Anti-Money Laundering and Anti-Terrorism Financing Act 2001: Impact on the Duty and Liability of Banks

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I. Introduction

Money laundering is not a new phenomenon.[1] However the recent regional and global initiatives to counter money laundering have intensified as a response to the spectre of terrorism, especially in the wake of September 11. It is indisputable that money laundering, if left unchecked would have far reaching adverse implications, domestically and globally. Money launderers typically amass funds that are moved from one jurisdiction to another to escape detection, as well as to disguise or conceal the unlawful origins of their funds. The integrity and financial soundness of financial institutions may be affected by the increased volatility of inexplicable capital flows and exchange. Money laundering activities perpetuate crime as they encourage further criminal activities.

The banking system is regarded as the first line of defense against money launderers. The banking system is particularly vulnerable as the provision of banking facilities may inadvertently conceal or facilitate criminal purposes. Banking secrecy, traditionally a legal and

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[1] Money laundering legislation originated in the United States in 1970 with the passage of the Bank Secrecy Act, in response to organised crime, especially in illegal drugs. The Act imposed record keeping and reporting requirements on financial institutions.

moral obligation that banks owe to their customers further aids in the concealment of tainted funds. Banks being commercially driven, are typically more interested in keeping the business, than in driving away business to rival institutions through what may be regarded as cumbersome procedures in the verification of customers and monitoring of customers' transactions, except when strictly necessary. The replacement of traditional face-to-face banking by automation and the advent of internet, worldwide and 24-hour banking, not only depersonalises banking, but facilitates money laundering activities as banking transactions can be conducted virtually anytime, anywhere, under the cloak of anonymity.

While the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLA)[2] is of general application and seeks to establish a comprehensive legal and regulatory framework to combat money laundering and terrorism financing, the focus in this article is on banks, as one of the many "reporting institutions" with obligations under AMLA.

This article seeks to examine the duty and liability of banks under AMLA. The focus is on the imposition of obligations of customer identification and mandatory record keeping and reporting of suspicious and large transactions. The article examines the relevant provisions of AMLA, the duties and liabilities of banks prior to AMLA and examines to what extent these duties and liabilities have been extended by AMLA, and the resulting implications to the banker-customer relationship.

Examination of the above issues will be undertaken in three parts-the first examines specific major provisions of AMLA relevant to the subject under discussion, the second reviews the position prior to AMLA, and the third focuses on the impact of AMLA on the duty and liability of banks.

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[2] For an instructive examination of the Act, refer to Norhashimah Mohd Yassin, "An Examination of the Malaysian Anti-Money Laundering Act 2001(AMLA)" [2002] 6 CLJ i; "Precedents Relating to Money-Laundering" [2004] 3 CLJ i.

II. Anti-Money Laundering and Anti-Terrorism Financing Act 2001

The Anti Money Laundering Act came into force on 15 January 2002. AMLA was enacted to comply with Malaysia's obligation as a member of the Asia Pacific Group (APG) on Money Laundering. It incorporates internationally accepted standards to combat money laundering, in particular, the Forty Recommendations of the Financial Action Task Force on Money Laundering (FATF).[3]

As a result of the association of money laundering with terrorist financing, a substantively revised set of recommendations were released in 2003. Consequently FATF member countries (Malaysia being one) were required to update their respective Anti-Money Laundering laws. AMLA was amended to extend the mechanism under it (AMLA) to trace, freeze, seize and forfeit assets intended for the financing of terrorist acts, or assets belonging to known terrorists. The amendments to AMLA and the Penal Code to cover terrorist financing were also made to accede to the UN Convention for the Suppression of the Financing of Terrorism. The amended Act is now referred to as the Anti-Money Laundering and Anti-Terrorism Financing Act 2001. The provisions hereafter referred to in this paper are provisions in AMLA, except if stated otherwise.

A. *What is Money Laundering?*

The essence of money laundering is the concealment or disguise of the proceeds of criminal activities, to make them appear as legitimate.

According to s 3(1):

"money laundering" means the act of a person who -

[3] Malaysia became a member of the APG on 31 May 2000. Members include Australia, Bangladesh, Chinese Taipei, Fiji, Hong Kong, India, Japan, Malaysia, New Zealand, Pakistan, Indonesia, South Korea, Philippines, Samoa, Singapore, Sri Lanka and Thailand. Members share knowledge and expertise relating to measures to counter money laundering.

