The Banking Litigation Law Review

Sixth Edition

Editor
Jonathan Clark

The Law Reviews

The Banking Litigation Law Review

Sixth Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Jonathan Clark

The Law Reviews

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADER
Katie Hodgetts

SENIOR BUSINESS DEVELOPMENT MANAGER
Rebecca Mogridge

BUSINESS DEVELOPMENT MANAGER
Joey Kwok

BUSINESS DEVELOPMENT ASSOCIATE
Archie McEwan

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Leke Williams

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Richard Cosgrove

SUBEDITOR
Jane Vardy

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.TheLawReviews.co.uk

ISBN 978-1-80449-139-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

CLEARY GOTTLIEB STEEN & HAMILTON LLP

DREW & NAPIER LLC

GILBERT + TOBIN

KANTENWEIN

PINHEIRO NETO ADVOGADOS

SLAUGHTER AND MAY

WENGER VIELI AG

CONTENTS

Preface

This year's edition of *The Banking Litigation Law Review* highlights that litigation involving banks and financial institutions shows little sign of slowing. The legal and procedural issues that arise in banking litigation continue to evolve and develop across the globe, in the context of both domestic and cross-border disputes.

The impact of covid-19 continued throughout 2022 with many of the temporary measures enacted becoming permanent features of the litigation landscape. In many jurisdictions, procedural rules have been revised to provide for the use of technology, including in the form of virtual and hybrid hearings. Nevertheless, physical hearings remain an option, especially for complex cases that involve witness evidence and large amounts of oral advocacy.

Financial institutions have also had to adapt to the increasing popularity of crypto-assets. Across the globe, regulators have made efforts to provide clarity on the regulatory framework of digital assets and this will no doubt be an evolving area in the years to come. It remains to be seen how courts will adapt to the unique challenges raised in disputes involving such assets.

Signs of the long-term economic effects of the pandemic, war in Ukraine and inflation are now visible in many parts of the world. From the perspective of the financial sector, these conditions are likely to translate into an increase in loan arrears and defaults, debt restructurings, bankruptcies and insolvencies affecting banks, their customers and counterparties. In a number of financial transactions, there will be winners and losers from the current increase in interest rates following a sustained period of historically low rates. These conditions typically presage an uptick in banking litigation and it seems likely that disputes arising from the current global economic environment will feature in future editions of this *Review*.

A continuing trend this year, as in other recent years, has been the broadening of obligations placed on financial institutions in the name of improving consumer protection. Faced with the challenge of increasing fraud, governments and courts alike have continued to develop the nature and scope of duties imposed on banks to protect their customers, including from their own susceptibility to fraudulent schemes. Claimants, and their funders, are expected to continue testing the limits of these obligations and duties in the courts.

Given the various headwinds and challenges ahead, the high volume and broad nature of litigation in the financial sector looks set to continue.

Jonathan Clark
Slaughter and May
London
November 2022

Chapter 5

SINGAPORE

Benedict Teo and Alexander Lee[1]

I OVERVIEW

In line with Singapore's objective of being a leading financial and disputes resolution hub, the statutory landscape has experienced much change in recent years. The Financial Services and Markets Act 2022 (FSMA) has enhanced and consolidated the powers of Singapore's central bank and financial regulatory authority, the Monetary Authority of Singapore (MAS). The FSMA's sector-wide regulation of financial services and markets addresses, among other things, the increasing presence of digital token service providers. Further, the Payment Services Act 2019 (PSA) consolidates regulatory oversight of payment services.

Civil procedure in the courts has experienced a sea change, with the enactment of the new Rules of Court 2021 (ROC 2021), which took effect on 1 April 2022. The ROC 2021 introduces a new regime which is intended to modernise litigation, enhance the efficiency of adjudication and manage costs.

Significant recent cases include the courts' clarification on the scope of customer information that a bank may disclose notwithstanding its secrecy obligations, the extent to which a bank may rely on exclusion or non-reliance clauses to avoid liability, circumstances in which a joint bank account may be garnished, and the liability of co-mortgagors pursuant to 'all moneys' clauses.

