Requirements on Protection of Customer's Moneys and Assets* (P008 – 2016, July 2016) at paras 3.16–3.17.

40 Examples of such legal impediments include where the sum representing Forward Value has been eroded by crystallised losses, or the customer has occasioned some breach of contract; see *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [46].

17 The Court of Appeal's reversal of the High Court's ruling that moneys segregated to cover Forward Value are not fixed with a statutory trust is a welcome one. The Court of Appeal based its decision primarily on the plain and ordinary meaning of the words used in the SFR and CTR, as well as on interpretations of the term "accrue" that the Singapore courts had previously adopted in other legal contexts.[41] As mentioned above, the Court of Appeal also held that "accrue" should not be conflated with "due" or "payable".[42] It is submitted that this holding by the Court of Appeal is correct, and that additionally, "accrue" should also be distinguished from "received" (and in this regard, the High Court appears to have conflated "accrue" with "received" in placing emphasis on the right to "receive actual money").[43] In this regard, apart from the local case authorities which the Court of Appeal referred to, it is noteworthy that the definition of "accrue" in *Black's Law Dictionary*[44] is "to come into existence as an enforceable claim or right",[45] "accrued asset" is defined as "an asset arising from revenues earned but not yet due",[46] and "accrued income" is defined as "money earned but not yet received".[47] These definitions centre on the concept of an entitlement or right (the concept adopted by the Court of Appeal) to receive a particular thing even though it may not yet be due or has not yet been received. Furthermore, it is submitted that if the Parliament had intended for "accrue" to mean "due", "payable" or "received", it could simply have used such words. It is clear the Parliament does not consider "accrue" to be synonymous with "payable" from the Civil List and Gratuity Act,[48] where these two words are used to refer to distinct concepts, with s 4 of this Act stating that "[t]he yearly sums payable under Class I of the Schedule shall … (a) accrue from day to day; and

41 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 ("*Vintage v MFGS*") at [36]–[44]: these other legal contexts were in the context of income tax (see *Pinetree Resort Pte Ltd v Comptroller of Income Tax* [2000] 3 SLR(R) 136; *ABD Pte Ltd v Comptroller of Income Tax* [2010] 3 SLR 609, which were discussed in *Vintage v MFGS* at [37]–[40]), garnishee proceedings (see *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd v Capital Insurance Bhd* [2004] 1 MLJ 353; *Lim Boon Kwee v Impexital SRL* [1998] 1 SLR(R) 757, which were discussed in *Vintage v MFGS* at [41]) and the accrual of causes of action (see *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd* [2014] 2 SLR 318, which was discussed in *Vintage v MFGS* at [42]).

42 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [42].

43 See *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [122].

44 Bryan A Garner, *Black's Law Dictionary* (Thomson Reuters, 10th Ed, 2014).

45 Bryan A Garner, *Black's Law Dictionary* (Thomson Reuters, 10th Ed, 2014) at p 25.

46 Bryan A Garner, *Black's Law Dictionary* (Thomson Reuters, 10th Ed, 2014) at p 134.

47 Bryan A Garner, *Black's Law Dictionary* (Thomson Reuters, 10th Ed, 2014) at p 831.

48 Cap 44, 2002 Rev Ed.

(b) be payable monthly on the last day of each month or on such other day as the Minister may from time to time determine."[49]