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(a) engages directly or indirectly, in a transaction that involves proceeds of an unlawful activity;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or

(c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity;

where -

(aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity;[4] or

(bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity;

The offence of money laundering is committed by any person who engages in, or attempts to engage in, or abets the commission of money laundering.[5]

It is clear that banks face potential liability if they turn a blind eye to circumstances that by objective standards should arouse suspicion of the origins of funds, or by their failure to act to ascertain the source of the funds. It would certainly be unusual for banks to act in complicity with money launderers, although the possibility of individual bank employees abetting or acting in concert with money launderers

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[4] According to s 3(1), "proceeds of an unlawful activity" means any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity.

[5] Section 4(1)(a) and (b).

is not far fetched. In such circumstances, are banks liable for the complicity of their employees? It would seem so. Pursuant to s 88, employers who fail to establish preventive measures in the form of procedures to detect money laundering may be vicariously liable for offences committed by their employees.[6]

B. *How is Money Laundered?*

Typically, there are three stages of money laundering:

1. *Placement*

This stage involves the physical deposit of the proceeds of the crime *eg* the deposit of cash in banking accounts, or the deposit of tainted valuables in safety deposit boxes. This might be done by breaking up large amounts of cash into less conspicuous smaller sums. They are then deposited directly into a bank account. At this stage the tainted proceeds are closest to the "perpetrator" and therefore measures to identify and link the tainted proceeds with the "perpetrator" are at its most effective.

2. *Layering*

After the funds have entered the financial system, the layering stage takes place. At this stage, the tainted proceeds are "laundered" through the process of conversion, movement or transfer. Funds are transferred among various accounts, at various banks across the globe or through multiple, often complex transactions intended to distance and disguise the true source of the funds. The transfer of funds across national borders, especially to jurisdictions with weak or non-existent anti money

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[6] Section 88(a) on "offence by an individual" provides:

> Where a person is liable under this Act to a penalty for any act, omission, neglect or default, he shall be liable to the same penalty for the act, omission, neglect or default of his employee, ... if the act, omission, neglect or default was committed by:
>
> (a) his employee in the course of the employee's employment.

laundering laws, or jurisdictions with strong banking secrecy provisions facilitate this process of layering. Identification and tracing of the proceeds have to take into account the complexities of pursuing the tainted proceeds and perpetrators across national borders. The "audit trail" becomes difficult to follow.

3. *Integration*

At this stage the tainted funds move to the third stage-integration in which the tainted funds find their way to legitimate individuals or organisations, where they are mixed or "integrated" with the legitimate funds or property of such individuals or organisations *eg* as real estate, luxury assets or business ventures. There is no apparent link between the funds and the criminal activities from which they were generated, facilitating the furtherance of criminal activities. The process of laundering "dirty money" is now complete.

C. *Retrospective and Extraterritorial Application*[7]

AMLA applies to property situated in Malaysia and outside Malaysia.[8] Thus the requirements of AMLA, *eg* the requirements of customer verification, record-keeping and reporting would apply to overseas branches and subsidiaries. Extraterritorial reach of AMLA is crucial as the rapid development in technology and communication allow for faster and easier cross border transfers, to avoid detection and prosecution.

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[7] Refer to Kriz, G, "International Co-operation to Combat Money Laundering: The Nature and Role of Mutual Legal Assistance Treaties" [1993] 1 CLJ xxvi. Refer also to the Mutual Assistance in Criminal Matters Act 2002.

[8] Thus banks incorporated in Malaysia with branches in foreign jurisdictions are subject to AMLA. They may also be subject to equivalent money laundering legislations in the host country. Conversely, foreign incorporated banks operating in Malaysia are subject to both money laundering legislations of their country of domicile as well as AMLA.

The Act also expressly provides that it applies to all money laundering offences[9] "whether committed before or after the commencement date"[10]. The retrospectivity of AMLA conflicts with Article 7(1) of the Federal Constitution that prohibits persons from being tried under retrospective criminal laws. A pertinent question to ask is how does this provision stand in the light of Article 4(1) of the Federal Constitution, wherein any law passed after Merdeka Day which is inconsistent with the Constitution shall to the extent of the inconsistency, be void?

