

SECTION 1 INTRODUCTION TO BANKING LAW IN SINGAPORE

22.1.1 In Singapore, the laws regulating banking are found in the relevant Acts passed by Parliament (and their related subsidiary legislation), the common law and principles and rules of equity.

22.1.2 The common law and principles and rules of equity are derived from case law. The main source of common law in Singapore is the common law of England, first received into Singapore in 1826 by the Second Charter of Justice. The Application of English Law Act (Cap 7A, 1994 Rev Ed) provides for the continued application in Singapore of English common law (including the principles and rules of equity) so far as it was part of Singapore law immediately before 12 November 1993, subject to such modifications as the circumstances in Singapore require.

22.1.3 While a substantial body of 'home-grown' case law has been built up in Singapore, judges can, and do, continue to refer to English court decisions and, increasingly, Australian judgments and, to a lesser extent, judgments from Canada, New Zealand, South Africa and other Commonwealth jurisdictions, for guidance.

22.1.4 Those decisions, which are of persuasive value, as well as the writings of academics and legal experts, together with the relevant Acts (principally the Banking Act (Cap 19, 2008 Rev Ed), the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed) and the Bills of Exchange Act (Cap 23, 2004 Rev Ed), that are continually reviewed, have greatly helped to ensure that the legal framework for banking in Singapore keeps pace with the latest developments in the financial world and have played a large part in the evolution of banking in Singapore.

SECTION 2 BANKER-CUSTOMER RELATIONSHIP

22.2.1 In Singapore, the relationship between banker and customer is largely governed by the common law. However, in certain matters, the most notable of which is banking secrecy, the Banking Act (Cap 19, 2008 Rev Ed) applies. A bank's duty of secrecy in Singapore is more extensively discussed later in this paper.

22.2.2 The establishment of a banker and customer relationship is significant as it gives rise to the rights and duties of a banker, e.g. the banker's duty of care in carrying out the customer's mandate. In the most common scenario, the banker and customer relationship is established upon the opening of an account by the customer with the bank.

A. Relationship between customer and banker essentially one of contract

22.2.3 Whether the customer is depositing money with the bank, or the bank is extending a loan or other banking facilities to the customer, the nature of the relationship between banker and customer is essentially one of contract. However, where the bank is holding the customer's deposits, it is a special feature of the contractual relationship that the bank is able to use the money received from the customer for the bank's purposes, subject to its undertaking to repay the money to the customer (with or without interest) either on demand or at a pre-determined time.

B. Age of contractual capacity

(1) Persons 18 years of age may enter into, be bound by and enforce contracts or bills of exchange

22.2.4 On 1 March 2009, the age of contractual capacity in Singapore was lowered from 21 years to 18 years as a result of amendments to the Civil Law Act (Cap 43, 1999 Rev Ed). Consequently, a contract entered into by a minor who has attained the age of 18 years (the 'specified minor') will be given the same effect as if the contract had been entered into by a person of full age and will, accordingly, be binding on and enforceable against him as such. A specified minor may also bring certain legal proceedings in his own name, without a litigation representative, as if he were of full age.

22.2.5 The Bills of Exchange Act was also amended on 1 March 2009 to allow for a bill of exchange that is drawn or indorsed by a specified minor to be enforced against him.

(2) Contracts for which 21 years is age of contractual capacity

22.2.6 However, these amendments to the Civil Law Act (Cap 43, 1999 Rev Ed) do not change the position with respect to the following contracts (i.e. the age of contractual capacity for these contracts continues to be 21 years):

- contracts for the sale, purchase, mortgage, assignment or settlement of any land, other than a contract for a lease of land not exceeding three years;
- contracts for a lease of land for more than three years;
- contracts whereby the minor's beneficial interest under a trust is sold or otherwise transferred to another person, or pledged as a collateral for any purpose;
- contracts for the settlement of (i) any legal proceedings or action in respect of which the minor is, pursuant to any written law, considered to be a person under disability on account of his age, or (ii) any claim from which any such legal proceedings or action may arise; and
- contracts whereby a trust is extinguished or the terms of the trust are varied.

C. Banker's duty to obtain and carry out customer's instructions with reasonable care

22.2.7 A banker owes a duty of care to its customer to carry out the customer's instructions with reasonable care. For instance, a banker must not make payment from the customer's account except in accordance with the customer's mandate and must take reasonable care to ensure that the person paid is entitled to receive the payment. A banker is also under a duty to make reasonable attempts to contact the customer to obtain his instructions, for example, whether to renew a fixed deposit (*Bank of America National Trust and Savings Association v Herman Iskandar & Anor* [1998] 1 SLR(R) 848; [1998] SGCA 22).

SECTION 3 BANKING SECRECY

A. Licensed banks subject to statutory obligations of secrecy

22.3.1 Licensed banks in Singapore are subject to statutory obligations of secrecy with respect to information relating to its customers and their accounts. This is dealt with in section 47 of the Banking Act (Cap 19, 2008 Rev Ed).

22.3.2 In 2001, the Banking (Amendment) Act 2001 (the 'Amendment Act') repealed section 47 and re-enacted it in a substantially different form. The legislative move marked a policy change in Singapore's regulatory approach to banking secrecy, the Monetary Authority of Singapore (the "MAS") having recognised that the previous provision had impeded banks seeking to take advantage of potential operational benefits and savings. For instance, under the previous regime, banks had encountered difficulty in securitising mortgage loans or outsourcing data processing to third parties. The current section 47 extends the circumstances under which banks may disclose customer information.

B. General prohibition against disclosure of customer information by a bank

(1) Statutory confidentiality obligations extend to bank and its officers

22.3.3 Section 47 provides that customer information shall not, in any way, be disclosed by a bank ((as defined in the Banking Act (Cap 19, 2008 Rev Ed), that is, a bank incorporated in Singapore or the branches and offices located within Singapore of a bank incorporated outside Singapore), or any of its officers, to any other person except as expressly provided in the Banking Act (Cap 19, 2008 Rev Ed) (and elaborated on in the Third Schedule thereof). Consequently, the confidentiality obligation under section 47 extends to the bank as well as its officers. An 'officer' is defined in section 2(1) of the Banking Act (Cap 19, 2008 Rev Ed) to include a director, secretary, employee, receiver, manager and liquidator.

(2) Definition of 'customer information'

22.3.4 The term 'customer information' is defined in section 40A of the Banking Act (Cap 19, 2008 Rev Ed) to mean:

- any information relating to, or any particulars of, an account of a customer of the bank, whether the account is in respect of a loan, investment or any other type of transaction, but does not include any information that is not referable to any named customer or group of named customers; or
- 'deposit information', which is, in turn, defined to mean any information relating to any deposit of a customer of the bank, funds of a customer under management by the bank, or any safe deposit box maintained by, or any safe custody arrangements made by, a customer with the bank, but, again, excluding any information that is not referable to any named person or group of named persons.