II SIGNIFICANT RECENT CASES

i Banking secrecy

Section 47(1) of the Banking Act 1970 imposes the duty of secrecy on banks in relation to customer information. Customer information may only be disclosed in certain circumstances, such as pursuant to an application under Section 175(1) of the Evidence Act 1893, which provides that the court may order disclosure of 'entries in a banker's book'.

In the 2003 decision of *Wee Soon Kim Anthony v. UBS* (*Wee Soon Kim*),[2] the Singapore Court of Appeal held that any form of permanent record maintained by a bank in relation to the transactions of a customer would fall within the scope of 'entries in a banker's book'.

1 Benedict Teo is a director and head of Banking and Financial Disputes and Alexander Lee is a director at Drew & Napier *LLC*. The authors would like to thank trainee Timothy Ho for his contribution.

2 [2003] 2 SLR(R) 91.

More recently, in the 2022 decision of *La Dolce Vita Fine Dining Company v. Zhang Lan*,[3] the Singapore High Court clarified that the identity of the ultimate beneficial owner of an account would be an entry in a banker's book when it forms part of that transactional record.

The court adopted the approach in *Wee Soon Kim*, and clarified that the identity of the ultimate beneficial owner of the account would be considered an entry in a banker's book, only when it forms part of the transactional record.

In the premises, information on ultimate beneficial ownership, which is found in questions asked of a customer at a meeting or in general correspondence, would not be considered an entry in a banker's book. However, a declaration of beneficial ownership for the purpose of regulatory compliance, which is recorded by the bank as part of its identification of the customer, would be an entry in a banker's book.

ii Exclusion and non-reliance clauses

In the 2017 decision of *Tradewaves Ltd v. Standard Chartered Bank*,[4] the Singapore High Court recognised that a bank may be able to exclude a duty of care owed to customers for advice on investments, by relying on exclusions, non-reliance clauses or both.

In that case, the customers brought a claim against the bank for, among other things, breaches of tortious and contractual duties of skill and care. The bank sought to rely on contractual clauses which purported to, among other things, exclude the bank's duty to advise the customers on their investments.

The court held that a bank may rely on contractual terms to negate a duty of care, in two broad ways. First, by relying on a term providing that the customer agrees that the bank owes no duty of care to the customer, or that the bank is under no liability to the customer for any act, omission or step taken (i.e., an exclusion term). Second, by relying on a term providing that the bank has not made any representation or recommendation or that the customer does not rely on any such representation or recommendation and relies solely on his or her own judgment (i.e., a non-reliance term).

The court also held that non-reliance terms may give rise to contractual estoppel (which the court confirmed applied in Singapore), such that a customer may be estopped from raising true facts that are contrary to the contractual term.

iii Letters of credit

In the 2021 decision of *Bank of China Ltd v. BP Singapore* (*Bank of China*),[5] the Singapore High Court held that while a bank may not be able to rely on the autonomy principle to avoid honouring a negligent presentation for payment under letters of credit, the bank may still potentially have a claim in negligence against the beneficiary.

The case arose as a result of claims relating to Hin Leong Trading (Pte) Ltd (Hin Leong). Bank of China had provided facilities to Hin Leong, under which letters of credit were issued to BP as beneficiary. BP presented documents which included its commercial invoices and letters of indemnity, to receive payment under the letters of credit. It was later discovered that the underlying transactions were non-existent.

3 [2022] SGHC 89.
4 [2017] SGHC 93.
5 [2021] 5 SLR 738.

The bank commenced proceedings to rescind the letters of credit and recover the sums paid. BP applied to strike out the bank's claims, which included a claim in negligence. At first instance, the Registrar struck out the bank's claim in negligence. The bank appealed and the High Court overturned the Registrar's decision.