D. *Establishment of a Competent Authority*[11]

Integral to a regulatory and supervisory framework to combat money laundering and terrorism financing is the appointment of a "competent authority" to carry out the functions of a financial intelligence unit (FIU). Bank Negara Malaysia has been appointed to this role pursuant to s 7 of AMLA. By virtue of s 8 of AMLA the FIU is empowered to receive and analyse information and reports from any person, including reporting institutions with regard to large and suspicious transactions. If the FIU, on analysis, has reason to believe the funds are the proceeds of an unlawful activity or linked to terrorist activity, the report and financial intelligence is forwarded to the relevant enforcement agency for investigation and subsequent prosecution. The FIU is also empowered to give instructions to banks (as reporting institutions) in relation to any information received as well as to provide training for

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[9] According to s 82 Jurisdiction -

(1) Any offence under this Act -

(a) on the high seas on board any ship or on any aircraft registered in Malaysia;

(b) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; or

(c) by any citizen or any permanent resident in any place outside and beyond the limits of Malaysia,

may be dealt with as if it had been committed at any place within Malaysia.

[10] Section 2(1).

[11] Refer to Part III of AMLA.

banks in respect of their reporting and record keeping obligation under AMLA.[12] The FIU also exercises powers of investigation, examination of person, and search and retention of documents.[13] The FIU is also vested with the power to issue guidelines, circulars or notices to banks in order to give effect to the provisions of AMLA.[14]

E. *Two Categories of "Whistle Blowers"*

Information on money laundering activities may come from two main reporting routes: from reporting institutions and individual informers.

1. *Reporting Institutions*

AMLA imposes specific obligations on reporting institutions. These institutions are listed in the First Schedule of AMLA. For present purposes, the list of "reporting institutions" includes commercial banks, merchant banks, Islamic banks as well as the Labuan offshore bank. In addition, a reporting institution is defined as "any person, including branches and subsidiaries outside Malaysia of that person, who carries on any activity, listed in the First Schedule".[15]

2. *Individual Informers*

By virtue of s 5 of AMLA, individuals may also disclose to an enforcement agency his knowledge or belief of money laundering activities. Such a disclosure shall not be treated as a breach of any restriction on the disclosure of information imposed by any law, contract or rules of professional conduct.[16]

Provided the disclosure was not made in bad faith, the informant also enjoys immunity from any loss arising out of the disclosure. Section

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[12] Section 8(3)(d).
[13] Refer to Part V.
[14] Section 21(1)(c).
[15] Section 3(1).
[16] Section 5(1)(b).

24 protects an informant from any civil, criminal or disciplinary proceedings arising out of such disclosure. This would cover the protection afforded to "whistle blowers" within the organisation *eg* a bank employee who has "inside" knowledge of "suspicious transactions" or dubious customers and discloses the same to an enforcement agency. In such circumstances, the employee cannot be sued by the customer, or indeed his employer, the bank, for damages for breach of contract and defamation, as the case may be.

F. *Tipping-Off*

Secrecy of disclosure and possible as well as ongoing investigations of suspicious customers and transactions of such customers is crucial to ensure effective enforcement of AMLA. The speed and expediency with which evidence of money laundering may be concealed or destroyed makes secrecy of paramount importance. Thus, any person, including banks, face potential liability in the event they divulge to other persons the possibility of an investigation or an ongoing investigation or that disclosure has been made to the relevant authorities.[17] Defences apply if it is proven that the person either, did not know or suspect that the disclosure was likely to prejudice the investigation or that he had lawful authority or reasonable excuse to make the disclosure.[18] In what circumstances would banks be permitted to raise such defences? An example would be disclosure by banks to third parties in response to an enquiry of a customer's creditworthiness (banking references).

G. *Banking Secrecy Overridden*

Wrongdoing is frequently cloaked in secrecy and unfortunately bank confidentiality can act as a barrier to bringing culprits to book. Section 20 of AMLA in categorical terms imposes a duty of disclosure on banks, "notwithstanding any obligation as to secrecy or other restrictions on the disclosure of information imposed by any written law or otherwise".[19]

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[17] Section 35(1).

[18] Section 35(4)(b).

[19] See ss 98-99 of the Banking and Financial Institutions Act 1989 (BAFIA) on "permitted disclosures" for an equivalent restriction on banking secrecy.

H. *Freezing of Movable Property*

Additional provisions seek to cut off the financial resources of criminals by the freezing, seizure and forfeiture of criminal proceeds, or assets intended for the financing of criminal activities. AMLA provides that the Public Prosecutor, after consultation with Bank Negara Malaysia, is empowered to issue an order to direct a bank "not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied".[20] In effect such an order acts as a legal bar to payment, similar to the imposition of a garnishee order or a *Mareva* injunction on a customer's account.

