Reporter
Issue 04/2016

DENTONS RODYK

Business bulletins

Revised listings due diligence guidelines issued by the Association of Banks in Singapore

By Kenneth Oh (Senior Partner, Singapore) and Hsu Li Chuan (Partner, Singapore)

Background

The Association of Banks in Singapore (ABS) introduced its revised due diligence guidelines (Enhanced Guidelines) in respect of listings on the Singapore Exchange Securities Trading Limited (SGX-ST) on 13 May 2016. These guidelines are recommended by the ABS as guidance on the due diligence procedures and processes required of its member banks in the context of initial public offerings in Singapore.

Based on input from the SGX-ST, auditors, lawyers, local and international banks, and corporate finance firms, the revisions were introduced with the aim of raising the standards for such due diligence activities and reflect the knowledge gained by industry practitioners from their experience in dealing with companies. The Enhanced Guidelines also seeks to align with the SGX-ST's experience with, and expectations of, listing application submissions. In particular, some of the major enhancements to the Enhanced Guidelines include matters which the SGX-ST deems important for companies to resolve at the early stage of the listing application process.

This article seeks to broadly present the key enhancements introduced.

Key enhancements

1. Scope of application

   The Enhanced Guidelines spells out its enhanced scope of application, with appropriate modifications, in respect of (a) an offer of securities by a business trust or real estate investment trust seeking a listing on the mainboard of the SGX-ST, (b) an offer of securities by a corporation seeking a listing on the Catalist, (c) a listing by way of introduction and (d) a reverse takeover. In reflecting the enhanced scope, the Enhanced Guidelines, formerly named "ABS IPO Due Diligence Guidelines" has been renamed "ABS: Listings Due Diligence Guidelines".

> Read more on page 2

In this issue...

MCI (P) 082/05/2016.

2. Recommended procedures

The recommended procedures to be undertaken are specified to include three broad aspects, namely: (a) management, directors and controlling shareholders of the issuer, (b) the business of the issuer, and (c) expert sections of the prospectus. At the same time, clarification was made that the Enhanced Guidelines does not prescribe any form or structure of due diligence processes, in its emphasis that the issue manager should exercise its judgement appropriate to the context and circumstances in determining the investigations or steps appropriate or applicable in the case of a particular issuer.

3. Management, directors and controlling shareholders

CFOs and resignations / cessation of management and controlling shareholders

In respect of the chief financial officer, issue managers will have to consider whether such a person is related to the chairman, the chief executive officer, the executive officers and/or the controlling shareholders. Issue managers have to also consider whether there are any indications that the management, directors and controlling shareholders who have recently resigned or ceased to be such persons (as the case may be) have done so for reasons that raise questions about the issuer, or the conduct or attitudes of the remaining management, directors and controlling shareholders.

Allegations/complaints against issuer, directors, executive officers and/or controlling shareholders

Issue managers should investigate all allegations or complaints, where there are any, against the issuer, directors, executive officers and/or controlling shareholders.

Golden parachutes

Where key management service contracts include golden parachute payments, issue managers should, in determining whether such golden parachute payments are in line with market practice and do not constitute a poison pill, obtain an opinion by an independent financial adviser where necessary.

4. Business of the issuer

Based on reasonable due diligence, the issue manager should achieve a thorough understanding of the issuer and its business, including recent major developments relating to it, and gain an understanding of the industry the issuer operates in.

Certain specific clarified areas include the following:

Material assets

Issue managers are also to include site visits to material assets, which may include inventory and biological assets such as livestock and crops. Local counsel should be engaged to verify title to assets, and that all key approvals have been obtained to operate the assets.

Whether a production facility, property or asset is material

In determining whether a production facility, property or asset is material, the issue manager may consider the following factors:

a. whether it represents a material component in the issuer's balance sheet;

b. whether it contributes to a material portion of the issuer's revenue;

c. whether it has any encumbrances that may materially and adversely impact the issuer's operations;

d. whether it has any potential defects that may materially and adversely impact the issuer's operations, or that may have a material and adverse environmental impact; and

e. whether it has a material re-development potential.

> Read more on page 3

Customers and suppliers
Where there is a material dependency on any particular supplier or customer or groups of suppliers or customers, issue managers should also assess whether the directors, executive officers, controlling shareholders and their associates have any interest and/or are involved in the management of these parties.

In the case of the issuer's distribution and marketing network and plans, issue managers should consider interviews with key distributors.

Issue managers are also to ascertain whether there are any material agreements with clauses, such as entrenchment of controlling shareholder(s)/unitholder(s) or sponsor in the case of a trust, which may result in a material adverse impact on the issuer's business and if so, to make an assessment of such clauses.

Non-compliance with laws and regulations
Issue managers should review any non-compliance with laws and regulations by the issuer (whether repeated or not) which may result in an adverse impact to the issuer's financials and/or operations, as well as the issuer's procedures to prevent a repeat. In addition, the involvement of independent advisers, investigators or experts, including legal counsels, in such review could be considered, where reasonable and appropriate to do so.

The issue manager should also review adverse findings by regulatory authorities arising from audits or inspections of the issuer by such authorities.

Pending key regulatory approvals and licences
Where key regulatory approvals and licences are pending, the involvement of independent advisers, investigators or experts, including legal counsels, in due diligence, could be considered where reasonable and appropriate to do so.

Financial health of the issuer
Issue managers should assess the issuer's business vis-à-vis its competitors and its industry, as well as the vulnerabilities and sustainability of the issuer's business. Where practicable, an issue manager should consider the involvement of its sector specialists in the financial health review of the issuer.

Issue managers should also consider whether disclosures made in respect of the issuer's cash deposits and other related disclosures in the accounts or financial statements reported by reporting accountants, are consistent with their observations from their discussions with the directors and management of the issuer. In reviewing cash deposits, issue managers should enquire whether there are any restrictions on remittances of cash from the issuer's overseas subsidiaries to the relevant holding company, and whether there are any charges or encumbrances on such cash deposits, and if so, whether these are consistent with any restrictions and charges disclosed in the audited financial statements.

Additionally, issue managers should consider whether the financial ratios of the issuer are in line with the industry norms and if not, whether there are relevant factors to explain such deviations.

Profitability and sustainability
Issue managers should consider the profitability of the issuer and the competitive advantages that will support the sustainability of the business, as well as review the prospects of the business to assess the viability of the business. The issue manager should seek to understand the revenue and cost drivers of the issuer's business.

> Read more on page 4

Taxation

The issue manager should conduct routine enquiries of the issuer's management, external auditors and tax adviser (if any), aiming to identify any material issues which may warrant further enquiries and to ascertain the following:

a. whether all material tax liabilities have been identified and addressed by the issuer;

b. whether taxes due have been paid;

c. whether current and deferred tax payments have been provided for;

d. whether the issuer's tax position has been adequately disclosed in the prospectus; and

e. whether the amounts of taxable income and revenue/costs declared to relevant tax authorities in the tax filings are consistent with the issuer's audited financial statements and whether the amounts of taxation paid by the issuer as disclosed in the prospectus may indicate any irregularities,

to the extent a reasonable non-expert could carry out such enquiries.

Corporate structure and ownership

Issue managers should review non-traditional/complex structures of the issuer. This is to ensure that the proposed structure is in compliance with the relevant laws and regulations in which the issuer operates. The issue manager should assess whether the group structure is unnecessarily complex such that it could raise suspicion on the legitimacy of the issuer's activities (for example, if there is any difficulty in determining the organisation or individual that owns and/or controls the issuer or to obtain access to them). The issue manager should also consider if there are significant subsidiaries or operations in non-home country jurisdictions that do not appear to have any clear commercial purpose.

Anti-Money Laundering (AML) and Countering Financial Terrorism (CFT)

Issue managers should conduct acceptable AML and CFT due diligence and procedures on the activities and operations of the issuer and its affiliated companies and its directors, officers and employees. This includes screening against relevant money laundering and terrorism financing information sources, as well as lists and information provided by

> Read more on page 5

relevant authorities in Singapore, for the purposes of determining if there are any money laundering or terrorism financing risks in relation to the issuer. The issue manager shall be able and willing to furnish, without delay, at the request of the SGX-ST, any data, documents or information arising from its conduct of such AML and CFT due diligence.

Territories involved

Issue managers should seek to understand if there are any operations in overseas territories and the economic and business environment of such territories. If the overseas territory involved is regarded as a high risk area (for example, where there is political instability, a weak legal framework and/or the existence of a culture of bribery), the issue manager should assess if it will impact the general reputation of the issuer group.

5. Expert sections in the prospectus

Suitability of Experts

In elaborating on the suitability of a relevant adviser or expert, issue managers should take into consideration the track record and specific experience (including prior experience in listings) of the relevant adviser or expert. In the case of property valuers, issue managers should take into consideration whether the valuers are internationally reputable valuers who have the necessary experience and track record to provide impartial and robust valuations. In the case of foreign legal advisers, issue managers should note that where a foreign legal adviser is not ranked by Chambers & Partners, the issue manager may be required by the SGX-ST to demonstrate that it has conducted the necessary assessment to ascertain the suitability of appointment of such foreign legal adviser.