The court was of the view that it was arguable that BP owed the bank a duty of care in relation to the commercial invoices and letters of indemnity that it had issued and presented to the bank. However, it ultimately left open the question of whether a beneficiary owes a duty of care to an issuing bank, particularly in relation to documents prepared by the beneficiary, as it should not be summarily determined in a striking-out application.

iv Garnishing of joint bank accounts

In the 2020 decision of *Timing Ltd v. Tay Toh Hin* (*Timing*),[6] the plaintiff had applied for a garnishee order, requiring the garnishee bank to show cause why the first defendant's joint accounts should not be garnished. At first instance, the Assistant Registrar relied on the 2016 decision of *One Investment and Consultancy Ltd v. Cham Poh Meng* (*One Investment*), in which the court accepted that joint accounts could not be garnished, and dismissed the summons.

On appeal, the High Court did not follow *One Investment*, on the basis that there was no indication of the proportion in which the debt (being the balance in the joint account) was owed between the joint account holders in the authorities cited in *One Investment*. The court had regard to the fact that, in *Timing*, there was strong prima facie evidence that all the monies in the joint account belonged to one party. The court reasoned that if the garnishee need not show cause in such a scenario, this would permit debtors to insulate their assets by holding them in joint accounts, and would result in an unsatisfactory position where the recoverability of a judgment debt would turn on the how the debtor organises his or her personal finances.

The court therefore held that a show cause order could be made against joint accounts where the following criteria were met:

a a strong prima facie case is made that the whole of the monies in the joint account belongs to the judgment debtor;

b notice is served on the other holder of the joint account; and

c an undertaking is given by the applicant to bear the costs and reasonably foreseeable losses of the garnishee or the other holder of the joint account, should it be shown that the monies sought to be garnished were not in fact payable in whole or in part to the judgment debtor.

v Liability of co-mortgagor under 'all moneys' clauses

In the 2020 decision of *Oversea-Chinese Banking Corp Ltd v. Lim Sor Choo*,[7] the plaintiff bank had granted the defendant and her husband a loan facility, secured by a mortgage executed by them. The mortgage required them to pay all outstanding sums of money owed by the mortgagor to the mortgagee 'either as principal or as surety and either solely or jointly' and 'whether on the said Accounts or otherwise in any manner whatsoever or for all liabilities'.

6 [2020] 5 SLR 974.

7 [2020] 5 SLR 463.

The defendant's husband subsequently furnished a guarantee to the bank's Hong Kong branch to secure loan facilities to two companies. The bank called on the guarantee and obtained default judgment against the defendant's husband for a sum of US$131 million. The bank then commenced an action to claim the judgment debt from the defendant.

The Singapore High Court, applying the Singapore Court of Appeal's decision in *Re Tararone Investments Pte Ltd*,[8] found that the defendant was liable for a range of liabilities including the judgment debt, and an 'all moneys' clause could hold the borrowers jointly and severally liable for the outstanding sums.

As the court noted, it is not uncommon for banks to draft clauses in the widest possible terms, and while the defendants could not have known that the defendant's husband would incur a liability of US$131 million, the borrowers were bound by the mortgage.

vi Trade finance – competing contracts

In the 2021 decision of *CIMB Bank Bhd v. World Fuel Services (Singapore) Pte Ltd*,[9] the appellant, CIMB Bank Bhd (CIMB) provided banking facilities to Panoil Petroleum Pte Ltd (Panoil). The respondent, World Fuel Services (Singapore) Pte Ltd (WFS), purchased marine fuel from Panoil. Panoil then issued invoices to WFS in respect of the transactions between them, and assigned to CIMB its rights under the transactions via a deed of debenture. When CIMB sought payment under the transactions from WFS, WFS refused. CIMB then claimed under the debenture as the legal assignee. In response, WFS claimed a right of set-off against the invoices.

The parties disputed which contractual documents applied to the transactions. CIMB contended that it was Panoil's sales confirmations, which incorporated Panoil's terms and conditions for the sale of marine fuel terms and conditions (the terms and conditions) and the corresponding invoices issued by Panoil, which applied. In this regard, Clause 8.2 of the terms and conditions provided that contracting parties must pay Panoil for invoices free of set-off.

WFS asserted, however, that three contracts between WFS and Panoil (the umbrella contracts) should apply instead. The umbrella contracts contained a provision entitling WFS to a right of set-off. WFS also relied on an offset agreement providing for the mutual setting off of certain payable sums. WFS claimed that under the umbrella contracts and the offset agreement, WFS was entitled to set off sums due under the invoices to Panoil.