(3) Prohibition extended to merchant banks approved as financial institutions in Singapore

22.3.5 Section 47 and the Third Schedule to the Banking Act (Cap 19, 2008 Rev Ed) apply not only to banks but also to merchant banks approved as financial institutions in Singapore under the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed). For this purpose, the modified section 47 and Third Schedule, which apply to merchant banks, are set out in the Banking Regulations (Rg 5, 2004 Rev Ed).

C. Exceptions to banking secrecy set out in Third Schedule to the Banking Act

22.3.6 The exceptions to banking secrecy are divided into two categories, set out in Part I and Part II of the Third Schedule to the Banking Act (Cap 19, 2008 Rev Ed). Where disclosure of customer information is made pursuant to an exception in Part I of the Third Schedule, the recipient of the information is not prohibited from further disclosing the information to any other person. In contrast, the recipient of information disclosed under an exception enumerated in Part II of the Third Schedule is prohibited from further disclosing the customer information to any other person, except as authorised under the Third Schedule or if required to do so by an order of the court. This obligation continues after termination of the recipient's appointment, employment or other office in which the information was received.

(1) Categories of exceptions in Part I of the Third Schedule

22.3.7 The purposes for which disclosure of customer information is allowed (and further disclosure is not prohibited), as provided in Part I of the Third Schedule, are where:

1. disclosure is permitted in writing by the customer or, if he is deceased, his appointed personal representative;
2. disclosure is solely in connection with an application for a grant of probate or letters of administration in respect of a deceased customer's estate;

3. disclosure is solely in connection with the bankruptcy of a customer who is an individual, or the insolvency of a customer which is a body corporate;
4. disclosure is solely with a view to the institution of, or solely in connection with, the conduct of certain types of proceedings, such as proceedings between the bank and the customer or his surety relating to the banking transaction of the customer;
5. disclosure is to a police officer or public officer or a court where it is necessary for reasons of investigation or prosecution;
6. disclosure is necessary for compliance with a garnishee order served on the bank attaching moneys in the account of the customer;
7. disclosure is necessary for compliance with an order of the Supreme Court or a judge thereof pursuant to the powers conferred under Part IV of the Evidence Act (Cap 97, 1997 Rev Ed);
8. provided the bank is a bank incorporated outside Singapore or a foreign-owned bank incorporated in Singapore, disclosure is strictly necessary for compliance with a request made by its parent supervisory authority. However, no deposit information may be disclosed to the parent supervisory authority; and
9. disclosure is in compliance with the provisions of the Banking Act (Cap 19, 2008 Rev Ed), the Deposit Insurance and Policy Owners' Protection Schemes Act (Cap 77B, 2012 Rev Ed) or any notice or directive issued by the MAS to banks.

(2) Categories of exceptions in Part II of the Third Schedule

22.3.8 The purposes for which disclosure of customer information is allowed (but further disclosure is prohibited), as provided in Part II of the Third Schedule, are where:

1. disclosure is solely in connection with the performance of duties as an officer, or a professional adviser of the bank;
2. disclosure is solely in connection with the conduct of internal audit of the bank or the performance of risk management. In the case of disclosure by a bank which is the branch of a bank incorporated outside Singapore, such disclosure may be made to its head office or parent bank or any branch or related corporation designated in writing by its head office. In the case of a bank incorporated in Singapore, such disclosure may be made to the parent bank or any related corporation of the bank designated in writing by its head office. In the case of a foreign-owned bank incorporated in Singapore, such disclosure may be made to the parent bank or any related corporation of the bank designated in writing by the parent bank;
3. disclosure, which is solely in connection with the outsourcing of the bank's operational functions is made to any person, including the head office of the bank or any branch outside Singapore, which is engaged by the bank to perform the outsourced functions. If any outsourced function is to be performed outside Singapore, reference must be made to the MAS Notice to Banks entitled 'Banking Secrecy – Conditions for Outsourcing' ("MAS 634"). Amongst other things, MAS 634 requires banks to notify the MAS of all outsourcing arrangements involving the disclosure of customer information upon entering into the relevant outsourcing agreement;
4. disclosure is solely in connection with (i) the merger or proposed merger of the bank or its financial holding company with another company, or (ii) any acquisition or issue, or proposed acquisition or issue, of any part of the share capital of the bank or its financial holding company;
5. disclosure is solely in connection with the transfer or proposed transfer of the business of the bank to a company under Division 1 of Part VIIA of the Banking Act (Cap 19, 2008 Rev Ed). In this case, the information may be disclosed to (i) any transferor or transferee defined in section 55A of the Banking Act (Cap 19, 2008 Rev Ed), (ii) any person affected by the transfer, (iii) any professional adviser appointed by any person referred to in paragraph (i) or (ii), or (iv) any independent assessor appointed by the Minister for Finance or the MAS under section 55B of the Banking Act (Cap 19, 2008 Rev Ed);
6. disclosure is solely in connection with the transfer or proposed transfer of the business of the bank to a company under Division 2 of Part IVB of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed). In this case, the information may be disclosed to (i) any transferor or transferee defined in section 30AAR of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed), (ii) any person affected by the transfer, (iii) any professional adviser appointed by any person referred to in paragraph (i) or (ii), or (iv) any independent assessor appointed by the MAS under section 30AAS of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed).
7. disclosure is solely in connection with the transfer or proposed transfer of the shares in the bank under Division 3 of Part IVB of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed). In this case, the information may be disclosed to (i) any

transferor or transferee defined in section 30AAV of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed), (ii) any professional adviser appointed by a transferor or transferee, or (iii) any independent assessor appointed by the MAS under section 30AAW of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed);

8. disclosure is solely in connection with the restructuring or proposed restructuring of the share capital of the bank under Division 4 of Part IVB of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed). In this case, the information may be disclosed to (i) any shareholder of the bank, (ii) any subscriber defined in section 30AAY of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed), (iii) any professional adviser appointed by the bank or any person referred to in paragraph (i) or (ii), or (iv) any independent assessor appointed by the MAS under section 30AAZ of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed);
9. disclosure is solely in connection with the restructure, transfer or sale, or proposed restructure, transfer or sale, of credit facilities. In this case, the information may be disclosed to any transferee, purchaser or any other person participating or otherwise involved in the restructure, transfer or sale, or proposed restructure, transfer or sale, including lawyers or other professional advisers. However, no customer information other than information relating to the relevant credit facilities may be disclosed. This exception would appear to permit disclosure of information relating to loans or other credit facilities where a bank wishes to sell such loans as such or, pursuant to an asset securitisation;
10. disclosure is by a bank in Singapore which has issued a credit or charge card to a customer, to other financial institutions in Singapore which issues credit or charge cards notifying of the suspension or cancellation of the card by the bank by reason of the customer's default in payment. Information that may be disclosed is the customer's name and identity, the amount of the debt outstanding on the credit or charge card, and the date of suspension or cancellation of the card;
11. disclosure is of customer information (excluding deposit information) which is strictly necessary (i) for the collation, synthesis or processing of customer information by a credit bureau for assessing the credit-worthiness of the customers of banks, or (ii) for the assessment, by certain specified members of the credit bureau, of the credit-worthiness of the customers of banks, subject to such conditions as may be specified by the MAS;
12. disclosure of information of a general nature (not related to the details of the customer's account) made to another bank or merchant bank in Singapore where it is strictly necessary for the assessment of the credit-worthiness of the customer in connection with or relating to a bona fide commercial transaction or a prospective commercial transaction; or
13. disclosure is solely in connection with the payment of compensation to insured depositors under the Deposit Insurance and Policy Owners' Protection Schemes Act (Cap 77B, 2012 Rev Ed). In this case, the information may be disclosed to the deposit insurance and policy owners' protection fund agency or the Public Trustee, or any person authorised or appointed by the deposit insurance and policy owners' protection fund agency or the Public Trustee. Pursuant to the Deposit Insurance and Policy Owners' Protection Schemes (Designation of Deposit Insurance and Policy Owners' Protection Fund Agency) Notification 2011 (S237/2011), Singapore Deposit Insurance Corporation Limited is designated as the deposit insurance and policy owners' protection fund agency for the purposes of the Deposit Insurance and Policy Owners' Protection Schemes Act (Cap 77B, 2012 Rev Ed).

