Reporter

Issue 05/2016

DENTONS RODYK

Commemorating the launch of Dentons Rodyk

Dentons Rodyk celebrated its launch on June 21, 2016, with a dinner for its clients at the historic The Clifford Pier restaurant in the Fullerton Bay Hotel.

Toast by Dentons Global Chairman Joe Andrew and Global CEO Elliott Portnoy, Philip Jeyaretnam, SC, Dentons Rodyk Regional CEO and Global Vice Chair, and members of Dentons Rodyk Exco.

Philip Jeyaretnam, SC, Dentons Rodyk Regional CEO and Global Vice Chair, addressed the guests. He shared his vision for the firm and recounted the journey leading up to the launch of Dentons Rodyk.

Nearly 200 clients attended the dinner event, together with 25 members of Dentons' Global Board, including Global Chairman Joe Andrew and Global CEO Elliott Portnoy. Present as guests of honour were Minister of Home Affairs and Law K Shanmugam and Senior Minister of State for Finance and Law Indranee Rajah.

Dentons Rodyk clients and guests celebrating the launch with us at the Fullerton Bay Hotel.

This was an opportunity to reinforce the value that the combination brings to our clients: the ability to follow them across the world, and enhancing our firm's ability to service our clients from the Asia Pacific region with more than 7,300 lawyers, more than 9,500 timekeepers and more than 13,500 people, working from 143 locations worldwide.

Dentons Global Chairman Joe Andrew and Philip Jeyaretnam, SC, Dentons Rodyk Regional CEO, walking in with Minister of Home Affairs and Law K Shanmugam.

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Business Bulletins

Challenges that HR professionals face in Singapore

Shifting policies

Singapore's employment laws have historically been employer-friendly. In the early days of Singapore's development, this was crucial to attract multi-national corporations to Singapore.

However, in the past decade, there has been a shift towards greater employee rights as well as greater protection of the Singapore core workforce. Examples of greater employee rights are the extension of maternity leave periods, and the introduction of paternity leave which hitherto did not exist. Another example involves Singapore's main employment legislation, which once protected mostly blue collar workers but has now been expanded to protect junior professional and managers earning below a certain threshold monthly income.

These policy shifts bring challenges to human resource (HR) professionals, and we share some of them below.

Increasing unionisation

There has been an increasing level of unionisation in Singapore in recent years, and significantly in 2015, legislation was introduced to allow professionals and managers to be collectively represented by rank-and-file unions.

While industrial relations in Singapore remain generally peaceful and strikes are extremely rare, HR professionals still face challenges since unions are additional entities that HR professionals have to seek consensus with. Unionised companies in Singapore typically sign collective agreements with unions that contain a range of employment terms to protect the employees, and negotiations on these terms between the companies and the unions can sometimes be protracted.

Foreign employees

Since 2009, the foreign workforce supply has been tightened in Singapore, partly as a result of public feedback on the increasing number of foreign employees in Singapore. The ratio of foreign semi-skilled and mid-skilled workers to Singaporeans allowed in certain industries was reduced, and this has caused manpower shortages in some industries like the food and beverage industry.

In 2014, the Ministry of Manpower also introduced a Fair Consideration Framework to make sure that companies with more than 25 employees advertise professional jobs to Singaporeans for at least 14 days before allowing such jobs to be filled up by foreign professionals (with certain exceptions to jobs above a threshold monthly salary). This entails additional responsibilities on HR professionals. In cases of suspected foreigner bias, the Ministry of Manpower may investigate and interview the company on why a foreign employee was chosen instead of a Singaporean, and even exercise its right to curtail future foreign manpower hiring by the company.

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What the future holds

HR professionals can expect to face further challenges as Singapore employment law's pro-employee shift continues. One change in the pipeline is the introduction of the Employment Claims Tribunal (ECT) in April 2017. One category of employees who will benefit from the setting up of the ECT is professionals and managers earning more than S$4500 basic salary a month, as currently any of their employment related claims can only be sought through the civil courts, which is typically more time consuming and more expensive. Companies and HR professionals should thus start preparing themselves for the introduction of this new tribunal by understanding its procedures and scope.

Further reading

To read a previous article on Employment Law in Singapore by the same author, please see http://dentons.rodyk.com/en/insights/articles/2015/april/1/extended-scope-of-union-representation-for-executives.

This article was first written for the HR Magazine UK September 2016 Issue. Author Ray Chiang was quoted in *A postcard from... Singapore* section of the Magazine.