The Court of Appeal held that the offset agreement was to be construed as a master contract which applied to all contractual transactions between WFS and Panoil. In the court's view, it was not necessary for subsequent contracts between these parties to explicitly refer to the offset agreement, for that agreement to apply to them. The court had regard to the fact that the offset agreement was a one-page document covering one substantive issue only – the right of set-off. In the court's view, this suggested that the parties had focused on this sole issue and entered into a contract encapsulating their agreement on it, intending for the right of set-off to apply to their transactions. On the other hand, Clause 8.2 of the terms and conditions was merely one provision in a set of terms canvassing multiple issues. The court also relied on the fact that Panoil's sales confirmations and terms and conditions were standard terms that were pre-printed and unilaterally issued by Panoil, whereas the offset

8 [2001] 1 SLR(R) 352.
9 [2021] SGCA 19.

agreement had been signed by both parties. The court therefore held that WFS was entitled to a right of contractual set-off under the offset agreement, and that the question of the application of the umbrella contracts to the transactions was academic.

III RECENT LEGISLATIVE DEVELOPMENTS

i The FSMA

The FSMA is an omnibus legislation which enhances the MAS's regulatory and enforcement framework across the financial sector, and consolidates the MAS's powers on issues which were previously spread across various statutes. The FSMA was also driven by a need to address dynamic changes in the financial sector such as digitalisation and the rise in virtual assets such as cryptocurrency.

Key features of the FSMA include prohibition orders, technology risk management and the regulation of digital token service providers.

Prohibition orders

The FSMA expands the MAS's powers to impose prohibition orders on persons who have shown themselves to be unfit to perform key roles, activities and functions in the financial industry. Previously, the MAS could only issue prohibition orders to specified persons under the Financial Advisors Act 2001, the Securities and Futures Act 2001 and the Insurance Act 1966, such as trading representatives and insurance agents.[10] The MAS's powers in this regard did not cover other individuals operating in the financial industry.

The categories of persons who may be subject to prohibition orders have now been broadened.[11] The grounds for the issuance of prohibition orders have also been changed from a list of specific criteria to the *Guidelines on Fit and Proper Criteria* issued by the MAS.[12] The FSMA also extends prohibition orders to prohibit persons from performing a wider range of activities than before, such as the handling of funds or assets, risk-taking, risk management and control, critical system administration and any other function critical to the integrity or functioning of financial institutions which the MAS may prescribe.[13]

These revised powers of the MAS are broadly aligned with the regulatory regimes in Australia, Hong Kong, the United Kingdom and the United States.[14]

Technology risk management

The FSMA consolidates existing technology risk management requirements under various MAS-administered statutes by introducing powers that apply to any financial institution or class of financial institution.[15]

The MAS may issue directions as it considers necessary for the management of technology risks, as well as the use of technology to deliver financial services and protect data.[16]

10 Explanatory Brief for Financial Services and Markets Bill 2022.
11 Section 7(1) of the Financial Services and Markets Act 2022 (FSMA).
12 Section 188 of the FSMA.
13 Sections 6 and 7(2).
14 Financial Services and Markets Bill – Second Reading Speech by Mr Alvin Tan, 4 April 2022 (Second Reading of the Financial Services and Markets Bill).
15 Section 29(1) of the FSMA.
16 ibid.

The maximum penalty for each breach of a technology risk management requirement is S$1 million.[17] Where multiple breaches of technology risk management requirements are established, for example, in relation to a cyberattack or disruption to essential financial services impacting a financial institution's customer or other industry participants, the financial institution is liable to further fines.[18]

Digital token service providers

Previously, digital token service providers that were operating from Singapore, but which only provided digital token services outside of Singapore, were unregulated as far as anti-money laundering and terrorism financing matters were concerned. This created reputational risks for Singapore, and the FSMA aims to address this regulatory lacuna.[19] Now, such digital token service providers require a licence.[20]