D. Penalties for contravening statutory obligations of banking secrecy

22.3.9 Contravention of section 47 is an offence. Upon conviction, an individual may be punished with a fine not exceeding S\$125,000, or imprisonment for a term not exceeding three years, or both. In the case of a corporation, a fine not exceeding S\$250,000 may be imposed.

E. Statutory secrecy regime does not prevent assumption of higher standard of confidentiality

22.3.10 The statutory banking secrecy regime does not prevent a bank from contracting with its customers to assume a higher standard of confidentiality. This is provided for in section 47(8).

F. Common law exceptions to duties of confidentiality no longer applicable in Singapore

22.3.11 It was previously thought that the statutory banking secrecy regime did not override the common law of duties of confidentiality on a bank which arose out of the banker customer relationship.

22.3.12 However, following the decision of the Singapore Court of Appeal in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737; 2009 SGCA 8, it is now clear that the current statutory secrecy regime leaves no room for the four general common law exceptions expounded in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 to co-exist.

22.3.13 In the seminal case of *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, the English Court of Appeal held that a banker had an implied duty to keep the affairs of a customer confidential, subject to four general exceptions under which disclosure could be made by the bank. These were classified into four categories: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.

22.3.14 The Singapore Court of Appeal held that, in light of the plain wording of section 47, the four exceptions in *Tournier* had been embraced within the framework of section 47 of the Banking Act (Cap 19, 2008 Rev Ed), which is now the exclusive regime governing banking secrecy in Singapore.

22.3.15 In arriving at its decision, the Singapore Court of Appeal held that, in terms of details and scope, section 47 of and the Third Schedule to the Banking Act (Cap 19, 2008 Rev Ed) provided a more comprehensive regime than that articulated in *Tournier*. In the words of the Court of Appeal: "There is simply no room, in Singapore, for the less sophisticated and more general common law rules articulated in *Tournier* to have any further relevance save for the perspective of historical evolution and context it provides."

G. Banks in Singapore and the Personal Data Protection Act 2012

Organisations in Singapore are obliged to observe and comply with the requirements of the Personal Data Protection Act 2012 (the "PDPA"), which establishes the Singapore regime for the protection of personal data.

While the PDPA does not establish specific statutory obligations specifically applicable to banks, as they are organisations operating within Singapore, banks are obliged to observe and comply with the requirements of the PDPA.

An individual's "personal data" refers to data, whether true or not, about an individual who can be identified from that data or other accessible information.

Broadly, banks have to observe the following obligations under the PDPA:

- Banks may only collect, use and disclose personal data of an individual with the individual's consent, and for a reasonable purpose which the organisation has made known to the individual.
- Personal data must not be transferred outside Singapore except in accordance with requirements of the PDPA. In short, banks are to provide a standard of protection to the transferred personal data comparable to the protection granted under the PDPA.
- Except in certain circumstances (which is discussed below), banks must accede to an individual's right of access and correction in respect of his personal data that is in the bank's possession. The individual has a right of action for relief against a bank for losses or damages suffered directly as a result of the contravention by the bank of its personal data protection obligations.
- If an individual has registered his Singapore telephone number with the Do Not Call Registry (DNC) and has thereby opted out from receiving certain types of marketing messages, banks have to ensure that such messages are not sent to the registered telephone number.

In general, banks have to carry out the following compliance obligations:

- Designate one or more individuals to be a data protection officer responsible for ensuring that the bank complies with the PDPA and making available to the public contact information of at least one such individual;
- Develop and implement policies and practices to enable the bank to meet its obligations under the PDPA; Communicate information on its PDPA-related policies and practices to its staff;
- Establish a process to receive and respond to complaints arising with respect to the PDPA; and
- Make available information about the bank's PDPA-related policies and practices and complaint process, upon request.

Exceptions and the effect of other written law on the PDPA

There are various exceptions and exclusions to the obligations described above within the PDPA.

In addition, the PDPA provides that the provisions of other written law prevail over portions of the PDPA to the extent of any inconsistency. For banks, it is useful to note that MAS Notice to Banks on Prevention of Money Laundering and Countering the Financing of Terrorism ("MAS 626") was prepared to take advantage of this. MAS 626 is discussed further below.

MAS 626

In the course of performing customer due diligence in compliance with MAS 626, banks may be required to collect, use and disclose personal data of individuals without first obtaining consent. This would be in breach of the PDPA provisions. To alleviate this situation, the MAS amended MAS 626 on 1 July 2014 to expressly allow a bank, whether directly or through a third party (e.g. data intermediaries), to collect, use and disclose personal data of an individual (the "relevant individual") who is:

- a customer;
- appointed to act on behalf of a customer;
- a connected party of a customer (namely, the director or natural person having executive authority in a customer which is a company, the partner or manager of a customer which is a partnership, limited partnership or limited liability partnership, or any natural person having executive authority in a customer which is a body corporate or unincorporate); a beneficial owner of
- a customer;

without the relevant individual's consent, for the purposes of complying with the requirements under MAS 626.

Further, MAS 626 provides that, in general, the bank is not required to provide the relevant individual with the right to access or correct an error or omission of his personal data in the possession or under the control of the bank, except with regard to the following:

- personal data of the relevant individual which was provided by him to the bank;
- his factual identification data (namely, his name, identity card number, birth certificate number, passport number, existing residential address, contact telephone number, date of birth and nationality).