Conclusions or opinions of experts

Issue managers, when relying on conclusions or opinions of experts in the expert sections of the prospectus, should be satisfied that such reliance is reasonable in the circumstances and should have no reasonable grounds to believe that the information in the adviser's and/or expert's opinion/report is untrue, misleading or contains any material omission.

In this regard, the issue manager should review the expert's report or opinion and actively raise queries on any problem areas with the expert where there are indications of inadequacy or unreliability with the expert's opinion/report. In conducting such a review, the issue manager has to, among others, additionally look out for material discrepancy or inconsistency against the information and disclosures obtained or findings made by the issue manager in the course of its due diligence, as well as assess (to the extent a reasonable non-expert could make such an assessment) whether the assumptions, on which the expert's report or opinion are based, are fair and reasonable.

Where the expert's opinion or report is qualified, the issue manager should assess (if necessary, in consultation with legal advisers) whether such qualification is required to be clearly disclosed in the prospectus and, if so, ensure its proper disclosure.

Conclusion

The amendments made resulting in the Enhanced Guidelines reflect a greater degree of detail, comprehensiveness and thoroughness in the due diligence procedures to be undertaken by issue managers and sponsors, in recognition of their key role and responsibilities in the listing process, and specifies some of the measures that have been informally practised, one way or other, by existing issue managers and sponsors.

The Enhanced Guidelines also reflects a clearer alignment with the requirements of the SGX-ST's listing rules, increasing the robustness of the listing process and with the aim of enhancing the quality of listings on the SGX-ST.

The Enhanced Guidelines can be obtained at the following links:

- ABS: Listings Due Diligence Guidelines
  (http://abs.org.sg/docs/library/abs_listings_due_diligence_guidelines.pdf)
- ABS Media Release
  (http://www.abs.org.sg/docs/library/media-release-20160516.pdf)

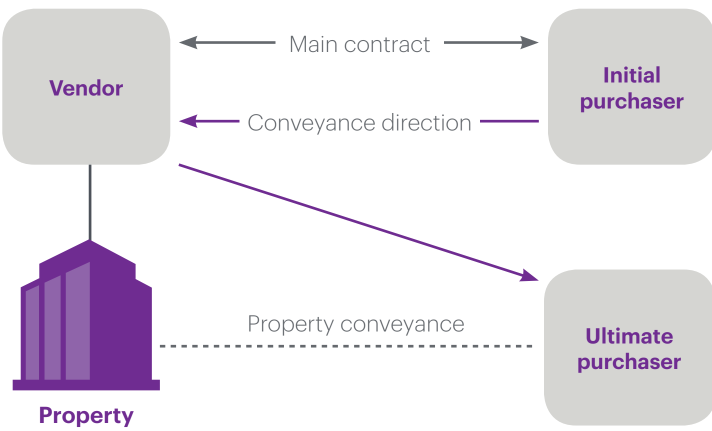
Dentons Rodyk acknowledges and thanks Matthew Yeo for his contribution in the writing of this article.

Remission of stamp duty on certain conveyance directions – Licensed housing developers

By Seow Jia Xian (Partner, Singapore) and Jeannette Lim (Partner, Singapore)

Introduction

1. Where a party (Vendor) enters into an agreement (Main Contract) to transfer any immovable property (Property) to another party (Initial Purchaser), and before having obtained a conveyance of the Property, the Initial Purchaser issues a direction in writing (Conveyance Direction) to the Vendor to convey or transfer that Property to another party (Ultimate Purchaser), stamp duty is payable on the Conveyance Direction.



2. This article examines the ways in which the Ultimate Purchaser may obtain remission of duty that is otherwise chargeable on Conveyance Directions, and where the land in question is purchased specifically by licensed housing developers as defined under the Housing Developers (Control and Licensing) Act (Cap. 130), for the purposes of housing development.

Buyer's stamp duty

3. The Buyer's Stamp Duty (BSD) is chargeable on the Conveyance Direction.

4. The applicable rate of BSD is 3% of the consideration or market value (whichever is higher) less a concession of S$5,400 if the value of the Property is above S$360,000.

Remission of BSD

5. Under the Stamp Duties (Conveyance Directions) (Remission) Rules 2015 (the CD Remission Rules), a party may apply for remission of BSD if the Commissioner is satisfied that:

    i. the Initial Purchaser entered into the Main Contract with the intention that the Property be transferred to the Ultimate Purchaser, which must be a company that is or is to be incorporated by the Initial Purchaser (Subsidiary);

    ii. no consideration is paid or agreed to be paid between the Initial Purchaser and the Ultimate Purchaser/ Subsidiary with regard to that Property;

    iii. duty had been duly paid upon the Main Contract;

    iv. the Conveyance Direction is made not more than two months after the date of the Main Contract; and

    v. the Initial Purchaser has and retains a "controlling interest" (as defined in the CD Remission Rules and reproduced in the Annex below) in the Ultimate Purchaser/ Subsidiary for the entire duration of the relevant period as follows:

        a. if, on the date of the Main Contract, there is a "development" on the Property that has yet to be completed, or there is to be a development by the Ultimate Purchaser/ Subsidiary on the Property that has yet to commence, the relevant period starts on the "material date" (as defined in the CD Remission Rules and reproduced in the Annex below) and ends on —

            1. the date of issue of the Temporary Occupation Permit (TOP) for the building that is the subject of the development; or

            2. if more than one TOP is to be issued for the building or buildings that is or are the subject of the development, or the parts of the building or buildings, the date of issue of the last of those TOPs;

        b. in any other case, the relevant period starts on the material date and ends on the date of the transfer of the Property to the Ultimate Purchaser/ Subsidiary because of that Conveyance Direction.

> Read more on page 6

6. IRAS has stated (for example, on its website at https://www.iras.gov.sg/irashome/Other-Taxes/Stamp-Duty-for-Property/Claiming-Refunds-Remissions-Reliefs/Remissions/Conveyance-Directions as of 27 June 2016) that it requires that "at the point of contract, there is a clear intention that the purchaser wants the property to be transferred to the company incorporated (or to be incorporated) by the purchaser".

7. As IRAS may require evidence of such intention in assessing an application for remission, it would be prudent for the Initial Purchaser and/or Ultimate Purchaser/ Subsidiary to determine at or prior to the Main Contract, whether or not the Initial Purchaser intends to incorporate a company to hold the Property and have readily available contemporaneous evidence of such intention (e.g. minutes of meeting or board papers or other memoranda).

Additional buyer's stamp duty

8. The Additional Buyer's Stamp Duty (ABSD) is chargeable on the Conveyance Direction where the Ultimate Purchaser is a company.

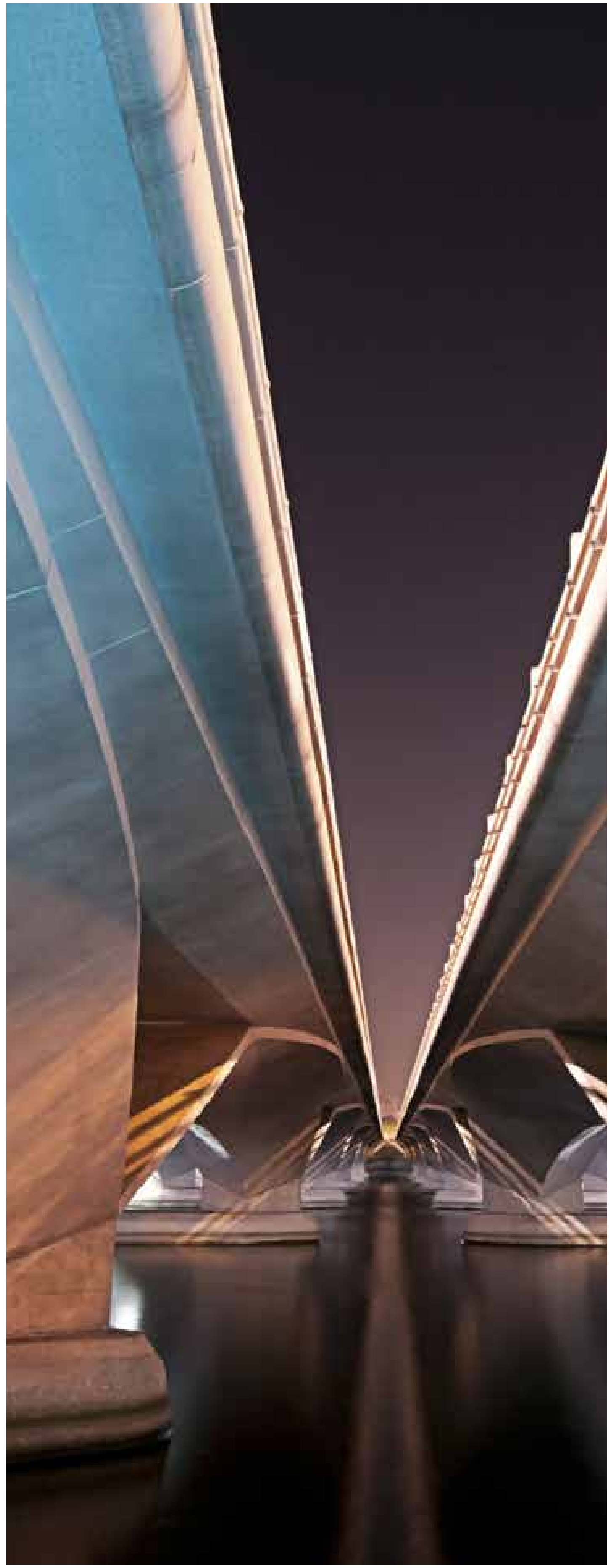
9. Where the Ultimate Purchaser is a company, the applicable rate of ABSD is 15% of the consideration or market value (whichever is higher) of the Property.