The complete version of the article is published here.

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Duties and responsibilities of independent directors — An overview

Introduction

This article seeks to provide a general overview of the role of independent directors in a company listed on the Singapore Exchange Limited (SGX), with a focus on the duties and responsibilities of such independent directors. As issues of corporate governance have come to the fore in recent times in the Singapore media and business community, the role of independent directors in listed companies is becoming increasingly critical in ensuring that companies stay above and beyond any mismanagement.

In this article, we have extracted certain highlights and key provisions from the relevant laws, regulations and guidelines that set the framework for independent directors' duties and responsibilities in Singapore.

Roles and responsibilities of independent directors

Definition of an independent director

While certain provisions in the SGX Listing Manual make reference to "independent directors" of a company, it does not provide a formal definition of an "independent director". However, it refers to non-executive directors who are independent and free from any material business or financial connection with the issuer.

The Code of Corporate Governance 2012 defines an "independent" director to be:

a. one who has no relationship with the company, its related corporations, its 10% shareholders or its officers;

b. that could interfere (or be reasonably perceived to interfere);

c. with the exercise of the director's independent business judgement; and

d. with a view to the best interests of the company.

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Code of Corporate Governance 2012 (the Code)

The Code, part of SGX's 'comply or explain' regime for SGX-listed companies, sets out the principle that there should be a strong and independent element on the board, which is able to exercise objective judgement on corporate affairs independently, in particular, from management and 10% shareholders, and that no individual or small group of individuals should be allowed to dominate the board's decision making.

In this regard, it sets out several guidelines as follows:

- Guideline 2.1 – Independent directors should make up at least one third of the board.
- Guideline 2.2 – Independent directors should make up at least half of the board where:

    a. the chairman and chief executive officer (CEO) (or equivalent) is the same person;

    b. the chairman and CEO are immediate family members;

    c. the chairman is part of the management team; or

    d. the chairman is not an independent director.

- Guideline 2.4 – The independence of a director who has served on the board beyond nine (9) years from date of first appointment should be subject to particularly rigorous review, and accordingly, the board should explain why any such director should be considered independent.
- Guideline 2.7 – Non-executive directors should:

    a. constructively challenge and help develop proposals on strategy; and

    b. review performance of management in meeting agreed goals and objectives and monitor reporting of performance.

- Guideline 2.8 – To facilitate a more effective check on management, non-executive directors are encouraged to meet regularly without presence of management.

SGX Listing Manual (Mainboard Rules)

The SGX Listing Manual prescribes certain rules in relation to the requirements for directors, which extends to independent directors, and also the need for an independent element on the board of directors of a company listed on the SGX (an issuer).

- Rule 210(5)(a) – The directors and executive officers should have appropriate experience and expertise to manage the group's business.
- Rule 210(5)(b) – The character and integrity of the directors, management and controlling shareholders of the issuer will be a relevant factor for consideration.
- Rule 210(5)(c) – The issuer's board must have at least two (2) non-executive directors who are independent and free from any material business or financial connection with the issuer.
- Rule 210(9)(e) – A mineral, oil and gas company must have at least one (1) independent director with appropriate industry experience and expertise.
- Rule 221 – A foreign issuer must have at least two (2) independent directors, resident in Singapore.
- Rule 610(8) – Statement by issuer whether any of the independent directors sits on the board of principal subsidiaries based in jurisdictions other than Singapore.
- Rule 720(1) – An issuer must comply with Rule 210(5) and Rule 221 (if applicable) on a continuing basis.
- Rule 725 – An issuer must appoint two (2) authorised representatives who must be either directors or a director and the company secretary.
- Rule 726 – Authorised representatives are:

    a. the principal channel of communication between SGX and issuer at all times; and

    b. to ensure that whenever he or she is outside Singapore, suitable alternates are appointed, available and known to SGX.

With effect from 7 October 2015, directors of SGX-listed companies have also been required to provide undertakings to SGX to the effect that they shall use their best endeavours to comply with the requirements of the SGX pursuant to or in connection with the SGX Listing Manual from time to time in force and use their best endeavours to procure that the SGX-listed company shall so comply.

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Companies Act (Chapter 50) of Singapore (the Act)

The Act sets out general duties and obligations of directors, which extend also to independent directors of SGX-listed companies.