H. Power of IRAS to obtain information

22.3.16 The Inland Revenue Authority of Singapore (the "IRAS") is given broad powers to obtain information for domestic tax administration purposes under section 65B of the Income Tax Act (Cap 134, 2014 Rev Ed). Notwithstanding that the information sought by the IRAS may consist of customer information which may not be disclosed under section 47 of the Banking Act (Cap 19, 2008 Rev Ed) (including any regulations made under section 47(10) of the Banking Act (Cap 19, 2008 Rev Ed)), a person is not excused from producing the information by reason only that he is under a statutory obligation to observe secrecy (section 65D(1) and (2) Income Tax Act (Cap 134, 2014 Rev Ed)). Section 65D Income Tax Act (Cap 134, 2014 Rev Ed) overrides any duty of secrecy imposed by the Banking Act (Cap 134, 2014 Rev Ed) in relation to the information sought, and provides for immunities for a breach of a duty under the Banking Act (Cap 19, 2008 Rev Ed) when complying with a notice for such information. Sections 65B and 65D also

apply in relation to information formally requested by a foreign tax authority concerning the tax position of any person pursuant to any Avoidance of Double Taxation Agreement which Singapore has entered into with the country of the foreign tax authority to implement the international standard for the exchange of information for tax purposes developed by the Organisation for Economic Co-operation and Development.

SECTION 4 LENDING AND SECURITY

A. Lending regulated by various statutes depending on the provider of the funds

(1) Banks and finance companies

22.4.1 In Singapore, the business of lending is regulated by various statutes depending on the person or type of institution that is providing the funds.

22.4.2 Banks and finance companies are licensed or regulated under the Banking Act (Cap 19, 2008 Rev Ed) and the Finance Companies Act (Cap 108, 2011 Rev Ed) respectively.

(2) Licensing and regulation under the Moneylenders Act

22.4.3 Every person who carries on the business of moneylending in Singapore (other than banks or finance companies licensed, under the relevant Acts, to carry on their respective businesses in Singapore) must be licensed under or excluded or exempted from the provisions of, the Moneylenders Act (Cap 188, 2010 Rev Ed). Moneylending by a person who is not so licensed or who is not an excluded or exempted moneylender, is an offence. In addition, section 14(2) of the Moneylenders Act (Cap 188, 2010 Rev Ed) renders the borrower's obligation to repay such a person unenforceable.

22.4.4 The Moneylenders Act (Cap 188, 2010 Rev Ed) came into force on 1 March 2009, repealing and replacing its predecessor which was enacted 50 years ago. The new Act underscores a more flexible and progressive approach to the regulation of moneylending in Singapore to keep pace with the modern credit economy. With the introduction of the concept of 'excluded moneylender', any person who lends money solely to corporations or limited liability partnerships or to business trusts and real estate investment trusts (or their respective trustees or trustee managers) will, generally, not be subject to the new Act. However, a person lending to individuals (other than those which qualify as 'accredited investors' within the meaning of Section 4A of the Securities and Futures Act (Cap 289, 2006 Rev Ed)) will not be an excluded moneylender for the purposes of the new Act.

B. Security taken for a loan

22.4.5 Security for a loan is taken by a bank in Singapore to avoid the effects, in the winding-up or bankruptcy of its borrowing customer, of the pari passu distribution of the assets of that borrowing customer. Such securities may be classified as proprietary security or possessory security.

(1) Proprietary security: confers upon the secured creditor a right of ownership to property

22.4.6 Proprietary security confers on the secured creditor a right of ownership to the property that is subject to the security. Possession of the property remains with the person providing the security. The most common proprietary securities are the mortgage and the charge.

(2) Possessory security: depends on creditor obtaining and retaining possession of property

22.4.7 In contrast, the legal effectiveness of a possessory security is dependent upon the creditor obtaining and retaining possession of the property that is the subject of the security. The most common possessory securities are the pledge and the lien.

(3) Personal security: undertaking by a third party to pay in event of default by borrower

22.4.8 In addition to proprietary and possessory security, a bank may enhance its position by obtaining personal security in the form of an agreement by a third party to undertake a personal obligation to pay the bank if the borrowing customer defaults. There are two types of such personal security, namely, guarantees and indemnities. While the taking of such personal security does not usually result in the bank acquiring rights over the assets of the relevant third party, such guarantees and indemnities are nonetheless useful in providing further recourse for the bank in the event of its borrowing customer's default.

(4) Characterisation of security based on substance of agreement rather than label applied by parties or form of documents

22.4.9 In determining whether a security interest is created by a particular transaction, and the nature of that security interest, the courts look to the substance of the parties' agreement rather than the label applied by the parties or the form of the documents. The true nature of the transaction should be ascertained from the documents against the surrounding circumstances in which they came into being.

(5) Security over scripless shares: Distinct regime provided by the Companies Act

22.4.10 Apart from the security rights granted in favour of the bank under charges, mortgages, pledges, and liens, the Companies Act (Cap 50, 2006 Rev Ed) provides for a distinct regime for the taking of security over scripless shares (or book entry securities) listed on the Singapore Exchange Securities Trading Limited.

(6) Bank's common law right to combine accounts and contractual rights of set-off

22.4.11 In addition to the proprietary, possessory and personal security which are available to a bank in Singapore to secure the obligations of its borrowing customer, the bank may also avail itself of its common law right to combine accounts and contractual rights of set-off against the borrowing customer's accounts with the bank. Unless the bank and its customer have agreed otherwise, a bank is entitled to combine accounts maintained with the bank by a customer in his own right against a debt payable by the customer to the bank and to treat the balance, if any, as the amount actually standing to the customer's credit. This right to combine all the accounts of a customer is regarded as a right of set-off which, in practice, is usually fortified by contract to circumvent the limitations of this right under the common law. For example, contractual provisions are usually introduced to entitle a bank to set-off a sum presently due to, or from, the customer with a sum payable by, or, as the case may be, to the customer at a future date to combine different kinds of accounts maintained by the customer in different currencies.

SECTION 5 CHARGES

A. Characteristics of a charge

(1) Confers the right to a creditor to resort to property for payment of a debt or claim

22.5.1 A security interest by way of charge arises when the owner of a property gives the right to his creditor to resort to the property for payment of a debt or claim. In the event of the chargor's insolvency, the chargee may enforce the security in priority to the claims of unsecured creditors.

(2) Differences between 'charge' and 'mortgage': no transfer of ownership in a charge

22.5.2 In practice, the terms 'mortgage' and 'charge' are often used interchangeably. Statutory usage has also tended to assimilate mortgages and charges as well. For example, a mortgage under the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) is defined to include a charge. However, there are differences between the two types of security.

22.5.3 A charge is created by the contractual acts of the parties. Unlike a mortgage, a charge does not involve a transfer of ownership to the chargee. Also unlike possessory securities such as the pledge and lien, the effectiveness of a charge is not dependent upon the chargee obtaining and retaining possession of the charged property. In the event of default, the chargee has the right to realise the charged property, through judicial process, whether by way of order for sale or the appointment of a receiver.

B. Creation of charge***(1) Charge takes effect by way of agreement, without passing of title or possession in property***

22.5.4 A charge takes effect by way of an agreement between debtor and creditor without title or possession in the property passing to the chargee.