Remission of ABSD

10. In the specific case of licensed housing developers as defined under the Housing Developers (Control and Licensing) Act (Cap. 130), remission of ABSD may be available under the Stamp Duties (Housing Developers) (Remission of ABSD) Rules 2013 (G.N. No. S 362/2013) (the HD ABSD Remission Rules).

11. Under the HD ABSD Remission Rules, remission is available for chargeable instruments relating to a sale of residential property to a "qualifying developer" (as defined in the HD ABSD Remission Rules and reproduced in the Annex below) for the purpose of "housing development" (as defined in the HD ABSD Remission Rules and reproduced in the Annex below) by the qualifying developer and is to be executed on or after 8 December 2011.

> Read more on page 8



Such remission is subject to the following conditions:

i. If the purchaser is a qualifying developer, but is not a licensed housing developer, he is granted the licence within two years starting from the date of execution of the instrument;

ii. The licence which the purchaser holds or (if he is not a licensed housing developer) which he is subsequently granted, authorises him to undertake housing development on the residential property in respect of which the instrument is executed;

iii. The purchaser commences housing development on the residential property within two years starting from the date of execution of the instrument.

iv. The purchaser completes the housing development, and sells all the units of housing accommodation that are the subject of the development within five years starting from the date of execution of the instrument.

v. The purchaser provides to the Commissioner, within two years starting from the date of execution of the instrument or by such earlier or later date as the Commissioner may require or permit in any particular case —

1. a copy of the purchaser's licence pursuant to the Housing Developers (Control and Licensing) Act (Cap. 130);

2. a copy of the approval of the Controller of Residential Property referred to in section 31 of the Residential Property Act (Cap. 274) (if applicable) in respect of the housing development; and

3. such other documents as the Commissioner may require to satisfy himself that the conditions under sub-paragraphs (iv), (v) and (vi) have been complied with.

vi. The purchaser provides to the Commissioner, within five years starting from the date of execution of the instrument or by such earlier or later date as the Commissioner may require or permit in any particular case, a copy of the TOP or CSC in respect of the units of housing accommodation, and such other documents as the Commissioner may require to satisfy himself that the condition under sub-paragraph (vii) has been complied with.

vii. The purchaser provides to the Commissioner on the date of execution of the instrument or by such later date as the Commissioner may permit in any particular case, a written undertaking to comply with all the conditions in sub-paragraphs (i) to (vi) above.

12. However in the specific situation where the Main Contract is subject to a Conveyance Direction, the Initial Purchaser will be subject to BSD on the Main Contract (BSD remission pursuant to the CD Remission rules under paragraphs 5 to 7 above only applies on the Conveyance Direction), and it would also normally be unable to qualify for ABSD remission on the Main Contract for the sale of residential property under paragraph 11 above, as it is not the legal entity undertaking the housing development and hence would not be able to meet the conditions for "qualifying developers" for the purposes of this particular residential property being purchased.

13. Nevertheless, under the HD ABSD Remission Rules, remission of ABSD will be allowed on both a Main Contract for the sale of residential property, and its accompanying Conveyance Direction subject to all of the following conditions:

> Read more on page 9

i. The Ultimate Purchaser is a company and a qualifying developer, and satisfies paragraphs 11(i) to (vii) above from the date of the Main Contract.

ii. The Initial Purchaser must have entered into the Main Contract with the clear intention at the onset that the property be transferred to another company (i.e. the Ultimate Purchaser) which the Initial Purchaser had at the date of the execution of the Main Contract, intended to be incorporated or has incorporated (ie. the Subsidiary) for the purpose of a housing development by the Subsidiary/ Ultimate Purchaser.

iii. The Conveyance Direction for the conveyance or transfer of the property to the Ultimate Purchaser/ Subsidiary is made not more than two months starting from the date of the execution of the Main Contract.

iv. No consideration passes between the Initial Purchaser and the Ultimate Purchaser/ Subsidiary for the conveyance or transfer.

v. At all times between the date of the execution of the Main Contract and the date of issue of the TOP or Certificate of Statutory Completion (CSC) for all units of housing accommodation that are the subject of the housing development (both dates inclusive), the Initial Purchaser has a controlling interest in the Ultimate Purchaser/ Subsidiary similar to that set out in the CD Remission Rules (and as reproduced in the Annex below).

vi. BSD must have been paid on the Main Contract.

14. We summarize the relevant BSD and ABSD remission implications discussed above in the table below:

	Main Contract	Conveyance Direction
BSD	No remission available	Remission available under the CD Remission Rules (paragraphs 5-7 above)
ABSD	Remission available under the HD ABSD Remission Rules (paragraph 13 above)	Remission available under the HD ABSD Remission Rules (paragraph 11 above)

15. From the above, it is clear that it is easier for a housing developer to qualify for BSD remission than ABSD remission for Conveyance Directions. To qualify for BSD remission, only a "development" on the Property is necessary (including any number of units of housing accommodation), and there is no requirement for the Ultimate Purchaser/ Subsidiary to be a qualifying developer. This is in contrast to the purpose of the Property being limited to "housing development", meaning a development of 5 or more units of housing, and also the Ultimate Purchaser/ Subsidiary being required to be a qualifying developer for ABSD remission on a Conveyance Direction. Furthermore, the Ultimate Purchaser/ Subsidiary has to satisfy the 2-year and 5-year conditions specified in paragraph 11(i) to (vii) above, in order to qualify for ABSD remission on a Conveyance Direction.

> Read more on page 10

Seller's stamp duty

16. The Seller's Stamp Duty (SSD) is normally chargeable on the Conveyance Direction if the Conveyance Direction is issued within four years from the date of the Contract.

17. The applicable rates of SSD are as follows:

    i. Holding period of 1 year :
    16% of price or market value, whichever is higher

    ii. Holding period of 2 years :
    12% of price or market value, whichever is higher

    iii. Holding period of 3 years :
    8% of price or market value, whichever is higher

    iv. Holding period of 4 years :
    4% of price or market value, whichever is higher

Remission of SSD

18. However, where the Ultimate Purchaser qualifies for remission of BSD on the Conveyance Direction subject to the conditions specified in the CD Remission Rules (and as set out in paragraph 5 above), the Initial Purchaser will similarly enjoy remission of SSD on the same Conveyance Direction.

Annex

The following terms bear these definitions in the Stamp Duties (Conveyance Directions) (Remission) Rules 2015:

I. "controlling interest", in relation to the ultimate purchaser, means —

    a. a beneficial interest in more than 50% of the shares in the ultimate purchaser; and

    b. holding more than 50% of the votes attached to the voting shares in the ultimate purchaser;

II. "development" means the construction of a building, including any building operations in, on, over or under the land for the purpose of erecting such building, and includes housing development;

III. "material date" means either of the following dates, whichever is the later:

    a. the date of the contract;

    b. the date of incorporation of the ultimate purchaser;

IV. "Temporary Occupation Permit", in relation to a building or part of a building, includes the Certificate of Statutory Completion for the building or part (or a building that includes the part), but only if no Temporary Occupation Permit is issued for the building or part under the Building Control Act (Cap. 29).

The following terms bear these definitions in the Stamp Duties (Housing Developers) (Remission of ABSD) Rules 2013:

I. "develop", "housing accommodation", "licence" and "licensed housing developer" have the meanings given to those expressions in the Housing Developers (Control and Licensing) Act (Cap. 130);

II. "housing development" means the development of more than 4 units of housing accommodation;

III. "qualifying developer" means a company —

    a. which is a licensed housing developer; or

    b. which is an applicant for a licence and whose application is not refused, or which intends to apply for a licence.

The Mergers and Acquisitions Incentive Scheme for Singapore companies

By Gerald Singham (Deputy Managing Partner, Singapore) and Ray Chiang (Partner, Singapore)

Background

The mergers and acquisitions (M&A) allowance and stamp duty relief schemes together form the M&A Scheme. This scheme was first introduced in Budget 2010 to encourage companies in Singapore to grow their businesses through M&A. The scheme has since undergone several enhancements in the recent Budgets 2015 and 2016.