Under Section 157(1) of the Act, a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office. In *Agrosin Pte Ltd v Martynov Igor* [2009] SGHC 148, it was held that this duty to act honestly entails acting bona fide in the best interests of the company. Further, in *Rajabali Jumabhoy v Ameerali Jumabhoy* [1997] 3 SLR 802, acting *bona fide* for the benefit of the company was found to require at least a consideration of views and/or of the relevant material.

Under Section 157(2) of the Act, there is a further duty for an officer or agent of a company not to make improper use of his position as an officer or agent of the company or any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

Singapore Institute of Directors Statement of Good Practice SGP No. 7/2007 (the SID Statement)

The SID Statement provides further guidance on the role of independent directors, stating that the general role of an independent director, who is by definition also a non-executive director, is no less than other directors, and that to suggest otherwise would be inaccurate. In this regard, non-executive directors should not be engaged in and should not be expected to be engaged in the day-to-day management of the company and are expected to be vigilant guardians of the activities of the board as a whole. They are required to monitor the actions of management, and to do this, they must be independent of management. These safeguards are meant to minimise the danger of management abusing their power.

Pursuant to the SID Statement, the primary task of independent directors is to adopt an oversight role and to ensure that the corporate assets are used only for the company.

This entails, without limitation:

a. being familiar with the fundamentals of the company's business;

b. continuing to be informed about the company's activities;

c. reviewing the accounts;

d. calling for additional information where the accounts show less than the full picture;

e. acting as a check on proposed corporate strategy, bearing in mind the economics of any potential transaction;

f. attending board meetings regularly; and

g. participating in the appointment, assessment and remuneration of directors.

Independent directors must ask for information about the company's operations and finances and if they do not get it, they must take steps to pursue the matter. Where an error or negligence is discovered, whether on the part of the board or otherwise, the independent director cannot hide behind a cloak of ignorance. The independent director's primary role is to act as a check and balance on the acts of the board and management.

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There is currently no legislative or regulatory rule providing a difference in degree of duties owed by executive and non-executive or independent directors. However, the Singapore High Court in the *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162 decision made it clear that all directors owe the same degree of duties and responsibilities, regardless of whether he has an executive or non-executive designation.

Although the independent director has a less involved role to play than an executive director, he must nevertheless keep himself informed of what is happening within the company. This is so that he can assure himself that the company's best interests are protected and this is the minimum he must perform.

Conclusion

Independent directors are expected to be vigilant gatekeepers, acting as a check and balance on the company's management, with a view to safeguarding the assets of the company and protecting the interests of all shareholders as a whole, and discharging their duties with reasonable diligence. They are also reasonably expected to rise up to the occasion and discharge their duties effectively to resolve the serious problems faced by the company.

Dentons Rodyk acknowledges and thanks Associate Kevin Chua for his contribution in the writing of this article.

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Grant of security — Not so secure anymore?

Summary

The recent High Court decision in *Encus International Pte Ltd (in compulsory liquidation) v Tenacious Investment Pte Ltd & Ors* [2016] SGHC 50 (Encus International) bears significance to lenders for two pivotal reasons. First, it reiterates the orthodox position that an appropriately-crafted entire agreement clause could cause a previously-negotiated agreement, including a prior term sheet, to be superseded. Secondly, it casts a long shadow of doubt on the status of grant of security in Singapore's insolvency regime. While the traditional English position holds that the grant of security is beyond the reach of avoidance under the Bankruptcy Act, the court in Encus International has significantly opined that this may no longer be the case in Singapore.

Facts

Several investors (the Investors) agreed to invest S$8.8 million in Encus International Pte Ltd (the Company). The broad terms of the agreement, which comprised terms relating to the investment and the giving of security, were set out in an investment term sheet (the Term Sheet). The parties later entered into a convertible loan agreement (CLA), containing an entire agreement clause, under which the Investors agreed to provide the Company with a loan of S$8.8 million, which would be convertible to shares in the Company after a whitewash procedure.

After the conversion of loan into shares under the CLA, the parties entered into a conditional share transfer agreement (CSTA), under which the Company's shares in a subsidiary (the DKE Shares) would be transferred to the investors in the event of its insolvency or unprofitability. When the Company did become insolvent, the Investors enforced the CSTA and the DKE Shares were transferred to them. Subsequently, when the Company entered compulsory liquidation, the liquidator applied to set aside the CSTA and the transfer of the DKE Shares.