In addition, a licensee must have a permanent place of business if it wishes to provide any type of digital token service, and it must appoint at least one person to be present at its permanent place of business to respond to queries relating to anti-money laundering and terrorism financing matters.[21]

ii The PSA

The PSA, which came into force on 28 January 2020, provides a new framework for the regulation of payment systems and payment service providers in Singapore. The PSA also consolidates the regulation of payment services that were previously governed by the Payment Services (Oversight) Act and the Money-changing and Remittance Business Act, which have been repealed.[22]

The PSA has two regulatory frameworks: a designation regime to designate payment systems for financial stability or to ensure efficiency or competition in the financial systems; and a licensing regime which is modular and risk-based, and right-sizes the regulation of payment services to mitigate risks according to the scope and scale of payment service providers.[23]

Under the designation regime, a payment system may be designated under the PSA if it is considered a systematically important payment system (SIPS) or system-wide important payment system (SWIPS), or where it is otherwise in the public interest to do so. A disruption in the operation of a SIPS could trigger further disruption to participants or cause systemic disruption to the financial system of Singapore. A disruption in the operation of a SWIPS could affect public confidence in payment systems or the financial system of Singapore.[24]

The licensing framework regulates seven main payment services:

a account issuance services;
b domestic money transfer services;
c cross-border money transfer services;
d merchant acquisition services;

17 Section 29(2) of the FSMA.
18 ibid.
19 Second Reading of the Financial Services and Markets Bill.
20 Sections 137(1) and 137(2) of the FSMA.
21 Section 143 of the FSMA.
22 Payment Services Bill Second Reading Speech by Minister Ong Ye Kung, 14 January 2019.
23 *A Guide to the Essential Aspects of the Payment Services Act 2019*, the MAS.
24 ibid.

e e-money issuance services;
f digital payment token services; and
g money changing services.[25]

Under the PSA, digital payment token services include cryptocurrency services such as exchanges.[26]

All payment service providers are required to hold one of the following licences to provide payment services in Singapore (unless exempted):

a a money changing licence;
b a standard payment institution licence; or
c a major payment institution licence.

Payment Services (Amendment) Act 2021

The Payment Services (Amendment) Act 2021 was passed on 4 January 2021, to align Singapore's regime with the Financial Action Task Force's enhanced standards for virtual asset service providers in June 2019.[27]

The definition of digital payment token services in the PSA will be expanded to include the transfer of digital payment tokens, the provision of custodian wallet services for digital payment tokens and the facilitation of the exchange of digital payment tokens for Singapore currency or other digital payment tokens, which the MAS recognised should be regulated for anti-money laundering/terrorism financing.[28]

The definition of cross-border money transfer services will also be widened to cover service providers that actively facilitate cross-border money transfers between entities in different countries although monies are not accepted or received in Singapore. This is in light of anti-money laundering and terrorism financing concerns and reputational risks that such activities may entail. A cross-border money transfer service provider which carries on a business in Singapore of providing such services will therefore need to be licensed and subject to the MAS's anti-money laundering/terrorism financing regulations.[29]

MAS Guideline PS-GO2

On 17 January 2022, the MAS issued Guideline PS-G02[30] on the provision of digital payment token services to the public. The MAS stressed that digital payment token service providers should conduct themselves with the understanding that the trading of digital payment tokens is not suitable for the general public.

The MAS has therefore highlighted that digital payment token service providers should not portray the trading of digital payment tokens in a manner that trivialises the high risks of trading in digital payment tokens, and should not promote their digital payment token services in public areas in Singapore. Digital payment token service providers should also not provide physical ATMs in public areas in Singapore to facilitate public access to their digital payment token services.

25 Section 6(4) of the Payment Services Act 2019 (P*SA*).
26 Part 3, First Schedule.
27 Explanatory Brief for Payment Services (Amendment) Bill (Explanatory Brief).
28 ibid.
29 ibid.
30 MAS Guideline PS-G02 'Guidelines on Provision of Digital Payment Token Services to the Public'.

Further, the MAS has directed that payment token derivatives such as contracts for difference and futures contracts should not be promoted to the public as a convenient unregulated alternative to trading in digital payment tokens.