Enhancements to the M&A Scheme in Budget 2016

M&A allowance

Under the M&A Scheme, subject to the qualifying conditions, a company (acquiring company) that acquires the ordinary shares of another company (target company) during the period between 1 April 2016 to 31 March 2020 (both dates inclusive) is granted an M&A allowance equivalent to 25% of the value of the acquisition for each year of assessment (YA), capped at S$40 million for each YA. The cap was previously S$20 million in Budget 2015. As a result of the increase in the cap, the claimable amount is now doubled from S$5 million in Budget 2015 to S$10 million in Budget 2016. This translates into a significant amount of S$1.7 million of tax savings for the company (S$10 million x 17% corporate tax rate).

Summary

	Budget 2015	Budget 2016
M&A allowance of 25% of the value of acquisition capped at the respective amount	S$20 million	S$40 million
Claimable amount	S$5 million	S$10 million
Tax savings (Corporate tax rate of 17%)	S$850,000	S$1.7 million

Stamp duty relief

As a result of the increase in the cap on the M&A allowance to S$40 million, the amount of stamp duty relief which is granted to the acquiring company will now be capped at S$80,000 for each financial year (FY). This relates to the same basis period for the YA for which the M&A allowance is granted for income tax purposes. For stamp duty purpose, where there is a change in accounting period, the

Commissioner of Stamp Duties may also, at his discretion, use any other period as reference in applying the cap.

Where both stamp duty relief and M&A allowance are claimed on the same qualifying share transaction, the FY or elected 12-month period for the purpose of stamp duty relief must be identical to the basis period or elected 12-month period for the purpose of claiming M&A allowance.

Transaction costs

Transaction costs include legal fees, accounting or tax advisor's fees, valuation fees and such other professional fees that are necessarily incurred in a qualifying share transaction but do not cover professional and incidental fees in respect of a loan arrangement. Double tax deduction (DTD) will be granted on transaction costs incurred on qualifying share acquisitions completed during the period 17 February 2012 to 31 March 2020, subject to an expenditure cap of S$100,000. The cap of S$100,000 applies to all transaction costs incurred in relation to qualifying share acquisitions made in all target companies for which the claims for M&A allowance are first made in the same YA. This is regardless of when the transaction costs are incurred.

> Read more on page 12

Qualifying conditions

The M&A allowance, stamp duty relief and DTD for qualifying transaction costs are given only if the following conditions are met:

1. the acquiring company:

    a. is incorporated and is a tax resident in Singapore. Where the acquiring company belongs to a corporate group, its ultimate holding company must also be incorporated and be a tax resident in Singapore. For companies under the Headquarters Tax Incentive Programme (HQ Programme) and Maritime Sector Incentive-Shipping-related Supporting Services Scheme (MSI-SSS Scheme), the Economic Development Board (EDB), the Monetary Authority of Singapore (MAS) or the Maritime and Port Authority of Singapore (MPA) may waive the requirement that the ultimate holding company must be incorporated and is a tax resident in Singapore on a case-by-case basis for share acquisitions completed from 17 February 2012 to 31 March 2020;

    b. is carrying on a trade or business in Singapore on the date of the acquisition of the ordinary shares of a target company;

    c. has in its employment at least three local employees (i.e. Singapore citizens or Singapore permanent residents who and whose employer make CPF contributions), excluding company directors, throughout the period of 12 months prior to the date of acquisition of the ordinary shares of the target company; and

    d. is not connected to the target company for at least two years prior to the date of acquisition of the ordinary shares;

2. where the acquisition is made through an acquiring subsidiary, the acquiring subsidiary:

    a. does not carry on a trade or business in Singapore or elsewhere on the date of the share acquisition;

    b. is directly or indirectly wholly-owned by the acquiring company;

    c. does not claim any tax benefits under the M&A Scheme, as the deduction will be granted to the acquiring company who must meet the conditions in (1) above; and

    d. the acquiring subsidiary and each intermediate company above it must be set up primarily to hold shares in other companies.

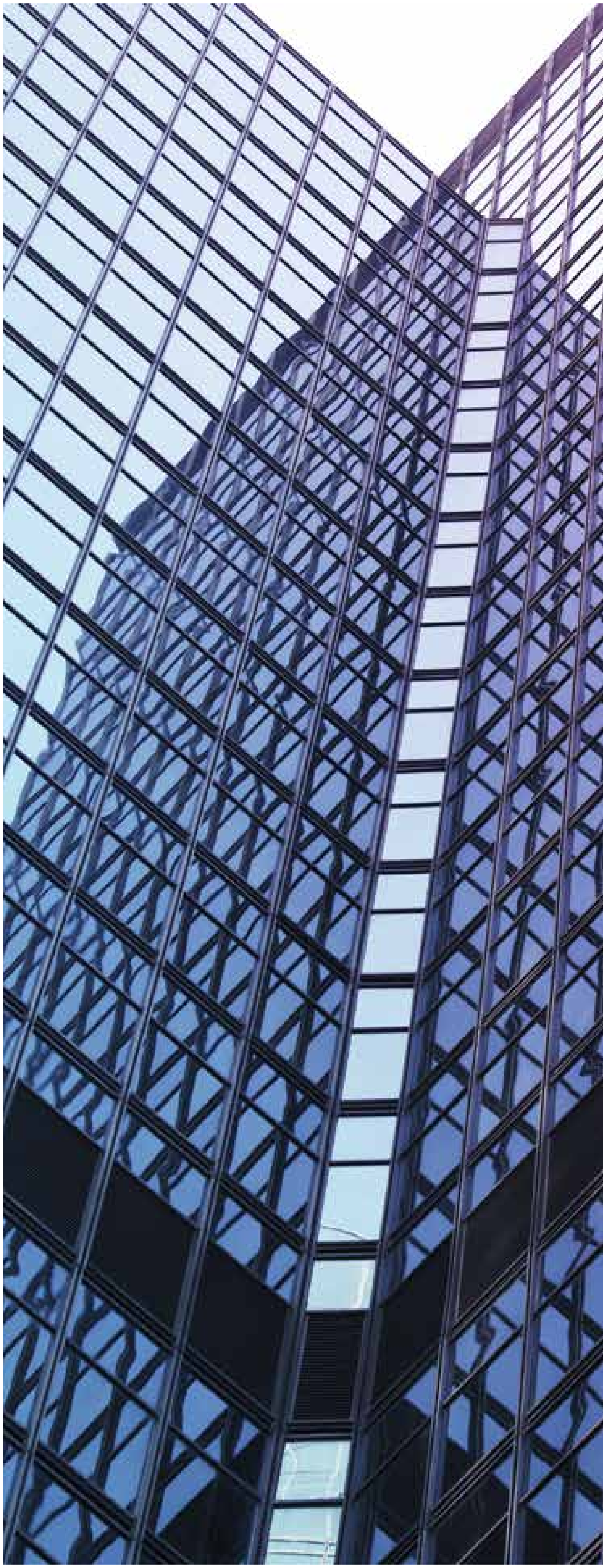
3. the target company or a subsidiary directly or indirectly wholly-owned by the target company (operating subsidiary):

    a. carries on a trade or business in Singapore or elsewhere on the date of share acquisition; and

    b. has at least three employees working for the company throughout the period of 12 months prior to the date of the share acquisition.

A target company may be incorporated in Singapore or elsewhere. Where it is not able to meet the conditions in (3), the conditions may be satisfied by a subsidiary directly or indirectly wholly-owned by the target company.

> Read more on page 13



4. In addition, the share acquisition must result in the acquiring company owning:

    a. at least 20% of the ordinary shares of the target company if it owned less than 20% before the date of the share acquisition; or

    b. more than 50% of the ordinary shares of a target company if it owned 50% or less of the ordinary shares of the target company before the date of the share acquisition.

5. Acquiring companies seeking to claim M&A allowance based on the 20% shareholding threshold must, besides meeting the conditions in (1), must also meet two additional conditions:

    a. the target company is considered an associate of the acquiring company under the Singapore FRS 28 or Singapore FRS for Small Companies; and

    b. the acquiring company must have at least one director represented on the board of directors of the target company.

Eligibility conditions during the 5–year write-down period

To remain eligible for M&A allowance for each of the YA during the 5-year write-down period, the acquiring company and its ultimate holding company must meet all the conditions under (1) and (4), and where applicable, the conditions under (5) above. If the acquisition is made through an acquiring subsidiary, the acquiring subsidiary and each intermediate company above it must meet all the conditions under (2) above. If any of the eligibility conditions is not met for any YA during the 5-year write-down period, the M&A allowance ceases to apply from that YA onwards.

Conclusion

The enhancements to the M&A scheme are in line with the continued efforts of the government to encourage local SMEs to expand and grow through acquisitions. In particular, the increase in the cap of the M&A allowance from S$5 million to S$10 million would allow larger SMEs to potentially partake in more ambitious acquisitions. SMEs that have the ambition and are prepared to take charge of their future should look to fully capitalise on the M&A allowance sooner rather than later.

Dentons Rodyk acknowledges and thanks Sarah Choong for her contribution in the writing of this article.