(2) Generally no formalities required to create charge except that, in certain circumstances, agreement must be in writing and signed

22.5.5 There is generally no formal requirement as to the agreement creating the charge. However, there are two important instances whereby writing is required. First, section 6(d) of the Civil Law Act (Cap 43, 1999 Rev Ed) provides that no action shall be brought against any person upon any contract for the disposition of interest in immovable property unless the agreement is in writing and signed. Accordingly, a charge created in respect of an interest in land will not be enforceable unless the contract between the parties is in writing and signed. The second exception relates to promises to answer for the debt of another. Pursuant to section 6(b) of the Civil Law Act (Cap 43, 1999 Rev Ed), no action shall be brought against a defendant upon a promise to answer for the debt of another person unless the promise is in writing and signed. Consequently a charge created over the chargor's assets to secure the debt of the bank's borrowing customer, for instance, a charge given by a holding company to secure a loan given by the chargee to a subsidiary of the holding company, must be in writing and signed.

C. Types of charges***(1) Registration of all floating charges and certain fixed charges under section 131 of the Companies Act***

22.5.6 A charge may be fixed or floating. All floating charges must be registered under section 131 of the Companies Act (Cap 50, 2006 Rev Ed) but only fixed charges over one or more of the specific types of assets listed in section 131 (3) need to be registered.

(2) Fixed charge: fastens on identifiable and ascertainable assets

22.5.7 A fixed charge is one that fastens on assets that are identifiable and ascertainable, such as land, shares, ships and aircraft. The fixed charge encumbers the charged asset immediately from the time it is created. The chargor is unable to deal with a charged asset without the consent of the chargee.

(3) Floating charge: creates immediate security interest without specifically attaching to individual assets

22.5.8 In contrast, a floating charge creates an immediate security interest, but does not specifically attach to the individual assets until 'crystallisation'. The assets secured by a floating charge are always generally identified in the charging document by referring to

all of, or, as the case may be, all of an identifiable class or type of, the 'undertaking and assets' of the chargee, both present and future.

(4) Fixed v floating charges: distinguished by liberty of chargor to deal with assets and ascertained from terms and circumstances of the agreement

22.5.9 The labelling of a charge as fixed or floating is not determinative of the nature of the charge. The critical feature distinguishing a floating charge from a fixed charge is whether the chargor is at liberty to deal with the assets.

22.5.10 The true nature of a charge must be ascertained by considering the terms of the security agreement, and the factual and commercial matrix in which the agreement is created and performed. As such, a charge over uncollected book debts which leaves the chargor free to collect them and use the proceeds in the ordinary course of business is a floating charge, even if expressed as a fixed charge over the uncollected book debts and a floating charge over the proceeds.

(5) Fixed v floating charges: fixed charge holders and statutorily preferred creditors have priority if charging company is wound up

22.5.11 The main disadvantage of having a floating rather than a fixed charge is the treatment of floating charge holders in the winding up of the charging company. Fixed charge holders and persons to whom statutory preferential debts are owed have priority over floating charge holders for the payment of their debts.

D. Registration requirements for charges created by companies incorporated or registered in Singapore

(1) Application of section 131(1) of the Companies Act for registration of charges

22.5.12 Section 131(1) of the Companies Act (Cap 50, 2006 Rev Ed) provides that a charge that is created by a company incorporated in Singapore (or the branch of a foreign corporation registered in Singapore under Division 2 of Part XI of the Companies Act) and to which section 131 applies must be lodged with the Registrar of Companies for registration within 30 days after the creation of the charge, in the case where the document creating the charge is executed in Singapore, and within 37 days after the creation of the charge, in the case where the document creating the charge is executed outside Singapore (section 139).

22.5.13 Charges that are subject to registration under section 131 are:

- a charge to secure any issue of debentures;
- a charge on uncalled share capital of a company;
- a charge on shares of a subsidiary of a company which are owned by the company;
- a charge or an assignment created or evidenced by an instrument which if executed by an individual, would require registration as a bill of sale;
- a charge on land wherever situate or any interest therein;
- a charge on book debts of the company;
- a floating charge on the undertaking or property of a company;
- a charge on calls made but not paid;
- a charge on a ship or aircraft or any share in a ship or aircraft; and
- a charge on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright.

Charges capable of registration under the International Interests in Aircraft Equipment Act (Cap 144B, 2012 Rev Ed) do not fall within the ambit of section 131 of the Companies Act (Cap 50, 2006 Ed).

(2) Charges that are not registered within time limit are void against liquidators and other creditors of company

22.5.14 A charge that is not registered under section 131 of the Companies Act (Cap 50, 2006 Rev Ed) within the time limit is void against the liquidator and other creditors of the company. In the event of insolvency of the chargor company, the chargee of an unregistered charge will lose its security and can only claim as an unsecured creditor of the company.

(3) Failure to register does not affect underlying debt

22.5.15 Notwithstanding the failure to register a charge as required under section 131 of the Companies Act (Cap 50, 2006 Rev Ed), the underlying debt due from the chargor company to the chargee is not affected by the avoidance of the charge against the liquidator and creditors of the company. However, pursuant to section 131(2), the money secured by the charge will become immediately repayable if the charge becomes void for non-registration.

(4) Registration constitutes notice of the existence of the charge

22.5.16 Registration constitutes notice of the existence (but not necessarily the particulars) of the charge to all persons dealing with the charged property who might reasonably be expected to search the register of all matters for which registration is prescribed.

(5) Additional registration requirements apart from those under the Companies Act may apply based on nature of charged asset

22.5.17 Apart from registration under the Companies Act (Cap 50, 2006 Rev Ed), there may be additional registration requirements depending on the nature of the charged asset. For example, a charge over real property governed by the Land Titles Act (Cap 157, 2004 Rev Ed) must be in the prescribed form and registered thereunder. Similarly, security given over a ship for a loan must be in the prescribed form and registered with the Registry of Ships. When an individual creates a charge over his property, the charge is subject to the registration requirements of the Bills of Sale Act (Cap 24, 2011 Rev Ed) if the charge constitutes a bill of sale. Under the Bills of Sale Act (Cap 24, 2011 Rev Ed), in order to be effective as security, the bill of sale must secure at least S\$100, should not be made or given wholly or partly in consideration of a pre-existing debt, has to be executed in the prescribed form, and must be registered within three days of its execution.

E. Enforcement of charges: different rights available before and upon default in payment

22.5.18 Some of the rights of enforcement available to a chargee of charged property may be exercised even before a payment default. Upon any dealing inconsistent with the charge, the chargee has not merely a personal remedy for breach of contract, but has other remedies such as an injunction, notwithstanding that there has been no failure to pay. A chargee can also obtain the appointment of a receiver prior to default on grounds of jeopardy of security. However, the power of sale arises as a remedy only upon default in payment of the secured debt. In the event of default in payment by the chargor, the chargee is entitled to look to the property and its proceeds for the discharge of the liability.

SECTION 6 MORTGAGES***A. Characteristics of a mortgage****(1) Transfer of ownership of asset but subject to mortgagor's equity of redemption*

22.6.1 In most cases, where a bank obtains security in the form of a mortgage, the mortgagor transfers ownership of the asset that is the subject of the security to the mortgagee. The transfer of ownership is subject to the mortgagor's right to redeem, which entitles the mortgagor to call for the re-transfer of ownership to the mortgagor when the secured debt is satisfied (this is known as the mortgagor's equity of redemption).

