Singapore Institute of Legal Education

Singapore Institute of Legal Education
Foreign Practitioner Examinations 2018
Commercial Practice

Contents:

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PART I: The Singapore Legal and Financial System

PRIMARY AND SECONDARY MATERIALS

Candidates should have access to LawNet. A number of statutes are referred to in the syllabus. While primary Acts are available to the public at statutes.agc.gov.sg, currently this does not extend to subsidiary legislation. In addition, a number of cases are listed; however, the essential parts are highlighted, and Candidates need not read the whole of each case.

BOOKS

On the legal system generally, candidates may refer to Gary Chan & Jack Lee (eds), *The Legal System of Singapore: Institutions, Principles and Practices* (LexisNexis, 2015).

An overview of the Singapore legal system is also available at www.singaporelaw.sg, a website hosted by the Singapore Academy of Law.

Required reading, and generally a good guide to securities regulation in Singapore:

> Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (LexisNexis, 2011, 2nd ed), hereafter 'Tjio'.

For reference, Candidates may, if they wish, look up the following, but these are not required reading:

> Kevin YL Tan & Thio Li-ann, *Constitutional Law in Malaysia & Singapore*, (LexisNexis, 2010, 3rd ed)
>
> Kevin YL Tan, *An Introduction to Singapore's Constitution* (Talisman Publishing, 2014)

NOTE ON THE EXAMINATIONS

Candidates will not be examined on the Constitutional Law of Singapore, or of Financial regulatory law as such under this topic. The focus will be on understanding the broad framework of our legal and financial system.

A. THE LEGAL SYSTEM

(1) The Framework

- The Constitution as the supreme law of the land, and the branches of government.
- The supremacy clause of the Constitution: Article 4, cf Art 162. The role of the three branches of Government: the Legislature (Art 38 and 39); the Judiciary (Art 93); and the Executive (Arts 23, 24, 25, 30, and 34); the Elected President and his powers (Art 17, 21, 22, 22A-I); the Attorney-General and Public Prosecutor (Art 35). Candidates are only expected to be familiar with the structure of government as described in these Articles.
- The structure of the Singapore Court system. They should be aware of the general structure of the State and Supreme Court. The websites of the State and Supreme Courts will also assist. Candidates do not need to delve into the history of the Singapore Court system, but should be at least aware that appeals to the Privy Council were abolished in 1994.
    - The Magistrates' Court, the District Court, the High Court (in its appellate and original jurisdictions), and the Court of Appeal.
    - The special courts: the Syariah Court, the Military Courts. *Candidates need only be aware that they exist*.
- Original, appellate, supervisory and revisionary jurisdiction: the Supreme Court of Judicature Act (Cap 322).

(2) The Jurisdiction of the Courts:

- Criminal
    - State Courts: ss 7 and 8, Criminal Procedure Code 2010
    - Supreme Court: s 3, Supreme Court of Judicature Act (Cap 322)
- Civil matters.
    - State Courts: s 2, 'District Court Limit' and 'Magistrate's Court Limit', State Courts Act (Cap 321)
    - Supreme Court: s 3, Supreme Court of Judicature Act (Cap 322)
- The role of a judge: Ng Chee Tong v PP [2008] 1 SLR (R) 900.

(3) The Sources of Law

- The sources of law in Singapore, namely statutes and secondary legislation, and case law.
    - Statutes.
        - Candidates should be familiar with the general structure of Singaporean Acts of Parliament, and with general rules of interpretation, which are

largely similar to those of other Common Law jurisdictions. They should also be familiar with the general mode of citing statutes adopted in our case reports.

- In addition, candidates should also develop an understanding of the operation of several specific Acts useful for legal practice in Singapore, namely:

a. <u>The Interpretation Act (Cap 1)</u>

Candidates should be familiar with the Interpretation Act (Cap 1), particularly ss 2 (meanings of common phrases), 9A (purposive interpretation), s 19 - 21 (subsidiary legislation) , s 50 (computation of time), s 51(standard time), and s 54 (saving of rights of the Government).

b. <u>The Application of English Law Act (Cap 7A)</u>

The Application of English Law Act lists the UK statutes (as applied in England and Wales) that are applicable in Singapore. Section 4 and the First Schedule are the operative provisions. Section 3 applies English common law and equity as of 12th November 1993. Candidates should be aware of the English statutes in force in Singapore.

The divergence between English and Singapore common law: *Review Publishing Co Ltd and Anor v Lee Hsien Loong and anor appeal* [2010] SGCA 46, at paras [236] – [248].

- Subsidiary Legislation
  - Candidates should be familiar with the source of the power to issue subsidiary legislation. See for example, s 42 of the Monetary Authority of Singapore Act (Cap 186), as well as the general provisions in the Interpretation Act (above) in respect of subsidiary legislation.
  - Note that subsidiary legislation may be described in various ways: Rules, Regulations, and Codes. See for example The Code of Practice issued under s 17 of the Media Development Authority of Singapore act (Cap 172).
  - *Ultra vires* subsidiary legislation*: Re Tiong Polestar Engineering Pte Ltd* [2003] 4 SLR (R) 1.
- Case law
  - The rules of stare decisis in Singapore: *Mah Kah Yew v PP* [1970] SGHC 19; and *AG v Shadrake Alan* [2011] 2 SLR 445 at [4].
  - On occasion, there may be more intricate issues of stare decisis concerning older decisions, especially those handed down by the Straits Settlement Courts, but Candidates will not be expected to address those.
  - Candidates should be aware that local courts increasingly look across multiple jurisdictions for guidance, going beyond England, Australia and Hong Kong in many instances. See for example *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd and Ors* [2011] 1 SLR 830.

- Legal resources

- Candidates should be aware of the common online resources for legal research on Singapore law: Lawnet, Statutes. Online (the Attorney-General's Chambers website), and the Singapore Parliament Reports.

  Note: Candidates should be aware of the available resources, their scope and limitations, should they need to research specific points on Singapore law.

- Other materials:
  - International law norms. See *Yong Vui Kong v PP* [2010] 3 SLR 489 at para [59]
  - International Conventions: *The "Sahand" and other applications*[2011] 2 SLR 1093 at [33].

(4) The Legal Profession

It is not necessary to have detailed knowledge of the Legal Profession Act for this topic. However, candidates should be aware of the broad outline of Part IXA of the Legal Profession Act, Cap 161, which governs foreign law practices, and foreign lawyers. Candidates should also of course know the Legal Profession (Foreign Practitioner Examinations) Rules 2011. *Detailed knowledge of disciplinary rules are not required under this topic*.

(5) Statutory Boards

- Statutory boards will be encountered fairly frequently. Candidates should have an understanding of the general framework governing such statutory boards. Taking the Monetary Authority of Singapore Act (Cap 186) as an example, Candidates should be familiar with the general structure of Statutory Boards, with the appointment of boards of directors, and Managing Directors or Chief Executive Officers: Part II of the MAS Act. Such statutes also generally prescribe the powers, duties and functions of the statutory board: Part IV, as well as ss 41A, and 42 of the MAS Act. Additional powers are often conferred on statutory boards through other Acts as well: for example, see ss 321 – 324, and 334 of the Securities & Futures Act (Cap 289), and 68 and 69 of the Banking Act (Cap 19). Candidates should be aware of how to identify the relevant agency, which in many cases will be a statutory board, responsible for administering a particular Act: see for example s 2 of the Securities & Futures Act.
- Statutory boards are generally within the responsibility of a particular Minister in the Cabinet. Candidates should be aware of how to identify the relevant Minister and Ministry: see Article 30(1) of the Constitution, and for example, the Constitution of the Republic of Singapore (Responsibility of the Minister for Trade and Industry) Notification 2011. The notifications are found in the Versioned Legislation Database under Subsidiary Legislation to the Constitution.
- For the relationship between different statutory boards, and their obligations, see *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board and anor* [1997] 1 SLR (R) 52 at para [99]

B. THE FINANCIAL SYSTEM

The focus of this part will be on the overall structure of the financial system: Candidates will not be tested on mechanics of financial transactions.

There is again no ready resource for an overview of the entire financial system in Singapore. Chapter 2 of *Tjio* gives an overview of the regulatory sphere in respect of the securities industry.

The 2004 IMF report, 'Singapore: Financial System Stability Assessment' at www.imf.org/external/pubs/ft/scr/2004/cr04104.pdf , at pages 7 to 10, gives a snapshot as of the early to mid 2000s. It is still a useful overview.

Also please see 'A Review of Singapore's Economy and Financial System', a speech given by the then MD of MAS, Mr Heng Swee Keat, available at http://www.bis.org/review/r090721e.pdf

(1) The role of MAS

- An overview may be gleaned of the responsibilities of MAS from the MAS website: http://www.mas.gov.sg/legislation_guidelines/index.html.
- Candidates will be expected to understand the wide role of MAS in the financial sector. See the website of MAS, for MAS' own understanding of its role, as well as the legislation it administers:

  http://www.mas.gov.sg/about_us/Introduction_to_MAS.html

  http://www.mas.gov.sg/legislation_guidelines/index.html

  Also recall Chapter 2 of Tjio.

  For the regulatory approach, please see the MAS monograph, 'Tenets of Effective Regulation', available at

  http://www.mas.gov.sg/publications/monographs/Tenets_of_Effective_Regulation.html

(2) The Securities Industry

- There is a separate component on Corporate Finance. For this topic, the Candidates will only be expected to have an appreciation of the roles played by the different stakeholders and entities within the industry.
  - The Securities Industry Council

    S 138 of the Securities and Futures Act.

    This administers the Singapore Code on Take-overs and Mergers (available at http://www.mas.gov.sg/legislation_guidelines/securities_futures/sub_legislation/SFA_Codes.html)
  - The Exchanges.

    The Singapore Exchange , 'SGX'. See Tjio, at [2.17].

    The Singapore Mercantile Exchange, 'SMX'. See http://www.mas.gov.sg/news_room/statements/2010/Speech_by_DMD_Ong_Chong_Tee_MAS_at_The_Launch_OF_SMX_Electronic_Trading_Platform.html
  - Clearing Houses: CDP, SGX-DC.

    See Chapter 4, Tjio.
  - Other stakeholders:

    The Securities Investors Association (Singapore): see www.sias.org.sg

The Financial Industry Disputes Resolution Centre Ltd (FIDReC): see www.fidrec.com.sg

(3) The Banking Industry and Moneylending

- Again, the focus will be on the overall structure and framework, rather than details of law or regulations. Unlike the securities industry, there is no ready overview of the banking sector from a lawyer's perspective. Candidates should know the broad framework of regulation contained in the Banking Act (Cap 19), that is they should be aware of the main areas dealt with by the Act, which would correspond to the various parts of the Act, i.e. Licensing (Part III), Prohibited Businesses (Part V), Powers of Control over Banks (Part VII); and Credit Card and Charge Card Businesses (Part VIII). Candidates should also be aware that moneylenders may be licenced under the Moneylenders Act (Cap 188), s 5.
- Note the role of the FIDReC in banking disputes with consumers: see FIDReC's website above.

(4) Insurance

As with banking, there is no ready overview either. Candidates should be aware of the broad outline of insurance regulation in Singapore: s 3 and Part II generally of the Insurance Act (Cap 142), insurance broking (ss 35W, 35X) and the inspection powers of the MAS (ss 40 and 40A).

(5) Controls

Candidates should be aware of the suspicious transaction reporting requirements: s 39, Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A) [commonly abbreviated to 'CDSA'] and ss 8 and 10, Terrorism (Suppression of Financing) Act (Cap 325)

Part II: Contract

PRIMARY AND SECONDARY MATERIALS

References:

- Andrew Phang Boon Leong, Gen. Ed., *The Law of Contract in Singapore* (Law Practice Series) (Academy Publishing, 1st Ed., 2012)

Relevant Legislation:

- Civil Law Act (Cap 43, 1999 Rev Ed): In particular, section 12
- Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed)
- Consumer Protection (Fair Trading) Act (Cap 53A, 2009 Rev Ed)
- Electronic Transactions Act (Cap 88, 2011 Rev Ed)
- Evidence Act (Cap 97, 1990 Rev Ed): In particular, section 94(f)
- Frustrated Contracts Act (Cap 115, 1985 Rev Ed)
- Limitation Act (Cap 163, 1996 Rev Ed): In particular, sections 4, 5, 6(1)(a), 6(2), 6(7), 22(1), 22(2), 24, 24A, 24B, 26(2), 27, 28(7), 29, and 32
- Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed): In particular, section 18(1) and 1st Schedule, para 6
- Unfair Contract Terms Act (Cap 396, 1994 Rev Ed)Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed)

Case Law:

Formation of the Contract

- *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332; [2009] SGCA 3 – Requirements for the formation of a contract
- *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63; [2010] SGCA 47 ¬– Contract implied from conduct
- *Lim Koon Park & Anor v Yap Jin Meng Bryan & Anor* [2013] SGCA 41 – Test for formation of a contract is objective
- *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd* [2011] 4 SLR 617; [2011] SGCA 42 – Effect of phrase "subject to contract"

Consideration

- *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332; [2009] SGCA 3 – Requirement of consideration

- *Rainforest Trading Ltd & Anor v State Bank of India Singapore* [2012] 2 SLR 713; [2012] SGCA 21 – Past consideration is not good consideration

Privity of Contract

- *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386; [2010] SGCA 3 – Reliance on Contracts (Rights of Third Parties) Act

Formal Requirements

- *Joseph Mathew & Anor v Singh Chiranjeev & Anor* [2010] 1 SLR 338; [2009] SGCA 51 – Requirement for writing and the Electronic Transactions Act

Terms of the Contract

Construction of Terms

- *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029; [2008] SGCA 27 ¬– Admission of extrinsic evidence for construction of a contract

- *Master Marine AS v Labroy Offshore Ltd & Ors* [2012] 3 SLR 125; [2012] SGCA 27¬– Limits on admission of extrinsic evidence

- *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308; [2012] SGCA 39 – Limits on admission of extrinsic evidence

- *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [30] – general principles of contractual interpretation

Implied Terms

- *Sembcorp Marine Ltd v PPL Holdings Pte Ltd & Anor* [2013] SGCA 43 – Test for implication of terms into a contract

- *Foo Jong Peng & Ors v Phua Kiah Mai & Anor* [2012] 4 SLR 1267; [2012] SGCA 55 – Test for implication of terms

- *Ng Giap Hon v Westcomb Securities Pte Ltd & Ors* [2009] 3 SLR(R) 518; [2009] SGCA 19 – Implied terms and entire agreement clauses

- *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094; [2011] SGHC 204 – Implied terms and entire agreement clauses

Specific Clauses

- *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738; [2012] SGCA 48 – Enforceability of agreement to agree in good faith

- *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd* [2012] 3 SLR 1088; [2012] SGCA 34 – Requirement to use "best endeavours"

- *BR Energy (M) Sdn Bhd v KSEnergy Services Ltd* [2013] 2 SLR 1154; [2013] SGHC 64 – Requirement to use "reasonable endeavours"

- *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd & Anor* [2013] 1 SLR 1; [2012] SGHC 186 – Construction of exclusion clauses

- *Transocean Offshore International Ventures Limited v Burgundy Global Exploration Corporation* [2013] SGHC 117 – Construction of exclusion clauses

- *Smile Inc Dental Surgeons Pte Ltd v LuiAndrew Stewart* [2012] 4 SLR 308; [2012] SGCA 39 – Restraint of trade clauses

- *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106; [2011] SGCA 1 – Force majeure clauses

- *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd & Anor (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232; [2010] SGHC 270 – Liquidated damages clauses

Defeasible Contracts – Vitiating and Other Factors with Similar Effect

Misrepresentation and non-disclosure

- *Tan Chin Seng v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307: Principles of misrepresentation in contract law

- *Lim Koon Park & Anor v Yap Jin Meng Bryan & Anor* [2013] SGCA 41: Presumption of reliance

Mistake and rectification

- *Peter Edward Nathan v Da Silva Petiyaga Arther Bernard* [2016] 3 SLR 361

Illegality

- *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666; [2013] SGHC 97 – Agreement to be performed in an illegal manner

- *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd & Anor* [2013] 1 SLR 1; [2012] SGHC 186 – Illegality and severance

- *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 – two principles for not enforcing a contract on account of foreign illegality

Duress

- *Tjong Very Sumito & Ors v Chan Sing En & Ors* [2012] 3 SLR 953; [2012] SGHC 125 – Economic duress

- *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd & Anor (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232; [2010] SGHC 270 ¬– Economic duress

Discharging the Contract

Discharge by breach

- *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413; [2007] SGCA 39 – Test for discharge by breach

- *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883; [2009] SGCA 22 – Test for discharge by breach

Discharge by frustration

- *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094; [2011] SGHC 204 – Frustration of tenancy agreement

Remedies

Damages

- *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363; [2013] SGCA 15 – Remoteness of damage

- *MFM Restaurants Pte Ltd & Anor v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150; [2010] SGCA 36 – Remoteness of damage

- *Metalform Asia Pte Ltd v Ser Kim Koi & Anor (Holland Leedon Pte Ltd (in liquidation), third party)* [2009] 1 SLR(R) 369; [2008] SGHC 131 – Damages for breach of warranties

- *Transocean Offshore International Ventures Limited v Burgundy Global Exploration Corporation* [2013] SGHC 117 – Remoteness of damages

- *MK Distripark Pte Ltd v Pedder Warehousing & Logistics (S) Pte Ltd* [2013] SGHC 84 – damages for loss of a chance

Specific Performance

- *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd & Anor (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232; [2010] SGHC 270

Pre-contract work

- *Eng Chiet Shoong v Cheong Soh Chin* [2016] 4 SLR 728

Part III: Property

READING LIST

Statutes:

Application of English Law Act (Cap.7A)

Civil Law Act (Cap.43)

Conveyancing and Law of Property Act (Cap 61)

Land Titles Act (LTA) (Cap 157)

Land Titles (Strata) Act (Cap 158)

Building Maintenance and Strata Management Act (Cap 30C)

Residential Property Act (Cap 274)

State Lands Act (Cap 314)

Land Acquisition Act (Cap 152)

Registration of Deeds Act (Cap 269)

Settled Estates Act (Cap 293)

Texts:

Tan Sook Yee *et al*, *Tan Sook Yee's Principles of Singapore Land Law* 3ed (LexisNexis, 2009)

WJM Ricquier, *Land Law* 4ed (LexisNexis, 2010)

Teo Keang Sood, *Strata Title in Singapore and Malaysia* 3ed (Butterworths Asia, 2009)

Tan Sook Yee, *Private Ownership of Public Housing in Singapore* (Times Academic Press, 1998)

A. SOURCES OF SINGAPORE LAND LAW

1. English common law and equity initially received and as applicable today:

A brief introduction: Tan Sook Yee's Principles of Singapore Land Law, Chapters 1-3; Ricquier's Land Law, Chapter 1.