18 In addition, it is submitted that a further and equally important reason justifying the Court of Appeal's ruling that moneys segregated to cover Forward Value should be impressed with a statutory trust is that a ruling to the contrary would undermine the very purpose of the relevant provisions in the SFR and CTR, namely, the purpose of protecting customers' moneys in, *inter alia*, the event of liquidation.[50] This is because the fact that Forward Value was settled and only became Ledger Balance a few days later on the Value Date was purely contractual (that is, this was contractually agreed in the agreement between MFGS and its customers). Therefore, interpreting the statutory trust to protect only Ledger Balance would mean that CMS licence holders or commodity brokers could contractually circumvent or defeat the protections accorded to customers by the SFR and CTR by extended Value Dates. Although the Value Date in *Vintage v MFGS* generally arrived only a few days after a customer closed out his position, there would be nothing to stop a CMS licence holder or commodity broker from stipulating that Forward Value would only become Ledger Balance, say, 30 days after the customer closed out his position. In fact, a CMS licence holder or commodity broker could go even further and provide contractually that a customer could only withdraw his Ledger Balance a further 30 days after the Value Date. Based on the reasoning of the High Court, in that situation, a statutory trust would presumably only arise after 60 days. It is submitted that the SFR and CTR could not have been intended to apply so unevenly such as to accord differing levels of protection to identical trades just because they are carried out through different brokers or through the same broker applying different contractual terms for different customers.

19 Moreover, the SFR and CTR do not contemplate the concept of a Value Date, and do not envisage any distinction between concepts such as Forward Value and Ledger Balance. Regulation 25(1) of the CTR appears to draw a distinction only between Unrealised Profits and "Realised Profits" in that it requires a commodity broker to furnish a customer with monthly confirmation statements showing, *inter alia*, the "net unrealised profits or losses in all positions marked to market" and a "detailed accounting of all financial charges and credits to the customer's account during that month, including … realised profits and losses

49 Civil List and Gratuity Act (Cap 44, 2002 Rev Ed) s 4.

50 This was the purpose identified by the High Court in *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [83] and [142], which was affirmed by the Court of Appeal in *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [34]–[35], [37] and [43].

belonging to the customer".[51] In fact, it could be argued that the use of the phrase "realised profits … belonging to the customer" suggests that the drafters of the CTR assumed that realised profits would belong to customers. It is submitted that Forward Value would fall within the definition of "realised profits" based on the plain and ordinary meaning of this term. "Realised profits" has been defined as "the gain on a position or trade after it has been closed",[52] and it has been stated that "[e]xchange profits and losses can be either realized or unrealized. They are said to be realized if both the buy side and the sell side of the transaction have been completed".[53]

20 Finally, it is submitted that the High Court's approach of treating Forward Value as mere unsecured claims would have resulted in an arbitrary (and possibly capricious) outcome. For example, such an approach would deprive a customer of a proprietary right to his Forward Value even if he had closed out his positions comfortably before the CMS licence holder or commodity broker went into liquidation, but the Value Date only arrived a day after the date of liquidation. It is illogical and unfair that another customer who had closed out a transaction just a day earlier (such that the Value Date arrived before the CMS licence holder or commodity broker went into liquidation) would have his profits protected by a statutory trust but not the former customer. Both customers had closed out their transactions before the CMS licence holder's or commodity broker's insolvency and should be treated in the same way. This reasoning was found to be persuasive in *Re MF Global Australia*,[54] where the court observed:[55]

> It would be an arbitrary and capricious result, in calculating a distribution (by reference to the Appointment Date) that is to be made some considerable time later, to treat a client whose position had been closed on 31 October as having an entitlement from the account but a client whose position would be closed on 2 November (or, indeed, 21 November) as having no entitlement to that account …

B. Seg Fund Statements and requirement of performing daily computations

21 The Court of Appeal's decision in *Vintage v MFGS* can also be seen as an implicit endorsement of the use of the Seg Fund Statements, modelled on a page from Form 1, to comply with the daily computation

51 Commodity Trading Regulations 2001 (S 578/2001) reg 25(1).

52 "Realized Profit", *Forex Dictionary* <http://www.forexdictionary.com/definition/501/realized-profit> (accessed 27 March 2017).

53 Steve Anthony, *Foreign Exchange in Practice: The New Environment* (Palgrave Macmillan, 3rd Ed, 2002) at pp 8–9.

54 [2012] NSWSC 994.