III. Banks Duties to Customers prior to AMLA

The specific duties examined are customer identification and the duty to inquire in suspicious circumstances.

A. *Customer Identification*

The duty of banks to verify the identity of customers, particularly as a prerequisite to opening a bank account, is well established by common law.

The bank's duty to verify the identity of their customer is crucial in order to invoke the protection of s 85 of the Bills of Exchange Act 1949. According to that section, banks are liable in conversion to the true owner of a cheque unless the banks had acted honestly and without negligence. Failure to properly identify their customers when opening accounts has been established by case law as imputing negligence. What is less clear however is the scope of "identifying information" which banks have a duty to verify.

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[20] Section 50(1).

In a number of cases such as *Ladbroke & Co v Todd*,[21] *St John's Hampstead v Barclays Bank Ltd*[22] and *Lumsden & Co v London Trustee Savings Bank*,[23] as well as the local case of *The Rubber Industry (Replanting) Board v HSBC*,[24] the banks concerned were found to be negligent in opening accounts without making adequate inquiries as to the true identity of their customers. This was seen to be particularly important in cases where the account holder was a foreigner, about whom little was known.

In *Lumsden & Co v London Trustee Savings Bank*, Donaldson J found the bank negligent as it had failed to follow up on inquiries and no attempt had been made to verify the identity of the customer. His Lordship said:[25]

> Again in the unsatisfactory position of a customer and a referee both newly arrived from abroad and to that extent liable to be more of an unknown quantity no attempt was made to obtain independent confirmation of Brown's identity, by for example, a request for the production of his passport. Last but by no means least, there was a failure to inquire further when Dr Blake failed to give any banker as a referee despite an express and very necessary request for this information. This above all else facilitated the assumption of a fictitious personality, buttressed by a fraudulent reference.

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[21] 30 TLR 433.

[22] (1923) 39 TLR 28. Acton J decided that a bank was negligent when it failed to detect that a customer had used a false name.

[23] [1971] 1 Lloyds Rep 114. Donaldson J found the bank negligent when it failed to follow up on inquiries and had made no attempt to verify the identity of the customer.

[24] [1957] MLJ 103.

[25] *Supra* n 23 at p 121.

However, in *Marfani & Co Ltd v Midland Bank Ltd*[26] involving a foreigner, the failure of the bank to verify the identity of their customer was not treated as imputing negligence on the bank as the customer had been introduced by a long established customer who had in the past introduced other satisfactory customers.

B. *Scope of "Identifying Information"*

In *Lloyd's Bank v E B Savory*,[27] the House of Lords by a majority laid down the rule that a bank when opening an account for a new customer should ascertain the name of the customer's employer. Failure to take this precaution may amount to negligence if the customer subsequently appropriates and pays into his account cheques of his or her employer. However in *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd*,[28] Harman LJ frowned upon this rule as imposing an onerous obligation on banks:

> In the latest case in the House of Lords on this subject, *Lloyd's Bank Ltd v E B Savory & Co*, it was held by the majority that a collecting bank had acted with negligence in not inquiring when two accounts were opened as to the employers of the customer. This seems to me a hard doctrine, but it has no application here. It cannot at any rate be the duty of the bank continually to keep itself up to date as to the identity of a customer's employer.

C. *Duty to Inquire in Suspicious Circumstances*

It is well established that banks acting in the capacity of collecting or paying bankers may be found to be negligent and liable to third parties

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[26] [1968] 1 WLR 956. In this case the plaintiffs alleged the bank had acted negligently when they opened the account without requesting the customer for identification, ascertaining his employer and previous banking references.
[27] [1933] AC 201. The case involved the perpetration of fraud by the deposit of cheques belonging to the account holders' employers.
[28] [1963] 1 QB 794.

if they failed to make inquiries when confronted with suspicious circumstances.

There are instances when the account or transactions involving the accounts of customers arouse suspicion. In *Lloyds Bank v The Chartered Bank of India, Australia and China*,[29] the Court of Appeal decided where the circumstances surrounding the deposit of cheques are unusual, banks are put on enquiry when it collects the cheque. In *Motor Traders Guarantee Corporation v Midland Bank Ltd*,[30] Goddard J was of the opinion that a collecting bank was under a duty to make inquiries where the account of the customer was operated in an irregular manner.

