Banking secrecy under the Banking Act

Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland and Germany),
Solicitor (England & Wales and Hong Kong)
Of Counsel, KGP Legal LLC
alexander.ressos@kgplegal.com.sg
www.ressos.com.sg

The statutory tradition

Banking secrecy in Singapore rests on statute. The Banking Act was first introduced in Parliament in 1962, but because of issues connected with the introduction of a new currency it was enacted only as Act 41 of 1970, which came into force on 1 January 1971.[1] Before 2001 the old section 47(1) dealt mainly with the supervisor, since it generally prohibited the Monetary Authority from enquiring into the affairs of individual customers.[2] The common law recognised a duty of confidentiality, defined by the English Court of Appeal in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461. Until 2001 the two sources stood side by side.

The government regarded secrecy as an asset of the financial centre. In a parliamentary statement on the banking secrecy provisions, the government explained: "Tight banking secrecy is important to maintaining the confidence of customers in our banking system."[34] That sentence summarises the official view of the 2000s. Confidentiality was a public good because it sustained the trust of depositors and investors. It was also a competitive asset at a time when the government had chosen to compete for private wealth.

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The re-enactment of section 47 in 2001

In 2001 the government reviewed the legislation and replaced section 47 entirely. The Banking (Amendment) Act 2001, Act 23 of 2001, repealed the old provision and enacted a new section with a new Third Schedule.[56] Section 47(1) now provides: "Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person except as expressly provided in this Act."

The structure of the new provision was distinctive. Subsection (2) allows disclosure only for the purposes listed in the first column of the Third Schedule, to the persons listed in the second column and subject to the conditions in the third.[7] The Schedule is divided into two parts. Part I lists disclosures after which further disclosure is not prohibited, such as disclosure with the written permission of the customer, in connection with probate, bankruptcy or winding up, in proceedings between the bank and the customer, under a garnishee order, under the bankers' books provisions of the Evidence Act and for the investigation or prosecution of offences under written law. Part II lists disclosures after which the recipient is itself bound to secrecy, for example disclosures to officers, auditors and professional advisers of the bank.

A foreign bank's head office supervisor received special treatment. Disclosure to the parent supervisory authority of a foreign bank was allowed only where strictly necessary to comply with its request. Even then, no deposit information could be disclosed to it. For the Swiss and European banks that were expanding their Singapore operations, this meant that the deposit information of their Asian clients was protected even against the supervisors of their home countries.

Penalties and the protection of proceedings

The penalties were substantial. A person who contravenes section 47(1) or (5) is liable on conviction, in the case of an individual, to a fine not exceeding S$125,000 or to imprisonment for a term not exceeding three years or both. In any other case the fine may reach S$250,000.[8] Where customer information is likely to be disclosed in insolvency proceedings or in proceedings between the bank and its customer, the

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court may direct that the hearing be held in camera. Publication of information likely to identify a party in breach of such an order is itself an offence punishable by a fine of up to S$125,000.

Section 47(8) added a feature of particular interest to private banks. It provides, "for the avoidance of doubt", that nothing in the section prevents a bank from entering into an express agreement with a customer for a higher degree of confidentiality than the Act prescribes.[9] Section 47(9) obliges MAS to treat as secret any customer information it obtains incidentally during inspections that is not necessary for supervision. The statute therefore protected the client against the bank, against third parties and, within limits, against the supervisor.

The exhaustive regime confirmed

The re-enactment raised the question whether the common law exceptions recognised in *Tournier* still applied. The Court of Appeal answered it in *Susilawati v American Express Bank Ltd*, decided on 27 February 2009. The court held that section 47 is the exclusive regime governing banking secrecy in Singapore and that the statutory scheme leaves no room for the four general common law exceptions.[10] The decision is reported at [2009] 2 SLR(R) 737. Some commentators criticised the court for conflating the bank's contractual duty with its statutory duty, while others defended the result as the natural reading of the words "except as expressly provided in this Act".

The practical effect was a closed list. A bank in Singapore could disclose customer information only through one of the gateways in the Third Schedule. Victims of fraud seeking information before proceedings found that the bankers' books application under the Evidence Act was in practice the only route available.[11] For a wealth management centre, the closed list offered predictability to clients. It also limited the tools of creditors and foreign claimants, a tension that grew as the volume of foreign wealth increased.

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Secrecy and crime

The government always maintained that secrecy did not protect criminals. Item 5 of Part I of the Third Schedule permits disclosure for compliance with an order or request under written law in the investigation or prosecution of an offence, and for the making of a complaint or report of an offence.[12] The Mutual Assistance in Criminal Matters Act allowed Singapore to assist foreign states in criminal investigations. The weak point lay elsewhere. Foreign tax evasion was not, during most of the decade, a crime that triggered these gateways. Singapore's tax treaties allowed the exchange of bank information only in limited circumstances. In 2010 a spokeswoman of MAS described the position in these words: banking confidentiality provisions "protect the privacy of legitimate investors while allowing for banking information to be provided to foreign authorities where crimes or investigations are involved".[13]

The turning point came in 2009. In a press release dated 7 March 2009, six days before the Swiss Federal Council took the same step, the Ministry of Finance announced that Singapore endorsed the OECD standard for the exchange of information on request. It stated that the standard was "consistent with Singapore's system of banking confidentiality, which does not shelter criminals".[14] The OECD nevertheless placed Singapore in early April 2009 on its list of jurisdictions that had committed to the standard without having substantially implemented it.[15] The legislative changes that followed, and the later move to automatic exchange, are the subject of Chapter II of Part E.