(2) Differences between 'mortgage' and 'charge': transfer of either legal or equitable title in a mortgage

22.6.2 As mentioned above, despite the technical differences between a mortgage and a charge, the terms are often used interchangeably. From the perspective of the secured creditor, a mortgage and charge will yield the same practical result although the nature of the security is different. A mortgage may be viewed as an 'enhanced charge' as it gives not only rights of appropriation over an asset (as a charge does), but also entails a transfer of ownership of either legal or equitable title to the mortgagee.

B. Creation of mortgage: formalities required to create mortgage agreement except that, in certain circumstances, agreement must be in writing and signed

22.6.3 As in the case of a charge, there is generally no formal requirement on the agreement creating a mortgage. However, formal requirements must be observed depending on the nature of the property which is the subject of the mortgage. The provisions of sections 6(d) and 6(b) of the Civil Law Act (Cap 43, 1999 Rev Ed), which have been discussed above, would similarly apply to mortgages in the circumstances described.

C. Types of mortgages: either legal or equitable

(1) Equitable mortgage

22.6.4 A mortgage can be either legal or equitable. The mortgage will be equitable where:

- the formalities necessary to create a legal mortgage have not been fully complied with; the
- mortgagor's interest in the asset being mortgaged is itself an equitable interest; or
- the parties have entered into an agreement to create a legal mortgage in the future over the asset in question.

(2) Equitable mortgagee loses priority to subsequent legal mortgagee if latter was a purchaser for value in good faith without notice

22.6.5 Generally, the main difference between a legal and an equitable mortgage is that an equitable mortgage loses priority to a subsequent legal mortgage if the subsequent mortgagee was a purchaser for value in good faith without actual or constructive notice of the prior equitable mortgage.

(3) Different rules of priority where a mortgage is taken over land

22.6.6 Different rules of priority apply where a mortgage is taken over land. In Singapore, the rules of priority applicable to legal and equitable mortgages over land that is not regulated under the Land Titles Act (Cap 157, 2004 Rev Ed) are governed by the Registration of Deeds Act (Cap 269, 1989 Rev Ed). Section 14 of the Registration of Deeds Act (Cap 269, 1989 Rev Ed) provides that all instruments entitled to be registered under the Registration of Deeds Act (Cap 269, 1989 Rev Ed) will have priority according to the date of their registration and not according to the date of the instruments or of their execution. Pursuant to section 6, a charge by reason of a deposit of title deeds will have no effect or priority as against a subsequent assurance for value unless and until a memorandum of charge signed by the person against whom the charge is claimed, has been registered in accordance with the Registration of Deeds Act (Cap 269, 1989 Rev Ed). Where the mortgaged land is governed by the Land Titles Act (Cap 157, 2004 Rev Ed), priority is determined according to the date of registration of the instrument of legal mortgage. In the case of an equitable mortgage, a caveat may be lodged to protect the mortgagee's interest.

D. Registration requirements under section 131 of the Companies Act

(1) Mortgages subject to same provisions relating to registration of charges under the Companies Act

22.6.7 The Companies Act (Cap 50, 2006 Rev Ed) defines a charge to include a mortgage and the provisions of section 131 of the Companies Act (Cap 50, 2006 Rev Ed) in relation to the registration of charges applies to mortgages.

(2) Additional requirements and/or formalities depending on nature of mortgaged asset

22.6.8 Apart from registration under the Companies Act (Cap 50, 2006 Rev Ed), there may be additional registration requirements depending on the nature of the mortgaged asset. For instance, a mortgage over real property governed by the Land Titles Act (Cap 157, 2004 Rev Ed) must be in the prescribed form and registered under that Act. It is the act of such registration that creates the mortgage. Further, it is provided that a registered mortgage shall not operate as a transfer of the land mortgaged but shall take effect as security only.

22.6.9 Pursuant to section 53 of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed), a mortgage of land will be void at law unless it is by deed in the English language. If, however, the subject matter of the mortgage is not land, then there is no requirement for the mortgage to be executed by deed. Nevertheless, in practice, it is advantageous for the mortgage to be executed by deed as, in order to enforce a deed, it is not necessary to show that consideration passed between the contracting parties. At common law, a promise is not binding as a contract unless it is either made in a deed or supported by consideration.

22.6.10 There are also practical issues to be taken into consideration when creating a mortgage. For example, in the case of a mortgage of shares, a mortgage is created through a transfer of title in the subject shares to the mortgagee, following which the shares are registered in the name of the mortgagee. Pursuant to section 195(4) of the Companies Act (Cap 50, 2006 Rev Ed), the mortgagor's interest cannot be reflected in the share register. Hence, in practice, the mortgage is effected by delivery of the share certificate and its related transfer form, duly executed by the mortgagor, together with a document setting out the circumstances of the transfer and providing for re-transfer to the mortgagor upon repayment of the loan.

E. Enforcement of security upon default in payment

(1) Rights of secured lender to enforce security are cumulative

22.6.11 Where the borrower defaults in repaying the sums due under the mortgage, a bank can have recourse to a number of rights and remedies in order to enforce its security. The rights of the secured lender are cumulative, which means that the bank may exercise all or any of the remedies until it is fully repaid. Thus, even after it sells the property and there is a shortfall (unless the sale is pursuant to the right of foreclosure) the bank can sue the borrowing customer for the balance, on his personal promise to repay the moneys.

(2) Exercising the power to sell mortgaged property

22.6.12 The bank may choose to exercise its power to sell the property. The power to sell is usually provided for in every well-drafted mortgage document. It is also implied by statute (pursuant to section 24 of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed)), into every mortgage that is made by deed. If the objective is to protect the security and to collect profits yielded by the property which may be applied towards discharging the mortgage debt, a receiver may be appointed either pursuant to the provisions of the security document, section 29 of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed), or a court order. Where the subject of the mortgage is land, the express terms of a mortgage instrument will usually give the bank the right to enter into possession upon default and after written notice is given to the borrowing customer. In selling the property, the bank has a duty to take reasonable steps to obtain a proper price, such as holding a public auction where appropriate.

SECTION 7 PLEDGES

A. Characteristics of a pledge: transfer of possession of asset without transfer of ownership

22.7.1 A pledge operates upon the transfer of possession of the asset by the pledgor to the pledgee. There is no transfer of ownership.

B. Delivery of pledged item critical to creation of pledge and may be actual or constructive

22.7.2 Critical to the creation of a pledge is the delivery of the subject matter of the pledge. Delivery may be actual or constructive. For example, a pledge may be created over personal chattels, stocks or goods by actual delivery of the items or bill of lading relating to the goods.

C. Pledged assets retained by pledgee until secured debt is satisfied

22.7.3 The pledgee retains possession of the pledged assets until the secured debt is satisfied. If the pledgor does not repay the debt, the pledgee is entitled to sell the pledged asset and use the proceeds to satisfy the debt.