(a) Common law and equity

- Concept of "land"
- Concept of tenures and estates
- The common law estates
- Freehold (fee simple)
- Leasehold
- Concept of joint tenancy and tenancy-in-common
- Landlord and tenant law

(b) Reported judgments of Singapore and English courts interpreting common law

(c) Statues modifying or supplementing unsatisfactory aspects of common law

- Civil Law Act (Cap.43)
- Settled Estates Act (Cap 293)

(d) Application of English Law Act (Cap.7A)

(e) Some other principal statutes

- Conveyancing and Law of Property Act (Cap 61)
- Land Titles Act (Cap 157)
- Land Titles (Strata) Act (Cap 158)
- Building Maintenance and Strata Management Act (Cap 30C)
- Residential Property Act (Cap 274)
- State Lands Act (Cap 314)
- Land Acquisition Act (Cap 152)

B. SUPPLY OF LAND

(a) From private sector (best source for freehold land)

- Individuals;
- Collective sales under Part VA of Land Titles (Strata) Act (Cap. 158)

(b) From public sector:

- State (Singapore Land Authority), under State Lands Act (Cap 314)—(a) in special circumstances, Grant in fee simple and Estate in perpetuity, (b) leaseholds
- URA (Urban Redevelopment Authority)—99 year (or lesser) leaseholds
- JTC (Jurong Town Corporation)—industrial, 30/60 leaseholds
- HDB (Housing and Development Board)—industrial/residential (DBSS/Executive Condos)

C. CONVEYANCING PRACTICE AND LAW

- Conveyancing and Law of Property Act (Cap 61)
- Civil Law Act (Cap.43)—Memorandum in writing
- Contractual and land law principles
- The Law Society of Singapore's Conditions of Sale 1999
- Conveyancing and Law of Property (Conveyancing) Rules 2011- solicitors holding conveyancing money
- Capacity and illegality
    - NB: Residential Property Act (Cap 274)- non-Singapore citizens forbidden to acquire certain types of residential property without Minister's consent-offence and unenforceable

- Housing Developers (Control and Licensing) Act & Rules
- Sale of Commercial Properties Act & Rules

- Co-ownership
  - Legal *contra* Equitable
  - *Malayan Credit Ltd v Jack Chia (MPH) Ltd* [1986] 1 MLJ 445
- Joint tenancy/tenancy-in-common
  - Inheritance implications—Wills; and intestate succession and Intestate Successions Act Cap. 146
  - Severance of joint tenancy

D. LAND TITLES ACT: PRINCIPAL SYSTEM FOR PERSONS TO REGISTER LAND OWNERSHIP

(a) Land Titles Act (Cap 157) based on Australian Torrens system
(b) Main features of Act:

- Only on registration, estate or interest in land passes—section 45
- Registration also confers indefeasibility to title—section 46
- Exceptions to indefeasibility:
  - Overriding interests—sections 46(1),159,160
  - Fraud and forgery—sections 46(2)(*a*),47,154(1)(*d*),160
  - Court's and Registrar's power to rectify section 160 LTA
  - Personal equity
- State guarantees title - Assurance Fund—section 151
- Priorities—sections 46-49, 80
  - Between registered interests
  - Between unregistered interests—section 49
- Protecting priority before registering title—Caveat
- Caveat scheme
  - What interests may be caveated?—section 115
  - Functions of caveat— *United Overseas Finance v. Mutu Jeras* [1989] 3 MLJ 20; *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212
  - Lodging a caveat—sections 116, 117
  - Form of caveat—section 115(1)
  - Terms of caveat—section 115 (2)
  - Effect of lodging caveat—sections 117, 119, 120, 127- *United Overseas Finance v. Mutu Jeras* [1989] 3 MLJ 20
  - Lifespan of caveat and remedies

- Liability for wrongfully caveating—section 128
- Priorities
- Registrar may also caveat—section 7

(c) Mortgages under Land Titles Act

- Mortgage is not a mortgage in the strict sense of the word. It is a charge—form of security rather than a transfer of title—section 68
- But substantially the same as a traditional form of mortgage
  - Mortgagees' rights under Part IV Conveyancing and Law of Property Act imported by section 69
  - Powers under Part IV CLPA— some of these are mortgagee in possession's power of leasing; power of sale; appointment of receiver (of income); foreclosure
  - Mortgagee has a right to foreclose under section 76 and a right to enter into possession under section 75.
  - Mortgagor entitled to discharge on discharging obligations—section 77(1)
  - Mortgagor deemed to have equity of redemption—section 76
- Mortgagee's right to submortgage—section 71
- Priorities and tacking— section 80
- Mortgagee's powers again:
  - Enter into possession
  - Lease
  - Appoint receiver with wide powers (conferred by contractual terms in instrument of mortgage)- advantage: receiver taken as agent of mortgagor, not mortgagee;
  - Foreclose- rare
  - Sell
- Mortgagee exercising power of sale—Duties of mortgagee governed by general law
  - Timing is at mortgagee's discretion -*Teo Siew Har v OCBC* [1999] 3 SLR 129
  - But mortgagee has duty to mortgagor—see, e.g. reported decisions of Singapore CA in *How Seen Ghee v. Development Bank of Singapore Ltd* [1993] 3 SLR(R) 610 and *Lee Nyet Khiong v. Lee Nyet Yun* [1997] 2 SLR (R) 173; and High Court in *Kian Choon Investments (Pte) Ltd v Societe Generale* [1990] 2 MLJ 74
  - Mortgagee's duties concerning proceeds of sale- section 74. *Chip Thye v Development Bank of Singapore* [1994] 3 SLR 613

(d) Leases under Land Titles Act

(for reading on general principles, Tan Sook Yee's Principles of Singapore Land Law, Chapters 17; Ricquier's Land Law, Chapter 9&10)

- Lease's term (including option) must (a) exceed 7 years to qualify for registration—section 87, and (b) conform with Land Titles Registry's prescribed forms and registration requirements.
    - Best form of protection for lessee; additional benefit—Registry will issue certificate of title for the lease—section 29(3), but in practice lessors are reluctant to permit registration
    - Lessee's right to fall back on general law—see section 45 (3) and generally, *Ricquier's Land Law, Chapter 9 Section B*
- Lease of term of 7 years and less not adversely affected by fact it cannot be registered under LTA—section 87(2), but lessee must be in occupation at time registered proprietor became registered as proprietor—section 46(1)(vi).

(e) Formalities for a lease outside Land Titles Act—section 53 Conveyancing and Law of Property Act; and avoiding "pitfall" of sections 3 & 4 of Planning Act (Cap 232) —creating a lease over land may be construed as subdividing the land

- *Golden Village Multiplex Pte Ltd v Marina Centre Pte Ltd* [2002] 1 SLR 333; *Ricquier's Land Law, Chapter 9 Section B*

E. LAND TITLES (STRATA) ACT

(a) Legal regime for "condominium" ownership and living—generally where a building has many units, each issued with a separate certificate of title under the land registration system. Most residential flats in private sector governed by LTSA

(b) Works in conjunction with:

- Land Titles Act —creation of certificates of title and registration of instruments; and
- Building Maintenance and Strata Management Act (management, upkeep and maintenance)

(c) Understand:

- Concept of strata title plan
- Difference between "lot" and "common property"
- Ownership of lot
- Ownership of common property-share value
- Concept of management corporation and Council of management corporation
- Duties and powers of management corporation
- Election of Council members and powers of Council members
- Workings of management corporation
- Participation by each subsidiary proprietor
- Meetings, voting and bye-laws
- Maintenance and upkeep of common property and management and sinking fund contributions

- Managing agent
- Enforcing compliance
- Disputes and Strata Titles Boards

F. LAND ACQUISITION

Land Acquisition Act Cap. 152

- Reason(s) for acquisition—section 5
- Compensation—section 33 —market value and other factors

G. PUBLIC HOUSING IN SINGAPORE - THE HDB

Housing and Development Act (Cap 129)

- Tan SY, *Private Ownership of Public Housing in Singapore* (1998) (for extra reading)
- Ricquier, "Public Housing Law in Singapore" (1987) 8 Urban Law & Policy 313 (for extra reading)

Part IV: Trusts and Equity

PRIMARY AND SECONDARY MATERIALS

The latest text on equity and trusts in Singapore is Tey Tsun Hang, Trusts, *trustees and equitable remedies* (LexisNexis, 2010). Candidates may also choose to use any standard English or Australian textbook, but it should be borne firmly in mind that the differences are considerable.

Introduction, history & general principles

Historical outline

- Early history of equity
- Transformation of equity
- The Judicature Acts
- Developments in Singapore

Relationship between common law and equity

The fusion 'fallacy'

Salt v Cooper (1880-1881) LR 16 Ch D 544, [1874-80] All ER Rep 1204

United Scientific Holdings Ltd v Burnley Borough Council [1978] AC 904, [1977] 2 WLR 806

Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon) [1986] 2 All ER 145, [1986] AC 785, [1986] 2 WLR 902

Attorney General v Blake [2001] 1 AC 268, [2000] 3 WLR 625, [2000] 4 All ER 385

Lionel Smith, Fusion *and Tradition*, in S Degeling and J Edelman eds. *Equity in Commercial Law* (2005) 19, 19-39

Andrew Burrows, *We Do This At Common Law But That In Equity* [2002] 22 Oxford J. Legal Stud. 1, 1-20

The modern role of equity and conscience

Chwee Kin Keong v Digilandmall.com Pte Ltd [2004] 2 SLR 594 noted Yeo [2004] SJLS1

Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] 1 SLR 502 noted Yeo (2005) 121 LQR 393 and Low [2005] LMCQ 423

General principles

The maxims of equity

Equity will not suffer a wrong to be without a remedy

Equity follows the law

He who seeks equity must do equity

He who comes into equity must come with clean hands

Equity assists the diligent, not the tardy

Equity is equality

Equity looks to the intent, rather than the form

Equity regards as done that which ought to be done

Equity imputes an intention to fulfil an obligation

Equity acts *in personam*

Concepts, classification and policies

Concepts

Tony Honore, Trusts: The Inessentials, in J Getzler ed. Rationalizing Property, Equity and Trusts (2004) 7, 7-20

- Settlor
- Beneficiary
- Trustee
- Trustee's duties
- Trust property
- Objectives of trusts

Classification

- Express trusts
- Resulting trusts
- Constructive trusts
- Bare trusts

Policies

- Trusts as facilitative devices
- Paternalistic considerations
- Communitarian considerations
- Utilitarian considerations
- Rights considerations

Requirements of a trust

Certainty of intention to create a trust

Joshua Steven v Joshua Deborah Steven [2004] 4 SLR 216

Relationships other than a trust

Bailment
Agency

Attorney General of Hong Kong v Reid [1994] 1 AC 324, [1994] 1 All ER 1, [Hayton 376-377]

Equitable charges and reservation of title clauses

Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 2 All ER 552, [1976] 1 WLR 676, [Martin 712-713]

Clough Mill Ltd v Martin [1984] 3 All ER 982, [1985] 1 WLR 111, [Hayton 138-142]

Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In Liquidation) (2000) HCA 25, 74 ALJR 862, (2000) 202 CLR 588, [Hayton 142-146]

Debt and trusts

Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567, [1968] 3 All ER 651

Re Kayford Ltd (In Liquidation) [1975] 1 WLR 279, [1975] 1 All ER 604, [Martin 52-55]

Neste Oy v Lloyd's Bank plc [1983] 2 Lloyds Rep 658

Geh Cheng Hooi v Equipment Dynamics Sdn Bhd [1991] 1 MLJ 293

Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd [2001] 4 SLR 154 (CA), [2001] 2 SLR 556 (HC)

Twinsectra v Yardley [2002] 2 AC 164

Tenpleton Insurance Ltd v Penningtons Solicitors LLP [2006] EWHC 685 (Ch), [2006] All ER (D) 191 (Feb)

Trusts and powers

Re Weekes' Settlement [1897] 1 Ch 289, [Hayton 152-153]

Language that reveals an intention to create a trust

Lambe v Eames (1871) LR 6 Ch 597

Comiskey v Bowring-Hanbury [1905] AC 84

Paul v Constance [1977] 1 WLR 527, [1977] 1 All ER 195, [Hayton 156-158]

Tanna v Tanna [2001] All ER (D) 333 (May)

Comboni Vicenzo and another v Shankar's Emporium (Pte) Ltd [2007] SGHC 55

Sham trust

Midland Bank plc v Wyatt [1995] 1 FLR 696

Certainty of subject-matter

Sprange v Barnard (1789) 2 BroCC 585

Anthony v Donges [1998] 2 FLR 775

Re Golay's Will Trusts [1965] 1 WLR 969

Hunter v Moss [1994] 1 WLR 452

Re Goldcorp Exchange Ltd [1995] 1 AC 74

Paul Eden, *Re Goldcorp Exchange Ltd Revisited*, in E Cooke ed., *Modern Studies in Property Law Volume III* (2005) 178, 178-184

Certainty of objects (beneficiaries)

Re Vandervell's Trusts (No 2) [1974] Ch 269

Fixed trusts
Discretionary trusts

Re Gulbenkian's Settlement Trusts [1970] AC 508, [1968] 3 WLR 1127, [1968] 3 All ER 785, [Hayton 176-177]

McPhail v Doulton [1971] AC 424, [1970] 2 WLR 1110, [1970] 2 All ER 228, [Hayton 177-181]

Schmidt v Rosewood Trust Limited [2003] UKPC 26, [2003] 2 AC 709, [2003] 2 WLR 1442, [2003] 3 All ER 76, [Hayton 188-190]

Conceptual uncertainty and evidential difficulties

Re Baden's Deed Trusts (No 2) [1973] Ch 9, [1972] 3 WLR 250

Re Jones [1953] Ch 125

Re Tuck's Settlement Trusts [1978] Ch 49

Re Tepper's Will Trusts [1987] Ch 358

Width of class and administrative unworkability

Re Manisty's Settlement [1974] Ch 17

Re Hay's Settlement Trusts [1982] 1 WLR 202, [1981] 3 All ER 786, [Hayton 181-186]

R v District Auditor Ex p West Yorkshire Metropolitan County Council (1986) 26 RVR 24, [2001] WTLR 785, [Hayton 190-191]

Gift subject to a condition precedent

Re Allen [1953] Ch 810

Re Barlow's Will Trust [1979] 1 WLR 278

Constitution of trusts

Transfer upon trust

Milroy v Lord (1862)4 De G F & J 264, [Hayton 231-232]

Re Rose [1952] Ch 499

Re Lee Phee Soo (1960) 1 MLJ 75 (HC), (1960) 1 MLJ 234 (CA)

Pennington v Waine [2002] 1 WLR 2075, [Hayton 232-237]

Declaration of trust

Jones v Lock (1865) LR 1 Ch App 25

Paul v Constance [1977] 1 WLR 527

Choithram (T) International SA v Pagarani [2001] 1 WLR 1

Covenants and choses in action

Section 2 of the Contracts (Rights of Third Parties) Act, Cap. 53B

Cannon v Hartley [1949] Ch 213, [Hayton 257-261]

Fletcher v Fletcher (1844) 4 Hare 67, [Hayton 254-257]

Exceptions to the rule that Equity will not assist a volunteer

The rule in *Strong v Bird* (1874) LR 18 Eq 315

Re Gonin [1979] Ch 16

Donatio Mortis Causa Cain v Moon [1896] 2 QB 283

Non-charitable purpose trusts and charitable trusts

The nature of non-charitable purpose trusts

Then Bee Lian, The Meaning of 'Charity' in Malaya – A Comparative Study (1970) 12 Mal LR 1, 4-19

The beneficiary principle/ the enforceability principle

Morice v Bishop of Durham (1805) 10 Ves Jun 522

The British Malaya Trustee & Executor Co Ltd (The Present Trustees of the Will of Khoo Cheng Teow Deceased) v Khoo Seng Seng (The Administrator of the Estate of Khoo Kok Oon Deceased) – In the Matter of Certain Parts of the Estate of Khoo Cheng Teow Devi [1933] MLJ 119, [1932] SSLR 226 (HC)

Leahy v Attorney General for New South Wales [1959] AC 457, [1959] 2 All ER 300, [Hayton 214-218]

Re Endacott [1960] Ch 232, [1959] 3 WLR 799

R Denley's Trust Deed [1969] 1 Ch 373, [1968] 3 All ER 65, [Hayton 218-220]

Bermuda Trust (Singapore) Ltd v Wee Richard and others [2002] 2 SLR 126, [1998] SGHC 390 (HC)

The perpetuity rules

Sections 31, 32, 33 and 34 of the Civil Law Act, Cap. 43

Re Tan Lip Buoy's Will [1996] 2 SLR 663, [1996] SGHC 91 (HC)

Government Proceedings Act

Section 9 of the Government Proceedings Act, Cap. 121

Lee Chick Yet v Chen Siew Hee and others [1977] 2 MLJ 218 (HC)

Possible reform?

Section 16 of the Ontario Perpetuities Act 1966 [Hayton 226]

Sections 12A and 12B of the Bermuda Trusts (Special Provisions) Amendment Act 1998 [Hayton 227]

Sections 19 and 21 of the Mauritius Trusts Act 2001

Charitable trusts

The nature of charitable trusts

Then Bee Lian, *The Meaning of 'Charity' in Malaya* – A Comparative Study (1970) 12 Mal LR 1, 22-26, 29-37

Statute of Charitable Uses Act 1601, 43 Eliz, c 4 [Hayton 435-436]

Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531, [Hayton 432]

Sections 2 and 5 of the Charities Act, Cap. 37

Khoo Jeffrey and others v Life Bible-Presbyterian Church and others [2011] 3 SLR 500

The advantages of charitable status

Section 7(1)(*c*) proviso (ii) of the Estate Duty Act, Cap. 96 and section 2 of the Income Tax Act, Cap.134

Sections 13M(1), 13M(2) and 37(3)(*c*) of the Income Tax Act, Cap. 134

Sections 4, 8 and 9 of the Charities Act, Cap. 37

Charities (Amendment) Bill No. 22/2006

Section 9 of the Government Proceedings Act, Cap. 121

Sections 63 and 64 of the Trustees Act, Cap. 337

Relief of poverty

Dingle v Turner [1972] AC 601, [1972] 1 All ER 878, [Hayton 457-463]

Re Sanders' Will Trusts [1954] Ch 265, [1954] 1 All ER 667

Advancement of education

Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297, [1951] 1 All ER 31, [Hayton 471-476]

Re Hopkins [1965] Ch 669

IRC v McMullen [1981] AC 1, [1980] 1 All ER 884, [Hayton 466-471]

Advancement of religion

Gilmour v Coats [1949] AC 426, [1949] 1 All ER 848, [Hayton 485-488]

Re South Place Ethical Society [1980] 1 WLR 1565, [1980] 3 All ER 918

Yeap Cheah Neo v Ong Cheng Neo (1872) 1 Ky 326 (SCSS), (1808-1884) 1 Ky 326, [1875] LR 6 PC 381 (PC)

Re Watson deceased [1973] 1 WLR 1472, [1973] 3 All ER 678

C H Sherrin, *Public Benefit in Trusts for the Advancement of Religion* (1990) 32 Mal LR 114, 123-129

Khoo Jeffrey and others v Life Bible-Presbyterian Church and others [2011] 3 SLR 500

Other purposes beneficial to the community

National Anti-Vivisection Society v IRC [1948] AC 31, [1947] 2 All ER 217, [Hayton 498-500]

Attorney General v Lim Poh Neo (W) and others [1976] 2 MLJ 233, [1975-1977] SLR 515 (HC)

Scottish Burial Reform and Cremation Society Ltd v Glasgow Corp [1968] AC 138, [1967] 3 All ER 215

Trusts which are partly charitable and partly non-charitable

Section 64 of the Trustees Act, Cap. 337

Chichester Diocesan Fund and Board of Finance plc v Simpson [1944] AC 341, [1944] 2 All ER 60

Leahy v Attorney-General for New South Wales [1959] AC 457, [1959] 2 All ER 300, [Hayton 215 and 218]

Administration of charities

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Charities (Amendment) Bill No. 22/2006

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Sections 63, 65 to 82 of the Trustees Act, Cap. 337

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Application cy-près

Sections 21-22 of the Charities Act, Cap. 37

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Attorney General v Lim Poh Neo (W) and others [1976] 2 MLJ 233, [1975-1977] SLR 515 (HC)

Nai Seng Hiang and others v Trustees of the Presbyterian Church in Singapore Registered and others [1988] 3 MLJ 311, [1988] SLR 717 (HC)

Re Vernon's Will Trusts [1972] Ch 300, [1971] 3 All ER 1061, [Hayton 516]

Re Spence's Will Trusts [1979] Ch 483, [1978] 3 All ER 92, [Hayton 517-525]