Paying banks may be liable as constructive trustees to third parties, as the following cases illustrate. In the case of *Karak Rubber v Burden*,[31] a bank had paid on a cheque to unauthorised persons. Brightman J, in finding the bank liable, stated that a bank is not an "automatic cash dispenser". The bank had a duty to exercise reasonable care and skill and "that care and skill must rationally include, in appropriate circumstances, a duty to inquire before paying". The matters to be considered include:

(i) first and foremost whether the operation was unusual and out of the ordinary course of banking business;

(ii) the magnitude of the transaction;

(iii) the time and opportunity available to the bank for making inquiry; and

(iv) the degree of suspicion which the known facts would have provoked in the mind of a reasonable banker.[32]

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[29] [1928] 44 TLR 534.
[30] [1937] 4 All ER 90.
[31] [1972] 1 WLR 602.
[32] *Id* at p 629.

D. *The Standard of Care*

In determining whether in the instant case the bank had acted negligently or not, courts frequently evaluate the banks' conduct by reference to tests or standards. Two such tests are:

(i) the "ordinary practice of bankers" test; and

(ii) the "protection against fraud" test.

The "ordinary practice of bankers" test was enunciated by the High Court of Australia in *Commissioners of State Savings Bank v Permewan, Wright & Co*, as follows:[33]

> The test of negligence is whether the transaction of paying in any given cheque, coupled with the circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the banker's mind, and caused them to make inquiry.

The Privy Council in *Commissioners of Taxation v English, Scottish and Australian Bank Ltd*[34] endorsed the test. According to this test, the standard of care expected of a banker is pegged to current prudent banking practice. As the Privy Council advised:

> If therefore a standard is sought, it must be the standard to be derived from the ordinary practice of bankers, not individuals.[35]

The same test was alluded to by Diplock LJ in *Marfani & Co Ltd v Midland Bank Ltd*:[36]

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[33] (1914) 19 CLR 457 at p 478.
[34] [1920] AC 683.
[35] *Ibid.*
[36] [1968] 1 WLR 956 at p 975.

> What facts ought to be known to the banker, that is, what inquiries he should make, and what facts are sufficient to cause him reasonably to suspect that the customer is not the true owner must depend on current banking practice, and change as that practice changes.

The "protection against fraud" test was formulated later by Lord Warrington in the case of *Lloyds Bank Ltd v EB Savory & Co* and expressed as follows:[37]

> The standard by which the absence, or otherwise, of negligence is to be determined must ... be ascertained by reference to the practice of reasonable men carrying on the business of bankers and endeavouring to do so in such a manner as may be calculated to protect themselves and others against fraud it is argued that ... a bank is not negligent, if it takes all precautions usually taken by bankers. I do not accept the latter proposition as true in cases where the ordinary practice of bankers fails in making due provision for a risk fully known to those experienced in the business of banking.

The standard of care expected of banks in the "protection against fraud test" is apparently higher than the ordinary practice of bankers' test. Banks that merely follow the current practice of banks, without regard to extenuating circumstances, may not escape liability, although Diplock LJ in *Marfani's* case, cautions:[38]

> ... but I venture to think that this court should be hesitant in condemning as negligent a practice generally adopted by those engaged in the banking business.

Simpson J in *National City Bank of New York v Ho Hong Bank Ltd* had cautioned against putting too onerous a burden on banks in the following terms:[39]

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[37] [1933] AC 201 at p 221.
[38] [1968] 1 WLR 956 at p 975.
[39] [1932] MLJ 64 at p 66.

> Moreover bank officials can be expected to be reasonably competent and careful but not to be amateur detectives and with a detective's trained powers of observation.

E. *Banking Secrecy*

At common law, it has long been established that banks owe a duty, subject to certain qualifications, to keep their customers affairs confidential. This duty is implied in the contract between banker and customer. The duty remains even after the termination of the banker-customer relationship. Breach of such duty would put banks at risk of an action for breach of contract by the affected customer. More importantly, such banks risk losing the confidence and goodwill of current as well as potential customers.

Nevertheless, there are qualifications to this duty. Bankes LJ in the classic case of *Tournier v National Provincial and Union Bank of England*[40] recognised four categories of qualifications to the duty of confidentiality, as follows:

(i) where disclosure is under compulsion by law;

(ii) where there is a duty to the public to disclose;

(iii) where the interests of the bank require disclosure;

(iv) where the disclosure is made with the express or implied consent of the customer.