IV CHANGES TO COURT PROCEDURE

The ROC 2021, which came into effect on 1 April 2022, marked a profound transformation to Singapore's civil procedure regime. It is intended to modernise the litigation process, enhance the speed of adjudication, and keep costs at reasonable levels.

The ROC 2021 is centred around five ideals:

a fair access to justice;
b expeditious proceedings;
c cost-effectiveness;
d the efficient use of court resources; and
e fair and practical results suited to the needs of the parties.[31]

In making orders, the court must seek to achieve the ideals, and parties have a duty to assist the court and to conduct their cases in a manner which helps to achieve the ideals.[32] Other features of the ROC 2021 include the following:

a A party must consider an amicable resolution of the dispute prior to the commencement of proceedings and during the course of any action or appeal, unless it has reasonable grounds not to do so.[33]
b An originating claim or originating application is now valid for three months beginning with the date of its issue.[34] Previously, an originating claim was valid for six months, while an originating application was valid for 12 months.
c The court must, as far as possible, order a single application pending trial to be filed by each party.[35] This is to deal with all interlocutory matters necessary for the case to proceed expeditiously. No other interlocutory application may be filed thereafter without the approval of the court, save for certain exceptions.
d The court may order the filing of the affidavits of evidence in chief prior to the discovery stage.[36]
e Only one expert may be appointed upon the agreement between the parties, and the court's approval must be sought prior to the appointment. The parties must agree on the list of issues for the expert.[37]

31 Order 3, Rule 1(2) of the Rules of Court 2021 (ROC 2021).
32 Order 3, Rules 1(3) and 1(4) of the ROC 2021.
33 Order 5, Rule 1 of the ROC 2021.
34 Order 6, Rule 3 of the ROC 2021.
35 Order 9, Rule 9 of the ROC 2021.
36 Order 9, Rule 8 of the ROC 2021.
37 Order 12 of the ROC 2021.

V INTERIM MEASURES

In the 2022 decision of *CLM v. CLN*,[38] the plaintiff had commenced an action to trace and recover Bitcoin and Ethereum that were allegedly misappropriated from him by unidentified persons. He sought, among other relief, a proprietary injunction prohibiting the first defendants from dealing with, disposing of, or diminishing the value of the stolen cryptocurrency assets.

The court had regard to authorities from the United Kingdom and Malaysia as to the making of orders against persons unknown, and held that such an order could be made in Singapore. Accordingly, it is now possible to obtain interim orders against persons whose identities are unknown at the commencement of proceedings. This is subject to the caveat that the description of the defendants must be sufficiently certain as to identify persons who fall within and outside of the description.

The court also found that cryptocurrencies satisfied the definition of a property right, based on the case of *National Provincial Bank v. Ainsworth*, because the right is definable, the right is identifiable by third parties, the right is capable of assumption by third parties, and the right and the asset have some degree of permanence or stability. The court consequently found that the plaintiff was able to prove a serious and arguable case that the stolen cryptocurrency assets were capable of giving rise to proprietary rights, which could be protected via a proprietary injunction.

VI PRIVILEGE AND PROFESSIONAL SECRECY

In the 2016 decision of *ARX v. Comptroller of Income Tax*,[39] the Singapore Court of Appeal clarified that legal professional privilege protects communications with in-house counsel that were made before changes to the Evidence Act 1893 in 2012. These changes expressly extended legal professional privilege to communications with in-house counsel.

However, the Court of Appeal found that the common law had long protected confidential communications with in-house legal counsel. Therefore, such communications, even before the aforesaid amendments in 2012, were equally subject to legal professional privilege.

VII JURISDICTION AND CONFLICTS OF LAW

On 1 October 2016, the Choice of Court Agreements Act 2016 (CCAA) came into effect. The CCAA gives effect to the Hague Convention on Choice of Courts Agreement (the Convention), and provides a framework of mutual recognition and enforcement of foreign judgments from states which are parties to the Convention, thereby giving effect to exclusive jurisdiction clauses in contracts.[40]

Under the CCAA, an application may be made for a foreign judgment to be recognised and enforced in the same manner and to the same extent as a judgment issued by the Singapore High Court.[41]

38 [2022] SGHC 46.