Resulting trusts

Difference between resulting and constructive trust

Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669, [1996] 2 All ER 961, [Hayton 296]

Air Jamaica Ltd v Charlton [1999] 1 WLR 1399, [Hayton 303-305]

Incomplete disposal of the beneficial interests

Failing trusts

Re Diplock [1941] Ch 253

Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669, [1996] 2 All ER 961

Incomplete disposal of beneficial interests

Re Trusts of the Abbott Fund [1900] 2 Ch 326

Alternative methods of disposal of surplus

Re Sanderson's Trust (1857) 3 K & J 497

Re Andrew's Trusts [1905] 2 Ch 48

Re Osoba [1979] 1 WLR 247, [1979] 2 All ER 393

Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts [1971] Ch 1, [1970] 1 All ER 544, [Hayton 306-308]

Re Bucks Constabulary Fund Friendly Society (No 2) [1979] 1 All ER 623, [Hayton 308-313]

Air Jamaica Ltd v Charlton [1999] 1 WLR 1399, [Hayton 303-305]

Section 62 of the Trustees Act

No declaration of trust

Re Vandervell's Trusts (No 2) [1974] Ch 269, [1974] 1 All ER 47, [Hayton 295]

Voluntary payment or transfer

Voluntary conveyance to third party

Hodgson v Marks [1971] Ch 892, [1971] 2 All ER 684, [Hayton 298-299]

Presumption of advancement

Pettitt v Pettitt [1970] AC 777

Re Estate of Chong Siew Kum, deceased [2005] 2 SLR 324

Low Geok Khim v Low Geok Bian [2006] SGHC 41; *Low Gim Siah v Low Geok Khim* [2006] SGCA 45

Lau Siew Kim v Yeo Guan Chye Terence and another [2008] 2 SLR 10 noted Low (2008) 124 LQR 369

Chen Gek Yong v Chan Gek Lan [2008] SGHC 167, [17]

Section 21 of the Evidence Act, Cap. 97

T H Tey, *Singapore's Muddled Presumption of Advancement* [2007] SJLS December

Rebutting the presumption

Anson v Anson [1953] 1 QB 636

Lavelle v Lavelle [2004] 2 FCR 418

Illegal or unlawful purposes

Tinsley v Milligan [1994] 1 AC 340, [1993] 3 All ER 65, [Hayton 327-331]

Nelson v Nelson (1995) 184 CLR 538, (1995) 132 ALR 133

Tribe v Tribe [1996] Ch 107, [1995] 4 All ER 236, [Hayton 331-335]

Wong Kia Meng v Seet Siow Luan [2004] SGHC 112

Purchase in the name of another

Fowkes v Pascoe (1875) LR 10 Ch App 343

Huntingford v Hobbs [1993] 1 FLR 736, [Hayton 317-320]

Trusts of the family home

Eves v Eves [1975] 3 All ER 768

Burns v Burns [1984] Ch 317

Grant v Edwards [1986] Ch 638

Tan Thiam Loke v Woon Swee Kheng Christina [1992] 1 SLR 232

Sections 59 and 112 of the Women's Charter, Cap. 353

The Singapore context

Cheong Yoke Kuen v Cheong Kwok Kiong [1999] 2 SLR 476

Sitiawah Bee bte Kader v Rosiyah bte Abdullah [2000] 1 SLR 612

Vesting Orders – Section 45 of the Trustees Act

Why are resulting trusts imposed?

Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669, [1996] 2 All ER 961, [Hayton 337-347]

Constructive trusts

Introduction

The nature of constructive trusts

Eves v Eves [1975] 3 All ER 768, [1975] 1 WLR 1338

Stack v Dowden [2007] UKHL 17, [2007] 2 All ER 929

Constructive trusts, accountability and proprietary remedies

Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd [2007] 1 SLR 292

Institutional or remedial

Muschinski v Dodds (1985) 160 CLR 583

LAC Minerals Ltd v International Corona Resources Ltd [1989] 2 SCR 574

Re Goldcorp Exchange Ltd [1995] 1 AC 74

Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669

Halifax Building Society v Thomas [1996] Ch 217

Ocular Sciences Ltd v Aspect Vision Care Ltd [1997] RPC 289 at 411-416

Re Polly Peck International Ltd (in administration) (No 2) [1998] 3 All ER 812

Ching Mun Fong v Liu Cho Chit [2001] 3 SLR 10

D M Jensen, *The Rights and Wrongs of Discretionary Remedialism* [2003] SJLS 178, 178-208

Comboni Vincenzo v Shankar's Emporium (Pte) Ltd [2007] 2 SLR(R) 1020

Commonwealth Reserves I v Chodar [2001] NZLR 374

Unauthorised fiduciary gains

Keech v Sandford (1726) [Hayton 362] 2 Eq Ca. Abr 741

Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134

Chan v Zacharia (1984) 154 CLR 178, (1984) 53 ALR 417, [Hayton 364-367]

Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41

Lord Millett, *Proprietary Restitution* in S Degeling and J Edelman eds. *Equity in Commercial Law* (2005) 309, 312-322

Identification of fiduciary

English v Dedham Vale Properties Ltd [1978] 1 WLR 93

Lac Minerals Ltd v International Corona Resources Ltd (1989) 61 DLR (4th) 14

Commonwealth Bank of Australia v Smith (1991) 102 ALR 453

Singapore River Cruises v Phua Teow Kie [2000] 4 SLR 791

Tai Kim San v Lim Cher Kia [2001] 1 SLR 607

Foster Bryant Surveying Ltd v Bryant [2007] EWCA Civ 200, [2007] All ER (D) 213 (Mar)

J D Davies, *Keeping Fiduciary Liability Within Acceptable Limits* [1998] SJLS 1, 1-14

Scope of fiduciary duties

Re Goldcorp Exchange Ltd [1994] 2 All ER 806

Caution against extending fiduciary situations

Bristol & West Building Society v Mothew [1998] Ch 1

Strict liability

Phipps v Boardman [1967] 2 AC 46, [1966] 3 All ER 721, [Hayton 367-375]

Proprietary and/ or personal liability

Lister v Stubbs (1890) 45 Ch D

Sumitomo Bank v Kartika Ratna Thahir [1993] 1 SLR 735

Attorney General of Hong Kong v Reid [1994] 1 AC 324, [1994] 1 All ER 1, [Hayton 376-377]

Daraydan Holdings Ltd v Solland International Ltd [2004] EWHC 622 (Ch), [2005] Ch 119, [2005] 4 All ER 73

Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2005] All ER (D) 397 (Jul)

Purchaser's undertaking

Ashburn Anstalt v Arnold [1989] Ch 1

The Pallant v Morgan equity

Pallant v Morgan [1953] 1 Ch 43

Ong Heng Chuan v Ong Boon Chuan [2003] 2 SLR 469

Incomplete transfer

Re Rose [1952] Ch 499

Pennington v Waine [2002] 4 All ER 215, [Hayton 236]

Special considerations that apply to trusts of the family home

Common intention constructive trusts

Eves v Eves [1975] 3 All ER 768

Gissing v Gissing [1971] AC 886

Lloyds Bank plc v Rosset [1991] 1 AC 107, [1990] 1 All ER 1111, [Hayton 405-407]

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cf. Section 112 of the Women's Charter

Equitable proprietary estoppels

Yaxley v Gotts [2000] Ch 162, [2000] 1 All ER 711

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Discretionary prevention of unconscionable conduct

Baumgartner v Baumgartner (1987) 164 CLR 137

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Intention

Bathurst CC v PWC Properties Pty Ltd (1998) 195 CLR 566

Paragon Finance plc v DB Thakerar & Co (a firm) [1999] 1 All ER 400

Trustees – appointment, retirement and removal

Appointment of trustees

Sections 36, 37, 38 of the Trustees Act, Cap. 337

Appointment of trustees by court

Sections 42, 44 of the Trustees Act, Cap. 337

Re Gibbon's Trusts (1882) 30 WR 287; 45 LT 756

Re Tempest (1886) LR 1 Ch 485, [Hayton 536]

Retirement of trustees

Sections 40, 41 of the Trustees Act, Cap. 337

Removal of trustees

Section 37 of the Trustees Act, Cap. 337

Letterstedt v Broers (1884) 9 App Cas 371, [Hayton 542-544]

Other types of trustees

Public Trustee

Section 63 of the Trustees Act, Cap. 335

Agents, nominees and custodians

Sections 41G, 41H, 41I, 41J, 41K of the Trustees Act, Cap. 335

Incorporation of trustees

Sections 65, 66, 67, 68 of the Trustees Act, Cap. 335

Trust Companies Act

Trustee-manager

Sections 6, 7, 8 of the Business Trusts Act, Cap. 31A

Want of trustees

Sections 37, 39 and 42 of the Trustees Act, Cap. 335

The obligations of trustees

General principles

Permanent Building Society v Wheeler (1994) 14 ASCR 109

Bristol & West Building Society v Mothew (t/a Stapley Co) [1998] Ch 1, [1996] 4 All ER 698

Distributive role

Re Hay's Settlement Trusts [1982] 1 WLR 202, [1981] 3 All ER 786, [Hayton 181-186]

McPhail v Doulton [1971] AC 424, [1970] 2 All ER 228, [Hayton 177-181]

Managerial or administrative role

Re Whiteley (1886) 33 Ch D 347

Sections 2(2) and 3A of the Trustees Act, Cap. 337

First Schedule to the Trustees Act, Cap. 337

Relief from personal liability

Section 60 of the Trustees Act, Cap. 337

Collective responsibility

Bahin v Hughes (1886) 31 Ch D 390, [Martin 666-667]

Conflict of interest and duty

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Purchase of trust property by trustees

Holder v Holder [1968] Ch 353, [Martin 612-613]

Chan v Zachariah (1984) 154 CLR 178

Wright v Morgan [1926] AC 788

Profits incidental to trusteeship

Boardman v Phipps [1967] 2 AC 46, [1966] 3 All ER 721, [Hayton 367-375], [Martin 624-628]

Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134, [Martin 621-622]

Swain v The Law Society [1978] 1 All ER 382, [Martin 620-621]

Queensland Mines Ltd v Hudson (1978) 18 ALR 1, [Martin 623-624]

Defences, etc.

Boardman v Phipps [1967] 2 AC 46, [1966] 3 All ER 721, [Hayton 367-375], [Martin 624-628]

Competition with the trust

Re Thompson [1930] 1 Ch 203, [Martin 618]

Remuneration of trustees

Sections 41P, 41Q, 41R, 41S and 41T of the Trustees Act, Cap. 337

Investment powers and duties

Part II of the Trustees Act, Cap. 337

Authorised investments

Section 4, 5 and 6 of the Trustees Act, Cap. 337

Duty in investing

Section 3A of the Trustees Act, Cap. 337

First Schedule to the Trustees Act, Cap. 337

Re Whiteley (1886) 33 Ch D 347

Section 5 of the Trustees Act, Cap. 335

Cowan v Scargill [1985] Ch 270, [1984] 2 All ER 750, [1984] 3 WLR 501, [Hayton 577-580]

Nestlė v Natwest Bank plc [1993] 1 WLR 1260, [1994] 1 All ER 118, [Hayton 580-585]

Jones v AMP Perpetual Trustee Co NZ Ltd [1994] 1 NZLR 690

Harries v Church Commissioners [1992] 1 WLR 1241, [1993] 2 All ER 300, [Martin 551-552]

Martin v City of Edinburgh District Council [1988] SLT 329, [1989] I Pensions LR 9

Delegation by a trustee

Part IVA of the Trustees Act, Cap. 337

Sections 27 and 32 of the Trustees Act, Cap. 337

Power to appoint agents

Section 41B of the Trustees Act, Cap. 337

Power to appoint nominees and custodians

Sections 41G and 41H of the Trustees Act, Cap. 337

Delegation of trustee's functions

Section 27 of the Trustees Act, Cap. 337

Deviations from terms of trust

Saunders v Vautier (1841) 4 Beav 115, [Hayton 601]

Stephenson v Barclays Bank [1975] 1 All ER 625, [Hayton 601-602]

Sections 54, 56 of the Trustees Act, Cap. 337

Duties upon accepting trusteeship

Inspection of trust documents

Hallows v Lloyd (1888) 39 Ch D 686

Duty to notify beneficiaries

Armitage v Nurse [1998] Ch 241, [1997] 2 All ER 705, [Hayton 671-673]

Schmidt v Rosewood Trust Ltd [2003] 2 AC 709, [2003] 3 All ER 76, [2003] UKPC 26, [Hayton 188-190]

Charman v Charman [2005] EWCA Civ 1606, [2006] 1 WLR 1053, [2006] 2 FLR 422

Reducing trust property into possession

Sections 16, 24 of the Trustees Act, Cap. 337

Distributing trust property

Sections 33, 34 of the Trustees Act, Cap. 337

Pilkington and another v IRC [1964] AC 612, [1962] 3 All ER 622, [Hayton 639-644]

Eaves v Hickson (1861) 30 Beav 136

Protection against liability

Sections 28, 29, 62 of the Trustees Act, Cap. 337

Judicial control of trustees

Re Beddoe, Downes v Cottam [1893] 1 Ch 547

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Wong v Burt [2004] NZCA 174, [Hayton 664-667]

Re Hastings-Bass [1975] Ch 25

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Exemption clauses

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Trustee Exemption Clauses (Law Com no 301) (2006) (Cm 6874) para.7

Indemnity of trustees

Sections 41S, 41T of the Trustees Act, Cap. 337

Re Beddoe, Downes v Cottam [1893] 1 Ch 547

Liability of trustees for breach of trust

Remedies for breach of trust

Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298

Gay Choon Ing v Loh Sze Ti Peter [2009] 2 SLR 332

Compensation claims against trustees

Substitutive performance claims, objective value of property

Reparation claims, loss sustained by beneficiary

Hayton 707

Re Dawson [1966] 2 NSWLR 211, [Hayton 711-712]

Target Holdings Ltd v Redferns (a firm) [1996] 1 AC 421, [1995] 3 WLR 352, [1995] 3 All ER 785, [Hayton 712-719], [Martin 658-660]

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Reparation claims against trustees

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Accountability

Glazier v Australian Men's Health (No. 2) [2000] NSWSC 6, [Hayton 729-732]

Knott v Cottee (1852) 16 Beav 77, [Hayton 733-734]

Nestlė v National Westminster Bank plc [1994] 1 All ER 118, [1993] 1 WLR 1260, [Hayton 580-585]

Defences

Relief from personal liability

Section 60 of the Trustees Act, Cap. 337 [Martin 674-676]

Instigation by or consent from beneficiary

Fletcher v Collis [1905] 2 Ch 24, [Hayton 743-746]

Holder v Holder [1968] Ch 353, [1968] 1 All ER 665, [Hayton 746-747]

Re Pauling's Settlement Trusts [1964] Ch 303, [1962] 1 WLR 86, [Martin 669-672]

Re Somerset [1894] 1 Ch 231, [Hayton 748-749]

Section 61 of the Trustees Act, Cap. 337 [Martin 673-674]

Statute of limitation

Section 22 of the Limitation Act, Cap. 163 [Martin 677-682]

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Liability of trustees *inter se*: contribution and indemnity

Head v Gould [1898] 2 Ch 250, [Hayton 757-758], [Martin 668]

Bahin v Hughes (1886) 31 Ch D 390, [Hayton 756-757], [Martin 666-667]

Liability of third parties involved in breach of trust

Personal liability

Nature of personal liability

Martin 310, Hayton 760-761

Trustee de son tort

Hayton 419-420

Accessory liability/ Dishonest assistants

Banque Nationale de Paris v Tan Nancy [2001] 1 SLR 300

Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd [2002] 3 SLR 241

Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd [2002] 4 SLR 537

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Twinsectra Ltd v Yardley [2002] AC 164, [Hayton 785-797]

Agip (Africa) Ltd v Jackson [1990] Ch 265

Lipkin Gorman v Karpnale Ltd [1989] 1 WLR 1340

Crown Dilmun v Sutton [2004] EWHC 52 (Ch), [2004] 1 BCLC 468

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A-G of Zambia v Meer Care & Desai [2007] EWHC 952 (Ch)

George Raymond Zage III v Rasif David [2010] SGCA 4

Causation

Grupo Torras SA v Al-Sabah (No 5) [2001] Lloyd's Rep Bank 36

Remedies

Hayton 765-766

Recipient liability/ knowing recipients

Personal and proprietary remedies

Martin 315-316

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Azero Investments v Velstra Pte Ltd [2005] 4 SLR 792

Knowledge

Belmont Finance Corp v Williams Furniture Ltd (No. 2) [1980] 1 All ER 393

Re Montagu's Settlement Trust [1987] 1 Ch 264, [1987] 2 WLR 1192, [Hayton 773-778]

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Crown Dilmun v Sutton [2004] EWHC 52 (Ch), [2004] 1 BCLC 468

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Change of position defence

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Twinsectra Ltd v Yardley [2002] AC 164, [Hayton 785-797]

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Proprietary claims

Introduction

Terminology

Following, tracing and claiming

Martin 682, Hayton 799-800

Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd [2002] 3 SLR 241

Relationship between rules of following, tracing and claiming

Foskett v McKeown [2001] 1 AC 102, [2000] 3 All ER 97, [Hayton 800, 815-823]

Tracing at Common Law and in Equity

Foskett v McKeown [2001] 1 AC 102, [2000] 3 All ER 97, [Hayton 800-802, 815-823]

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Indian Oil Corp v Greenstone Shipping SA [1988] QB 345

Glencore International AG v Metro Trading International Ltd [2001] 1 Lloyd's Rep 284

McKeown v Cavalier Yachts Pty Ltd (1988) 13 NSWLR 303

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Taylor v Plumer (1815) 3 M&S 562

Banque Belge pour L'Etranger v Hambrouck [1921] 1 KB 321

Lipkin Groman v Karpnale Ltd [1991] 2 AC 548]

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Agip (Africa) Ltd v Jackson [1990] Ch 265]

Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd [2009] 4 SLR(R) 788

Tracing in Equity

Fiduciary relationship

Re Hallett's Estates (1880) 13 Ch D 696

Re Diplock [1948] Ch 465

Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669

Foskett v McKeown [2001] 1 AC 102, [2000] 3 All ER 97, [Hayton 815-823]

Compagnie Noga D'Importation Et D'Exportation SA v Australia and New Zealand Banking Group Ltd (No 5) [2005] EWHC 225 (Comm), [2005] All ER (D) 176 (Mar)

Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd [2009] 4 SLR(R) 788

Equitable proprietary interest

Attorney-General for Hong Kong v Reid [1994] 1 AC 324, [Martin 631-633]

Unmixed funds

Re Hallett's Estates (1880) 13 Ch D 696

Trustee mixes trust money with his or her own money

Foskett v McKeown [2001] 1 AC 102, [2000] 3 All ER 97, [Hayton 815-823]

Swollen asset theory

Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd [1986] 1 WLR 1072

Bishopsgate Investment Management Ltd v Homan [1995] Ch 211, [Hayton 810-815]

Trustee mixes trust funds together

Re Diplock [1948] Ch 465]

Bank accounts

Re Hallett's Estates (1880) 13 Ch D 696]

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Barlow Clowes International Ltd v Vaughan [1992] 4 All ER 22

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Subrogation

Lipkin Groman v Karpnale Ltd [1991] 2 AC 548

Boscawen v Bajwa [1996] 1 WLR 328, [1995] 4 All ER 769, [Hayton 831-838]

Increased value

Re Tilley's Will Trusts [1967] Ch 1179

Foskett v McKeown [2001] 1 AC 102, [2000] 3 All ER 97, [Hayton 815-823]