Venture Debt Programme – A new source of funding development plans for emerging entities

By Lim I-An (Senior Partner, Singapore), S Sivanesan (Senior Partner, Singapore) and Sunil Rai (Partner, Singapore)

Introduction

Regarded among investors and industry observers as Southeast Asia's most developed entrepreneurial ecosystem, Singapore has much to be proud of with regard to the transformation of its entrepreneurial landscape over the last decade. In fact, between 2012 and 2015, Singapore moved up seven places to rank 10th in an international report by Compass, which ranks start-up ecosystems. This is ostensibly a testament of Singapore's ceaseless aspiration to becoming what might very well be, the Silicon Valley of the East.

Singapore's achievement as the region's entrepreneurial hub has, for the most part, been recognisably attributed to the extensive government efforts in supporting start-ups and entrepreneurship. Indeed, there is currently a whole host of government funding and assistance schemes available to enable enterprise development and to contribute to Singapore's success as a start-up-friendly nation.

In this article, we review a new initiative known as, venture debt, and other similar schemes offered in other jurisdictions.

Singapore's Venture Debt Programme

The Venture Debt Programme (VDP) is one of the latest government-led initiatives that expands the range of capital raising options available to entrepreneurs in Singapore. First announced in Budget 2015, the VDP is intended to be an approach towards supporting innovation, with the aim of providing local early stage and high growth small and medium-sized enterprises (SMEs) with a new financing option for business growth and expansion.

For such SMEs with high growth potential, traditional bank loans and equity investments may not be feasible as these entities may likely have neither established revenue streams (that often attract venture capital) nor significant assets to use as collaterals (in order to obtain traditional bank loans). As such, venture debt, as an alternative form of financing, presents itself as an in-between option, since it may involve deferred repayment terms to minimise short term impact on cash flow, and also allow applicant SMEs to enjoy enhanced capital efficiency (without requiring any shareholder dilution). To compensate for the higher risk involved in financing such entities, venture debt providers may combine their loans with warrants, or rights to purchase equity.

On 28 April 2016, SPRING Singapore officially launched the VDP with the local banks - DBS, OCBC and UOB. Under the VDP, DBS, OCBC and UOB will seek to catalyse about 100 venture debt loans, totalling close to S$500 million over two years. SPRING Singapore will provide 50% risk sharing to these local financial institutions for such loans. So far, loans to at least three companies have already been approved since the VDP was rolled out by the three local participating banks in January 2016. These companies are Ascenz Solutions Pte Ltd, Conversant Pte Ltd, and MDS Retail Pte Ltd.

Eligibility for VDP

Under the VDP, an SME can apply for venture debt loans of up to S$5 million each for business expansion purposes such as scaling up business production, undertaking new projects, undergoing mergers and acquisitions etc.

To be eligible, startups and SMEs must not only demonstrate clear growth potential, they must also be registered and operating in Singapore, have a minimum of 30% local shareholding (by Singaporean or Singapore permanent resident), and a group annual sales turnover of not more than S$100 million or group employment size of not more

> Read more on page 15

than 200 employees. Additional eligibility requirements imposed by the respective local participating banks can be found at their respective websites and enquiry channels. The respective banks will evaluate the application with SPRING Singapore before determining the outcome.

A brief look into the giants of entrepreneurial hubs

The world's leading entrepreneurial ecosystems like the United States (US) and Israel also have similar initiatives to SPRING Singapore's VDP.

US

In the US, the Small Business Investment Company Program (SBIC) is one such similar government venture capital program, administered by the US Small Business Administration (SBA). A multi-billion dollar program created in 1958, SBICs are privately owned and managed investment funds, licensed and regulated by the SBA, that use their own capital plus funds obtained through issuing debentures guaranteed by the SBA (subject to a cap of US$150 million), to make equity and debt investments in qualifying small businesses and thereby assisting in their early stages of growth. From 2011 through 2015, more than US$21 billion in financing was invested in small businesses and more than 6,400 businesses received investments.

Israel

Likewise in Israel, the Yozma program has earned worldwide recognition as the creator of the Israeli venture capital industry. Established in 1992-1993, the Yozma program was based on a US$100 million government-owned venture capital fund, of which US$80 million was invested in 10 private Yozma Funds and the additional US$20 million was directly managed by the government-owned Yozma Venture Fund. The 10 private Yozma Funds were each managed by an independent, Israeli venture capital management company, and would have to engage a foreign institution together with a well-established Israeli financial institution. By providing matched funding of typically 40% of the capital for the 10 private Yozma Funds , limited to US$8 million per fund with private partners contributing US$12 million, an additional US$150 million of private sector funds (domestic and foreign) were raised and invested in over 200 startup companies at that time. In addition, each Yozma Fund also had a call option (at cost) on the government's 40% shares for a period of five years after foundation. Since its inception, the Yozma Group has managed more than US$220 million and made direct investments in approximately 50 portfolio companies.

Concluding remarks – Our thoughts

Venture debt can assist companies during their growth stage with mezzanine financing when early stage entities are in between raising different rounds of funds from investment funds / institutional investors (such as venture capitalists) – perhaps between a Series A investment and Series B investment – in order to finance working capital and accelerate growth. Venture debt can be considered as an alternative to convertible loans and as a complement to obtaining venture capital when companies are attempting to reach key milestones in their business life cycle.

SPRING Singapore's VDP is therefore another step in boosting the local funding ecosystem and adding to success stories of US and Israel in stimulating the venture capital and corporate financing industry for the benefit of local high growth enterprises. It is, of course, hoped that such government efforts will be met with an ever increasing eagerness on the part of aspiring entrepreneurs to tap on these opportunities, stay the course and keep the momentum going in Singapore's investment and start-up scene.

The process can get started by either speaking (or being introduced) to a venture capitalist or a relationship manager at the bank, or emailing the bank to commence the process. In our experience, the former approach often gains better traction and a potentially more rapid response from the relevant bank.

Dentons Rodyk acknowledges and thanks Wong Chun Han for his contribution in the writing of this article.

IP Edge

A picture speaks a thousand words – Lessons from the Trunki case

By Lee Ai Ming (Consultant, Singapore)

Introduction

The registered designs regime protects new and innovative product designs, but only if designers register those designs. However, design registration is sometimes treated as the poor cousin of patent and trade mark registration. Companies do not always pay attention to the nature or quality of the design drawings they file with the Designs Registry. The recent UK Supreme Court case of *PMS International Group plc v Magmatic Limited* [2016] UKSC 12 (the Trunki case) emphasises the importance of choosing appropriate design drawings in order to avoid limiting the scope of protection conferred by registration.

If the value of your product lies in its visual appearance (its aesthetic features), it is advisable not only to apply for a registered design but also to obtain legal advice so as to avoid the pitfalls highlighted in the Trunki case.

Singapore's Registered Designs Regime

If you have invested much thought, creativity and resources into creating a new design for your product, you should consider protecting your design by registering it in the markets in which you manufacture and sell your products. You will then be better placed to take action to stop third parties that make, sell and/or import unauthorised imitations in the territories in which you have registered your design.

In Singapore, the registered design regime protects new features of shape, configuration, pattern and ornamentation of an article. Famous examples of designs include the shape of the Coca-Cola bottle and the shape of the Volkswagen Beetle car. In other words, design registration protects what the article looks like, not how it works (which is the purview of patents). A Singapore registered design confers on the registered proprietor a maximum of 15 years' exclusivity to the design, subject to payment of renewal fees every five years.

> **Read more on page 17**

During this period of exclusivity, no third party may reproduce or monetise a design that is identical or substantially similar to the registered design in Singapore without the consent of the proprietor of the registered design. It does not matter that similarity between the parties' designs is merely coincidental or that the third party had no intention to infringe the registered design.

If you have reproduced your design for the purposes of sale or hire on more than 50 articles, and have not registered your design, you will not be able to seek recourse under the Copyright Act or the Registered Design Act. Thus, it is important to seek registration as early as possible.

As with patent and trade mark registration, design registration is territorial in nature. You should register your design in the territories in which you seek protection. Usually, these are the territories in which you manufacture and sell your products. If you wish to seek protection of your design in multiple territories, it may be possible to take advantage of the Hague System of international registration which provides a practical business solution for registering designs in over 65 territories by filing a single international application.

The Trunki case and its impact

The Trunki case is a decision of the UK Supreme Court on a Registered Community Design (with coverage in the European Union (EU) only). The decision is therefore not legally binding in Singapore. However, the Trunki case is still an important one because the law and practice of design registration in Singapore shares some similarities to that of the UK and EU. The Trunki case makes it clear that the extent of registered design protection depends on the images that you have submitted for registration.

In the Trunki case, Magmatic Limited (Magmatic) had obtained a Registered Community Design (RCD) for the design of children's' suitcases, which it sold under the brand "Trunki". The drawings that Magmatic submitted to the European Intellectual Property Office for registration consisted of three-dimensional computer aided design (3D CAD) images in monochrome, grey-scale shading and distinct tonal contrasts for registration of its design. Subsequently, a competitor, PMS International Group plc (PMS), imported childrens' suitcases that were similar to Magmatic's RCD, which PMS sold under the brand "Kiddee". PMS even admitted to being inspired by the design of Magmatic's "Trunki" suitcases.