55 *Re MF Global Australia* [2012] NSWSC 994 at [145].

requirements under the SFR and CTR. These daily computation requirements are set out in reg 37 of the SFR and reg 22(12) of the CTR, and require a CMS licence holder and commodity broker respectively to essentially perform three computations on a daily basis, to compute the: (a) total amount of moneys in the segregated accounts; (b) total amount of moneys required to be segregated by the relevant legislation and regulations; and (c) CMS licence holder's or commodity broker's own residual financial interest in the moneys in the segregated accounts.[56]

22 The SFR and CTR specify that the computations are to be done before noon of the next business day and must be kept by the CMS licence holder and commodity broker.[57] However, they do not prescribe any form or format to be used for the daily computations. It is, therefore, important for CMS licence holders and commodity brokers to know whether they can use a document modelled on the page from Form 1 (as MFGS did through the use of the Seg Fund Statements) to comply with their statutory obligation to perform the daily computations. This is particularly important given that MAS has proposed, in the MAS Consultation Paper, to extend the daily computation requirement to all CMS licence holders holding customers' moneys (whereas this requirement was only previously applicable to CMS licence holders that traded in futures or that conducted leveraged foreign exchange trading).

23 The Seg Fund Statements prepared by MFGS, based on a page from Form 1, contained two sections. The first section was titled, "Segregation Requirements" and contained several lines of items which, essentially, were added up to compute (at item 6) the "Amount Required to be Segregated".[58] The liquidators of MFGS deposed that this computation at item 6 essentially corresponded with the Total Account Equity of all MFGS' customers on that particular date. The liquidators of MFGS also confirmed that items 1 and 3 (which formed part of the computation at item 6) corresponded with the aggregate of the Ledger Balances of all MFGS' customers on that date and the aggregate of the Forward Value and Unrealised Profits of all MFGS' customers on that date respectively.[59] The second section was titled, "Location of Segregated Funds", which also contained several lines of items and which set out where the actual moneys were segregated (for instance,

56 Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) reg 37; Commodity Trading Regulations 2001 (S 578/2001) reg 22(12).

57 Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) reg 37(2); Commodity Trading Regulations 2001 (S 578/2001) reg 21(12).

58 *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [211]–[212].

59 *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [212].

in the customer segregated bank accounts, receivables from margin deposits with clearing houses). The "Total Amount Segregated" was reflected at item 15, and this corresponded with the total amount of physical moneys actually in segregation.[60] The final-line item in the second section (item 16) was titled, "Excess/(Deficiency) Funds in Segregation", and reflected the difference between the total amount segregated (item 15) and the amount required to be segregated (item 6).[61]

24 The Court of Appeal proceeded on the basis that the Seg Fund Statements were the daily computations that MFGS was required to perform under the SFR and CTR.[62] Given that the Court of Appeal did not state that there was anything deficient in the way MFGS discharged its obligation to perform the daily computations by using the Seg Fund Statements, one could assume that it would be safe for CMS licence holders and commodity holders to similarly use the page from Form 1 as a template for performing the daily computations.

25 Unfortunately, it is submitted that this would not be a safe assumption. While there is nothing inherently wrong with using the page from Form 1 as a template, it is submitted that the way that MFGS used it did not in fact comply with the SFR and CTR in light of the Court of Appeal's holding that the moneys segregated to cover Unrealised Profits were not fixed with a statutory trust and, accordingly, needed not have been segregated. The requirement in the SFR and CTR is that CMS licence holders and commodity brokers must compute the total amount of customers' moneys "required to be segregated" by the applicable legislation and regulations. However, what MFGS computed in the ordinary course of business at item 6, "Amounts Required to be Segregated", was the Total Account Equity of all its customers. This comprised both of sums which were required to be segregated (that is, the LFX and LC customers' Ledger Balance and Forward Value) and

60 *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [214].

61 *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [214].