Common misconception

It is often said that Singapore simply copied Swiss banking secrecy. The two regimes share the use of criminal sanctions. Their structure differs in a decisive respect. Article 47 of the Swiss Banking Act punishes the breach of a professional secret whose content is defined by private law and by the protection of personality. Section 47 of Singapore's Banking Act defines the permitted disclosures itself, in a closed list in the Third Schedule. After *Susilawati*, no common law exception survives beside it.

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Notes

1. Goh, CBFL Working Paper, 29 December 2016, cited above, section II and footnotes 12–14: the Banking Act was first introduced in Parliament in 1962 (Singapore Parliamentary Debates, 16 January 1962, vol 15); Act 41 of 1970, in force on 1 January 1971; the Malayan Banking Ordinance applied in the interim. Goh, CBFL Working Paper, cited above, section II and footnotes 28–29: the banker's duty of confidentiality was traditionally thought to be governed by the common law under *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 as well as by the Banking Act. ↩
2. Goh, CBFL Working Paper, cited above, section II: "the old Section 47(1) which generally prohibited the Monetary Authority of Singapore (MAS) from enquiring into the affairs of a customer" was replaced in 2001. ↩
3. Goh, CBFL Working Paper, cited above, section II, quoting the Singapore Parliamentary Debates: "The banking secrecy provisions of the Banking Act protect the confidentiality of customer information. Tight banking secrecy is important to maintaining the confidence of customers in our banking system". ↩
4. Goh, footnotes 3 and 15, cites the statement as Singapore Parliamentary Debates, 16 May 2002, vol 73, cols 1689–1690. ↩
5. Goh, CBFL Working Paper, cited above, section II: in 2001 the government undertook a review; "the erstwhile provisions under Section 47 of the Banking Act were completely repealed and replaced"; Banking Act (Cap 19), s 47 and Third Schedule as reproduced by DataGuidance, each subsection bearing the legislative note [23/2001]. Banking Act (Cap 19), s 47(1), text as amended by Act 23 of 2001, reproduced by DataGuidance, "The Banking Act (Cap. 19), s 46, s 47, sch 3". ↩
6. The amended section 47 is reported to have taken effect on 18 July 2001. ↩
7. Banking Act (Cap 19), s 47(2), as amended by Act 23 of 2001 (DataGuidance text, cited above). Banking Act (Cap 19), Third Schedule, Part I ("Further disclosure not prohibited"), items 1–9, and Part II ("Further disclosure

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prohibited"), item 1, as amended by Act 23 of 2001 (DataGuidance text, cited above). Banking Act (Cap 19), Third Schedule, Part I, item 8 and third column, condition (a): "No deposit information shall be disclosed to the parent supervisory authority"; condition (b) on the confidentiality obligations of that authority (DataGuidance text, cited above). ↩

8. Banking Act (Cap 19), s 47(6)(a) and (b), as amended by Act 23 of 2001 (DataGuidance text, cited above). Banking Act (Cap 19), s 47(3) and (4), as amended by Act 23 of 2001 (DataGuidance text, cited above). ↩
9. Banking Act (Cap 19), s 47(8), as amended by Act 23 of 2001 (DataGuidance text, cited above). Banking Act (Cap 19), s 47(9), as amended by Act 23 of 2001 (DataGuidance text, cited above). ↩
10. *Susilawati v American Express Bank Ltd* [2009] SGCA 8, CA 140/2007, decided 27 February 2009 (Chan Sek Keong CJ, Andrew Phang Boon Leong JA and V K Rajah JA, grounds delivered by V K Rajah JA): section 47 is "now the exclusive regime governing banking secrecy in Singapore", leaving "no room for the four general common law exceptions" in *Tournier*. Goh, CBFL Working Paper, cited above, footnotes 9 and 30–32: *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737, [64]–[70]. Goh, CBFL Working Paper, cited above, section II and footnote 33, citing the criticism of Tan Yun Hui and Poh Chu Chai and defending the interpretation in *Susilawati*. ↩
11. Goh, CBFL Working Paper, cited above, sections I–II: given the banking secrecy regime, likely only the bankers' books application under the Evidence Act remains available for pre-action discovery from banks. ↩
12. Banking Act (Cap 19), Third Schedule, Part I, item 5 (DataGuidance text, cited above). Goh, CBFL Working Paper, cited above, section II and footnote 24: the Mutual Assistance in Criminal Matters Act (Cap 190A) allows Singapore authorities, at the request of a foreign state, to facilitate the investigation and gathering of evidence in criminal matters. ↩
13. *Business Times*, 24 September 2010, cited above, quoting Jacqueline Ong, spokeswoman of MAS. ↩

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14. Ministry of Finance, press release "Singapore Endorses the OECD Standard for Exchange of Information", 7 March 2009: the standard "is consistent with Singapore's system of banking confidentiality, which does not shelter criminals"; it "does not preclude countries from having such confidentiality or privacy safeguards"; Singapore as "a trusted centre for finance and a responsible jurisdiction". Goh, CBFL Working Paper, cited above, footnote 21, dates the same press release 6 March 2009. For the Swiss decision of 13 March 2009, Ressos, *Genève, place financière internationale*, partie E, chapitre III. ↩

15. Ministry of Finance, parliamentary reply by Minister for Finance Tharman Shanmugaratnam to Ms Sylvia Lim, 28 May 2009, "Organisation for Economic Cooperation and Development (Singapore on the 'Grey List')": Singapore was placed on the list in early April 2009; the OECD "does not regard Singapore as a tax haven". ↩

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Author contact: Dr Alexander Ressos, TEP · contact@ressos.com

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