> Read more on page 18

Selected images of Magmatic's RCD and the parties' actual products are set out below:

Magmatic's RCD

Magmatic's "Trunki" suitcase

PMS's "Kiddee" suitcase

The UK Supreme Court held that the overall impression given by Magmatic's RCD was that of a horned animal. On the other hand, PMS's "Kiddee" suitcases featured insects' antennae and animals' ears. In coming to this finding, the court relied on the fact that the CAD images of Magmatic's RCD were not adorned with any surface decoration. The absence of surface decoration reinforced the horned animal impression. Other differences noted by the court included the tonal difference in RCD wheels not present in the "Kiddee" suitcase. In light of these differences, the Supreme Court held that Kiddee suitcases did not infringe Magmatic's RCD.

Types of images for registration

The Trunki case is a lesson in the different types of images that could be submitted for design registration. Not all of them have the same scope or effect. As the UK Supreme Court had pointed out, designers should note the differences in the following types of images:

1. Black and white line drawings: In most instances, black and white line drawings offer the widest scope of protection, as you can use line drawings to protect features of shape, configuration, pattern and ornamentation of your design.

2. 3D CAD images: 3D CAD images are useful in identifying shading and tonal differences in a particular design. However, if shading and tonal differences are NOT part of the design, 3D CAD images may not be appropriate.

In addition to the above types of images, you may also consider submitting high definition photographs. These are useful in seeking protection of important features of your design that are not so easily reproduced by line drawings. It is important to seek professional advice on selecting the appropriate images so that that they accurately reflect the shape and/or other features that you wish to protect. In Singapore, design applicants are also required to make a Statement of Novelty to declare the features that they claim should be protected by registration, whether such features be of shape, configuration, pattern and/or ornamentation.

Absence of decoration can also be a feature of the design

The Trunki case is also a cautionary tale for designers who use simple basic line drawings in an attempt to seek broad protection for their design. The UK Supreme Court recognises that an absence of decoration can be a feature of a registered design. The UK Intellectual Property Office has thus cautioned designers that it is possible that line drawings may be construed as seeking protection for the shape and the plain undecorated surfaces of the design.

At the same time, if a designer places too many details into his images for design registration, he risks finding himself with a narrow scope of protection. This was exactly what the Trunki designers had found themselves in by submitting CAD images that had shown shading and tonal differences. In order to avoid the pitfalls of Trunki, you should decide what the essential features of your design are, and whether there is a risk that a third party may infringe your design by adding ornamentation.

Conclusion

If design protection were sought in Singapore for a product such as the Magmatic "Trunki" suitcase, it would be necessary to declare the novel features of the design for which protection is claimed. These could very well be both the shape *and* ornamentation of the suitcase. In order to obtain maximum protection, the designer may wish to consider filing an application for the shape of the suitcase, a separate application for ornamentation on the body of the suitcase and another application for the combination. Different permutations of shape (e.g. animal horns, animal ears and insect antennae) would require registration separately, as would different types of ornamentation (e.g. tiger stripes and leopard spots). It is certainly not possible to conceive all permutations of a design at once. However, designers should consider filing fresh design applications as and when they update their designs or create new variants of existing designs.

Dentons Rodyk acknowledges and thanks Desmond Chew for his contribution in the writing of this article.

Personal data protection – Prohibition on transfer of data out of Singapore

By Woon C. (Woon Chooi) Yew (Senior Partner, Singapore)

Background

In a connected world, data moves across borders everyday, and most of us do not have any concerns. However, since Singapore's data protection law came into effect on 2 January 2013, organisations in Singapore have to be mindful of the prohibitions under the law against the transfer of personal data out of Singapore.

Section 26 of the Personal Data Protection Act (No. 26 of 2012) (PDPA) prohibits the transfer of personal data to a country or territory outside of Singapore except in accordance with requirements prescribed under the Act to ensure that the standard of protection accorded to the personal data transferred is comparable to the protection offered under the PDPA.

Section 26 does not apply to:

a. Business contact information which is defined as an individual's name, position name or title, business telephone number, business address, business electronic mail address or business fax number and any other similar information about the individual, not provided by the individual solely for his personal purposes;

b. a Data intermediary (or "data processor" in the European Union) in respect of its processing of personal data on behalf of and for the purposes of another organisation. "Processing data" means the carrying out of any operation or set of operations in relation to the personal data, and includes:

   i. recording;
   ii. holding;
   iii. organisation, adaptation or alteration;
   iv. retrieval;
   v. combination;
   vi. transmission; and
   vii. erasure or destruction.

Hence, if an organisation appoints a data processor (a subsidiary or an unrelated third party), then the data processor may transfer the personal data outside Singapore in the course of its processing of the personal data. However, the organisation itself will not be permitted to transfer the personal data to a facility outside Singapore (even if the facility is owned by the organisation).

Prescribed requirements for permissible transfer out of Singapore

The Personal Data Protection Regulations (Regulations) provide that before an organisation transfers personal data to a country or territory outside Singapore, it must:

a. take appropriate steps to ensure that it remains in compliance with all the other provisions of the PDPA as regards the transferred personal data; and

b. take appropriate steps to ensure that, the recipient of the personal data is bound by legally enforceable obligations to provide the transferred personal data with a standard of protection that is at least comparable to the protection under the PDPA.

> Read more on page 20

If the requirements (a) and (b) are complied with, then an organisation may transfer the personal data out of Singapore without restriction.

The Regulations set out certain circumstances under which a transferring organisation is deemed to be in compliance with the two requirements above. However, these circumstances are unlikely to be applicable in most cases. Hence, it is necessary for organisations to take appropriate steps (including entering into binding agreements and obtaining the requisite consents) to comply with requirements (a) and (b).

In the following paragraphs, we set out the circumstances under which requirements (a) and (b) are deemed to be complied with.

Where the personal data is in the public domain or if the personal data is in transit in Singapore (and is not being accessed or used or disclosed while in Singapore), both requirements (a) and (b) are deemed to be complied with. Hence, organisations are free to transfer such personal data outside of Singapore without restrictions. The personal data handled by most organisations is unlikely to fall within these circumstances.

Further, requirement (b) is deemed to be complied with in the following circumstances:

- if the individual consents to the transfer of personal data;
- the transfer of the personal data is necessary for the performance of a contract between the individual and the transferring organisation, or to do anything at the individual's request with a view to the individual entering into a contract with the transferring organisation;
- the transfer of the personal data to the recipient is necessary for the conclusion or performance of a contract between the transferring organisation and a third party which is entered into at the individual's request;
- the transfer of the personal data to the recipient is necessary for the conclusion or performance of a contract between the transferring organisation and a third party if a reasonable person would consider the contract to be in the individual's interest;
- the transfer of the personal data to the recipient is necessary:
    - in the interest of the individual if consent cannot be obtained in a timely way;
    - in an emergency that threatens the life, health and safety of the individual/another individual;
    - in the national interest; or
    - to contact the next of kin or friend of an individual who is injured, ill or deceased;

  and the transferring organisation has taken reasonable steps to ensure that the personal data so transferred will not be used or disclosed by the recipient for any other purpose.

An organisation will still have to comply with requirement (a) even if circumstances exist such that the organisation is deemed to be in compliance with requirement (b).

Exemption

An organisation may also apply to the Personal Data Protection Commission (PDPC) for exemption from Section 26.

In applying for exemption, it is necessary to provide the following information:

- the period(s) for which the exemption is sought;
- the identity of person(s)/organisation(s) or class of persons/organisations seeking the exemption, details of the type and volume of personal data intended to be transferred, and all relevant circumstances of the transfer;
- detailed explanation of the reasons for seeking the exemption and evidence supporting those reasons; and
- detailed explanation of the reasons why the organisation is unable to rely on the avenues provided for in the Regulations to comply with section 26 of the PDPA.

Conclusion

As any contravention of the PDPA attracts penalties of up to S$1 million, organisations in Singapore should review their internal operations to ensure that there is no inadvertent transfer of personal data out of Singapore in contravention of the provisions of the PDPA.

Litigation Brief

Do not break the trust after a trust is created – The law on concurrence examined

A case review on *Kuntjoro Wibawa v Harianty Wibawa and others* [2016] SGHC 109

By Lek Siang Pheng (Deputy Managing Partner, Singapore), Koh Kia Jeng (Partner, Singapore) and Tan Yee Siong (Partner, Singapore)

Introduction

Dentons Rodyk acted for Mdm Harianty Wibawa, the settlor of an offshore discretionary trust which has a value exceeding US$45 million (taking into account distributions of some US$10 million). One of the beneficiaries and the named Protector of the trust (her eldest son) disputed that his elderly mother, Mdm Harianty Wibawa, was the beneficial owner of the funds settled into the offshore trust hence she was in breach of her duty as executrix of the estate of his deceased father, Mdm Harianty Wibawa's husband. Instead the eldest son alleged that he was entitled to a part of the trust assets as a beneficiary under the father's will. The High Court dismissed the eldest son's claims and ruled in favour of his mother.