Judgment

The court declared that the CSTA was null and void because it was an undervalue transaction within the meaning of Section 98 of the Bankruptcy Act read with Section 329(1) of the Companies Act.

Discussion

Can the investment contemplated under the Term Sheet constitute consideration for the CSTA?

The crux of the matter was whether the CSTA was an undervalue transaction, which turned on whether the Investors' investment under the Term Sheet could constitute consideration for the transfer of the DKE shares to them.

On the facts, the parties had, subsequent to the Term Sheet, entered a CLA. The CLA contained an entire agreement clause which purported to "supersede any previous agreements or arrangements between [the parties] relating to the subject matter of [the CLA]".

Examining the Term Sheet against the CLA, it was found that the quantum of the loan/investment and the number and price of the shares involved in both documents were identical. Further, the CLA did not give the Investors the right to refuse the conversion of the loan into shares once the whitewash procedure was completed and the notice of conversion served. The court thus held that the CLA, though a loan in form, was essentially an investment and the CLA's subject matter was the same as that of the Term Sheet. Consequently, the entire agreement clause in the CLA served to supersede the Term Sheet. Since the Term Sheet was deprived of legal effect, the investment contemplated under it could not stand as consideration for the CSTA. Accordingly, the CSTA was a transaction for no consideration and as the Company was insolvent at the relevant time, the Court held that it was an undervalue transaction liable to be unwound.

Can a grant of security be unwound as a transaction at an undervalue?

The issue of whether a grant of security could be impugned as an undervalue transaction under the Bankruptcy Act did not directly arise on the facts because the CSTA did not create any form of security. The court's reasoning was that the CSTA did not create a debt, nor was the Company under any obligation to avoid insolvency or be profitable; rather, insolvency and unprofitability were simply events that triggered the transfer of the DKE Shares. As there was neither any debt nor other obligation for the CSTA to secure, the CSTA merely constituted a contract for the conditional transfer of property, as its name suggested, and did not create any security.

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The court nevertheless discussed the status of securities in Singapore's insolvency regime.

The traditional position in Re MC Bacon Ltd [1990] BCC 78 (MC Bacon) is that *"[t]he mere creation of a security over a company's assets does not deplete them ... or diminish their value"* and thus *"securitising an existing debt or other obligation can never be a transaction at an undervalue"*.

However, in *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404 (Hill), the English Court of Appeal implicitly overruled MC Bacon, holding that a transaction involving the grant of security can in fact amount to a transaction for no consideration.

Subsequently, however, a differently-constituted English Court of Appeal chose to apply MC Bacon without citing Hill in *Feakins v Department for Environment Food and Rural Affairs* [2007] BCC 54.

While acknowledging that the issue did not arise on the facts and that the law in Singapore is undecided, Prakash J unequivocally expressed *obiter dicta* her preference for the approach in Hill.

Comments

In summation, the case of Encus International reiterates the traditional position that an appropriately-worded entire agreement clause in a subsequent agreement supersedes previously-negotiated agreements like a term sheet, insofar as the agreements relate to the same subject matter.

Further, Prakash J's *dictum* has wider implications – it suggests that the grant of security might no longer be immune to avoidance under the Bankruptcy Act. Hence, this case serves as a cautionary tale that unless there is sufficient consideration furnished by the lender, a secured lender might land himself in the unfortunate situation of being left unsecured should its security provider become insolvent and the grant of security be found to be an undervalue transaction. Great care should thus be exercised in structuring transactions to ensure that lenders do not get caught by insolvency laws against avoidance.

Dentons Rodyk acknowledges and thanks Tan Sih Im for her contribution in the writing of this article.

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International focus — Taking security over real estate in the Commonwealth of Independant States

Introduction

For better or worse, we live in an increasingly globalised world. And in the lifetime of many businesses, there comes a time when they need to expand into new markets in foreign lands. Rather than taking the well-trodden road of investing in developed countries, some have ventured into emerging markets.

In a series of articles, we attempt to demystify certain legal aspects of investing and doing business in such countries and offer qualified encouragement for businesses thinking about paving the way. In this first article of the series, we will touch upon the taking of security over real estate in some of the largest economies of the Commonwealth of Independent States (CIS), namely Russia, Ukraine, Kazakhstan and Azerbaijan.