Innocent volunteer

Re Diplock [1948] Ch 465

Loss of right to trace

Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd [1986] 1 WLR 1072

Re Diplock [1948] Ch 465

Lipkin Groman v Karpnale Ltd [1991] 2 AC 548

Niru Battery Manufacturing Company v Milestone Trading Ltd [2004] QB 985

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Part V: Intellectual Property

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- Tan Tee Jim, SC, *Law of Trade Marks and Passing Off in Singapore* (2nd ed, 2005)
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- *Ng-Loy, "An Interdisciplinary Perspective on the Likelihood of Confusion: Consumer Psychology and Trademark Infringement in an Asian Society" (2008) 98 The Trademark Reporter 950*
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- *Ng-Loy Wee Loon, "Copyright Protection for Traditional Compilations of Facts and Computerised Databases - Is Sweat Copyrightable?" [1995] SJLS 96*
- *George Wei, "Telephone Directories and Databases: The Policy at the Helm of Copyright Law" [2004] IPQ 316*
- Saw Cheng Lim, "Protecting the Sound of Silence in 4'33" – A Timely Revisit of Basic Principles in Copyright Law" [2005] EIPR 467
- *For a comment on Virtual Map v SLA, see Burton Ong, "Copyright and Cartography: Mapping the Boundaries of Infringement Liability" [2009] EIPR 17*
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- Burton Ong, "Fissures in the Façade of Fair Dealing: Users' Rights in Works Protected by Copyright" [2004] SJLS 150
- Saw Cheng Lim, "Is there a defence of Public Interest in Singapore?" [2003] SJLS 519
- George Wei, "Surreptitious Taking of Confidential Information" (1992) 12 Legal Studies 302
- Ng-Loy, "Emergence of a Right of Privacy From Within the Law of Confidence?" [1996] EIPR 307
- See Ng-Loy, "Patenting Genes – A Closer Look at the Concepts of Utility and Industrial Application" (2002) 33 IIC 412

A. TRADE MARKS

(1) Trade Marks Legislation

- For Singapore:
  - Trade Marks Act 1998 (Cap 332, 2005 Rev Edition)

(2) International Agreements relevant to trade marks

- The Paris Convention For the Protection of Industrial Property (http://www.wipo.int/treaties/en/ip/paris/)
- The Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (http://www.wipo.int/treaties/en/classification/nice/)
- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (http://www.wipo.int/treaties/en/registration/madrid_protocol/)
- The TRIPS Agreement (http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)
- The Singapore Treaty on the Law of Trademarks (http://www.wipo.int/treaties/en/ip/singapore/)

(3) Common Law: Passing Off

(i) Elements of the action: the 'classical trinity'

- Goodwill
- Misrepresentation and Confusion
- Damage
  - *Lifestyle 1.99 Pte Ltd v S$1.99 Pte Ltd* [2000] 2 SLR 766

(ii) First element: Goodwill

- Definition of 'goodwill'
  - *IRC v Muller & Co Margarine Ltd [1901] AC 217 (followed in Lifestyle 1.99 Pte Ltd v S$1.99 Pte Ltd [2000] 2 SLR 766)*
  - *Future Enterprises Pte Ltd v Tong Seng Produce Pte Ltd [1998] 1 SLR 1012*
  - *Tong Guan Food Products Pte Ltd v Hoe Huat Hng Foodstuffs Pte Ltd [1991] 1 SLR 133*
- Where goodwill exists
  - *The Chinese Calligraphy Society of Singapore v Khoo Seng Kong [2008] SGHC 121*
  - *White Hudson & Co v Asian Organisation Ltd (1965) 1 MLJ 186*
  - *Tong Guan Food Products Pte Ltd v Hoe Huat Hng Foodstuffs Pte Ltd [1991] 1 SLR 133*
  - *Cadbury Schweppes Prop Ltd v Pub Squash Prop Ltd [1981] RPC 429*
  - *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd [2011] SGCA 37; [2010] 4 SLR 744 (HC)*

- Goodwill in a descriptive get-up
  - *Reckitt & Coleman Products Ltd v Borden Inc [1990] RPC 341*
  - *Lifestyle 1.99 Pte Ltd v S$1.99 Pte Ltd [2000] 2 SLR 766*
  - *Johnson & Johnson v Uni-Charm Kabushiki Kaisha (Uni-Charm Corporation) [2007] 1 SLR 1082*
  - *OTO Bodycare Pte Ltd v Hiew Keat Foong [2005] SGHC 133*
  - *Nations Fittings (M) Sdn Bhd v Oystertec Plc [2006] 1 SLR 712*
  - *The Chinese Calligraphy Society of Singapore v Khoo Seng Kong [2008] SGHC 121*
- When must goodwill exist?
  - *Lifestyle 1.99 Pte Ltd v S$1.99 Pte Ltd* [2000] 2 SLR 766
- The difference between 'goodwill' and 'reputation'
  - *Future Enterprises Pte Ltd v Tong Seng Produce Pte Ltd [1998] 1 SLR 1012*
  - *CDL Hotels International Ltd v Pontiac Marina Pte Ltd [1997] 3 SLR 726 (HC); [1998] 2 SLR 550 (CA)*
  - *Future Enterprises Pte Ltd v McDonald's Corp [2007] 2 SLR 854 (CA)*
  - *Novelty Pte Ltd v Amanresorts Ltd [2009] 3 SLR 216 (CA)*
- Goodwill and the Internet
  - *800-Flowers TM [2000] FSR 697 (HC); [2002] FSR 12 (CA)*
  - *Weir Warman Ltd v Research & Development Pty Ltd [2007] 2 SLR 1073*
  - *Novelty Pte Ltd v Amanresorts Ltd [2008] 2 SLR 32 (HC); [2009] 3 SLR 216 (CA)*
- The significance of the requirement for 'business within jurisdiction' in the context of Article 6*bis* of the Paris Convention relating to 'well known marks'
  - *See s 55(1)-(2), TMA*
  - *See definition of 'well known trade mark' in s 2(1), s 2(7)–s 2(8) TMA 1998*
  - *Novelty Pte Ltd v Amanresorts Ltd [2009] 3 SLR 216 (CA)*

(iii) Second element: Misrepresentation and Confusion

- Misrepresenting the trade source or origins of the goods or services
  - *Tong Guan Food Products Pte Ltd v Hoe Huat Hng Foodstuffs Pte Ltd [1991] 2 MLJ 361*
  - *Wagamama Ltd v City Centre Restaurants plc [1995] FSR 713*
  - *CDL Hotels International Ltd v Pontiac Marina Pte Ltd [1997] 3 SLR 726 (HC); [1998] 2 SLR 550 (CA)*
- Inquiry into likelihood of confusion
  - *Tong Guan Food Products Pte Ltd v Hoe Huat Hng Foodstuffs Pte Ltd [1991] 1 SLR 133*
  - *The Polo/Lauren Co, LP v Shop In Department Store Pte Ltd [2006] 2 SLR 690 (CA)*
  - *Polo/Lauren Co LP v United States Polo Association [2002] 1 SLR 129*

- *Nations Fittings (M) Sdn Bhd v Oystertec Plc [2006] 1 SLR 712*
- *McDonald's Corp v Future Enterprises Pte Ltd [2005] 1 SLR 177*
- *Ng-Loy, "An Interdisciplinary Perspective on the Likelihood of Confusion: Consumer Psychology and Trademark Infringement in an Asian Society" (2008) 98 The Trademark Reporter 950*

- Relevance of intention to confuse the public
  - *Gillette UK Ltd v Edenwest Ltd [1994] RPC 279*
  - *Tessensohn t/a Clea Professional Image Consultants v John Robert Powers School Inc [1994] 3 SLR 308*
  - *Johnson & Johnson v Uni-Charm Kabushiki Kaisha (Uni-Charm Corporation) [2007] SLR 1082*
  - *Saga Foodstuffs Manufacturing (Pte) Ltd v Best Food Pte Ltd [1995] 1 SLR 739*
  - *Pernod Ricard v Allsworth Trading [1994] 1 SLR 603*
  - *Glaxo Plc v Glaxowellcome Ltd [1996] FSR 388*
  - *The Chinese Calligraphy Society of Singapore v Khoo Seng Kong [2008] SGHC 121*
- What is the scope of protection for descriptive get-up?
  - *Lifestyle 1.99 Pte Ltd v S$1.99 Pte Ltd [2000] 2 SLR 766*
  - *Super Coffeemix Manufacturing Ltd v Unico Trading Pte Ltd [2000] 3 SLR 145*
  - *Nippon Paint (Singapore) Co Pte Ltd v ICI Paint (Singapore) Pte Ltd [2001] 1 SLR 1*
- Need for a common field of activity?
  - *CDL Hotels International Ltd v Pontiac Marina Pte Ltd [1997] 3 SLR 726 (HC); [1998] 2 SLR 550 (CA)*
- Concept of 'initial interest confusion'
  - *Brookfield Communications Inc v West Coast Entertainment Corp 174 F 3d 1036 (9th Cir 1999)*
  - *Och-Ziff Management Europe Ltd v OCH Capital LLP [2010] EWHC 2599*
  - *OTO Bodycare Pte Ltd v Hiew Keat Foong [2005] SGHC 133*
  - *The Polo/Lauren Co LP v Shop In Department Store Pte Ltd [2005] 4 SLR 816*

(iv) Third element: Damage

- *Novelty Pte Ltd v Amanresorts Ltd [2009] 3 SLR 216 (CA)*
- *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd [2011] SGCA 37*

(v) Concept of 'dilution of goodwill':

- *Tattinger v Allbev Ltd [1993] FSR 641*
- *CDL Hotels International Ltd v Pontiac Marina Pte Ltd [1997] 3 SLR 726 (HC); [1998] 2 SLR 550 (CA)*

(vi) Other Forms of Passing Off

- Passing off as to the quality of the goods/services
  - *Kickapoo (Malaysia) Sdn Bhd v The Monarch Beverage Company (Europe) Ltd [2010]* 1 SLR 1212 (CA)
  - *Spalding v Gamage* (1915) 32 RPC 273
  - *Yunan Baiyao Group Co Ltd v Tong Jum Chew Pte Ltd* [2003] 1 SLR 62
- Passing off as to 'authority'?
  - *Kickapoo (Malaysia) Sdn Bhd v The Monarch Beverage Company (Europe) Ltd* [2010] 1 SLR 1212 (CA)
  - *Sony v Saray* [1983] FSR 302
- 'Inverse' Passing Off
  - *Tessensohn t/a Clea Professional Image Consultants v John Robert Powers School Inc [1994] 3 SLR 308*
  - *QB Net Co Ltd v Earnson Management (S) Pte Ltd [2007] SLR 1*
  - *Tang Chay Seng v Tung Yang Wee Arthur [2010] 4 SLR 1004*

(4) Registered Trade Marks

(i) Introduction

- Note relationship between the registration system and the common law: s 4(2) TMA

(ii) Registration Criteria: Trade Mark

  - *s 7-8 TMA*
  - *See also s 23(1) TMA*
- What is a 'trade mark'?
  - *Statutory* definitions: s 2(1) TMA (as amended in 2004): what is the impact of deletion of 'visually perceptible' in the definition of 'trade mark'?
- 'Capable of being represented graphically'
  - *Sieckmann [2003] RPC 38 (ECJ)*
  - *Shield Mark [2004] RPC 17*
  - *Libertel Groep BV [2004] Ch 83; [2004] FSR 4*
  - *Burrell & Handler, "Making Sense of Trade Mark Law" [2003] IPQ 388*
- Shape marks
  - *Under TMA, see restrictions in s 7(3)*
  - *For UK/ECJ cases on these restrictions:*
  - *Philips Electronics NV v Remington Consumer Products [1998] RPC 283 (HC); [1999] RPC 809 (CA*); [2003] RPC 2 (ECJ)
  - *Lego Juris A/S v OHIM [2010] ETMR 63*
  - *Julius Sämann Ltd v Tetrosyl Ltd [2006] FSR 42*
- Special types of trade marks

- Collective marks (s 60 TMA)
- Certification marks (s 61 TMA)

(iii) Registration Criteria: Distinctiveness

- Interplay between s 7(1)(a) ('capable of distinguishing') and s 7(1)(b)-(d)
  - *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 281
  - *Philips Electronics BV v Remington Consumer Products* [1998] RPC 283 (HC); [1999] RPC 809 (CA); [2003] RPC 2 (ECJ)
  - 'Jeryl Lynn' TM [1999] FSR 491
  - *Nations Fittings (M) Sdn Bhd v Oystertec Plc* [2006] 1 SLR 712
  - *Wing Joo Loong Ginseng Hong v Qinghai Xinyuan Foreign Trade Co Ltd* [2008] 3 SLR 296 (HC); [2009] 2 SLR 814 (CA)
  - *Love & Co Pte Ltd v The Carat Club Pte Ltd* [2009] 1 SLR 561
  - *Richemont International SA v Da Vinci Collections Pte Ltd* [2006] 4 SLR(R) 369
  - Ng-Loy, "Trade Marks, Language and Culture: The Concept of Distinctiveness and Publici Juris" [2009] SJLS 508

(iv) Registration Criteria: Conflicts with Earlier Marks

- Definition of 'earlier trade mark': see s 2(1) TMA 1998
  - Note the concept of the 'priority claim' in s 10
- Comparison between marks
  - The Polo/Lauren Co, LP v Shop In Department Store Pte Ltd [2005] 4 SLR 816 (HC); [2006] 2 SLR 690 (CA)
  - Johnson & Johnson v Uni-Charm Kabushiki Kaisha (Uni-Charm Corporation) [2007] 1 SLR 1082
  - Mitac International Corp v Singapore Telecommunications Ltd [2009] 4 SLR 961
  - City Chain Stores (S) Pte Ltd v Louis Vuitton Malletier [2009] 2 SLR 684 (HC); [2010] 1 SLR 382 (CA)
- Comparison between goods/services
  - British Sugar Plc v James Robertson & Sons Ltd [1996] RPC 281
  - Johnson & Johnson v Uni-Charm Kabushiki Kaisha (Uni-Charm Corporation) [2007] 1 SLR 1082
  - Valentino Globe BV v Pacific Rim Industries Inc [2009] 4 SLR 577 (HC)
  - Richemont International SA v Goldlion Enterprise (Singapore) Pte Ltd [2006] (SLR(R) 401.
  - Ferrero SPA v Sarika Connoisseur Cafe Pte Ltd [2011] SGHC 176.
- Requirement for confusion in s 8(2)
  - Can we elide the requirements for similarity between marks and between goods/services with the requirement for confusion into one question?
  - *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 281

- *Sabel BV v Puma AG* [1998] RPC 199
- *Canon Kabushiki Kaisha v MGM* [1999] RPC 117
- The Polo/Lauren Co, LP v Shop In Department Store Pte Ltd [2005] 4 SLR 816 (HC); [2006] 2 SLR 690 (CA)
- *MediaCorp News Pte Ltd v Astro All Asia Networks PLC* [2009] 4 SLR 496
- *McDonald's Corp v Future Enterprises Pte Ltd* [2005] 1 SLR(R) 177
- *Ferrero SPA v Sarika Connoisseur Cafe Pte Ltd* [2011] SGHC 176.
- Ng-Loy, "The Polo Match in Singapore: England vs Europe? The Polo/Lauren Co LP v Shop in Department Store Pte Ltd" (2006) European Intellectual Property Review 250

- The scope of s 8(4) TMA
  - Relevant for applications to register filed on or after 1 July 2004
  - For applications filed before 1 July 2004, see s 8(3) TMA: *Mobil Petroleum Co Inc v Hyundai Mobis* [2010] 1 SLR 512
  - See s 2(7)-(9) TMA ("well-known in Singapore")
- What is the scope of s 8(4)(b)(*i*) TMA?
  - *Amanresorts Ltd v Novelty Pte Ltd* [2008] 2 SLR 32 (HC); [2009] 3 SLR 216 (CA)
  - Burton Ong, "Protection of Well Known Marks: Perspectives from Singapore" [2005] TMR 1226
  - Ng-Loy, "Exploring Flexibilities Within the Global IP Standards" [2009] IPQ 162, at 165–173
- What is the scope of s 8(4)(b)(*ii*)(A) TMA: what is 'cause dilution in an unfair manner'?
  - See s 2(1) TMA for definition of 'dilution'
  - *Amanresorts Ltd v Novelty Pte Ltd* [2009] 3 SLR 216
  - *Ferrero SPA v Sarika Connoisseur Cafe Pte Ltd* [2011] SGHC 176
- What is the scope of ss 8(4)(b)(*ii*)(B) TMA: what is 'taking unfair advantage'?
  - *Premier Brands v Typhoon Europe* [2000] FSR 767
  - *L'Oréal SA and others v Bellure NV* [2007] RPC 14 (HC); [2008] RPC 9 (CA); [2010] RPC 1 (ECJ); [2010] RPC 23 (CA)
  - *Whirlpool Corp v Kenwood Ltd* [2009] RPC 2 (HC); [2010] RPC 2 (CA)
  - *Amanresorts Ltd v Novelty Pte Ltd* [2009] 3 SLR 216
  - *City Chain Stores (S) Pte Ltd v Louis Vuitton Malletier* [2009] 2 SLR 684 (HC)
  - *Clinique Laboratories LLC v Clinique Suisse Pte Ltd* [2010] 4 SLR 510
  - *Ferrero SPA v Sarika Connoisseur Cafe Pte Ltd* [2011] SGHC 176
- Exceptions to objection based on conflict with earlier mark or earlier right
  - Concept of 'honest concurrent user': s 9 TMA
  - Concept of acquiescence: s 24 TMA

(v) Other Obstacles (selected)

- Applications made in bad faith: s 7(6) TMA
  - *Gromax Plasticulture Ltd v Low Nonwoven Ltd* [1999] RPC 367
  - Harrison's TM Application [2005] FSR 10 (CA)
  - *Nautical Concept Pte Ltd v Mark Richard Jeffery* [2007] 1 SLR 1071
  - *Wing Joo Loong Ginseng (S) Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR 814 (CA)
  - *Valentino Globe BV v Pacific Rim Industries Inc* [2009] 4 SLR 577 (HC); [2010] 2 SLR 1203
  - Note also breaches of s 5(2)(*e*) TMA [lack of bona fide intention to use] dealt with under concept of bad faith
  - See also s 23(8) TMA

(vi) Trade Mark Term/Duration

- 10 years from date of registration, and renewable for further periods of 10 years
  - s 18 TMA
- Date of registration: date of the application for registration
  - s 15(2) TMA
- Rights in the trade mark accrue as from the date of registration: s 26(4) TMA

(vii) Infringement

- Exclusive right to use trade mark in the course of trade in relation to goods/services for which it is registered: s 26 TMA
  - Certain uses (eg. use of sign on material for labelling or packaging goods) infringe only where there is knowledge or reason to believe that such application is unauthorised: s 27(5) TMA
  - Other infringing acts:
  - Use of identical sign on identical goods or services: s 27(1) TMA [see also s 55(2)] TMA
  - Use of identical sign on similar goods/services; use of similar sign on identical/similar goods or services: s 27(2) TMA [see also s 55(2)] (contrast wording in the English equivalent s 10(2) TMA of the UK TMA 1994)
  - Use of identical/similar sign on dissimilar goods/services (applies only to a trade mark which is well-known in Singapore): s 27(3) TMA
  - Use of a trade mark on identical/similar/dissimilar goods/services (applies only to a well-known trade mark): s 55(3) TMA
- Meaning of 'use'
  - s 2(4) TMA and s 27(4) TMA
  - Certain uses (eg. use of sign on material for labelling or packaging goods) infringe only where there is knowledge or reason to believe that such application is unauthorised: s 27(5) TMA