Background to the Plaintiff's claims

In 2011, Mr Kuntjoro Wibawa (the Plaintiff) brought a civil suit against his elderly mother, Mdm Harianty Wibawa (Mother), and siblings, the trust vehicle, the trustee, and the private bank who had advised to set up the offshore discretionary trust in 2003. The Plaintiff alleged that the funds settled into the trust (which originated from seven bank accounts in various names of the family members) belonged to his late father and should be distributed under a will made in 1996. The Plaintiff alleged that Mother had wrongfully used the deceased's estate to set up the trust and breached her duty as executrix and trustee.

Alternatively, the Plaintiff alleged breaches of trust against Mother and his siblings in respect of the funds settled into the trust, in that he was entitled to such a part based on a constructive trust as a joint bank account holder (the Account Holders' Trust).

There were complex issues of whether the offshore discretionary trust was properly settled, the accuracy of the dispositions made by Mother, and the actions of the Plaintiff himself, including his role in setting up the trust, and whether he retained any interest in the assets before they were settled into the trust. The suit was tried in the Singapore High Court over 16 days in 2015. The judgment in favour of Mother was delivered by the court in June 2016.

The Plaintiff was intimately involved in the creation of the offshore discretionary trust (the Trust) with the advice and assistance of a wealth planner, a senior officer of the private bank. The siblings were not aware of, and not involved in, the setting up of the Trust. The use of the Trust in conjunction with an underlying company to hold the trust funds under the trust structure was designed to protect the family's wealth and privacy. Mother was named as the settlor of the Trust and the Plaintiff was its first protector. The beneficiaries of the Trust were Mother, the Plaintiff and his siblings (the family members).

After the Trust was constituted and properly settled, the Plaintiff made investment decisions pursuant to his role as protector of the Trust.

However, at the trial, the Plaintiff claimed that he was unaware of the terms of the trust instrument that his Mother signed as he was not present at the material time and did not know about the setting up and administration of the Trust at all. The Plaintiff alleged that the trust discussed with the wealth planner was not the Trust that was eventually set up, i.e. Mother had set up her own private trust and it was a different trust.

The High Court's decision in dismissing the Plaintiff's claims

The judge analysed the Plaintiff's alternative claim first, and held that the Plaintiff's argument regarding the Account Holders' Trust should be rejected because he had not put forward the basis, legal and factual, for his assertion. Thus, the Plaintiff was unable to prove his alternative claim.

The judge held that the assets in the seven bank accounts were estate assets but noted that the events in 2003 were pivotal in dismissing the Plaintiff's claims against his Mother.

The judge examined the extent of the Plaintiff's knowledge and involvement in the setting up of the Trust in 2003 because it went to the heart of his case. It was established that Mother understood only Mandarin and was neither able to read nor speak English. The trust instrument documents from the wealth planner were in English. The wealth planner spoke English and depended on the family's relationship manager to translate the documents in Mandarin to the Mother before requesting her signature. The judge also found that the private bank's file notes and the paper work involved prior to the creation of the Trust revealed that the Plaintiff was very much involved. Mother had placed a great deal of trust in the Plaintiff in the creation and setting up of the Trust.

The court found that the Plaintiff appreciated the benefits of a discretionary trust and that it provided an efficient vehicle for the transfer of beneficial ownership interests on the death of a settlor without the need to obtain a grant of probate or similar formalities.

The Plaintiff was comfortable with the creation of the Trust and thereafter acted as the protector and investment manager. This could only have come about because the Plaintiff consented to the setting up of the Trust so as to protect the family wealth.

Concluding points

The judge held that consent or concurrence is a positive defence to the Plaintiff's claims. In the circumstances, it could not be fair and equitable that, having given his concurrence, the Plaintiff should now turn around and sue his Mother for setting up the Trust.

The judge also noted that there were other defences available to Mother or reasons for dismissing the Plaintiff's claims, even if she was found to have been in breach of trust. The judge observed that, after the Plaintiff knew about his father's will, the Plaintiff did not detract from the objective to protect the family wealth with the use of an offshore discretionary trust with Mother as settlor of the Trust. Hence, the Plaintiff had acquiesced to the Mother's settlement of the Trust with the estate assets.

Moreover, the defence of estoppel by convention would have applied to stop the Plaintiff's claims about Mother's alleged breach of trust, from going back on the assumptions that the Trust was to be set up with the estate assets settled therein for the protection of family weath, that Mother was the settlor of the Trust, and that distribution of the family wealth would be from the trustee under the terms of the Trust.

Dentons Rodyk's Litigation & Arbitration Practice Group partner Lek Siang Pheng led the defence at trial as lead counsel; he was assisted by his team comprising partners Koh Kia Jeng, Tan Yee Siong and senior associate Amogh Chakravarti.

Property Notes

Starting an en bloc sale – Salient issues to consider

By Lee Liat Yeang (Senior Partner, Singapore)

When Chinese developer Qingjian Realty signed a conditional contract to buy the 358 units Shunfu Ville for S$638 million in May this year, some believe that this could herald the dawn of a new wave of collective or en bloc sales in Singapore. This prospect comes at the back of a lowered land supply by the Government, which seems to barely satisfy the appetite of property developers who have participated actively in the recent government land tenders.

Property owners may seek an en bloc sale of their development, pursuant to section 84A of the Land Titles (Strata) Act (LTSA) where a collective sale supported by 80% of the owners (in terms of both share value and strata area) and where the development is at least 10 years old, could receive the order of sale from the Strata Titles Board or the High Court. Such property owners should, however, be mindful of the salient issues for starting an en bloc sale.

Starting an En bloc Sale

The election of avid and responsible Collective Sale Committee (CSC) members marks a good starting point. Owners of developments which had failed in an earlier round of en bloc sale should note a higher threshold requirement of 50% (by way of total number of owners or by their total share value) for the signing of a requisition for an Extraordinary General Meeting (EOGM) to elect a CSC within two years from the relevant event of a failed en bloc sale attempt. Otherwise, the usual requirement for such requisition is to get the signatures of owners holding 20% of total share value or of owners comprising 25% of the total number of owners. Owners should aim to appoint CSC members representing all types of units in the development so as to ensure better cross representation of different interests. Candidates for CSC should, at the time of election and at other relevant times, make full disclosure of any actual or potential conflict of interests.

Appointment of lawyers and property consultants

The CSC could be empowered at the EOGM to appoint the lawyers and the property consultants to act for the owners in the en bloc sale process. Otherwise, the respective appointment of the lawyers and property consultants should be made at an EOGM. The experience track record and commitment levels of the lawyers and the property consultants respectively should be fully considered before their respective appointment.

Reserve price in the Collective Sale Agreement (CSA)

CSC should propose a reserve price in the CSA taking into consideration a myriad of factors including but not limited to development gross plot ratio, development baseline, special height controls (if any), lease top-up premium (if any) and general market conditions. CSC should be mindful that, while a high reserve price will facilitate the collection of signatures to the CSA from owners, a high reserve price may turn away potential buyers. CSC should understand the importance of enticing developers to invest time and money to do feasibility studies on the land of the development with a reasonable reserve price and allowing the spirit of competition to take the eventual winning offer above the reserve price.

> Read more on page 25

Method of Apportionment of sale proceeds (MOA)

The CSC should propose a MOA that is fair and reasonable to all owners, and that should not disadvantage any particular type of units or class of owners. There is no "one size fits all" MOA for distribution of sale proceeds for en bloc sale. The Singapore Institute of Surveyor and Valuers recommends one or a combination of two or more of the following methods or factors for a MOA, namely valuation, strata area and share value. Valuation could be made of a typical unit of each type ignoring renovation, facing or floor level. However, the siting or location of a unit should be taken into consideration for such valuation of retail units. While valuation is an important factor for commercial or mixed uses development, it is rarely used for pure residential developments. Strata area is understandably a commonly adopted factor for the MOA. Owners of smaller units may argue for weightage to be given to their share value in the MCST since a collective sale relates to unlocking the potential of the land. However they should also appreciate that share value is approved by the Commissioner of Buildings at the onset of the development for purpose of determining the maintenance contributions and voting rights of owners in the MCST, and not for the purpose of apportionment of en bloc sale proceeds.

MOA is often an emotional topic, as everyone thinks his unit or unit type deserves more than others. Practically speaking, the MOA to be adopted must also be able to garner the support of 80% owners; otherwise the en bloc sale effort will fail.