39 [2016] 5 SLR 590.

40 'Singapore Ratifies Hague Convention on Choice of Court Agreements', Ministry of Law Press Release, 2 June 2016.

41 Section 13(1) of the Choice of Court Agreements Act 2016 (CCAA).

Where a Singapore court is not the chosen court in an exclusive jurisdiction clause, the Singapore court must stay or dismiss any case or proceeding to which the agreement applies, unless the Singapore court determines that, among other things: the agreement is null and void under the law of the State of the chosen court; a party to the agreement lacked the capacity, under the law of Singapore, to enter into or conclude the agreement; and giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of Singapore.[42]

In the 2022 decision of *6DM (S) Pte Ltd v. AE Brands Korea Ltd*,[43] the Singapore High Court gave effect to an exclusive jurisdiction clause in favour of the courts of England and Wales, and dismissed a Singapore suit.

The court noted that an application under Section 12(1) of the CCAA for a stay or dismissal of proceedings entailed a two-stage inquiry. The court has to first consider whether there exists an exclusive jurisdiction clause which does not designate Singapore as a chosen court and which applies to the case or proceeding in which the application is made. If the court is satisfied that there is such an exclusive jurisdiction clause before it, then it must stay or dismiss the case or proceeding, unless it is shown that one of the exceptions set out in Section 12(1) applies.

In this regard, the court also held that the effect of Section 12 of the CCAA is that the common law test has been displaced. It no longer suffices for a party resisting a stay of the Singapore proceedings to show that there is 'strong cause amounting to exceptional circumstances' why he should not be held to an exclusive jurisdiction clause or that the applicant had submitted to the jurisdiction of the Singapore courts pursuant to Section 16(1)(b) of the Supreme Court of Judicature Act 1969, if he cannot bring himself within one of the exceptions specified in Section 12(1).

VIII SOURCES OF LITIGATION

Given the court's decision in *La Dolce Vita Fine Dining Company v. Zhang Lan* (discussed in Section II) that a bank's record of the beneficial owner of an account would be part of its transactional record, more banker's book applications may be expected to uncover the ultimate beneficial owner of the banks' customers.

While the decision in *Bank of China v. BP Singapore* (discussed in Section II) was in the context of a striking-out application, the court's finding that a duty of care may be imposed on beneficiaries in respect of their documents tendered to banks for payment under letters of credit may result in more banks considering claims in negligence against such beneficiaries.

The decision in *CLM v. CLN* (discussed in Section V) is a welcome development for victims of cryptocurrency fraud. In light of the court's recognition that it may grant a worldwide *Mareva* injunction against unknown persons, and proprietary injunctions over digital assets, more potential litigants may be encouraged to take legal action to enforce their rights.

42 Section 12 of the CCAA.

43 [2022] 3 SLR 1300.

IX EXCLUSION OF LIABILITY

Singapore's courts have long upheld exclusion of liability clauses in banks' standard terms and conditions, subject to the test of reasonableness under the Unfair Contract Terms Act 1977 (UCTA). In the 2018 decision of *Major Shipping & Trading Inc v. Standard Chartered Bank (Singapore) Ltd* (*Major Shipping*), the Singapore High Court considered the principles to apply in determining the validity of such clauses.

In *Major Shipping*, Clause 10.1(a) of the bank's standard account terms and conditions provided that the bank was not liable for loss suffered as a result of, among other things, any act or omission, breach of contract or duty or any tort on the bank's part, and that the bank remains liable for the customer's direct loss only to the extent it is caused by any fraud, gross negligence or wilful misconduct on the bank's part.

The plaintiff argued that Clause 10.1(a) contravened Sections 2(2) and 3(2) of the UCTA and was therefore ineffective, on the basis that it unreasonably restricted the bank's liability for negligent conduct.