Secured transactions

Owing to their common Soviet heritage, the legal systems of the CIS countries bear certain similarities in the area of secured transactions, in terms of the legal aspects of taking, perfecting and enforcing security. Since secured loans in these countries often include real estate as a key element of the security package, whether loans are granted for general corporate purposes, specific projects (eg commercial real estate and infrastructure) or otherwise, we focus our attention below on immovable property as collateral.

Since the break-up of the Soviet Union, secured transactions have become an important part of the law and economy of CIS countries, as state housing funds have largely been privatised and the overall volume of lending has dramatically increased. Allowing lenders to create a security interest in collateral owned by an obligor or a third party security provider, coupled with a centralised registry of rights over immovable property and relatively effective enforcement mechanisms, has provided lenders with greater remedies in case of a default by the obligor.

Taking security

In general terms, security agreements are regarded in the CIS countries as legal devices by which a pledgor (often but not always the borrower) pledges to a pledgee (usually the lender) assets and/or rights which it owns, to secure the performance of an obligation arising out of a loan or other agreement. A security agreement is typically a written document which is an accessory to the loan (or other agreement which obligations are secured by such security). Agreements creating a security interest over immovable property typically must be publicly registered (and sometimes also notarised). As a rule, the pledgor retains the legal title to, and is entitled to occupy and/or use, the assets and/or rights, unless and until the pledgor fails to perform the secured obligations.

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In addition to a mortgage over real property, various types of security are also available and commonly used by foreign lenders to complement the security package in commercial real estate financings in CIS countries.

These include a pledge over movables or rights (e.g., receivables, construction contract(s), performance bond(s), insurance and/or re-insurance policies, etc.), a pledge of shares in the borrower and/or holding company(ies) (eg for purposes of obtaining control in an event of default), suretyships, pledges of bank account rights, assignments of key contractual relations, standby letters of credit, etc.

There are also no general prohibitions or limitations on taking security over immovable property, except for certain restrictions related to foreigners' ownership or ability to mortgage land generally or those based on location of or designation of said land (eg border areas, agricultural land, etc.), as well as additional conditions related to mortgaging unfinished construction of real estate.

CIS countries generally are so-called 'race' jurisdictions, ie where the priority of mortgage claims are determined based on the time of registration in the relevant register (the earlier the registration, the higher the priority).

Cross-border lending; Foreign exchange control

While general banking activities are regulated, generally foreign lenders do not need a licence to lend into these countries, including if secured by local real estate or denominated in foreign currency.

There are generally no statutorily-prescribed loan forms, though each country is likely to have certain elements that must be included in the loan. Similarly, the absence of local-law usury rules, which might affect the terms of cross-border commercial loans generally, allows for greater flexibility for lenders, subject to local versions of thin-capitalisation rules.

Foreclosure and enforcement

Both judicial and non-judicial enforcement of security are possible in these CIS countries.

Judicial enforcement involves a number of steps, including initiating court proceedings, sale of the collateral at the public auction and statutory distribution of proceeds. Each of these steps has its own content, filing and timing requirements. Judicial enforcement is generally a lengthy process and may take anywhere from several months to several years to complete. This is one of its main disadvantages. Others include a sale by public auction under the supervision of bailiffs, which requires a statutory distribution of the proceeds.

Non-judicial enforcement (or so-called 'self help'), where legally available, also requires compliance with the prescribed statutory steps, including a possible appeal of non-judicial enforcement by the security provider in court.

Therefore, the most important advantage of this method, ie avoidance of the involvement of the local courts, can easily be eliminated by such an appeal.

Country survey

Dentons hopes that this short summary has been helpful in framing some of the main issues in cross-border secured lending.

A far more detailed version of this article, focusing on each of Russia, Ukraine, Kazakhstan and Azerbaijan, is available on Dentons' website, in our Country Survey. The Country Survey represents an in-depth analysis of these and other salient rules (including tax and insolvency), which we have tried to put into plain, user-friendly language for bankers and in-house counsel in our key strategic client organisations.

Dentons Rodyk acknowledges and thanks the Dentons CIS Banking and Finance team who had compiled the Country Survey.