D. Implied term of pledge that asset may be sold to satisfy debt upon default in repayment

22.7.4 It is an implied term of the contract of pledge that the pledgee may sell the asset pledged to satisfy the debt on default of payment at the time fixed for repayment. Where there is no time fixed for repayment, the pledgee may demand payment and, in default of payment, sell on notice to the pledgor of his intention to do so. The pledgor has a right to redeem the pledge up to the time of the sale.

SECTION 8 LIENS

A. Characteristics of a lien: confers a right to retain lawful possession of property owned by another until a claim is met

22.8.1 The significance of a lien is that it confers a right to retain lawful possession of property owned by another person, until a claim by the person in possession against the owner is met.

B. Two types of lien: general and particular

22.8.2 There are two types of lien, namely, a general lien and a particular lien.

(1) General lien: gives right to lien holder to retain possession of property until all claims are satisfied

22.8.3 A general lien gives a right to the lien holder to retain possession of property of another until all claims against that person are satisfied. It usually exists as a common law right arising by usage or as a term in a contract. Examples of general liens created at common law are solicitors' lien, bankers' lien, stockbrokers' lien, insurance brokers' lien, and factors' lien.

(2) Particular lien: gives right to the lien holder to retain possession of property until expenses incurred in respect of the retained property are satisfied

22.8.4 On the other hand, a particular lien gives a right to the lien holder to retain possession of property of another until the expenses incurred in respect of the retained property is satisfied. A particular lien generally arises where property has been delivered to the lien holder for improvement and repair and he has expended skill or labour on the property. Upon completion of the work and provision of services, a particular lien arises upon the improved goods. A common example of a particular lien is an architect's lien on the plans he has prepared to secure his professional fees.

C. Creation of Lien: by common law, contract or statute

22.8.5 A lien may be created by common law, by contract, or by statute:

- A common law lien arises where the custom and usage in a particular trade has been so frequently recognised that the right of lien becomes part of the common law, and is accepted by the courts without further evidence. For example, at common law, a banker has a lien over the securities of a customer placed with the bank to cover the customer's indebtedness to the bank.
- Depending on the terms of the contract, a lien created by contract may be a general lien or a particular lien. As an example of a lien arising by contract, a banker often contracts with his customer to create a lien in the bank's favour over the customer's property to secure the customer's indebtedness to the bank.
- The scope and nature of a statutory lien are to be construed according to the words of the statute in question. A statutory lien may be a general lien or particular lien, depending on the provisions of the statute. An example of a statutory lien is the unpaid seller's lien where only part delivery of goods is made (see the Sale of Goods Act (Cap 393, 1999 Rev Ed), section 42).

D. Lien holder only has a passive right to detain property unless a power of sale is conferred

22.8.6 A holder of a common law lien only has a passive right to detain the property of another until his claim is met; he cannot recover the amount owing to him by disposing of the property. However, a power of sale may be conferred on the lien holder by statutory provisions or contractual terms. In the absence of a statutory or contractual power of sale, a lien holder may apply to court for an order of sale where it is desired that the property be sold at once.

SECTION 9 GUARANTEES AND INDEMNITIES

A. Characteristics of a guarantee: where a guarantor promises to answer for a debt owed by the principal debtor to the creditor

22.9.1 A guarantee is essentially a species of contract whereby a party (called the 'guarantor') promises to answer for the debt of a second person (called the 'principal debtor'), the promise being made to the creditor to whom the principal debtor is liable. A contract of guarantee is an ancillary contract and cannot exist unless there originally existed a principal debtor's obligation.

22.9.2 A guarantee is often given as a collateral form of security, e.g. a guarantee by a parent company in respect of the obligations of the subsidiary, or a guarantee by the directors of a company in respect of the company's obligations under the mortgage.

B. Requirement of corporate benefit given by a company

(1) Directors of company must act in the best interest of the company itself and not its group

22.9.3 Where a guarantee is to be given by a company to secure banking facilities granted to a borrower, the directors of a company must always act bona fide for what they consider to be in the best interests of the company itself and not the group of which it is a member. However, this is not to say that directors of a company in a group cannot consider the company's wider interests as a member of the group. The interests of the group may be relevant to deciding what is in the interests of the company. In addition, if the company is insolvent at the time the guarantee is given, the directors are also under a duty to consider the interests of the company's creditors.

(2) Test based on the standard of an intelligent and honest man in the position of the director

22.9.4 The proper test is whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company (Charterbridge Corporation Ltd v Lloyds Bank Ltd [1970] Ch 62, which was approved by the Singapore Court of Appeal in *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR (R) 1064; [1994] SGCA 142).

(3) Corporate benefit in a holding company/subsidiary relationship

22.9.5 The requirement of corporate benefit may be more readily established in the case of a guarantee given by a holding company to secure the obligations of a subsidiary. However, the giving of a guarantee by a subsidiary to secure obligations of its holding company is not so easily justified unless the guarantor is itself receiving the proceeds of the loan, possibly indirectly via inter-company loans. Other indirect benefits which may flow to the subsidiary guarantor, such as reduced cost of funding, or stronger or maintained financial capability of the parent, are factors which may be taken into account by the directors in assessing whether there is sufficient corporate benefit.

(4) Corporate guarantee given in furtherance of purpose which is not for benefit of the company

22.9.6 If the corporate guarantee was given in furtherance of some purpose which is not for the benefit of the company, for example, the guarantee is provided in order for a totally unrelated company to obtain a bank loan, the provision of the guarantee may amount to an abuse of the directors' powers, and the guarantee may be set aside if the bank had knowledge of the impropriety. The directors would be in breach of their duty as directors to act in good faith in the best interests of their company, and may be personally liable for any loss sustained by the company as a result of their actions.

C. Creation of a guarantee

(1) Guarantee must be in writing and signed by guarantor or someone lawfully authorised

22.9.7 Pursuant to section 6(b) of the Civil Law Act (Cap 43, 1999 Rev Ed), a guarantee is required to be in writing and signed by the guarantor or someone lawfully authorised by him to sign it.

(2) Joint and several guarantees must be signed by all who are named as sureties

22.9.8 In a joint and several guarantee, it is essential that all who are named as sureties in the guarantee should actually sign the guarantee; otherwise, those who have already signed will not be bound. In *Indian Bank v Ramachandran & Ors* [1991] 1 SLR(R) 511; [1991] SGHC 43, the Singapore High Court observed that a 'joint and several' guarantee carries with it the implication that it shall not be binding unless executed by all those named as guarantors therein. This is not a defence, but a condition precedent to a guarantor's liability.

Execution of guarantee in presence of a witness despite lack of requirement

22.9.9 Although there is no requirement for the execution of a guarantee to be witnessed, it is, and has long been the practice to execute guarantees in the presence of a witness or witnesses. There should be indorsed on or subscribed to the document, a statement that it has been so signed, and the attesting witness should sign his name to the statement and add his address and description. It is always advisable that the execution of guarantees should be attested according to the usual practice in order to preserve evidence of their execution.

D. Indemnity clause

(1) Guarantees usually drafted to take effect as both a guarantee and an indemnity.