62 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 ("*Vintage v MFGS*") at [11]: the Court of Appeal held that MF Global Singapore Pte Ltd ("MFGS") was required to perform the daily computations. Counsel for the liquidators of MFGS initially stated that there could be other documents (apart from the Seg Fund Statements) that had been prepared in compliance with the statutory obligation to perform the daily computations, but he later withdrew this statement and stated that he did not know whether there was other information as to how MFGS performed the daily computations. The Court of Appeal held that the liquidators of MFGS "accepted that the Seg Fund Statements were the *only* documents that [the court] had *on record* to demonstrate how [MFGS] carried out its obligations to compute such information daily. If there were other documents, the Liquidators [of MFGS] were under an obligation to disclose them and, since they had failed to do so, they could not rely on such non-disclosure to their advantage" [emphasis in original].

sums which were not required to be segregated (that is, the LFX and LC customers' Unrealised Profits). This is because the sum computed at item 3, "Net Unrealised Profit/(Loss) in Open Contracts", included both the Forward Value and Unrealised Profits of MFGS's customers.

26 It is also pertinent that item 3 computed not just the aggregate of Unrealised Profits and Forward Value of MFGS' customers, but also took into account the customers' unrealised losses. Therefore, in a situation where the customers' unrealised losses exceeded their Unrealised Profits, item 3 (and correspondingly item 6) would state a sum which was less than what MFGS was actually required to segregate under the SFR and CTR. This could then lead to a situation where MFGS had less physical moneys segregated (and available to be fixed with a statutory trust) than customers' moneys which it was required to segregate under the SFR and CTR. It is submitted that this would defeat the whole purpose of requiring the daily computations, which must have been for CMS licence holders and commodity brokers to check, on a daily basis, that they had sufficient funds in segregation (such that a statutory trust could arise over and protect customers' moneys) and to remedy the situation if there was a "deficiency" in funds in segregation.

27 A further complication would arise if it were assumed, as the liquidators of MFGS accepted, that where a CMS licence holder or commodity broker acted as agent, its customers' Unrealised Profits, Forward Value and Ledger Balance were to be segregated and fixed with a statutory trust. If that were the case, even the aggregate of Unrealised Profits and unrealised losses contained in item 3 would be a composite sum of amounts "required to be segregated" (the Unrealised Profits and losses of all MFGS' customers save for the LFX and LC customers) and amounts that were not "required to be segregated" (the Unrealised Profits and losses of the LFX and LC customers). In these circumstances, in order to use the page from Form 1 in compliance with the daily computation requirements in the SFR and CTR, CMS licence holders and commodity brokers would have to take the additional step of deducting from item 3 the aggregate of the Unrealised Profits and losses of their customers with whom they had transacted on a principal-to-principal basis.

C. Should segregation and trust obligations in the SFR and CTR also apply to a customer's unrealised profits?

28 As discussed above, the Court of Appeal held that moneys segregated to cover a customer's Unrealised Profits are not subject to a statutory trust (at least where the CMS licence holder or commodity

broker transacts as principal) because these are notional and uncertain profits.[63] While this is the law as it currently stands, it appears that the proposals in the MAS Consultation Paper may change the law given that one proposal is to expand the definition of customers' moneys to include "contractual rights arising from transactions entered into by the CMS licensees on behalf of a customer (e.g. futures contracts) or with a customer (e.g. contract for differences)".[64] It is arguable that customers' Unrealised Profits could potentially fall within the scope of the term "contractual rights". This is particularly so, given that in the IOSCO recommendations, which MAS had considered in formulating its proposals in the MAS Consultation Paper, "client assets" are stated to include "client positions", which are in turn defined as "contractual rights arising from transactions entered into by an intermediary on behalf of its clients, including mark to market accruals arising from the change in value of futures and options positions".[65]

29 It is submitted that there are valid justifications for the segregation and statutory trust obligations in the SFR and CTR to apply to a customer's Unrealised Profits. First, it is incongruous that where a CMS licence holder or commodity broker transacts with its customer as agent, the customer's Unrealised Profits are required to be segregated and held on trust whereas these obligations will have no application if the CMS licence holder or commodity broker transacts as principal. Nothing in the SFA, SFR, CTA, CTR or the parliamentary debates suggests that the Parliament intended for a different level of protection to apply where a CMS licence holder or commodity broker transacts as agent as opposed to when it transacts as principal. In addition, it appears to be industry practice for a CMS licence holder or commodity broker to specify in its agreement with its customers that it may, at its own discretion, choose to act as agent in one transaction and as principal in the next, even if the transactions relate to the same product (and some agreements further provide that the CMS licence holder or commodity broker does not even have to inform its customer in advance of the basis on which it is transacting). If that is the case, according a lower level of protection when the transaction is on a principal-to-principal basis undermines the purpose of protecting customers' moneys because the customer can never be assured of the level of protection that will be accorded to his profits.