In Malaysia the position on banking secrecy is governed by ss 97 to 102 of the Banking and Financial Institutions Act 1989 (BAFIA). These provisions, in effect, prohibit any director or officer of any financial institution from disclosing information on a customer's account to any person. However, ss 98-102 details what is expressed as "permitted disclosures". Among them:

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[40] [1924] 1 KB 461.

"where the disclosure is authorised in writing by Bank Negara Malaysia[41], or where such disclosure is authorised under any Federal law to be made to a police officer investigating into an offence specified in such law ..."[42]

The scope of exceptions or qualifications to the bank's duty of confidentiality under BAFIA is considerably more extensive than that laid down in *Tournier's* case.[43] This was the position even prior to AMLA.

Preventive measures to combat money laundering were not initiated by AMLA. Even prior to AMLA, Bank Negara Malaysia had put in place a supervisory framework for the compliance of financial institutions in the form of the "Guidelines on Money Laundering and Know Your Customer Policy".[44]

1. *Customer Identification*

Prior to the enactment of AMLA, Bank Negara had on 27 December 1993 issued the abovementioned Guidelines in an effort to combat money laundering through customer identification and verification, financial record keeping and mandatory reporting of suspicious transactions. The Guidelines, referred to as BNM/GP9, in effect requires banking institutions to determine the true identity of customers opening accounts or utilizing any other services of the banks. Banks were advised to develop a "transaction profile" of every customer with the objective of identifying unusual patterns of transactions or suspicious transactions.

2. *Reporting Suspicious Transactions*

The Guidelines require banks to report immediately to Bank Negara all cases of suspicious transactions. Banking institutions are also required

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[41] Section 99(1)(i) BAFIA.

[42] Section 99(1)(h) BAFIA.

[43] *Supra* n 40.

[44] Bank Negara Guidelines (BNM/GP9).

to identify a single reference point within their organisation to which unusual or suspicious transaction can be reported promptly. While the Guidelines encourage the use of a standard format to lodge the report, it is left to individual banks to establish proper procedures and appoint designated officers to liaise with Bank Negara.

There was no attempt to define the circumstances that would put the bank on enquiry or what would amount to suspicious transactions. However Appendix I of the Guidelines gives more than 40 examples of suspicious transactions in different banking transactions, *eg* "money laundering using cash transactions, money laundering using bank accounts, money laundering using investment related transactions". The Guidelines were largely intended to create an awareness of money laundering by giving examples of suspicious transactions that may reveal them as illegitimate funds. It was a precursor to AMLA.

However, BNM/GD9 lacked legal force, expressly stipulating:

> While there is no legal requirement at present for banking institutions to detect money laundering activities and report to the appropriate authorities, there is a moral and ethical obligation on the part of the banking institutions not to facilitate money laundering activities.[45]

The Guidelines remain in force even after the enactment of AMLA. They are intended to be complementary to AMLA.

IV. Duties and Liabilities of Banks under AMLA

AMLA criminalises money laundering and appoints the Financial Intelligence Unit of Bank Negara as the competent authority to implement and administer provisions of AMLA. As a reporting institution banks are required to put in place effective procedures:

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[45] BNM/GP9 at p 3.

(i) to ensure that persons conducting banking business are properly identified;[46]

(ii) to report suspicious transactions and cash transactions above a specified threshold;[47]

(iii) to keep and retain records of specified transactions;[48] and

(iv) to develop and implement an internal compliance programme[49]

For the purposes of this article, examination of the bank's liability under AMLA would focus primarily on the duty to verify the identity of account holders and the duty to report suspicious transactions. The duty of record keeping and implementation of compliance programmes, being largely operational, will be referred to briefly.

A. *Duty to Verify the Identity of Account Holder*

Banks are required to open and maintain accounts only in the names of the account holders.[50] This is further reinforced by s 16(1)(b) whereby anonymous accounts or accounts under fictitious, false or incorrect names are strictly prohibited. By virtue of s 18(2) where persons may be known by more than one name *eg* an alias, he is required to disclose the names to the bank before opening an account. Banks are required to report to the competent authority, a client or clients[51] who use a different name or names from the name by which he or they are commonly known. Contravention of s 18 by banks would be an offence which on conviction makes the bank liable to a

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[46] Section 16.
[47] Section 14.
[48] Section 13(3)(d).
[49] Section 19.
[50] Section 16 (1)(a).
[51] Section 3(1) defines "client" to include a customer. The usage of the term "client" applies to a wider class of persons dealing with banks. At common law, the term "customer" has a specific interpretation. See *Great Western*

fine not exceeding one million ringgit or to imprisonment for a term not exceeding one year or to both.[52]