- Meaning of 'in the course of trade'
  - See definition of 'trade' in s 2(1) TMA: includes any business or profession
  - *Arsenal Football Club plc v Reed* [2003] RPC 9 (ECJ)
- Meaning of 'use in relation to'
  - *Schütz (UK) Ltd v Delta Containers Ltd* [2011] EWHC 1712
- Must use be 'trade mark use'?
  - *Super Coffeemix Manufacturing Ltd v Unico Trading Pte Ltd [2000] 3 SLR 145*
  - *Nations Fittings (M) Sdn Bhd v Oystertec Plc [2006] 1 SLR 712*
  - *City Chain Stores (S) Pte Ltd v Louis Vuitton Malletier [2009] 2 SLR 684 (HC); [2010] 1 SLR 382 (CA)*
  - *Ferrero SPA v Sarika Connoisseur Cafe Pte Ltd [2011] SGHC 176*

(viii) Invalidation

- *See s 23 TMA*
- *Note also that registration is prima facie evidence of validity: s 101(a) TMA*

(ix) Revocation

- See Section 22 TMA

(x) Defences (selected)

- Use of own name in accordance with honest practices in industrial and commercial matters: s 28(1)(*a*) TMA
  - *Reed Executive Plc v Reed Business Information Ltd [2004] RPC 40*
  - *Hotel Cipriani SRL v Cipriani (Grosvenor Street) Ltd [2009] RPC 9 (HC); [2010] RPC 16 (CA)*
  - *See also s 55A(1)(a) (well-known marks) TMA*
- Use of a sign to indicate quality, purpose…other characteristic of goods/services in accordance with honest practices in industrial and commercial matters: s 28(1)(*b*)
  - *Adam Opel AG v Autec AG [2007] ETMR 33*
  - *Hasbro Inc v 123 Nahrmittel GmbH [2011] EWHC 199 (Ch)*
  - *See also s 55A(1)(b) (well-known marks) TMA*
- Use of trade mark to indicate the intended purpose of goods (in particular as accessories or spare parts) or services in accordance with honest practices in industrial and commercial matters: s 28(1)(*c*) TMA
  - *Gillette Co v LA-Laboratories Ltd Oy [2005] FSR 37 (ECJ)*
  - *DataCard Corporation v Eagle Technologies Limited [2011] EWHC 244*
  - *See also s 55A(1)(c) (well-known marks) TMA*
- Fair use in comparative advertising or promotion: s 28(4)(a) TMA
  - *Compare with repealed s 27(6) TMA*

- *Fragrance Foodstuff Pte Ltd v Bee Cheng Hiang Hup Chong Foodstuff Pte Ltd [2002] 4 SLR 916 (HC); [2003] 1 SLR 305 (CA)*
- *See also s 55A(3)(a) (well- known marks) TMA*

- News reporting or news commentary: s 28(4)(*c*) TMA
  - *See also s 55A(3)(c) (well-known marks) TMA*
- Section 28(2) TMA

B. COPYRIGHT

(1) Copyright and Related Legislation

- For Singapore:
  - *The* Copyright Act 1987, Cap 63 (2006 Revised Ed) ("CA")

(2) International Agreements

- Berne Convention For the Protection of Literary and Artistic Works 1886 (http://www.wipo.int/treaties/en/ip/berne/http://www.wipo.org/treaties/ip/berne/index.html)
- Rome Convention for the Protection for Performers, Producers of Phonograms and Broadcasting Organisations 1961 (http://www.wipo.int/treaties/en/ip/rome/)
- The TRIPS Agreement 1995 (http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)
- WIPO Copyright Treaty 1996 (http://www.wipo.int/treaties/en/ip/wct/)
- WIPO Performances and Phonograms Treaty 1996 (http://www.wipo.int/treaties/en/ip/wppt/)
- Anti-Counterfeiting Trade Agreement http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf

(3) Subject-Matter Protected by Copyright

(i) No registration required

(ii) Connecting factors under the Copyright Act 1987

- Types of copyright material protected
  - original authors' works
  - entrepreneurial works ('subject-matter other than works')
- Local copyright materials:
  - Authors' works:
    - Unpublished: s 27(1) CA

Note the definition of "qualified person" in s 27(4) CA and the definitions of "citizen" and "residence" in s 7(1) and s 8 CA

- Published: s 27(2) CA
- Subject matter other than works:
  - Sound recordings: s 87 CA
  - Cinematograph films: s 88 CA
  - Broadcasts: s 89 CA
  - Cable programmes: s 90 CA
  - Published editions of authors' works: s 91 CA

- Foreign copyright materials:
  - s 184 CA and the Copyright (International Protection) Regulations 1987 – 2003
  - Foreign works: see Alteco Chemical Pte Ltd v Chong Yean Wah [2000] 1 SLR 119
  - Importance of distinction between 'author' and 'copyright owner': see Radcoflex Australia v James Lim Hwa Chin [2000] SGHC 96
- Concept of "publication": s. 24 CA

  General Principles: s 24(1)(*a*), (*b*), (*c*) CA

  Qualifications:
  - Whole publications: s 24(2) CA
  - Excluded acts: s 24(3) CA
  - Simultaneous publications: s 24(5) CA
  - Unauthorised publications: s 24(6) CA
  - Colourable publications: s 24(4) CA
  - *Francis, Day & Hunter v. Feldman* [1914] 2 Ch. 728
  - *Bodley Head v. Flegon* [1972] RPC 587
  - *Television Broadcasts v. Mandarin Video Holdings* [1983] 2 MLJ 346

(4) Original authors' works

(i) Meaning of "originality"

- "Form of expression" vs "Idea"
  - *Flamelite (S) Pte Ltd v Lam Heng Chung* [2001] 4 SLR 557
- Is merit or quality relevant? Is simplicity a bar to originality?
  - *University of London Press v University Tutorial Press [1916] 2 Ch 601*
  - *AUVI Trade Mark [1992] 1 SLR 639*
  - *Real Electronics v Nimrod Engineering [1996] 1 SLR 336*
  - *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd [2011] SGCA 37*

(ii) Reduction to material form

- ss 16, 17, 15(1A) CA

(iii) Literary works

- s 7A CA: non-exhaustive definition
  - *University of London Press v University Tutorial Press [1916] 2 Ch 601*
  - *Real Electronics v Nimrod Engineering [1996] 1 SLR 336*
  - *Fragrance Foodstuff Pte Ltd v Bee Cheng Hiang Hup Chong Foodstuff Pte Ltd [2002] 4 SLR 916 (HC)*
  - But what about words, short phrases and names?
  - *Exxon v Exxon Insurance Consultants [1982] RPC 81*
  - *Express Newspapers v Liverpool Daily Post [1985] FSR 306*
  - *Tay Long Kee Impex Ltd v Tan Beng Huwah [2000] 2 SLR 750*
  - *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd [2011] SGCA 37*
- Compilations: s 7A(2), (3) CA
  - *Feist v Rural Telephone Service 111 S Ct 1282 (1991)*
  - *Global Yellow Pages Ltd v Promedia Directories Pte Ltd [2010] SGHC 97*
  - *Pioneers & Leaders (Publishers) v Asia Pacific Publishing [2010] SGHC 211*
  - *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd [2011] SGCA 37*
- Computer programs
  - s 7A(1) CA
- Reports of speeches
  - *Walter v Lane* [1900] AC 539, [1900] All ER 1666
  - *Roberton v Lewis* [1976] RPC 169
  - *Express Newspapers v News UK* [1990] FSR 539
  - *Hyperion Records Limited v. Dr. Lionel Sawkins* [2005] RPC 32
  - J Pila, 'An Intentional View of the Copyright Work' (2008) 71 MLR 535

(iv) Dramatic works

- s 7(1) CA: non-exhaustive definition
  - *Tate v Fullbrook* [1908] 1 KB 821
- Game Show Formats
  - *Green v Broadcasting Corporation of New Zealand [1989] RPC 469; [1989] RPC 700*
- Static Scenes
  - *Creation Records v Newsgroup Newspaper Ltd* [1997] 39 IPR 1
- Computer games
  - *Nova Productions Ltd v Mazooma Games* [2006] RPC 14 (HC); [2007] RPC 25 (CA)

(v) Musical works

- Adaptations and re-arrangements: see *Wood v Boosey* (1867) LR 3 QB 223
- Saw Cheng Lim, "Protecting the Sound of Silence in 4'33" – A Timely Revisit of Basic Principles in Copyright Law" [2005] EIPR 467

(vi) Artistic works

- s 7(1) CA: exhaustive definition
- Distinction between (a)-(b) and (c)
- Any requirement of permanence or durability?
  - Merchandising Corporation v Harpbond [1983] FSR 32
- Drawings
  - Includes trade logos: AUVI Trade Mark [1992] 1 SLR 639
  - *Fragrance Foodstuff Pte Ltd v Bee Cheng Hiang Hup Chong Foodstuff Pte Ltd* [2002] 4 SLR 916 (HC)
  - Includes maps: Virtual Map (S) Ltd v Suncool International Pte Ltd [2005] 2 SLR 157
- Sculptures
  - s 7(1) CA: non-exhaustive definition
- Works of artistic craftsmanship
  - Is artistic merit a relevant consideration: *Hensher v Restawile* [1975] RPC 31

(vii) Entrepreneurial works (subject matter other than Works)

- Sound recording: ss 7(1), 16, 18, 19, 87, 97 CA
  - Cinematograph films: ss 7(1), 16, 88, 98 CA
  - Broadcasts: ss 7(1), 20, 89, 99 CA
  - Cable programmes: ss 7(1), 21, 90, 100 CA
  - Published editions: ss 91, 101 CA

(viii) Copyrights to subsist independently

- s 117 CA
- *The Performing Rights Society Ltd v United Artists Singapore Theatres Pte Ltd* [2001] 2 SLR 375

(5) Copyright term

- Authors' works: s 28 CA
- Entrepreneurial works: ss 92 – 96 CA

(6) Authorship / ownership

(i) Author's works

- Basic rule: s 30(2) CA

- *Definition of 'author' in relation to a photograph: s 7(1) CA*
- *Alteco Chemical Pte Ltd v Chong Yean Wah [2000] 1 SLR 119*
- *Pioneers & Leaders (Publishers) v Asia Pacific Publishing* [2010] SGHC 211, [24]-[36]
- *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] SGCA 37

- Employees and works made in the course of employment: s 30(6) CA
  - *Stephenson, Jordan and Harrison v M & E [1952] 69 RPC 10*
- Commissioned works: s 30(5) CA

(ii) Entrepreneurial works

- Sound recordings: ss 97(2), 16(3), 97(3) CA
- Films: ss 98(2), 16(4), 98(3) CA
- Cable programmes: s 100 CA
- Broadcasts: s 99 CA
- Published editions: s 101 CA

(7) Copyright infringement

(i) Primary infringement

- What constitutes primary infringement:
  - s 31 CA (authors' works), s 103 CA (entrepreneurial works)
- The exclusive rights for authors' works:
  - Reproduction in material form: s 26(1)(*a*)(i) CA; s 26(1)(b)(i) CA
  - Meaning of 'reproduction': ss 15 CA and 17 CA
    - Creative Technology v Aztech System [1997] 1 SLR 621
  - Publication: s 26(1)(*a*)(ii) CA; s 26(1)(*b*)(ii) CA
  - Meaning of 'publication': s 24 CA
  - Public performance [not for artistic works]: s 26(a)(iii) CA
  - What is to 'perform'? See s 22 CA
  - Communication of the work to the public: s 26(1)(a)(iv); s 26(1)(b)(iii)
    - Meaning of 'communicate': s 7(1) CA
      [subsumes the previous rights of broadcasting and including in a cable programme service]
    - *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd & ors* [2010] SGCA 43
  - Adaptations (not for artistic works): ss 26(a)(vi) CA; 26(a)(vii) CA
  - Meaning of 'adaptation': s 7(1) CA
  - Entry into commercial rental arrangement (only for computer programs): ss 26(1)(c) CA, s 26(2) – (4) CA

- Meaning of 'commercial rental arrangement': s 25A CA

- The exclusive rights for entrepreneurial works
  - ss 82 – 86 CA
- Causal connection:
  - *Creative Technology v Aztech Systems* [1997] 1 SLR 621
  - *Chua Puay Kiang v Singapore Telecommunication Ltd* [2000] 3 SLR 640
  - AUVI Trade Mark [1992] 1 SLR 639
  - Virtual Map v SLA [2008] 3 SLR 86
- Indirect copying:
  - *Interlego v Tyco* [1989] AC 217
- Subconscious copying:
  - *Francis Day Hunter v Bron* [1963] Ch 587
- *How much must be copied?*
  s 10(1) CA: a substantial part
    - *John Robert Powers School v Tessensohn [1993] 3 SLR 724 (HC); [1994] 3 SLR 308 (CA)*
    - *Creative Technology v Aztech System [1997] 1 SLR 621*
    - *Flamelite (S) Pte Ltd v Lam Heng Chung [2001] 4 SLR 557*
    - *Virtual Map v SLA [2008] 3 SLR 86 (HC); [2009] 2 SLR 588 (CA)*
    - *For a comment on Virtual Map v SLA, see Burton Ong, "Copyright and Cartography: Mapping the Boundaries of Infringement Liability" [2009] EIPR 17*

(ii) Authorising primary infringement

- ss 31, 34 CA (works); s 103 (subject matter other than works)
- Meaning of 'authorise':
  - *Ong Seow Pheng v Lotus Development Corporation* [1997] 3 SLR 137
  - *RecordTV Pte Ltd v MediaCorp TV Singapore* [2010] 2 SLR 152; [2009] SGHC 287; [2010] SGCA 43 (CA)

(iii) Secondary infringement

- Commercial exploitation of infringing copies made in Singapore
  - *s 33 CA (works), s 105 CA* (subject matter other than works)
- Infringing copies made elsewhere and commercially exploited in Singapore (e.g. by importation or sale)
  - ss 32 CA, 33 CA (works); ss 104 CA, 105 CA (entrepreneurial works)
- Who is the 'owner of copyright' for the purpose of these sections?
  - See s 25(3) and (4) CA

(iv) Groundless Threats

- s 200 CA

(v) Criminal Liability for Primary Infringement

- s136(3A) CA – "wilful" infringement and
  (i) extent of infringement is "significant" or
  (ii) "commercial advantage" gained from infringement
  See Public Prosecutor v PDM International Pte Ltd [2006] SGDC 91

(8) Defences to infringement (selected)

(i) Fair dealing

- s 35 CA (works), s 109 CA (subject matter other than works)
- Factors to consider when determining if the dealing with a l/d/m/a work for any purpose other than for criticism/review/reporting of current events, is fair:
  - *non-exhaustive list set out in s.35(2) CA*
  - presumption of fair dealing and quantitative limits in s 35(3) CA and(4) CA. See also the definition of reasonable portion in s 7(2) CA and s 7(2A) CA.
  - Ng-Loy, ""Intellectual Property Rights in Singapore - Restoring the Balance in IP Law" in *Developments in Singapore Law between 2001 and 2005*, (Singapore Academy of Law, 2006) pp 242 – 268
- Fair dealing for purpose of criticism or review
  - s 36 CA (works); ss 110 CA, 116 CA (subject matter other than works)
- Fair dealing for purpose of reporting a current event
  - s 37 CA (works); ss 111 CA, 116 CA (subject matter other than works)
  - *Fragrance Foodstuff Pte Ltd v Bee Cheng Hiang Hup Chong Foodstuff Pte Ltd* [2002] 4 SLR 916 (HC); [2003] 1 SLR 305 (CA)
- Public interest defence?
  - *Fragrance Foodstuff Pte Ltd v Bee Cheng Hiang Hup Chong Foodstuff Pte Ltd* [2002] 4 SLR 916 (HC); [2003] 1 SLR 305 (CA)
  - Saw Cheng Lim, "Is there a defence of Public Interest in Singapore?" [2003] SJLS 519

(ii) 'Home taping' defence

- s 114 CA

(9) Assignments and licences

- As a type of personal or movable property: s 194(1) CA
- Assignment of copyright: s 194(2)-(3) CA
- Assignment of 'future' copyright: s 195 CA
- Licensing of copyright
- Position of exclusive licensees: ss 121-129 CA

C. PATENTS

(1) Patent legislation

- For Singapore:
  - The Patents Act 1994, Cap 221 (2005 Rev Ed) ("PA")

(2) International Agreements

- The Paris Convention For the Protection of Industrial Property (http://www.wipo.int/treaties/en/ip/paris/)
- The Budapest Treaty on Deposit of Micro-organisms (http://www.wipo.int/treaties/en/registration/budapest/)
- The Patent Co-operation Treaty (http://www.wipo.int/treaties/en/registration/pct/)
- The TRIPS Agreement (http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)

(3) 'Patentable invention'

- S80(1)(*a*) PA: A patent for an invention may be revoked if the invention is not a 'patentable invention'
- S13(1) PA: Subject to section (2), a patentable invention is one that satisfies the following conditions:

  (a) the invention is new (the 'novelty' requirement)
  (b) it involves an inventive step (the 'non-obviousness' requirement)
  (c) it is capable of industrial application (the 'industrial applicability' requirement)

- S13(2) and (3) PA: the '*ordre public*' provision

(4) The novelty requirement

- See s 14 PA
- *The 'state of the art'*
  - *General definition in s 14(2) PA*
  - *See s 17 PA on 'priority date'*
  - *Genelabs Diagnostics Pte Ltd v Institut Pasteur [2000] SGCA60*
  - *Dextra Asia Co Ltd v Mariwu Industrial Co [2006] 2 SLR 154*
- Status of unpublished patent applications
  - See s 14(3)
- Status of 'non-prejudicial' disclosures
  - See s 14(4) PA
  - Disclosures in breach of confidence: s 14(4)(*a*) and (b) PA
  - See above on the action for breach of confidence PA
  - Disclosures at international exhibitions : s 14(4)(*c*) PA

- See s 2(1) PA on 'international exhibition'
- Disclosures before learned societies: s 14(4)(*d*) PA
- See s 14(5) PA on 'learned society'
- NB: Must file the patent application within 12 months of the 'non-prejudicial' disclosure
- First medical use of a known product: see s 14(7) PA

- Rule against 'mosiacing': Genelabs Diagnostics v Institut Pasteur [2001] 1 SLR 121
- The 'enabling disclosure' principle:
  - *Genelabs Diagnostics v Institut Pasteur* [2001] 1 SLR 121
  - *Merck v Pharmaforte* [2002] 3 SLR 515 (HC); [2000] 3 SLR 717 (CA)
  - *FE Global Electronics v Trek Technology* (Singapore) [2005] 3 SLR 389 (HC); [2006] 1 SLR 874 (CA)
  - *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] SGCA 6

(5) The Inventive Step / Non-obviousness Requirement

- See s 15 PA
  - The hypothetical skilled addressee
  - *Technograph Printed Circuits Ltd v Mills & Rockley (Electronics) Ltd* [1969] RPC 395, [1972] RPC 346
  - *First Currency Choice Pte Ltd v Main-Line Corporate Holdings Ltd* [2008] 1 SLR 335 (CA)
- The 'Windsurfing' approach:
  - *Windsurfing International Inc v Tabur Marine Ltd* [1985] RPC 59
  - *Pozzoli Spa v BDMO SA* [2007] FSR 37
- No rule against 'mosiacing':
  - *Peng Lian Trading Co v Contour Optik Inc* [2003] 2 SLR 560
- Guidelines:
  - *Merck v Pharmaforte [2002] 3 SLR 515 (HC)*
  - *FE Global Electronics v Trek Technology (Singapore) [2006] 1 SLR 874*
  - *Ng Kok Cheng v Chua Say Tiong [2001] 3 SLR 487*
  - *First Currency Choice Pte Ltd v Main-Line Corporate Holdings Ltd [2008] 1 SLR 335 (CA)*
  - *Peng Lian Trading Co v Contour Optik Inc [2003] 2 SLR 560*
  - *ASM Assembly Automation Ltd v Aurigin Technology Pte Ltd [2010] 1 SLR 1*
  - *Muhlbauer AG v Manufacturing Integration Technology Ltd [2010] 2 SLR 724*

(6) The Industrial Application Requirement

- See s 16PA

- *Example: UK Patent office in June 2008 (O/156/08) involving an application* for a perpetual motion machine. Decision available at

  http://www.ipo.gov.uk/patent/p-decisionmaking/p-challenge/p-challenge-decision-results/p-challenge-decision-results-bl?BL_Number=O/156/08

- Unknown function?
  - *Merck v Pharmaforte* [2002] 3 SLR 515 (HC)
  - See Ng-Loy, "Patenting Genes – A Closer Look at the Concepts of Utility and Industrial Application" (2002) 33 IIC 412
- Methods of treatment of the human/animal body
  - See s 16(2) PA
  - Note s 16(3) PA regarding products used in methods of treatment

(7) 'Clear and complete disclosure'

- Also known as the 'sufficiency' requirement
- See s 80(1)(*c*) PA: A patent for an invention may be revoked if the specification of the patent does not disclose the invention clearly and completely for it to be performed by the person skilled in the art
- See also s 25(4) PA
- Two step Inquiry
  - identify the invention and decide what it claims to enable the person skilled in the art to do.
  - determine whether the specification enables him to do it.
- *First Choice Currency Pte Ltd v Main-Line Corporate Holdings Ltd* [2007] SGCA 50
- *Genelabs Diagnostics v Institut Pasteur* [2001] 1 SLR 121

(8) Other grounds of revocation

- See, for example, s 80(1)(f) PA: A patent for an invention may be revoked if the patent was obtained –
  - *fraudulently;*
  - *on any misrepresentation; or*
  - *on any non-disclosure or inaccurate disclosure of any prescribed material* information, whether or not the person under a duty to provide the information know or ought reasonably to have known of such information of the inaccuracy.
- See s 80(1)(*b*) PA: A patent for an invention may be revoked if it was granted to a person who was not entitled to be granted that patent
- Putting Invalidity into issue: s.82 PA

(9) Who is entitled to the grant?