63 *Vintage Bullion v MFGS* [2016] 4 SLR 1248 at [44]–[45].

64 Monetary Authority of Singapore, *Consultation Paper on Enhancements to Regulatory Requirements on Protection of Customer's Moneys and Assets* (P008 – 2016, July 2016) at paras 3.1–3.3.

65 International Organization of Securities Commissions, *Recommendations Regarding the Protection of Client Assets* (FR01/14, January 2014) at p 6.

30 Second, although it is true that Unrealised Profits are in a sense notional and uncertain such that it may be difficult to see how a common law trust can arise over such profits,[66] it should be emphasised that, as the Court of Appeal accepted in *Vintage v MFGS*, a statutory trust does not have to bear all the indicia of a common law trust (that is, a statutory trust may not need to meet all the requirements of a common law express trust such as the requirement that there be certainty of intention, certainty of subject matter and certainty of objects).[67] Further, while the customers' Unrealised Profits are notional in that they have not crystallised by the closing of the transaction, it is submitted that this should not necessarily lead to the conclusion that they cannot have "accrued" to the customers because these profits are derived by virtue of the LFX and LC transactions having been daily marked to market. "Mark-to-market" is defined in reg 2 of the CTR as "the process whereby the daily closing price of a commodity contract is used to value all outstanding positions of that contract at the end of the day and to establish the resulting gains and losses".[68] Similarly, commentators have opined that marking to market is where "positions are revalued periodically at current market prices, and investors realise their profits/losses with each such revaluation [such as] where positions on organised markets are marked to market at the end of each trading day and traders' margins are adjusted accordingly so that all gains or losses are realised immediately"[69] and that "the system of daily mark to market is that the gains and losses are paid out daily, instead of waiting for maturity".[70] Based on these definitions, daily marking to market can be seen as the process whereby any Unrealised Profits are being "paid out daily" or "realised immediately", and this can justify a finding that such profits are "accruing" to the customers on a daily basis.

31 As for Unrealised Profits being uncertain, while it is true that Unrealised Profits are uncertain from the perspective that the amount of such profits may change from day to day, looking at the matter from a different angle, there is some degree of certainty (at least such as to allow for the imposition of a statutory trust to be workable) in that it is

66 For example, it is arguable that such profits would not fulfil the requirement of certainty of subject matter, which requires that the subject of a common law trust must be identifiable and clearly defined: see *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [177].

67 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [54], citing *Ayerst v C & K (Construction) Ltd* [1976] AC 167, which was in turn cited with approval by the Singapore High Court in *Power Knight Pte Ltd v Natural Fuel Pte Ltd* [2010] 3 SLR 82 at [50].

68 Commodity Trading Regulations 2001 (S 578/2001) reg 2.

69 Kevin Dowd, *Measuring Market Risk* (John Wiley & Sons Ltd, 2nd Ed, 2005) at p 16.

70 Jayanth Rama Varma, *Derivatives and Risk Management* (Tata McGraw Hill, 2008) at para 2.3.

possible to quantify the amount of these profits (and any unrealised losses) as at any particular day, both at a customer level and on an aggregate level. In fact, that was precisely what MFGS was doing in the ordinary course of business because it had included the aggregate of the Unrealised Profits (and losses) of its customers in the preparation of the daily Seg Fund Statements. Further, each customer's Unrealised Profits and losses as at any particular day would be captured in that customer's daily statement. The facts of *Vintage v MFGS* show that it is neither unworkable nor impractical for a CMS licence holder or commodity broker to segregate moneys to cover the Unrealised Profits of its customers to allow a statutory trust to arise over such moneys given that this was precisely what MFGS had done in the ordinary course of business. By performing daily computations which took into account the Total Account Equity of all its customers, MFGS ensured that there was a defined amount of moneys segregated in the customer segregated bank accounts which: (a) corresponded with the LFX and LC customers' Unrealised Profits; (b) were not subject to any proprietary claim by third parties; and (c) could have been impressed with a statutory trust.