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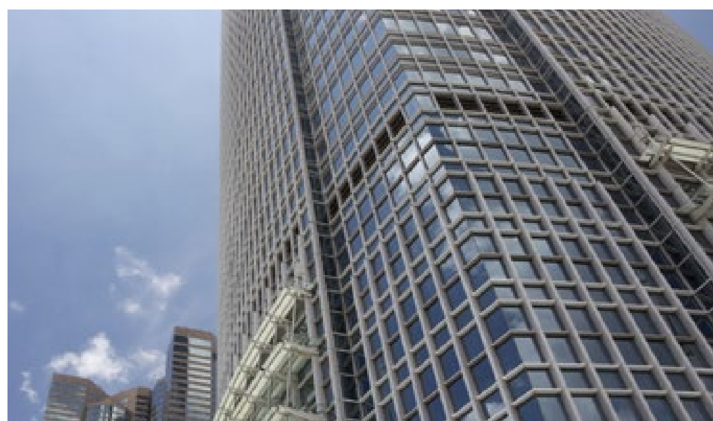

IP Edge

Personal data protection

Personal Data Protection Commission publishes nine decisions on data protection enforcement

On 21 April 2016, Singapore's Personal Data Protection Commission (PDPC) published its decisions of action taken against organisations in breach of provisions relating to the collection, use and disclosure of personal data under the Personal Data Protection Act 2012 (the PDPA). There were nine published decisions involving 11 organisations in total – four organisations were slapped with fines while the other seven were issued with warnings for failure to protect the consumers' personal data.

The provisions of the PDPA that were breached mainly related to the failure to implement adequate data protection measures by the organisations in question including failure to appoint a data protection officer, failure to update the software containing customer information and the use of weak passwords (such as those comprising only one letter in the alphabet).

The highest fine of S$50,000 was meted out to the operator of a chain of karaoke outlets for a data security breach involving unauthorised disclosure of over 317,000 individuals' personal data. The operator's IT vendor was also found guilty and fined S$10,000 despite being a third-party service provider (and therefore a data intermediary). While data intermediaries are partially exempted from the data protection obligations in the PDPA, this decision reiterates that data intermediaries are also responsible for complying with the provisions related to the protection and retention of personal data (including protecting the personal data that it was processing on behalf of the operator of the karaoke outlets).

From these decisions, it can be distilled that the PDPC will take into account the organisation's initial response to the breach and the level of co-operation throughout the investigations when deciding on the appropriate penalty. For example, the operator of the chain of karaoke outlets was found to be less than forthcoming in providing information during the investigations and provided bare facts in their responses – this was found to be an aggravating factor in deciding the penalty to be meted out.

On the same day that the above decisions were published, the PDPC also published the advisory guidelines relating to the enforcement of the data protection provisions in the PDPA and regulations. The guidelines, although non-binding, indicate how in practice the PDPC proposes to handle complaints, reviews and investigations of breaches of data protection rules, and its approach to enforcement and sanctions. The guidelines indicate that the PDPC will take into account the time taken by the organisation alleged to be in breach to resolve a matter, whether the breach was intentional, repeated or ongoing, any obstruction or concealment of information, the failure to comply with previous warnings as well as the nature and volume of sensitive personal data held by the organisation.

These latest decisions, together with the new guidelines, serve as a reminder to organisations of the consequences of failing to comply with the PDPA. In addition, given the scale of the penalties that may be meted out, they serve to impress on all organisations the seriousness of the consequences of any breaches of PDPA obligations.

Dentons Rodyk acknowledges and thanks Associate Ng Chong Yuan for his contribution in the writing of this article.

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Litigation Brief

Recognising foreign insolvency proceedings arising in jurisdictions other than the place of incorporation

A case study of *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108.

Overview

The central question in the case of *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108 (Opti-Medix) was whether insolvency proceedings in a jurisdiction other than the place of incorporation could be recognised by the Singapore court.

Ex parte applications were made for (a) the recognition of foreign insolvency proceedings and (b) the appointment of a foreign bankruptcy trustee, in respect of two companies (the Companies).

Aedit Abdullah JC (the Judge) granted the orders sought.

Background facts

- The Companies were incorporated in the British Virgin Islands.
- The Companies' main business concerned the factoring of receivables from medical institutions in Japan.
- The factoring was funded by the issue of non-recourse notes, which were governed by Singapore law. The proceeds of the business were transferred into Singapore bank accounts.
- However, the notes were only marketed in Japan using Japanese brokers.
- Eventually, the business failed and the bankruptcy orders (the Japanese Orders) were granted by the Tokyo District Court, with the applicant in this case being appointed the Bankruptcy Trustee.

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- The majority of the largest creditors were Japanese entities or persons. There were only two Singapore creditors.
- The Bankruptcy Trustee made the applications so as to exercise his powers under the Japanese Bankruptcy Orders to ascertain, administer and dispose of the companies' assets held in various Singapore bank accounts.