Good faith and fiduciary duties

It is provided explicitly in the LTSA that the Strata Titles Board or the High Court will not approve a collective sale that is not in good faith taking into consideration only of the factors of the sale price, the MOA and the relationship (if any) between the buyer and any of the owners. The importance of the CSC's role in a collective sale was explained by the Singapore Court of Appeal in the landmark case of Horizon Towers. It was opined by the court that CSC members are fiduciaries of all the owners including the owners who do not consent to the sale. The duties of the CSC members include the duty of loyalty, the duty of even handedness, the duty to avoid any conflict of interest, the duty to make full disclosure of relevant information and the duty to act with conscientiousness to exercise its powers in the best interests of all owners. The duty to act with consciousness in relation to the sale price requires CSC to discharge its duty to use all possible diligence to secure the best price reasonably obtainable.

Financial loss

Non-consenting owners can raise a valid objection on ground of financial loss. The CSC should get the property consultants to check whether any owner will suffer a financial loss, meaning the proposed sale proceeds for his unit, after such deduction as the High Court may allow, is less than the purchase price. Such deductions include what is stated in the Fourth Schedule of the LTSA, namely stamp duty on the purchase, legal fees in the purchase, costs related to privatisation, and costs incurred pursuant to the collective sale which are to be shared by owners under the CSA.

Incentive payments

Incentive payment arrangements made or participated by CSC members or the property consultants in breach of their fiduciary duties would constitute bad faith in the transaction and are disallowed in law. This was established by the court in the case of Harbour View and affirmed in the subsequent case of Thomson View where the court regarded such incentive payments as affecting the MOA of the sale proceeds.

Sale by public tender or auction

The need to ensure that the highest market price is achieved is safeguarded by this requirement of a sale by public tender or auction. This will allow maximum exposure of the development to the potential buyers so that there is competition to get the highest offer. It is also mandated that the CSC shall obtain a valuation report prepared by an independent property valuer on the date of close of the public tender or auction. The CSC may, within 10 weeks from the close of the public tender or auction, enter into a private treaty contract with a buyer.

Conclusion

The CSC should seek the advice of experienced lawyers and property consultants to guide them through the aforesaid issues and more, so as to ensure that they do not trip over the legal pitfalls as they strive towards their en bloc dream.

An edited version of this article first appeared in *The Straits Times Singapore* on 18 July 2016.

About Dentons Rodyk

Situated at the southern most tip of Southeast Asia, Singapore is a massive regional hub for global commerce, finance, transportation and legal services. This important island city-state is a vital focal point for doing business throughout the Asia Pacific region.

As one of Singapore's oldest legal practices, trusted since 1861 by clients near and far, rely on our full service capabilities to help you achieve your business goals in Singapore and throughout Asia. Consistently ranked in leading publications, our legal teams regularly represent a diverse clientele in a broad spectrum of industries and businesses.

Our team of more than 200 lawyers can help you complete a deal, resolve a dispute or solve your business challenge. Key service areas include:

- Arbitration
- Banking and Finance
- Capital Markets
- Competition and Antitrust
- Corporate
- Intellectual Property and Technology
- Life Sciences
- Litigation and Dispute Resolution
- Mergers and Acquisitions
- Real Estate
- Restructuring, Insolvency and Bankruptcy
- Tax
- Trade, WTO and Customs

Providing high quality legal and business counsel by connecting clients to top tier talent, our focus is on your business, your needs and your business goals, providing specific advice that gets a deal done or a dispute resolved anywhere you need us. Rely on our team in Singapore to help you wherever your business takes you.

About Dentons Rodyk Academy

Dentons Rodyk Academy is the professional development, corporate training and publishing arm of Dentons Rodyk & Davidson LLP. The Dentons Rodyk Reporter is published by the academy. For more information, please contact us at sg.academy@dentons.com.

Key contacts

Gerald Singham
Deputy Managing Partner, Singapore
D +65 6885 3644
gerald.singham@dentons.com

Lek Siang Pheng
Deputy Managing Partner, Singapore
D +65 6885 3606
siangpheng.lek@dentons.com

Lee Liat Yeang
Senior Partner, Singapore
D +65 6885 3676
liatyeang.lee@dentons.com

Lim I-An
Senior Partner, Singapore
D +65 6885 3627
i-an.lim@dentons.com

Kenneth Oh
Senior Partner, Singapore
D +65 6885 3603
kenneth.oh@dentons.com

S Sivanesan
Senior Partner, Singapore
D +65 6885 3685
sivanesan.s@dentons.com

Woon C. (Woon Chooi) Yew
Senior Partner, Singapore
D +65 6885 3609
woonchooi.yew@dentons.com

Lee Ai Ming
Consultant, Singapore
D +65 6885 3686
aiming.lee@dentons.com

Ray Chiang
Partner, Singapore
D +65 6885 3680
ray.chiang@dentons.com

Hsu Li Chuan
Partner, Singapore
D +65 6885 3660
lichuan.hsu@dentons.com

Koh Kia Jeng
Partner, Singapore
D +65 6885 3698
kiajeng.koh@dentons.com

Jeannette Lim
Partner, Singapore
D +65 6885 3719
jeannette.lim@dentons.com

Sunil Rai
Partner, Singapore
D +65 6885 3624
sunil.rai@dentons.com

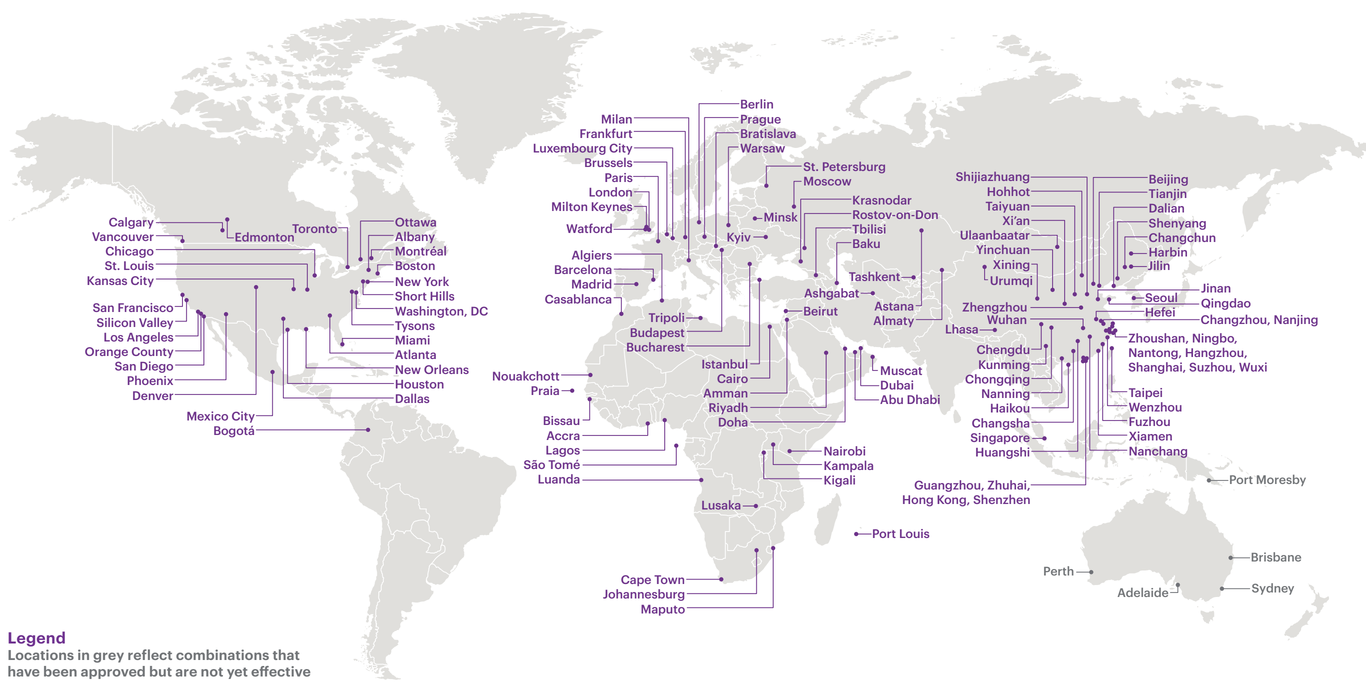
Seow Jia Xian
Partner, Singapore
D +65 6885 3658
jiaxian.seow@dentons.com

Tan Yee Siong
Partner, Singapore
D +65 6885 3757
yeesiong.tan@dentons.com

About Dentons

Dentons is the world's first polycentric global law firm. A top 20 firm on the Acritas 2015 Global Elite Brand Index, the Firm is committed to challenging the status quo in delivering consistent and uncompromising quality and value in new and inventive ways. Driven to provide clients a competitive edge, and connected to the communities where its clients want to do business, Dentons knows that understanding local cultures is crucial to successfully completing a deal, resolving a dispute or solving a business challenge. Now the world's largest law firm, Dentons' global team builds agile, tailored solutions to meet the local, national and global needs of private and public clients of any size in more than 125 locations serving 50-plus countries. www.dentons.com.

Our locations



This publication is for general information purposes only. Its contents are not intended to provide legal or professional advice and are not a substitute for specific advice relating to particular circumstances. You should not take, and should refrain from taking action based on its contents. Dentons Rodyk & Davidson LLP does not accept responsibility for any loss or damage arising from any reliance on the contents of this publication.