In addition, banks are under a statutory duty to verify particulars of their "clients", which particulars include their identity, representative capacity, domicile, legal capacity, occupation or business purpose.[53] The verification applies, whether the "client" is an occasional or habitual client.[54] The above duty applies whenever the banks conducts business relations, and "particularly when opening new accounts or passbooks, entering into any fiduciary transaction, renting of a safe deposit box, or performing any cash transaction exceeding such amount as the competent authority may specify". Banks are also required to be alert to situations where the bank doubts that the person[55] is opening an account or conducting a transaction not as a principal but on behalf of some other person "particularly in the case of a person, who is not conducting any commercial, financial, or industrial operations in the foreign State where it has its headquarters or domicile".[56]

Banks are expected to take a greater interest in their customers and the transactions effected by them. Keeping a detailed "customer profile" and "customer transaction profile", continuous monitoring and surveillance must become part and parcel of "banking business".

Railway Co v London and County Banking Co Ltd [1901] AC 414, HL, *Commissioners of Taxation v English, Scottish and Australian Bank Ltd* [1920] AC683, HL, *Woods v Martins Bank Ltd* [1959] 1 QB 55; approved by *Oriental Bank of Malaya v Rubber Industry (Replanting Board)* [1957] MLJ 153, CA. In summary, the term "customer" applies to persons who open an account with the bank, or performs a service not on a casual basis.

[52] Section 18(5).

[53] According to s 16(2)(a), the documents for identification include the identity card, passport, birth certificate, driver's licence and constituent documents.

[54] Section 16(2).

[55] According to s 16 (4), "person" shall include any person who is a nominee, agent, beneficiary or principal in relation to a transaction.

[56] Section 16(3).

B. *Duty to Report Suspicious Transactions*

Section 14 of AMLA requires a reporting institution to make a prompt report to the competent authority:

(a) where the transaction exceeds an amount specified by the competent authority; and

(b) where the identity of the person involved, the transaction or other circumstances are such that gives an officer or employee of the reporting institution reason to suspect that the transaction involves proceeds of an unlawful activity.

Compliance with the requirement in paragraph (a) poses no problem. However, the same cannot be said of paragraph (b). Given the multiplicity, diversity and complexity of transactions, the ingenuity of criminals in "covering their tracks", plus the differing responses in terms of what would arouse the suspicions of an officer or employee of a bank (red flags), it would be difficult to ascertain when this duty is invoked and therefore a failure to act attracts potential liability. The case law on the standard of care that banks must exercise and instances when that standard has been regarded as breached, would certainly act as guidelines. The penalty for contravention of the abovementioned section on conviction is liability to a fine not exceeding one million ringgit or to a term of imprisonment not exceeding one year, or to both.[57]

C. *Duty of Record Keeping*

Banks, designated as reporting institutions, have a statutory duty to keep records of transactions involving domestic and foreign currency above a certain threshold to be determined by the FIU. The records are to be retained for a period of not less than six years from the date

[57] Section 17(4).

an account has been closed or the completion or termination of the transaction.[58]

D. *Duty to Implement Compliance Program*[59]

An integral part of the AMLA framework is the imposition of a statutory duty on banks to adopt, develop and implement internal programmes, policies, procedures and controls to guard against and detect money laundering offences. The programmes include:

(i) the establishment of procedures to ensure high standards of integrity of its employees and a system to evaluate the personal, employment and financial history of their employees;

(ii) on-going employee training programmes, such as "know your customer programme"; and

(iii) an independent audit function to check compliance with such programmes.

V. Consequences of Non-Compliance with AMLA

AMLA imposes a statutory duty on a reporting institution to comply with all obligations under the Act. Section 22 empowers the competent authority, upon application to the High Court, to enforce compliance with any obligations under AMLA, if the court is satisfied that the bank's failure to report was without reasonable excuse. Failure to comply with the directive would result on conviction to a fine not exceeding RM100,000 or imprisonment to a term not exceeding six months or to both. If the offence continues, a further fine not exceeding RM100,000 per day is imposed.

[58] Section 17(1).
[59] Refer to s 19.

VI. Conclusion

A. *Significance of AMLA*

From a consideration of the above, it is apparent that the bank's duty to verify the identity of the customer and to be put on enquiry in the face of suspicious circumstances existed even prior to AMLA. However there was neither a duty on banks to maintain records of specified transactions nor to develop and implement internal policies and procedures as part of the compliance programme. However AMLA ushered significant changes for banks, banking business, customers as well as third parties as discussed above.