The court's decision

The court allowed the applications, citing a precedent, a Straits Settlement decision dating from 1926 (but reported in 1958), *Re Lee Wah Bank* [1958] 2 MC 81.

The Judge sought to restrict the effect of his decision by making it clear that the mere fact that a company is in liquidation in a particular country, does not by itself provide a basis to recognise that liquidation in Singapore. Instead, more is required before a foreign liquidation is recognised: in this case, the fact that Japan was where the bulk of the business was conducted was the determinative issue.

While it may be natural to suppose that a liquidator appointed in the place of incorporation should have primacy, this would not always be the case. In particular, the Judge sensibly noted that *"the place of incorporation may be an accident of many factors, and may be far removed from the actual place of business"*.

The Judge highlighted the *centre of main interest or COMI* test as being useful in identifying where insolvency proceedings should be conducted. In the judgment, the Judge wrote that *"The COMI will likely be the place where most dealings occur, most money is paid in and out, and most decisions are made. It is thus the place where the bulk of the business is carried out, and for that reason, provides a strong connecting factor to the courts there."*

In applying the COMI test, the Judge suggested that it might be sensible to apply a presumption in favour of the registered office being the COMI. Nevertheless, any of such presumption would be rebutted on the facts of the present case.

Further, the Judge stated that where the interests of the forum are not adversely affected by a foreign order, the courts should lean towards recognition of the foreign insolvency proceedings.

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Commentary

This decision is in line with what is sometimes referred to as the *Universalist* trend in insolvency law.

In this respect, the Judge stated:

> *"In cross border insolvency, there has been a general movement away from the traditional, territorial focus on the interests of the local creditors, towards recognition that universal cooperation between jurisdictions is a necessary part of the contemporary world. Under a Universalist approach, one court takes the lead while other courts assist in administering the liquidation."*

The effect of the Universalist trend is, in essence, *"a greater readiness to go beyond traditional bases for recognising foreign insolvency proceedings"*.

The Judge's decision is sensible and commercially-oriented. The traditional rule that only foreign insolvency proceedings which are also initiated in the place of incorporation ought to be recognised by a forum court, is severely outmoded.

Globalisation has resulted in an explosion of economic activity which frequently transcends national borders. International businesses often engage in commerce through a spectrum of branches, offices, subsidiaries and special purpose vehicles. The Judge's decision has accorded with the commercial realities of the 21st century in which we often find ourselves faced with a variety of eclectic business arrangements, designed to maximise advantages across multiple jurisdictions.

However, while the facts of the present case clearly weighed in favour of Japan being the COMI, one can easily envisage circumstances where the answer is not so clear-cut. In view of the sheer variety of cross-border business arrangements now prevalent across the world, the court may be faced with some difficulty at a future date, in attempting to lay down a coherent set of guidelines for the determination of the COMI in such situations.

The universalist trend in insolvency proceedings demonstrated in *Opti-Medix* has also surfaced in another recent decision of Aedit Abdullah JC in *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] SGHC 195 (Taisoo).

In *Taisoo*, the applicant sought, and the court granted interim orders for the recognition of rehabilitation proceedings in Korea, and the restraint of all pending, contingent or fresh proceedings against a company. However, the test laid down for recognising foreign rehabilitation proceedings appears to be slightly distinct from the COMI test.

In particular, the Judge stated that the following factors would have to be assessed: (a) the connection of the company to the forum in which the rehabilitation proceedings are taking place and to the place of rehabilitation, (b) what the rehabilitation process entails, including its impact on domestic creditors and whether it is fair and equitable in the circumstances, and (c) whether there are any strong countervailing reasons against recognition of the foreign rehabilitation proceedings.

Nevertheless, it is of note that the decision in *Taisoo* applies and extends the universalist trend to insolvency proceedings, other than winding up and/or bankruptcy, such as restructuring and rehabilitation. Indeed, the Judge in *Taisoo* stated that *"[s]uch recognition and assistance perhaps constituted a development of the common law in Singapore"*.

It remains to be seen in what further circumstances the universalist trend in insolvency may lie to be applied. However, insolvency practitioners would be wise to keep these important jurisprudential developments in mind when approaching cases which involve multiple jurisdictions.

Dentons Rodyk acknowledges and thanks Associate Reuben Gavin Peter for his contribution in the writing of this article.

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