- General rule: the inventor or joint inventors
- See s 19(2)(*a*) PA
- See s 2(1) PA for definition of 'inventor'

(10) Exceptions to general rule:

- Person entitled to the property in the invention by virtue of (i) any rule of law (including foreign law), or (ii) an enforceable term of an agreement made by the inventor before the making of the invention: s 19(2)(*b*) PA
- Person entitled to the inventor's successor-in-title: s 19(2)(*c*) PA
- Employer, in the case of employed inventors: s 49 PA

(11) Patent Term/Duration

- See s 36 PA
- See s 36(1) PA: 20 years from the filing date
- See s 76 PA on when the patentee's exclusive rights accrue (date of publication of patent application), and when patentee may commence infringement action (after the grant of patent)
- See s 36A PA

(12) Infringement

- S.66(1) PA
  - *Institut Pasteur v Genelabs Diagnostics [2000] SGHC 53*
  - *Trek Technology (Singapore) v FE Global Electronics [2005] 3 SLR 389 (HC)*
  - *FE Global Electronics v Trek Technology (Singapore) [2005] 3 SLR 389 (HC); [2006] 1 SLR 874*
  - *Weir Warman Ltd v Research & Development Pty Ltd [2007] 2 SLR 1073*
  - *Bean Innovations v Flexon [2001] 1 SLR 24 (HC); [2001] 3 SLR 121 (CA)*
  - *FE Global Electronics v Trek Technology (Singapore) [2005] 3 SLR 389 (HC); [2006] 1 SLR 874 (CA)*
  - *First Currency Choice Pte Ltd v Main-Line Corporate Holdings Ltd [2008] 1 SLR(R) 335 (CA)*
  - *Mühlbauer AG v Manufacturing Integration Technology Ltd [2010] SGCA 6*

(13) Defences (selected)

- Private and non-commercial use: See s 66(2)(a) PA
- Experimental use: See s 66(2)(*b*) PA
- The '*Bolar*' defence: See s 66(2)(*h*) PA
- Exhaustion of rights: See s 66(2)(*g*) PA
- See special position of patented 'pharmaceutical product': s 66(3)-(5A) PA
- See s 2(1) PA for definition of 'pharmaceutical product'
- See special position of 'specific patient' in s 66(2)(*i*) PA
- 'Prior use' defence: See s 71 PA

(14) Section 69(1)PA

- *Seiko Epson Corp v Sepoms Technology Pte Ltd and anor* [2008] 1 SLR(R) 269

- *First Currency Choice Pte Ltd v Main-Line Corporate Holdings Ltd* [2008] 1 SLR(R) 335 (CA)

(15) Groundless Threat

- See s 77 PA
  - *Contour Optik Inc v Pearls' Optical Co Pte Ltd* [2002] SGHC 238
  - *Bean Innovations Pte Ltd v Flexon (Pte) Ltd* [2001] 3 SLR 121
  - *ASM Assembly Automation Ltd v Aurigin Technology Pte Ltd* [2010] 1 SLR 1

D. BREACH OF CONFIDENCE

(1) Elements of the action on breach of confidence

- *Coco v Clark* [1969] RPC 41
- *X v CDE* [1992] 2 SLR 996

(2) Confidential Information

- Different types of information
  - *Vestwin Trading Pte Ltd v Obegi Melissa* [2006] 3 SLR 573
  - *Tang Siew Choy v Certact Pte Ltd* [1993] 3 SLR 44
  - *X v CDE* [1992] 2 SLR 996
- General definition
  - *Stratech Systems Ltd v Guthrie Properties (S) Pte Ltd* [2001] SGHC 77
  - *QB Net Co Ltd v Earnson Management (S) Pte Ltd* [2007] 1 SLR 1
  - *Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR 579
- Requirement for specificity
  - *Chirapurk Jack v Haw Par Brothers International Ltd* [1993] 3 SLR 285
  - *Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR 579
- The "trivial tittle-tattle" exception
  - *Coco v Clark* [1969] RPC 41

(3) Obligation of confidentiality

- Direct recipients
  - *Coco v Clark* [1969] RPC 41
- Indirect/Third party recipients
  - *QB Net Co Ltd v Earnson Management (S) Pte Ltd* [2007] 1 SLR 1
  - *Vestwin Trading Pte Ltd v Obegi Melissa* [2006] 3 SLR 573
  - George Wei, "Surreptitious Taking of Confidential Information" (1992) 12 Legal Studies 302
  - Ng-Loy, "Emergence of a Right of Privacy from Within the Law of Confidence?" [1996] EIPR 307

- Employees and ex-employees
  - *Faccenda Chicken Ltd v Fowler* [1986] 3 WLR 288
  - *Tang Siew Choy v Certact Pte Ltd* [1993] 3 SLR 44
  - *Asia Business Forum Ltd v Long Ai Sin* [2003] 4 SLR 658
- Unauthorised use or disclosure
  - *Stratech Systems Ltd v Guthrie Properties (S) Pte Ltd* [2001] SGHC 77
- Detriment?
  - *Vestwin Trading Pte Ltd v Obegi Melissa [2006] 3 SLR 573*
- Defences
  - *Hubbard v Vosper (1972) 2 WLR 389*
  - *Lion Laboratories v Evans [1985] QB 526*
  - *X v CDE [1992] 2 SLR 996*

E. REGISTERED DESIGNS

Registered Designs Act (Cap 266) ("RDA")

Registered Designs Rules R1 (Cap 266) ("RDR")

(1) What is a Design?

- s.2(1) RDA.

(2) Industrial Application

- r.12 RDR

(3) Exceptions

- Functionality exception: s.2(1)(*b*)(i) RDA; s.70 Copyright Act
- Must-match exception; Must-fit exception.

(4) `Unregistrable subject matter

- r.9 RDR
- Designs contrary to Public Policy and Morality (s.6 RDA)
- Computer programmes; layout design of integrated circuits (s/7 RDA)
- Artistic Works (r.9 RDR)
- r.10 RDR
- Designs consisting of name or representation of any person (r.11 RDR)

(5) Novelty

- s.5 RDA

(6) Confidential Disclosure

- ss.8-10 RDA

(7) Date of Registration (s.20 RDA)

(8) Duration (s.21 RDA)

(9) Copyright and Design

- s.70, s.74 Copyright Act
  - Designs that are registrable under the RDA and which are registered: s.74(1) CA.
  - Designs that are registrable under the RDA but not registered s.27(2); s.74(3) CA.
  - Designs that are unregistrable under s.70.

(10) Infringement

- s.30, s.36 RDA

(11) Remedies

- ss.39-41 RDA

(12) Rights of third parties to continue use of registered designs

- s.31 RDA

(13) Remedy for Groundless Threats of Infringement Proceedings

- s.44 RDA

(14) Cases

- *Sebel Furniture Ltd v Tiong Hin Engineering Pte Ltd* [1999] 2 SLR 662;
- *Hunter Manufacturing Pte Ltd v Soundtex Switchgear & Engineering Pte Ltd* [2000] 1 SLR 401
- *Nagasima Electronic Engineering Pte Ltd v APH Trading Pte Ltd* [2005] 2 SLR 641.

PART VI: TAX

The reading list for the tax component is as follows:

1. Income Tax Act (Cap 134), with emphasis on Parts III, IV, V, IX, XII, XIV.
2. Stamp Duties Act (Cap 312), with emphasis on Part II, III, IV, V, First Schedule
3. Goods and Services Act (Cap 117A), with emphasis on Part III, IV, V, Fourth Schedule.
4. The following IRAS E-Tax Guides:

No.	Guide	Document Location
a.	**Group Relief System** (Published on 6 Sep 2011)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/Group%20Relief%20System.pdf
b.	**Tax Exemption for Foreign-Sourced Income** (Published on 6 Sep 2011)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/Tax%20Exemption%20for%20Foreign-Sourced%20Income.pdf
c.	**Income Tax**: Tax Deduction for Shares Used to Fulfill Obligations under an Employee Equity-Based Remuneration Scheme (Published on 8 Jul 2011)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/Tax%20Deduction%20for%20Shares%20used%20to%20fulfill%20obligations%20under%20an%20EEBR%20scheme.pdf
d.	**Income Tax & Stamp Duty**: Mergers and Acquisitions Scheme (Published on 27 Jun 2011)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/M&A%20scheme%20e-Tax%20guide.pdf
e.	**Tax Framework for Corporate Amalgamations** (1st Edition) (Published on 20 Jan 2010 First Edition: 20 Jan 2010)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/Business_and_employers/Tax%20Framework%20for%20Corporate%20Amalgamations%20(1st%20edition).pdf
f.	**Income Tax Treatment of Limited Partnership (LPs)** (Published on 30 Jun 2009)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/Individuals_and_employees/Eguide-%20LP_final_.pdf

g.	**Enhanced Carry-back Relief System** (First published on 23 Jan 2009 Revised on 30 Jan 2009)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/ECBR%20circular%20_revised-%20as%20at%2030jul09.pdf
h.	**Not Ordinarily Resident Scheme** (Published on 7 Jul 2008 Annexes B & F updated on 29 Aug 2008)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/NOR%20Circular_07.07.08%20.pdf
i.	**Income Tax Treatment of Trusts** (Published on 30 Nov 2006)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/Individuals_and_employees/incometaxtreatmentoftrusts30nov06.pdf
j.	**Carry-Back Relief System** (First published on 10 Jun 2005 Revised on 15 Jun 2005)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/Business_and_employers/CBR%20circular_revised-as%20at%2030jul09.pdf
k.	**Income Tax Treatment of Limited Liability Partnerships (LLPs)** (Published on 10 Jun 2005)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/Individuals_and_employees/llpsupplementarycircular.pdf
l.	**Changes to Tax Treatment of Employee** Stock Options and Other Forms of Employee Share Ownership Plans (Published on 31 Aug 2002 Updated on 27 Dec 2002 Updated on 5 Aug 2008)	http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-Tax_Guides/Individuals_and_employees/Stock%20options%20changes%20circular.pdf

5. General reading: Singapore Master Tax Gui de 2011/12 (CCH)

PART VII: COMPETITION

NOTE ON SYLLABUS

Candidates are expected to have a working knowledge of competition law, and be able to identify antitrust issues which arise in the course of their commercial practice. The syllabus sets out ten topics. As the Competition Law paper is a part of the Commercial Practice component of the Examination, emphasis will be placed on the area of merger control. Accordingly, a greater focus will be placed on the topics of "The Section 54 Prohibition" and "Market Definition". Candidates are free to raise competition law precedents from their respective jurisdictions, but should note the extent to which Singapore antitrust law is unique in its thresholds and its application.

OVERVIEW

A. The Section 34 Prohibition

B. The Section 47 Prohibition

C. The Section 54 Prohibition

D. Market Definition

E. Powers of Investigation

F. Enforcement

G. Leniency Regime

H. Penalties

I. Treatment of Intellectual Property Rights

J. Regulated Sectors

THE SECTION 34 PROHIBITION

A. Undertakings
    1. Meaning of undertaking
    2. Single economic entity

B. Agreements
    1. Scope of agreements
    2. Decisions by associations of undertakings
    3. Concerted practices
    4. The prevention, restriction and distortion of competition
    5. The appreciable adverse effect on competition test
    6. Net economic benefit

C. Examples of infringing behaviour
    1. Directly or indirectly fixing prices

2. Bid-rigging
3. Agreements to share markets
4. Agreements to limit output or control production or investment
5. Agreements to fix trading conditions
6. Joint purchasing/selling
7. Information sharing
8. Exchange of price information
9. Exchange of non-price information
10. Advertising
11. Standardisation agreements
12. Other anti-competitive agreements

D. Exclusions

E. Block exemptions

F. Notification for guidance and decisions

G. Consequences of infringement

1. Voidness
2. Financial penalties
3. Rights of private action

H. Market power and market shares

1. Measuring market shares

(a) Evidence

I. The analytical framework to assess if agreements meet the criteria for the exclusion of individual agreements under the Third Schedule

1. "Contributes to improving production or distribution; or promoting technical or economic progress"
2. "But which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives"
3. "Afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question"

THE SECTION 47 PROHIBITION

A. Concept of dominance

1. Market definition
2. Assessing dominance
3. Extent of existing competition: Market shares
4. Extent of potential competition: Entry barriers

5. Other constraints
6. Collective dominance

B. Abuse

1. Abuse in related markets

C. Exclusions

D. Block exemptions

E. Notification for guidance and decisions

F. Consequences of infringement

1. Financial penalty
2. Rights of private action

G. Market power and market shares

1. Measuring market shares
   (a) Evidence

H. Entry barriers

1. Sunk costs
2. Limited access to key inputs and distribution outlets
3. Essential facilities
4. Intellectual property rights
5. Regulation
6. Economies of scale
7. Network effects
8. Exclusionary behaviour
9. Predatory response to entry
10. Vertical restraints
11. Other exclusionary practices
12. Assessing entry barriers
13. Barriers to expansion

I. Examples of conduct that may amount to an abuse

1. Predatory behaviour
2. Pricing below cost
3. Price is below AVC
4. Price is above AVC but below ATC
5. The feasibility of recouping losses
6. Discounts
7. Price discrimination

8. Margin squeeze
9. Vertical restraints
10. Examples of foreclosure
11. Refusals to supply and essential facilities
12. Essential facilities

THE SECTION 54 PROHIBITION

A. Jurisdiction

1. Has a relevant merger situation arisen?
   (a) Definition of a merger
   (b) Acquisition of control
   (c) Legal and de facto control
   (d) Acquisitions of control
2. Foreign mergers
3. Is a merger exempted or excluded from the merger control regime?
   (a) Exemption under section 54(7) of the Act
   (b) Exclusions in the Fourth Schedule to the Act
   (c) Exemption under public interest considerations
   (d) Exclusion of mergers from the Section 34 and the Section 47 Prohibitions
   (e) Exclusion of ancillary restrictions from the Section 34 and the Section 47 Prohibitions
   (f) Joint ventures
   (g) Examples of situations giving rise to joint control
4. Horizontal mergers versus non-horizontal mergers
   (a) Horizontal mergers
   (b) Non-horizontal mergers

B. Analytical framework for merger control

1. The substantial lessening of competition test
   (a) Identification of the "counterfactual" scenario in the absence of the merger
2. Assessment of the effect of a merger on market structure
   (a) Market share thresholds
   (b) Market definition
   (c) Hypothetical monopolist test
   (d) The product market and geographic market
   (e) Other considerations in defining the market

(f) The treatment of captive sales in market definition

3. Immediate competitive effects of a merger

(a) Non-coordinated effects

(b) Coordinated effects

4. Factors to consider in examining the effects of a substantial lessening of competition of a merger

(a) Barriers to entry and expansion

(b) Countervailing buyer power

(c) Removal of a maverick player

(d) Efficiencies

(e) Failing firm/division defence

(f) Other issues

C. Practical issues in merger notification procedures and investigations

1. What are merger notifications?

(a) When should notifications be made?