The court noted that under Section 11(1) of the UCTA, the test for reasonableness was whether the term was 'a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made'. The court found that Clause 10.1(a) did not contravene the UCTA as it satisfied the test of reasonableness. The court had regard to, among other things, the fact that the plaintiff was a commercial entity which had entered into a contractual relationship with the bank in the course of its business, that Clause 10.1(a) was a clause commonly found in the account opening documents and standard terms of Singapore banks, and that it was reasonable for the bank to exclude liability for negligence given the volume of transactions it handled for various customers.

X REGULATORY IMPACT

As discussed above, there have been significant changes in the regulatory enforcement landscape, particularly to address the rise of virtual assets and digitalisation. The FSMA and the PSA have enhanced and consolidated the MAS's powers concerning payment services and cryptocurrency service providers.

In light of the Russian invasion of Ukraine, the MAS issued Notice SNR-N01 (the Notice) on 14 March 2022. The Notice prohibits financial institutions from dealing with the assets of, or entering into business with, certain designated entities. Financial institutions are also required to freeze the funds or financial assets of such entities that are in the financial institutions' possession, custody or control in Singapore. This has naturally made it more challenging for Singapore banks and other financial institutions to do business with Russian financial institutions, and may result in future litigation involving Russian financial institutions and their customers.

XI OUTLOOK AND CONCLUSIONS

The recent developments addressed above are the result of Singapore's perennial aim of maintaining its reputation as a leading financial and disputes resolution centre. The promulgation of the FSMA and the PSA seeks to address the rapidly evolving nature of the financial sector, while the ROC 2021 is aimed at fine-tuning civil procedure and, among other things, increasing access to justice.

These developments are welcomed, given the financial uncertainty that has followed the economy's emergence from the covid-19 pandemic, the cryptocurrency winter and a macroeconomic environment with rising interest rates coupled with rising inflation. These challenges may yet result in more litigation involving financial institutions in the near future.

Appendix 1

About The Authors

BENEDICT TEO

Drew & Napier LLC

Benedict is the head of Drew & Napier's banking and financial disputes practice. His practice covers a wide range of commercial and criminal litigation, investigations, as well as complex arbitration matters. He is regularly sought to advise and act for prominent individuals, as well as major Singaporean and foreign companies in multimillion-dollar corporate disputes, with a particular focus on contentious banking and real estate matters. His clients include major local and international financial institutions. He also acts for leading property developers and investors. He is actively involved in all levels of trial and appellate advocacy before the Singapore courts.

Benedict was an adjunct tutor at the Faculty of Law, National University of Singapore. He has also been a member of the Rules of Court Working Party since 2010, which reviews and proposes changes to the procedural rules for civil litigation in Singapore. He was placed on the Dean's List in his final year in the National University of Singapore and was the chief editor of the *Singapore Law Review* from 2003 to 2004. His articles and views on various topics have been published in prominent magazines and newspapers, and he has co-authored various publications on matters relating to civil procedure.

ALEXANDER LEE

Drew & Napier LLC

Alexander's practice covers a wide range of civil and commercial matters including shareholder and investment disputes, insolvency and restructuring, and banking and financial disputes. He is experienced with civil litigation in the Singapore High Court and Court of Appeal, and has been involved in landmark cases in relation to, among other things, directors' and fiduciary duties.

Alexander is also experienced with cross-border, multi-jurisdictional disputes and has acted as counsel in international commercial arbitrations conducted under the Singapore International Arbitration Centre and International Criminal Court rules, with a particular focus on energy, infrastructure, and oil and gas disputes. He also has an interest in investor, start-up and venture capital contentious work and has advised fintech, life sciences and electric vehicle companies.

Alexander regularly writes on topics such as company law, insolvency and litigation funding, and co-authored LexisNexis' *Annotated Laws of Singapore*, Part 9, Companies Act, as well as the *Insolvency, Restructuring and Dissolution Act Compendium* published in 2022.

DREW & NAPIER LLC

10 Collyer Quay
10th Floor Ocean Financial Centre
Singapore 049315
Tel: +65 6535 0733
Fax: +65 6535 4906
benedict.teo@drewnapier.com
alexander.lee@drewnapier.com
www.drewnapier.com

ISBN 978-1-80449-139-3