32 Of course, the extension of statutory trust protection to cover Unrealised Profits also would mean that there will be fewer assets for satisfaction of the debts of unsecured creditors, and this can arguably be unfair to such unsecured creditors. It will then be a question of whether the legislative intent is to protect customers to the fullest extent, even if this comes at the expense of unsecured creditors.

D. Uniform approach towards segregation and trust obligations in the SFR and CTR

33 It is noteworthy that the Court of Appeal essentially applied the same test of legal entitlement to determine when a statutory trust will arise under the SFR and CTR. This was despite the difference in the language used, "received on account of" and "accruing". It is submitted that profits in the nature of Forward Value fit more neatly into the term "accruing", that is, it is more natural to contend that such profits have "accrued" to the customer, particularly given that the term "accruing" is followed by "to a customer as a result of such trading". In contrast, the term "received on account" appears to suggest that it is meant to cover moneys which a CMS licence holder receives for or on behalf of its customers. To deal with this difficulty in language, the Court of Appeal held that "received" must not be read so narrowly as to require a separate counterparty, and that payment received from MFGS (as principal-payor) by MFGS (as payee on its customer's behalf) can be considered moneys received "on account of" its customers and may be

subject to a statutory trust.[71] The Court of Appeal went on to hold that the words "on account of" mean that a statutory trust arises over any money a CMS licence holder receives "for" or on its customer's "behalf". However, prior to the customer being legally entitled to the sums in question, the CMS licence holder cannot be said to have received such sums on the customer's behalf but will, instead, simply have received the same for itself.

34 It is submitted that the Court of Appeal's interpretation of the term "received on account of" was likely, at least, partially motivated by a desire to ensure consistency in protection of customers' moneys in LFX and LC transactions, and rightly so, given that it is hard to see why customers who engage in LFX transactions should be accorded any different protection than customers who engage in LC transactions. However, an examination of the SFR and CTR reveals that while the general scheme of how customers' moneys are protected is broadly similar, there are other differences apart from the difference in terminology discussed above. Other differences include that while a commodity broker may maintain a residual financial interest in the segregated accounts solely for the purpose of preventing the accounts from being "under-margined" under the CTR,[72] the purposes for which a CMS licence holder may maintain a residual financial interest in the segregated accounts appear, on their face, to be broader. Apart from the purpose of preventing the accounts from being "under-margined", a CMS licence holder may also maintain a residual financial interest in the segregated accounts to prevent them from being "under-funded" or to "ensure the continued maintenance of that account where it is maintained with … a financial institution specified in regulation 17(1); or a custodian specified in regulation 17(2)".[73] The penalties for non-compliance with, *inter alia*, the segregation and trust obligations under the SFR and CTR are also different. While both attract criminal penalties, the maximum punishment under the SFR is a fine of S$50,000[74] whereas the maximum punishment under the CTR is a fine of just S$5,000.[75]

35 In these circumstances, ensuring genuine consistency in protection of customers' moneys could require the regulators to relook the relevant provisions of the SFR and CTR. The difficulty in embarking on such an exercise is that, at present, this would have to be a joint

71 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [43].
72 Commodity Trading Regulations 2001 (S 578/2001) reg 21(4).
73 Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) reg 23.
74 Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) reg 55.
75 Commodity Trading Regulations 2001 (S 578/2001) reg 34.

exercise between two regulators, MAS (in the case of the SFR) and International Enterprise Singapore (in the case of the CTR). Having said that, for LFX and LC transactions specifically, consistency in protection is likely just around the horizon given that amendments to the SFA have been proposed to transfer the regulatory oversight of commodity derivatives under the CTA (which includes leveraged commodity trading) to the SFA (and this would mean that the relevant provisions in the SFR relating to protection of customers' moneys would apply to LC transactions).[76] However, spot commodity trading will be retained under the CTA (and consequently, the CTR);[77] so the regulators may still want to consider whether the differences in the SFR and CTR make sense if they result in a different level of protection for spot commodity trading transactions.