2. When should a notification be made to the CCS

(a) Introduction to self-assessment

(b) The self-assessment matrix

3. Pre-notification discussions

4. Merger notifications

(a) Application process for a merger notification

(b) Confidentiality of information

5. Review process

(a) Preliminary thresholds

(b) Phase 1 review

(c) Phase 2 review

(d) Interim measures

6. Provision of information

(a) The CCS information gathering process

7. Decision process

(a) Favourable decisions

(b) Unfavourable decisions

(c) Competing bids

8. Appeals

(a) Introduction to appeals

(b) Appeals against directions

9. Penalties

(a) Intention versus negligence

(b) Determining the amount of penalty

(c) Payment

D. Interface with Securities Industry Council Take-over code

1. Introduction

E. Remedies/commitments

1. Behavioural versus structural remedies

(a) Structural remedies

(b) Behavioural remedies

(c) Consideration of the appropriate remedy

(d) The cost of remedies and proportionality

2. Commitments

(a) Timeframe for negotiation of commitments

(b) Issue of favourable decision upon acceptance of commitment

(c) Applications to vary, substitute or release a commitment

3. Enforcement of remedies

(a) Procedure for giving directions

(b) Enforcement of directions

(c) Directions as to financial penalties

(d) Rights of private action

MARKET DEFINITION

A. Market definition

1. Market

2. Practical issues

B. The product market

1. Demand-side

2. Price discrimination

3. Chains of substitution

4. Supply-side

C. The geographic market

1. Demand-side

2. Supply-side

3. Imports

D. Other issues

1. Temporal markets
2. Identifying the competitive price
3. Previous cases
4. Other approaches to market definition

E. Market definition for after markets

1. Complements and secondary markets

POWERS OF INVESTIGATION

A. Circumstances under which the CCS will use its powers of investigation

B. Power to require the production of documents and information

1. Scope of the power
2. The procedure

C. Power to enter premises for inspection

D. Power to enter premises without warrant

1. When the power can be used
2. Entry of premises with prior written notice
3. Entry of premises without prior written notice
    (a) Scope of the power
4. The procedure
    (a) Entry of premises with prior written notice
    (b) Entry of premises without prior written notice
5. Access to legal advice

E. Power to enter and search premises under warrant

1. When the power can be used
2. Scope of the power
3. The procedure
4. Access to legal advice

F. Limitations on the use of powers of investigation

1. Privileged communications
2. Self-incrimination
3. Disclosure of information

G. Offences relating to the powers of investigation

ENFORCEMENT

A. Directions to bring an infringement to an end

1. Procedure for giving directions
2. Enforcement of directions
3. Appeal against directions

B. Directions on interim measures

1. Procedure on giving directions on interim measures
2. Enforcement of directions on interim measures
3. Appeals against directions on interim measures
4. Assurances in lieu of interim measures directions

C. Penalties

1. Intentionally or negligently
   (a) Intention
   (b) Negligence
   (c) Involuntary infringement
2. Provisional immunity from penalties under the Section 34 Prohibition from the date of notification to the CCS
3. Immunity after guidance or decision
4. Turnover
5. Amount of a penalty
6. Lenient treatment for undertakings coming forward with information
7. Payment
8. Liability for payment
9. Enforcement of penalty decision
10. Appeals against penalty decision

D. Enforcement in the courts

LENIENCY REGIME

A. Total immunity for the first to come forward before an investigation has commenced

B. Reduction of up to 100 per cent. in the level of financial penalties where the undertaking is the first to come forward but which does so only after an investigation has commenced

C. Subsequent leniency applicants: Reduction of up to 50 per cent. in the level of financial penalties

D. Procedures for requesting immunity or a reduction in the level of penalties

E. Additional reduction in financial penalties (leniency plus)

F. Quality of information provided by undertaking

G. Confidentiality

H. Effect of leniency

PENALTIES

A. Determining the amount of penalty

1. Seriousness of infringement
2. Duration of infringement
3. Other relevant factors
4. Aggravating and mitigating factors
5. The maximum penalty
6. Immunity or reduction from penalty

TREATMENT OF INTELLECTUAL PROPERTY RIGHTS

A. The interface between IPRs and competition law

1. Relevant markets
2. Product markets
3. Technology markets
4. Innovation markets
5. Pro-competitive benefits of licensing

B. IPRS and the Section 34 Prohibition

1. General framework for assessing licensing agreements
2. Licensing agreements between competitors
3. Licensing agreements between non-competitors
4. The exclusion of vertical agreements under paragraph 8 of the Third Schedule
5. The appreciable adverse effect on competition test
6. Considerations in the application of the Section 34 Prohibition to various types of licensing restraints or arrangements
7. Autonomy of licensees to engage in independent R&D
8. Grantbacks
9. Territorial and field-of-use restrictions
10. Licensing agreements involving exclusivity
11. Technology pools

C. IPRs and the Section 47 Prohibition

1. Refusals to supply a licence
2. Tying
3. Acquisition of an IPR

REGULATED SECTORS

A. The Third Schedule and Fourth Schedule of the Competition Act

B. Sections

1. Telecommunications
2. Media
3. Electricity
4. Gas
5. Financial institutions
6. Airports
7. Casinos

Reading List

- Richard Whish, Competition Law (Oxford University Press, 6th Ed, 2008)
- Daren Shiau and Elsa Chen, Merger Control in Singapore: Law and Practice (Lexis Nexis, 1st Ed, 2011)
- The Competition Act, Chapter 50B of Singapore
- The CCS Guidelines
- Decisions on the Public Register of the CCS (https://www.ccs.gov.sg/public-register-and-consultation/public-register)

PART VIII: ARBITRATION

PRIMARY AND SECONDARY MATERIALS

STATUTES AND RULES

International Arbitration Act (Cap 143A, 2002 Ed) ("IAA")

Orders 69 and 69A Rules of Court

SIAC Arbitration Rules 2013 Ed ("SIAC Rules 2013")

New York Convention 1958

Arbitration Act (Cap 10, 2002 Ed) ("AA")

KEY TEXTS

Halsbury's Laws of Singapore, Arbitration, Vol 1(2) 2011 Reissue (LexisNexis, 2011) ("Halsbury's)

Gary Born, International Commercial Arbitration (Volume I and II) (Kluwer Law International, 2009)

Leslie Chew, Introduction to the Law and Practice of Arbitration in Singapore (LexisNexis, 2010)

Sundaresh Menon, Arbitration in Singapore: A Practical Guide (Thompson Reuters 2014)

David Joseph QC and David Foxton QC, Singapore International Arbitration: Law & Practice (LexisNexis 2014)

A. THE LEGISLATIVE FRAMEWORK IN SINGAPORE

- Domestic vs International arbitration: s. 5 IAA
- Opting out of the Model Law regime: s. 15 IAA
- See generally, Halsbury's pgs 17 – 25
- S. 15A IAA
- *Coop International Pte Ltd v Ebel SA* [1998] 3 SLR 670
- *John Holland v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262
- *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd* [2002] 2 SLR 164

B. FUNDAMENTAL PRINCIPLES

(1) Party autonomy

- *ABC Co v XYZ Co Ltd* [2003] 3 SLR 546
- Article 34(2)(*a*)(iv) of the Model Law
- Definition of dispute: *Multiplex Construction Pty Ltd v Sintal Enterprise Pte Ltd* [2005] 2 SLR (R) 530
- Singapore's continued support of the autonomous nature of arbitration: *AJU v AJT* [2011] SGCA 41

- Consistent with the policy of minimal intervention, unless principle of fairness is under siege: *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57

- Assumption that parties entered into the arbitration agreement with a rational commercial purpose: *Piallo GmbH v Yafririo International Ltd* [2014] 1 SLR 1028

- *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd and another* [2016] 4 SLR 1336

(2) Laws applicable to arbitration

- Law governing the arbitration agreement: determines validity of the arbitration agreement
  - *Dallal v Bank Mellat* [1986] 1 All ER 239; *Sulamerica CiaNacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102; *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12; *BCY v BCZ* [2017] 3 SLR 357; *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267
  - s. 31(2)(*d*) and (e) IAA
- Law of the seat of arbitration
  - *Smith (Paul) Ltd v H & S International* [1991] 2 Lloyd's Rep 127
  - *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401
  - *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25
- Substantive law
  - Express choice: *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377
  - No express choice: *Pacific Recreation Pte Ltd v SY Techonology Inc* [2008] SGCA 1; *SulAmerica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102; *BMO v BMP* [2017] SGHC 127
    - See also *Re An Arbitration between Hainan Machinery Import and Export Corp. and Donald & McArthy Pte Ltd* [1995] 3 SLR(R) 354
- Law governing the supportive and enforcement measures
  - S. 6 IAA
  - s. 12A of the IAA, statutory amendment to address *Swift-Fortune Ltd v Manifica Marine* [2007] 1 SLR(R) 629

(3) Privacy and Confidentiality

- Privacy in arbitration derives from party consent to submit dispute to arbitration: *Oxford Shopping Co Ltd v Nippon Yusen Kaisha, The Eastern Saga* [1984] 3 All ER 835
- Confidential but subject to exceptions. Exceptions depend on the circumstances of the case and may operate differently with respect to different types of documents: see *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* [2003] 2 SLR 547; *International Coal Pte Ltd v Kristle Trading Ltd* [2009] 1 SLR 945; *Dolling Baker v Merrett* [1990] 1 WLR 1205; *Hasneh Insurance Co of Israel v Mew* [1993] 2 Lloyds Rep 243; *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041;

AAY and others v AAZ [2009] SGHC 142; [2011] 1 SLR 1093; *BBW v BBX and others* [2016] 5 SLR 755

- Sealing of court documents to preserve confidentiality of arbitration proceedings: *AZT v AZV* [2012] 3 SLR 794
- AA s. 57(4), IAA s. 23(4), SIAC Rules r 35

(4) Public policy and arbitrability

- Non-arbitrability of dispute: IAA s. 11(1) and (2)
- *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and Another* [2006] 3 SLR(R) 174
- Broad approach: *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] SGCA 21
    - Confirmed in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455
- Minority oppression claims: *Silica Investors Limited v Tomolugen Holdings Limited and others* [2014] SGHC 101
    - See also Tomolugen *Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57
- *Petroprod Ltd v Larson Oil and Gas Pte Ltd* [2010] SGHC 186
- Challenge of tribunal's jurisdiction: Model Law Art 16(2)
- Impact of failure to appeal award on tribunal's jurisdiction pursuant to Model Law Art 16(3) on subsequent proceedings to resist enforcement and/or challenge award for lack of jurisdiction – *Astro Nusantara International BV v PT Ayunda Prima Mitra & Ors* [2013] 1 SLR 636

Note: SIAC 2013 Rules also introduced a new Rule 24.1(n) which allows the arbitral tribunal to decide any issue not expressly or impliedly raised in the pleadings filed by parties, provided such issue has been "*clearly brought to the notice of the other party and that other party has been given adequate opportunity to respond*."

- See also *PT Prima International Development v Kempinski Hotels SA* [2012] SGCA 35

C. THE ARBITRATION AGREEMENT

(1) Basic requirements of an Arbitration Agreement/Clause

- s. 4 of the AA and s.2 of the IAA read with Article 7 Model Law.
- Specimen clauses/agreements: ICC and SIAC model clauses.

(2) Separability

- s 21 AA and Article 16 (1) Model Law
- *Heyman v Darwins Ltd* [1942] AC 356; *Harbour Assurance v Kansa General International Insurance* [1993] 1 Lloyd's Rep 455
- Forms part of Singapore law: *Government of the Republic of the Phillipines v Phillipine International Air Terminals Co., Inc.* [2006] SGHC 206

- Doctrine is inapplicable where the main underlying contract is held to be void *ab initio*: *Woh Hup (Pte) Ltd v Property Development Ltd* [1991] 3 MLJ 82

(3) Competence - Competence

- S. 21(4) of the AA, Art 16(2) of the Model Law
- *Aloe Vera of America, Inc v Asiatic Food (S) Pte Ltd* [2006] 3 SLR 174
- *Ian Leonard Jackman v Culifrance Furniture Pte Ltd (Unreported*); *Arden Shipping Ltd v Owners of Sungei Bulan* [1983] 2 MLJ 377 which Culifrance followed.

(4) Ambiguity or Inconsistency

- *Lucky-Goldstar (HK) Limited v Ng Moo Kee Engineering* [1993] 2 HKLR 73
- Interpretation by the Singapore courts - *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 23 SLR 603; *Insigma Techonlogy Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936
- Ambiguous clauses/agreements may be attacked – *Teck Guan Sdn Bhd v Beow Guan Enterprises Pte Ltd* [2003] 4 SLR 276
- Arbitration agreement incorporated by reference – is a question of construction – *Concordia Agritrading Pte Ltd v Cornelder Hoogewerff (Singapore) Pte Ltd* [2001] 1 SLR 222; *Star-Trans Far East Pte Ltd V Norske-Tech Ltd* [1996] 2 SLR 409

(5) Competing Clauses – Which Clause To Apply

- *Oei Hong Leong V Goldman Sachs International* [2014] SGHC 128

(6) Pathological Arbitration Clauses

- *Insigma Technology Co. Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936
- *HKL Group Co. Ltd v Riza International Holdings Pte Ltd* [2013] SGHCR 5

D. THE ARBITRAL TRIBUNAL

(1) Powers of tribunal

- See Halsbury's p 82 – 105 for comprehensive list of powers.
  - Singapore Courts have a wider supervisory role in respect of local or domestic arbitrations: Singapore Court Practice, 2009, at paragraph 69/1/5 and *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565.
- Notable powers:
  - Model Law Article 19 (2) – Power to conduct the arbitration in a manner it considers appropriate. Power to determine admissibility, relevance, materiality and weight of any evidence.
  - Model Law Article 24 (Hearings), Article 25 (Default of party) and Article 26 (appointment of experts by tribunal).
  - Power to order interim measures
    - S. 12 and 12A IAA, Article 9 Model Law
    - See discussion in Chew, Chapter 11, on the news. 12A IAA and the cases of *Swift-Fortune Ltd v Magnifica SA* [2006] 2 SLR 323 and *Front Carriers v Atlantic Orient Shipping Corp* [2006] 3 SLR 854

- See also *Chan/Crasta* (2008) SAcLJ 769
- NB: Singapore Courts would only intervene and grant interim relief in narrow circumstances: *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565

(2) Duties of Arbitrators

- AA s. 22, Model Law Art 18.
- *Newspeed International Ltd v Citus Trading Pte Ltd* [2003] 3 SLR(R) 1
- *Official Assignee v Chartered Industries of Singapore* [1977-1978] SLR(R) 435
- SIAC Code of Ethic for Arbitrators
- Immunity of arbitrators: s. 20 AA, s. 25 IAA.
- Fees of arbitrators: see Halsbury's pgs 81-82.

(3) Conduct of arbitration

- Party choice and institutional rules – see Halsbury's pg 87
- Time limits: s. 24 AA and Art 23 Model Law.
- Rules of evidence and other procedural matters – see Halsbury's pgs 89 – 95; *Kempinski Hotel v PT Prima International Development* [2011] SGHC 171 - 173

(4) Qualification and disqualification of arbitrators

- Art 12,13 of the Model Law, AA s. 14 and 15.
  - 'Real likelihood of bias' – *Turner (East Asia) Pte Ltd v Builders Federal (HK) No 2)* [1988] 1 SLR(R) 483; 'Reasonable suspicion of bias' – *PT Central Investindo v Franciscus Wongso and others and another matter* [2014] SGHC 190
  - See also SIAC Rules 2010 r 11 -13.
- The effect of the issuance of a final Award – *PT Central Investindo v Franciscus Wongso and others and another matter* [2014] SGHC 190
  - The issuance of a final award does not bar parties from challenging the arbitrator for bias
  - Court has no power to issue consequential orders on successful removal of an arbitrator to annul the award; a separate application under Article 34 of the UNCITRAL Model Law must be filed

E. THE ARBITRAL AWARD

(1) Form and Type of Award

- Essential requirements, s. 3(1) IAA, Model Law
  - Place of award – whether a Singapore award or a foreign award; Article 31(3) Model Law.
- Under the AA – domestic awards
  - Same requirements as under the IAA – Part VIII of AA – see s 38

- AA expressly provides that award is deemed to be made at place of arbitration - s. 38(4), mirroring Article 31(3) Model Law.

(2) Meaning of 'Award '

- *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 in relation to s 2(1) of the IAA and in the context of Article 34 of the Model Law.

(3) Arbitral award must be Complete

- *Tan Toi Lan v Lai Kee Ying* [1975] 1 MLJ 27; *Jeeram v National Union of Plantation Workers* [1993] 3 MLJ 104.
- Incomplete awards may not be enforceable – Article 33 Model Law and s 43 AA.

(4) Final and Binding Effect of the Award

- s 19, 19B IAA and s 44, 46 of AA, Article 32(1) Model Law; *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2012] SGHC 212; *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30; *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd* [2017] SGHC 199
- Question of when an arbitral award is final. The practice of making awards "final save as to costs".
  - *Tan Poh Leng Stanley v Tang Boon Jek Jeffrey* [2001] 1 SLR 624 (HC); *Tang Boon Jek Stanley v Tan Poh Leng Stanley (CA)* [2001] 3 SLR 237.

F. THE ASSISTANCE OF THE NATIONAL COURT

(1) Stay of court proceedings

- S. 6 IAA; Rules of Court O 5 r 3; s. 6 AA
  - Singapore Court Practice, 2009, paragraph 5/3/1.
  - *Mitsui Engineering & Shipbuilding Co Ltd v PSA Corp Ltd & Anor* [2003] 1 SLR 446; *Coop International Pte Ltd v Ebel SA* [1998] 3 SLR 670; *Dalian Hualiang Enterprise Group Co Ltd & Anor v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646 at [75]; *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57; *BASF Intertrade AG Singapore Branch v H&C S Holding Pte Ltd* [2017] SGHCR 10
  - Whether different circumstances call for different standards of review – *H P Construction & Engineering Pte Ltd v Chin Ivan* [2014] SGHC 137; *Oei Hong Leong v Goldman Sachs International* [2014] SGHC 128
- Refusal to grant stay if the arbitration agreement is "null and void, inoperative or incapable of being performed": Lucky-Goldstar [1993] 2 HKLR 73; see also Kwan Im Tong [1998] 2 SLR 137
- Both IAA and AA make it clear in subsections (1) of both sections 6 that a stay application must be made "at any time after appearance and before delivering any pleading or taking any other step in the proceedings "
  - *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168

- Reservation of rights to make application for stay – Chong Long Hak Kee Construction Trading Co Ltd v IGE Global Pte Ltd [2003] 4 SLR 499; Australian Timber, supra at [22]
    - See also, *Lian Teck Construction Pte Ltd v Woh Hup (Pte) Ltd* [2006] 4 SLR1;*Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1Lloyd's Rep 357; *Kuwait Airway Corp v Iraq Airways Co* [1994] 1 Lloyd's Rep 357
- Court's approach in assessing whether a step has been taken:
    - *Carona Holdings Pte Ltd Pte & Ors v Go Go Delicacy Ltd* [2008] 4 SLR 460 'to be understood in a practical and commonsensical way' ; *The Republic of Philippines v Maler Foundation* [2008] 2 SLR 857
- Whether third parties can succeed in a stay application – claiming "through or under" (S6(5)(a) IAA) – *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2015] SGHC 264
- Court's approach in deciding whether to order a stay for the other parts of the suit not subject to a mandatory stay under S6 IAA – *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57
- Stay of Arbitral Proceedings under S10(9)(a) of the IAA – *AYY v AYZ and another* [2015] SGHCR 22.

(2) Aiding arbitral proceedings

- Referral of "dispute" to arbitration:
    - *Uni-Navigation Pte Ltd v Weil Loong Shipping Pte Ltd* [1993] 1 SLR 876; *Kwan Im Tong Chinese Temple & Anor v Fong Choon Hung Construction Pte Ltd* [1998] 2 SLR 137; *Multiplex Construction Pty Ltd v Sintal Enterprise Pte Ltd* [2005] 2 SLR (R) 530
- Enforcement of arbitral orders and directions
    - S. 12 IAA, s. 28 IAA
    - ss13 – 14 IAA, s 30 AA.
- Other orders in aid of arbitration: see Halsbury's at 105 – 111, *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040
    - Power of court to protect or preserve assets situated overseas where seat of arbitration is Singapore – *Five Ocean Corporation v Cingler Ship Pte Ltd (PT Commodities & Energy Resources, intervener)* [2015] SGHC 311
    - Joinder of third parties – *The "Titan Unity"* [2014] SGHCR 4
    - Power to grant permanent anti-suit injunctions granted by S4(10) of the CLA – *R1 International Pte Ltd v Lonstroff AG* [2014] SGHC 69; *R1 International Pte Ltd v Lonstroff AG* [2014] SGCA 56
- Refusal to aid arbitration: *LC v ALF* [2010] SGHC 231

G. SETTING ASIDE, RECOGNITION AND ENFORCEMENT OF AWARD

(1) Setting aside awards

- Procedure: RC O 69 r 5, O 69A r 2.