To summarise, the duties imposed on banks by AMLA appears to be more extensive. In effect it imposes on banks a statutory duty to scrutinize every new account holder and to be on the alert for persons who may be known by different names. The "identifying information" that a bank has to elicit from every new account-holder is considerably more than that required by case law. The usage of the term "client" is deliberately wider than that of the term "customer", and explicitly includes the person who transacts with a bank on a one off or occasional basis. What would amount to suspicious circumstances, and the standard of care expected of a prudent banker, would still be a question to be determined on the individual facts. In this instance, case law would be especially useful.

The compliance framework under AMLA certainly places onerous duties on banks with severe penalties on contravention. These "new" duties certainly extend further than the duties imposed by common law. The implications for the customer are no less significant. Inroads have been made into the sanctity of client confidentiality and a customer is likely to be subjected to invasive due diligence. The banker-customer relationship is not just governed by implied and express terms customary to banker-customer relations, but also by statutory terms which may well takes precedence over the contractual terms.

Most significantly, AMLA is in the genre of a criminal statute with consequent criminal penalties on contravention of its provision. If the failure of banks to be vigilant to suspicious circumstances would have exposed them to liability in tort from the "true owner", the same lack of vigilance would be an offence punishable by a stiff fine.

While the need to put in place effective anti-money laundering laws is undisputed, one must not lose sight of the "costs" this translates into to the banks and the customer. The statutory requirement for banks to establish compliance programmes, staff training, procedures for record keeping and internal reporting mechanism will certainly drive up the cost of "banking business", as well as enforcement. Ultimately, will this "cost" be passed on to the customers?

B. *How Effective are Anti-Money Laundering Statutes?*

The primary objective of AMLA in imposing a stringent compliance program on banks is to guard against the banking system being used by money launderers. This has necessitated imposing additional duties and corresponding liabilities on banks. It has also re-written the terms of the banker-customer relationship. Has AMLA achieved its objective?

Banks are oriented towards serving their customers; they are not trained to be "detectives with a detective's trained powers of observation".[60] With primarily book knowledge of detection, they are probably familiar with certain kinds of frauds, like cheque or credit card frauds more than money laundering activities, even when committed before their very noses, on the premises of banks.

The reporting obligations imposed on banks may in the long run become counter productive. Banks, for fear of attracting liability, or indeed losing their banking licenses, may err on the side of caution, reporting every transaction that appears even slightly dubious. The

[60] *Lloyd's Bank Ltd v Chartered Bank of India, Australia, China* [1929] 1 KB 40.

competent authority, overwhelmed with reports may find the task of sieving the legitimate from the illicit transaction difficult, somewhat equivalent to looking for a needle in the haystack. In a study in the United States of America, it was revealed that an estimate of only 1% of suspicious transactions reported resulted in a conviction.[61] It is certainly true that most clients of banks are "legitimate". However AMLA in its effort to apprehend the few "illegitimate" clients casts a wide regulatory net.

At the end of the day, the question that may be asked is that are such AMLA measures producing results that commensurate with the employment of resources? The AMLA may have put a damper to criminals as it were, laughing all the way to the bank, but there are "launderettes" other than banks, and criminals wise up soon enough to seek other avenues. A recent study in US found that the focus of anti money laundering measures on financial institutions resulted in criminals using the postal system, said to provide the cheapest and most efficient way to move tainted money.[62] What may well transpire is that while criminals find alternative "launderettes", banks are left with onerous duties of customer identification, record keeping and reporting of suspicious transactions, and customers have to bear with invasive "due diligence" conducted on them, while money launderers as it were "have left the building". Be that as it may, it may well be true, as the argument goes, that should such preventive measures be lifted from banks, criminals would certainly and quickly find their way back!

It is still too early to evaluate the effectiveness of AMLA and its far reaching implications to the banker-customer relationship. For AMLA to be effective and fulfill the objectives for which it was intended, banks must not view AMLA as just another compliance issue to be performed in a perfunctory way, for that would defeat the very purpose for which AMLA was conceived.

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[61] Refer to "Money Laundering and Terrorism: A Failed Past and a Bleak Future", accessed at http://www.fed-soc.org/Publications/Terrorism/financialone.htn, accessed on 29 November 2005.
[62] *Ibid.*