22.9.10 In Singapore, guarantees are usually drafted in such a way as to take effect as both a guarantee and an indemnity. For example, the guarantee may include a clause which states that, aside from his obligations as a guarantor, each guarantor agrees to indemnify the bank against all claims, losses, etc. which the bank may suffer in relation to the advances to the borrower. In this way, each guarantor has also entered into a contract of indemnity with the lender.

(2) Indemnifier's liability independent of existence of a principal debtor's obligation

22.9.11 A contract of indemnity is a contract by one party to keep another harmless against loss. Unlike a guarantee, the liability of an indemnifier is independent of the existence of a principal debtor's obligation.

(3) No requirement for indemnity to be in writing or in a deed

22.9.12 There is no requirement for an indemnity to be in writing or in a deed, although for reasons explained above, it is usual practice for an indemnity to be executed as a deed and for the execution to be attested.

SECTION 10 SECURITY OVER BOOK-ENTRY SECURITIES

A. No security interest may be created in securities listed on the SGX-ST except as provided in section 130N, or pursuant to section 130P, of the Companies Act

22.10.1 In Singapore, no security interest may be created in securities listed on the Singapore Exchange Securities Trading Limited ("SGX-ST") except as provided in section 130N of the Companies Act (Cap 50, 2006 Rev Ed) or any other written law or any regulations made under section 130P. The security which may be created is statutory security, as provided under section 130N(2), or security created under common law, as provided by regulation 23A of the Companies (Central Depository System) Regulations (Cap 50, Rg 2) which is made under section 130P.

B. Book-entry securities and the Central Depository (Pte) Limited

(1) 'Book-entry securities'

22.10.2 Such securities are referred to as 'book-entry securities' in the Companies Act (Cap 50, 2006 Rev Ed) which are defined in Section 130A to mean listed securities, the documents evidencing title to which are deposited by a depositor with the Central Depository (Pte) Limited (the "Depository") and that are registered in the name of the Depository or its nominee and which are transferable by way of book-entry in the register maintained by the Depository in respect of book-entry securities and not by way of an instrument of transfer.

(2) The Depository

22.10.3 The Depository is a corporation established as a depository company for the purposes of the Companies Act (Cap 50, 2006 Rev Ed), which, as a bare trustee, operates the Central Depository System for the holding and transfer of book-entry securities.

(3) Only account holders or depository agents may deposit book-entry securities with the Depository

22.10.4 Book-entry securities can only be deposited with the Depository by a person who has an account directly with the Depository ("an account holder") or by a depository agent, but not by a sub-account holder.

(4) "Depository agent" and "sub-account holder"

22.10.5 A depository agent is a person or body approved by the Depository (This includes a member company of the SGX, a trust company registered under the Trust Companies Act (Cap 336, 2006 Rev Ed), or a banking corporation or merchant bank approved by the MAS under the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed)) which:

- i. performs services as a depository agent for sub-account holders in accordance with the terms of a depository agent agreement entered into between the Depository and the depository agent;
- ii. deposits book-entry securities with the Depository on behalf of the sub-account holders; and
- iii. establishes an account in its name with the Depository.

A 'sub-account holder' means a holder of an account maintained with a depository agent.

C. Statutory security in book-entry securities***(1) Statutory security under section 130N(2) can only be created in favour of an account holder or a depository agent***

22.10.6 With respect to the creation of statutory security, section 130N(2) of the Companies Act (Cap 50, 2006 Rev Ed) provides that a security interest in book-entry securities to secure the payment of a debt or liability may be created in favour of any depositor (i) by way of assignment, by an instrument of assignment in the prescribed form executed by the assignor, or (ii) by way of charge, by an instrument of charge in the prescribed form executed by the chargor. As such, a statutory security under section 130N(2) can only be created in favour of an account holder or a depository agent (and not a sub-account holder) and must be created by an instrument in a form prescribed by the Companies Act (Cap 50, 2006 Rev Ed).

(2) Disadvantages of statutory security

22.10.7 Consequently, in order to take a statutory security under section 130N(2) of the Companies Act (Cap 50, 2006 Rev Ed), the bank must either hold an account with the Depository or, be itself, a depository agent. In addition, because of the inflexible nature of the form prescribed for creating the statutory security, the nature of the security, the rights of the bank as beneficiary of the security and the obligations of the grantor of the security are quite restricted and the holding of such statutory security by a bank presents quite a number of disadvantages.

(3) Common law security over book-entry securities preferred

22.10.8 As a result, many banks in Singapore choose to take 'common law' security over book-entry securities, as provided for in regulation 23A of the Companies (Central Depository System) Regulations made under section 130P of the Companies Act (Cap 50, 2006 Rev Ed).

D. Common law security over book-entry securities

22.10.9 Essentially, in order to create common law security over scripless shares pursuant to regulation 23A, the grantor of the security and the bank would each open a sub-account with a depository agent selected by, and which is acceptable to, the bank. The grantor and the bank should then enter into a security agreement under the terms of which, the grantor will, inter alia, charge in favour of, and assign to, the bank all of its right, title and interest in and to the sub-account maintained by it with the depository agent, as well as all the book-entry securities held in that sub-account. Notice of that assignment should be given to, and be acknowledged by, the depository agent. Pursuant to the assignment, the bank, as the assignee of the grantor's rights, would be entitled to instruct the depository agent to transfer the scripless shares held in the grantor's sub-account to the bank's sub-account – although this should not strictly be necessary, as the security should be perfected once notice of that assignment has been given to the depository agent.

SECTION 11 ISLAMIC BANKING

A. Accommodating Islamic finance and conventional banking within a common regulatory framework

22.11.1 Recent years have witnessed a growing impetus for Islamic financial services to become part of Singapore's continuing development as an international financial centre. As corporations are increasingly tapping Islamic financing to raise funds, financial institutions have been encouraged to add Islamic financial products and services to the range of conventional financial services and products that are already available in Singapore. Whereas some jurisdictions have established a separate regulatory framework for Islamic financial services, the financial authorities in Singapore have decided that, for the time being, both Islamic and conventional banking shall be accommodated within a common regulatory framework. Towards this end, some legislative changes have taken place to accommodate and facilitate the development, within that current framework, of Islamic banking in Singapore.

B. Guidance on the regulation of Islamic banking in Singapore

Pursuant to the Banking Regulations (regulations 4A, 22, 23, 23A, 23B, 23C and 23E of the Banking Regulations), banks in Singapore may carry on and offer financing based on Islamic concepts of murabaha, ijara wa-gtina, diminishing musharaka and istisna. In 2010, the MAS issued its comprehensive 'Guidelines on the Application of Banking Regulations to Islamic Banking' which aims to provide banks with guidance on the regulation of Islamic banking in Singapore.

C. Overall policy approach: to align tax treatment of Islamic contracts with tax treatment of economically equivalent conventional financing contracts

The overall policy approach in relation to the tax treatment of Islamic financing products and instruments in Singapore has been to align the tax treatment of Islamic contracts with the tax treatment of those conventional financing contracts to which they are economically equivalent. The tax regime in Singapore has seen progressive modification with a view to achieving a level playing field for Islamic and conventional financial services with respect to taxation.