E. Nature of statutory trust

36 A final point of interest raised in *Vintage v MFGS* is the Court of Appeal's discussion, in *obiter*, of the nature of the statutory trust which arises under the SFR and CTR. The Court of Appeal considered that there are two possibilities. The first possibility is that a statutory trust arises upon receipt or accrual of moneys, but it is a purpose trust that merely gives the customers the right to invoke the protection of the court to ensure the company fulfils its statutory duties.[78] While non-charitable purpose trusts are generally not enforceable[79] outside certain limited and anomalous exceptions,[80] the Court of Appeal appeared to accept that such a purpose trust could be valid since it analogised such a purpose trust to the purpose trust that has been recognised to arise on the winding-up of a company (and which, while not conferring beneficial ownership on the creditors, gives them a right to invoke the protection of court to ensure that the liquidator fulfils his statutory duties).[81] The second possibility is that the statutory trust does not automatically arise upon receipt or accrual, but only after the moneys are segregated in accordance with the statutory obligations in the regulations.[82]

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76 Monetary Authority of Singapore, *Consultation Paper on Proposed Amendments to the Securities and Futures Act* (P004 – 2015, February 2015) at para 3.1.

77 Monetary Authority of Singapore, *Consultation Paper on Proposed Amendments to the Securities and Futures Act* (P004 – 2015, February 2015) at para 3.1.

78 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [55].

79 See *Morice v Bishop of Durham* (1804) 9 Ves Jr 399; *Re Astor's Settlement Trusts* [1952] Ch 534; *Koh Lau Keow v Attorney-General* [2013] 4 SLR 491 at [18].

80 See *Petingall v Petingall* (1842) 11 LJ Ch 176; *Re Hooper* [1932] 1 Ch 38; *Mussett v Bingle* (1959) AC 457.

81 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [55].

82 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [56].

37 The Court of Appeal did not decide this issue in a definitive manner, as it did not have to do so on the facts of the case.[83] Nevertheless, it did express that the second possibility may be preferable as such an interpretation is supported by the language of the SFR and CTR which, on a plain and ordinary reading, merely appear to set out statutory obligations on a would be-settlor to segregate moneys received from and accruing to the customers into a trust account.[84] However, the concern with the second possibility, which the Court of Appeal acknowledged, is whether this accords sufficient protection to customers given that the statutory obligation to segregate is interpreted, in effect, as a prerequisite to the imposition of a statutory trust over the moneys.[85] The Court of Appeal considered that this concern is addressed in the SFR and CTR by the enactment of reg 34 of the CTR and reg 55 of the SFR, which penalise non-compliance with the statutory obligations to segregate by imposition of criminal sanctions, and that the presence of these regulations could suggest that the Parliament had intended to address non-compliance with segregation requirements through the use of such sanctions.[86]

38 However, given that the maximum penalty for non-compliance with the segregation requirements in the SFR and CTR is a S$50,000 fine and a S$5,000 fine respectively, it is respectfully submitted that the possibility of criminal sanctions being imposed may not be a sufficient deterrent against non-segregation by CMS licence holders and commodity brokers. As most CMS licence holders and commodity brokers are large institutions with significant financial muscle and in light of the fact that there is no provision for any penalties against officers of a CMS licence holder or commodity broker personally, it is hard to see how fines of the level currently provided for in the SFR and CTR would deter non-compliance with the segregation requirements in the SFR and CTR, particularly if the obligation is to segregate significant sums of moneys which could be deployed elsewhere for profit.