- If the award is made under the IAA, the applying party must furnish proof of one of the following exhaustive grounds:
  - Incapacity of a party to the arbitration agreement or invalidity of agreement under the law to which the parties have subjected it or under the law of Singapore: Model Law Art 34(2)(a)(*i*)
  - No proper notice of appointment of arbitrator or of arbitral proceedings or otherwise unable to present case: Model Law Art 34(2)(a(*ii*); *Sobati General Trading LLC v PT Multistrada Arahsarana* [2010] 1 SLR 1065
  - Award deals with dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission: Model Law Art 34(2)(b)(*iii*); *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33; *AKN and another v ALC and others and other appeals* [2015] SGCA 18
  - Composition of the arbitral tribunal or the arbitration procedure not according to agreement of the parties, unless agreement conflicted with non-derogable provision of Model Law or, failing such agreement, was not in accordance with Model Law: Model Law Art 34(2)(a(*iv*); *Luzon Hydro Corp v Transfield Philippines Inc* [2004] 4 SLR(R) 705
  - Subject matter of the dispute is not capable of settlement by arbitration under the laws of Singapore; or the award conflicts with the public policy of Singapore: Model Law Art 34(2)(b)(*ii*); *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597
- Alternatively, the High Court may set aside award if making of the award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced: s. 24 IAA; *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871*; Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573; *AKN and another v ALC and others and other appeals* [2015] SGCA 18; *ADG and another v ADI and another matter* [2014] SGHC 73
- If the award is made under the AA, the applying party must prove to the satisfaction of the court one of the following:
  - One of the parties was under some incapacity: AA s. 48(1)(a)(*i*)
  - The arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication on it, under the law of Singapore: AA s.48(1)(a)(*ii*)
  - The applicant was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case: AA s. 48(1)(a)(*iii*)
  - The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission, with certain exceptions: AA s. 48(1)(a)(*iv*)
  - Composition of arbitral tribunal did not comply with agreement of parties or was not in accordance with provisions of AA from which parties cannot derogate, or in absence of such agreement is contrary to provisions of the AA: AA s. 48(1)(a)(*v*)

- The making of the award was induced or affected by fraud or corruption: AA s. 48(a)(*vi*)
- A breach of the rules of natural justice occurred by which the rights of any party have been prejudiced: AA s. 48(1)(a)(*vii*), *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86; *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80; *AQU v AQV* [2015] SGHC 26; *AKN and another v ALC and others and other appeals* [2015] SGCA 18; *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd* [2017] SGHC 193

- Alternatively, the High Court may set aside the award if it finds that the subject matter is not capable of settlement by arbitration under the Act or the award is contrary to public policy: AA s. 48(1)(b)(*i*) and (*ii*).
- Court must guard against attempts to fault an arbitrator for failing to consider arguments that were never put before him – no "second bite of the cherry" – *BLC and others v BLB and another* [2014] SGCA 40
- Power to remit as an alternative to setting aside – *AKN and another v ALC and others and other appeals* [2015] SGCA 63
- Consequences of setting aside an award – *AKN and another v ALC and others and other appeals* [2015] SGCA 63
- Whether the Singapore High Court can set aside an arbitral award on the grounds that the decision was "perverse" and/or "manifestly unreasonable and irrational" – *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1

(2) Appeal process specific to the AA

- See Halsbury's pg 138 – 146; *Motor Image Enterprises Pte Ltd v SCDA Architects Pte Ltd* [2010] SGHC 278

(3) Enforcement of Singapore arbitral awards

- AA s. 46 applies for enforcement of domestic awards and s. 19 of the IAA applies for enforcement of a domestic international award;
  - RC O 69 and 69A apply respectively
- Procedure to apply for leave of High Court – two-stage process:
  - 1) *Ex parte* application for leave to enforce the award supporting by an affidavit
    - Such application is typically made by an originating summons, although if an action is already pending in court, the application must be made by a summons in action.
    - Creditor to draw up order and serve on debtor once leave has been granted
    - Debtor has 14 days after service (or a period fixed by court if order is served out of jurisdiction) to apply to set aside the order
    - Where debtor does not apply to set aside the order, order for leave to enforce award becomes final and creditor at liberty to enforce award

- 2) Where debtor applies to set aside the order for leave, court has to consider whether enforcement should be refused
    - See *PT First Media v Astro Nusantara International BV and others* [2013] SGCA 57 for grounds upon which court could refuse enforcement: Whether there is a statutory basis for the appellant to invoke lack of jurisdiction as a ground to resist enforcement of the awards

- Court's power to grant enforcement of an award made in Singapore as a judgment or order is discretionary: Halsbury's at pg 155, *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41 at [76] per Chan CJ.
- Remedies upon entry of judgment: RC O 45 r 1.

(4) Recognition and enforcement of foreign arbitral awards

- Part III of the IAA.
- New York Convention, Halsbury's pgs 158 – 161.
- Two-Stage Procedure
    - Award creditor to satisfy the court that the requirements for enforcement found in IAA s30(1) and O69A r6(1A) of the Rules are met.
        - See *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174
    - If the award debtor challenges the enforcement of the award by applying to court to set aside the order made on the *ex parte* application, award debtor must prove one or more of the exclusive grounds for refusing recognition and enforcement provided in s31 of IAA.
- See *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661; *Strandore Invest A/S v Soh Kim Wat* [2010] SGHC 151

(5) Refusal of recognition and enforcement of foreign awards under the IAA

- Court cannot refuse recognition of Convention award, except on grounds in s 31(2) of IAA itself
    - see *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174.
- Grounds for refusal:
    - A party's incapacity at the time when the agreement was made – s 31(2)(*a*) IAA
    - The arbitration agreement is invalid under the lex arbitri – s 31(2)(*b*) IAA.
        - *Bobbie Brooks Inc (USA) v Lanificio Walter Banci sas* (Italy VolIV (1979) Yearbook Commercial Arbitration, 2889.
        - *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [156]
    - Failure to give notice of arbitration proceedings or the appointment of arbitrators and inability to present the case – s 31(2)(*c*) IAA
        - *Newspeed International Ltd v Citus Trading Pte Ltd* [2003] 3 SLR(R) 1 at [16] – [19] and [25]
    - Scope of the Arbitration Agreement – s 31(2)(*d*) IAA

- *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 at [37] – [39]; *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR 278; *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672; *Galsworthy Ltd of the Reuplic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 at [12] – [14]
- See also s 31(3) IAA

- Non-compliance with the agreed composition of the tribunal, the qualifications of its members and the appointment procedure – s 31 (2)(*e*) IAA
  - *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661; *Galsworthy Ltd of the Reuplic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727
- Award not yet binding, is suspended or has been set aside – s31(2)(*f*) IAA

- The subject matter is not arbitrable under the law of Singapore; or the award conflicts with the public policy of Singapore – s. 31(4) IAA
  - *AJU v AJT* [2011] SGCA 41; *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597; *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174; *Strandore Invest A/S and others v Soh Kim Wat* [2010] SGHC 151 at [27]; *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2014] 1 SLR 814 at [21]

Part IX: Financial Crimes

PRIMARY AND SECONDARY MATERIALS

The texts in Singapore include the following:

- Hans Tjio, Principles and Practice of Securities Regulation in Singapore (LexisNexis, 2011)
- Walter Woon, *Company Law* Insider Trading

DIRECTORS' DUTIES & LIABILITIES UNDER THE COMPANIES ACT

- Section 157(1) – a requirement for a company director to act honestly and with reasonable diligence in the discharge of his duties. See Abdul Ghani Tahir v PP [2017] SGHC 125
- Section 157(2) – prohibits officers of the company from making improper use of the information acquired through his position to obtain an advantage or to cause the company detriment

FRAUDULENT TRADING UNDER THE COMPANIES ACT

- Under Section 340 (5) of the Companies Act, where
    - Business of the company has been carried on with intent to defraud creditors of the company or of any other persons or for any fraudulent purpose
    - Persons were knowingly party to the carrying on of the business in that manner

Criminal sanctions apply

- Civil sanctions under Section 340 (1) – Court may declare persons who knowingly carry out such fraudulent trading to be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.
- Case law
    - Rahj Kamal bin Abdullah v PP [1998] 1 SLR 447
    - Phang Wah and others v PP [2011] SGHC 251

SECURITIES & FUTURES ACT
"An Act relating to the regulation of activities and institutions in the securities and futures industry, including leveraged foreign exchange trading, and of clearing facilities, and for matters connected therewith"

- Disclosure based regime

- There is an emphasis is on market discipline and full information disclosure to protect investors
- Three significant areas where offences are tied to lack of timely and accurate information disclosure:
  - Offers of investments
  - Disclosure of interests
  - Disclosure related market conduct offences

Part XIII SECURITIES & FUTURES ACT - Offers of Investments

- Applies to securities as defined in S239
  - Shares or units of shares
  - Debentures or units of debentures
  - Interests in limited partnership or LLP
  - Prescribed products
- Requirements for prospectus and profile statement in Section 240
- Lodging a supplementary document or replacement document in Section 241
- Contents of the prospectus/profile statement
  - Section 243
  - Section 246
- Exemptions found in subdivision 4
  - Sections 272 - 282
- ***Criminal liability for false or misleading statements***
  - ***Section 253***
- ***Such liability attaches to various persons involved in the making of the offer including***
  - ***The offeror***
  - ***The directors of the issuer***
  - ***The issue manager***
  - ***any person (other than those specifically included in the section) who intentionally or recklessly makes the false or misleading statement, or omits to state the information or circumstance, as the case may be, but only in respect of the relevant statement or omission***
- Civil liability also attached to false or misleading statements (see Section 254)
- Defences of reasonability (see Section 255)
- There are similar prospectus requirements for Business Trusts
  - Part XIII Division 1A

- ***Sections 282N and 282O deal with criminal and civil liability attaching to false or misleading statements in prospectus/profile statements***
- Part XIII Division 2 deals with collective investment schemes

Part VII SECURITIES & FUTURES ACT – Disclosure of Interests

Relevant persons are required to disclose their interests in relation to corporations and units of business trusts and real estate investment trusts that are listed for quotation on a securities exchange

- Relevant persons are defined in Part VII, in relation to corporations, business trusts and REITs
- Circumstances in which the disclosure obligation arises
- The timeframe for the disclosures
- Obligations of the corporation/business trust trustee manager/REIT trustee in relation to such disclosures
- ***There is a range of criminal and/or civil penalties attached to***
  - ***non compliance in relation to required disclosures***
  - ***furnishing of false/misleading information***

Note that at this time, the civil penalty regime extends only to Parts VII and XII of the SFA.

Part XII SECURITIES & FUTURES ACT – Failure to comply with Continuous Disclosure requirements & False/Misleading Statements

False or Misleading Statements

S 199 SFA prohibits a person from

- making or disseminating materially false or misleading statements which are likely to induce other persons to subscribe for, purchase or sell securities *or* which are likely to affect the market price of securities
- if at the point of making the statement or dissemination, he knew, ought to have known or did not care if the information was false or misleading

PP v Wang Ziyi Able [2007] SGHC 204 and [2008] SGHC 37 (sentencing) discusses the requisite mens rea and provides an interpretation of materiality as well as "likely to induce".

A more recent case involving this provision is *Madhavan Peter v PP, Chong Keng Ban @ Johnson Chong v PP, Ong Seow Yong v PP [2012] SGHC 153*

There is considerable overlap between S 199 and S 200(1) SFA, but the emphasis in S 200(1) is on inducement of others to deal in securities. S 200(2) SFA provides a defence.

Dissemination of information concerning illegal transactions

S 202 SFA relates to the dissemination of information concerning illegal securities transactions which will affect the price of the relevant securities. It makes it an offence for a person to circulate or disseminate any information with respect to the likely price fluctuations of the securities of a body corporate by reason of any transactions entered into in contravention of ss 197-201 SFA in relation to those securities, if that person was involved in the illegal transactions or has received or expects to receive reward for carrying out such dissemination.

Failure to comply with Continuous Disclosure Requirements

- Where the exchange has requirements that it be notified by
    - Listed entity
    - Listed business trust
    - Listed collective investment scheme

  of specified events or matters as they arise so that it can make the information available to the market
- The entity/business trustee/CIS responsible person must not fail to notify the exchange, whether intentionally or recklessly or negligently. Note that a negligent breach is punishable only by way of civil penalty.

Madhavan Peter v PP, Chong Keng Ban @ Johnson Chong v PP, Ong Seow Yong v PP [2012] SGHC 153

SECURITIES & FUTURES ACT – Other forms of Market Misconduct
Insider Trading

Insider trading provisions exist to minimise the unlevel playing field that results from information asymmetry. Such provisions thus go hand in hand with the disclosure obligations in achieving a transparent marketplace.

The approach taken here is that of information connection. Such an approach allows secondary tippees (i.e. C is tipped by B who was in turn earlier tipped off by A) to be caught.

Other points to note:

- Section 213 defines the scope of the insider trading provisions
- The insider trading provisions prohibit various actions, including trading in relevant securities, when one is in possession of information not generally available, but if it were, a reasonable person would expect it to have a material effect on the price or value of the securities ("price sensitive information"). Sections 214 -216 provide guidance on what is included in "information", "generally available" and "material effect on price or value of securities".
- There is a distinction drawn between connected persons (S218) and insiders (S219). S 218 contains the definition of "person connected to a corporation":
    - S218 SFA allows for constructive knowledge
    - S218(4) presumes that the connected person in possession of price sensitive information knows it is PSI
- Section 220 removes the need to prove that the connected person/insider intended to use the PSI in his possession
- Section 226 – 227 attribute knowledge of the PSI within corporations/partnerships
- Sections 222 – 225, 228 – 229 list the exceptions. Section 230, although not explicitly stated as an exception, provides a defence for capital markets services licence holders in certain circumstances
- Section 231 provides parity of information defences
- The subsidiary legislation (regulations) exempt certain transactions from the operation of Sections 218 and 219.

Kevin Lew Chee Fai v MAS [2012] SGCA 12
Madhavan Peter v PP, Chong Keng Ban @ Johnson Chong v PP, Ong Seow Yong v PP [2012] SGHC 153

Market Rigging and False Trading

Section 197(1) prohibits the doing of anything, or causing anything to be done, or engaging in a course of conduct if one of the purposes for such actions is to create a false or misleading appearance

- of active trading; or
- with respect to the market or price of securities

Section 197(1A) makes it an offence if a person does something that creates or is likely to create such a false or misleading appearance, if he knows or is reckless that his actions will create or be likely to create such an appearance.

The amendment of Section 197(1) and inclusion of Section 197(1A) on 18 March 2013 make clear that the creation of a false or misleading appearance with respect to the market, price or trading of securities can still be an offence, even if the person did not possess the intention to cause such an appearance.

Other points to note:

- Section 197(3) is a presumption provision in relation to Section 197(1) (in respect of active trading). It is a rebuttable presumption (see Section 197(4)). No such presumption and rebuttals apply to Section 197(1A)
- Section 197(2) is targeted at "wash sales" – transactions without a change in beneficial ownership - and fictitious transactions. Section 197(5) clarifies what no change in beneficial ownership means. (It has to be read with Section 4 SFA). Section 197(6) contains a specific defence to Section 197(2)

There is no case law on the recently amended Section 197(1) and the new Section 197(1A).
Some cases of interest:

North v Marra Developments Ltd (1981) 148 CLR 42 (HCA – Austlii)
Ng Geok Eng v PP [2006] SGHC 232 (sentencing guidelines for S 197)
Tan Chong Koay &Pheim Asset Management Sdn Bhd v MAS [2011] SGCA 36

Fu Kor Kuen Patrick & Lee Shu Yuen Francis v HKSAR FACC No. 4 of 2011

Manipulative & Deceptive devices

Section 201 appears to be the catch all provision of Part XII SFA. The section states that it shall be unlawful for any person directly or indirectly in connection with the purchase or sale of any securities to employ any device or scheme or to engage in any act to defraud any person, or to make any untrue statement or misleading omission of material facts. It is almost *in pari materia* with the famous rule 10b-5 in America (promulgated under s 10 of the Securities Exchange Act 1934) which has spawned a large volume of American case law and writing. This open-ended 'catch-all' provision is the most important insider trading provision in America and has been described as 'an acorn that grew into a mighty oak'. In Singapore it has recently been used in the High Court in *Public Prosecutor v Cheong*

Hock Lai and Others [2004] 3 SLR 203; *Shapy Khan s/o Sher Khan v PP* [2003] 2 SLR 433; *Teo Kian Leong v PP* [2002] 1 SLR 147

SECURITIES & FUTURES ACT – Sanctions & Remedies in respect of Part XII
Criminal Sanctions

Division I (relating to securities)	Division II (relating to leveraged foreign exchange trading and futures trading)	Division III (insider trading)	Criminal Penalty for individuals
Section 204	Section 212	Section 221	S$250,000 or 7 years imprisonment or both

Section 333 prescribes the criminal penalty for corporations as a maximum fine of S$500,000.

Civil Penalties

	Where profit was made or loss avoided	No profit and no loss avoidance
Civil penalty in relation to Part XII (Section 232)	• Individual: up to 3X P/L or S$50,000 whichever is higher • Corporation: up to 3X P/L or S$100,000 whichever is higher	Between S$50,000 and S$2 million

Civil Liability

- Section 234 deals with civil liability arising from contraventions of Part XII provisions.
- Recent amendments to this provision (18 March 2013) allow for civil liability to arise even if
    - a claimant's trading was not contemporaneous with the contravention (under certain specified circumstances)
    - the contravening person has not have gained a profit or avoided a loss

Other Points to Note:

The contravening person may also face liability at common law as the statutory right to compensation does not exclude such liability. It should be noted that it has not been judicially recognised that a contract to deal in securities is a contract *uberrimei fidei*, at least where a fiduciary relationship between the parties cannot be inferred. However, at common law, there is the possibility of imposing a constructive trust or maintaining an action for restitution with respect to the ill-gotten gains. In the case where the offender is an officer of the body corporate and he obtains the price-sensitive information by virtue of his position, the body corporate may be entitled to claim an account of profits for breach of fiduciary duty or an injunction or damages for breach of confidentiality. Consider also the torts of breach of statutory duty and conspiracy. Another possibility is that where fraudulent or

negligent statements are made which cause the price of securities to be artificially inflated or deflated, an action for damages may be maintained.

Section 325 SFA gives the Court power, on the application of the Authority, to make a range of orders, including restraining and mandatory orders and orders declaring that a contract relating to securities is void or voidable, where it appears that an offence under the SFA has or is about to be committed (again, s 130J CA should be borne in mind). Furthermore, where an investigation, prosecution or civil proceeding has been commenced under the SFA, the Court may, on the application of the Authority, prohibit payment of debts or transfer of moneys, securities or other property: s 324 SFA.

SECURITIES & FUTURES ACT – Attributed Liability

Part XII Dvision V attributes liability for market misconduct by a relevant individual to a corporation or partnership or LLP where

- such contravention gave rise to a profit or a loss avoidance situation for the entity; **and**
- the contravention took place with the consent or connivance of the entity, or through its negligence to detect or prevent the contravention

The relevant individual is defined as:

- employee or officer of the corporation
- partner or employee of the partnership
- partner, employee or manager of the LLP

Consent or connivance	Failure to detect or prevent contravention	Made a profit or avoided a loss through the contravention
Criminal or civil penalties may apply	Civil penalty may apply	Gives rise to civil liability

Part XII Division V also contains civil penalty and civil liability provisions when market misconduct by a corporation or partnership or LLP is attributable to:

- An officer of the corporation
- Partner of the partnership
- Partner or manager of the LLP

Section 331 also renders such persons guilty of a criminal offence if the contravention by the corporation, partnership or LLP is attributable to their consent, connivance or neglect.

Consent or connivance or neglect of • An officer of a body corporate • Partner • Partner or manager of LLP	Criminal offence under Section 331	• Civil penalty & civil liability provisions in Part XII Division 5

Section 236L is a disgorgement provision contained within this division, where a third party who received at least part of the benefit arising from a Part XII contravention can be ordered by court to disgorge his gain, if that gain arose from trades carried out by the contravening person for this third party.

SUSPICIOUS TRANSACTION REPORTING UNDER THE CDSA

- s.39 Duty to Disclose Knowledge or Suspicion
- s.40 Protection where information is given under s.39
- s.40A Information and identity of informers not to be disclosed
- s.48 Tipping Off

Offences

- s.43 Assisting another to retain benefits of drug trafficking
- s.44 Assisting another to retain benefits of criminal conduct
- s.46 Acquiring, possessing, using, concealing or transferring benefits of drug trafficking
- s.47 Acquiring, possessing, using, concealing or transferring benefits of criminal conduct

See Abdul Ghani Tahir v PP [2017] SGHC 125

Others

- s.2 Interpretation, especially
  - authorised officer
  - criminal conduct
  - drug trafficking
  - drug trafficking offence
  - foreign drug trafficking offence
  - foreign serious offence
  - serious offence
  - 1st Schedule (Drug Trafficking Offences)
  - 2nd Schedule (Serious Offences)

INTRODUCTION TO THE PREVENTION OF CORRUPTION ACT

The Law on Corruption in Singapore, pages 1-68, page 143