39 In addition, it is noteworthy that both the SFR and CTR provide first, in reg 16(1)(*a*) of the SFR and reg 21(1)(*a*) of the CTR, that a CMS licence holder and commodity broker respectively should treat moneys "received on account of" and "accruing" to its customers as "belonging" to these customers (that is, the statutory trust obligation). It is only in the next sub-sections, regs 16(1)(*b*) and 16(1)(*c*) of the SFR and regs 21(1)(*b*) and 21(1)(*c*) of the CTR, that it is provided that the CMS licence holder and commodity broker, respectively, should deposit

83 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [58].
84 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [56].
85 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [57].
86 *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248 at [57].

moneys "received on account of" and "accruing" to its customers in a "trust account", and should not commingle such moneys with its own funds (that is, the segregation obligation). Therefore, an argument could be made that what is envisaged in the SFR and CTR is that the statutory trust arises upon receipt or accrual; but separately and subsequently, the CMS licence holder and commodity broker is obliged to segregate such moneys in a "trust account" to accord it the protection it is entitled as trust moneys. For these reasons, while there is considerable force in the Court of Appeal's reasoning, it is submitted that the first possibility it identified may in fact be preferable.

E. Obtaining acknowledgements by overseas financial institutions

40 At this juncture, it may be apposite to touch briefly on the proposal by MAS relating to the obtaining of acknowledgments from overseas financial institutions that, *inter alia*, the customers' moneys deposited with them are placed in accounts designated as customers' trust accounts. It is submitted that this proposal is sensible in that it aims to protect customers' moneys wherever held, and to ensure a certain degree of consistent protection for customers' moneys. However, a potential issue that could arise is that certain jurisdictions, particularly civil law jurisdictions, may not recognise the concept of a trust or a trust account. If that is the case, it will not be possible for a CMS licence holder to get the requisite confirmation that the account in which customers' moneys (and assets) are deposited are designated as customers' trust accounts. One possible way forward could be for MAS to consider what alternatives are available in other jurisdictions that accord similar protections to those accorded by a trust. Perhaps the starting point could be to ensure that the CMS licence holder is able to, at least, obtain a confirmation that the overseas financial institution will: (a) hold the moneys in an account for the benefit of the customer; (b) segregate the moneys in this account from all other moneys of the CMS licence holder; and (c) not use the moneys in the account to set off against any debt owed by the CMS licence holder to the financial institution. Alternatively, the requirement for obtaining the acknowledgment could be on a "reasonable endeavours" basis, and for MAS to then consider, on a case-by-case basis, whether what the CMS licence holder has managed to obtain accords sufficient protection to customers' moneys.

IV. Conclusion

41 In order for markets to operate effectively, it is unavoidable that CMS licence holders and commodity brokers should hold customers' moneys when transacting with these customers or when undertaking

investment business on their behalf. Consequently, it is of great importance to investor protection and confidence in markets that customers should know that: (a) their moneys will be protected so far as practicable from the risk of loss as a result of a CMS licence holder's or commodity broker's insolvency; and perhaps even more importantly, (b) the extent to which their moneys will be protected. The latter objective has certainly been achieved through the Court of Appeal clarifying, in *Vintage v MFGS*, that the segregation and trust obligations under the CTR apply to any profits arising from transactions that have been closed out or to which the customers are otherwise legally entitled. The Court of Appeal in *Vintage v MFGS* also advanced the former objective by ruling that customers' Forward Value, and not just their Ledger Balance, is also impressed with a statutory trust where the CMS licence holder or commodity broker has segregated moneys to cover such profits. Nevertheless, it is submitted that there are compelling reasons for perhaps extending regulatory protection even further, to cover customers' Unrealised Profits that are marked to market. This can potentially be achieved when the proposed enhancements in the MAS Consultation Paper come into force, though it remains to be seen whether the re-definition of customers' moneys that is eventually enacted in new rules will be wide enough to cover such profits.