Reporter
Issue 01 (2018)

Regional CEO's Message

Happy New Year and welcome to the first issue of the Dentons Rodyk Reporter 2018.

Let me share our key developments in 2017, and what you can expect from us in 2018.

It was quite a year for all of us at Dentons Rodyk. Being part of a global law firm has been a game changer for us. About a year and a half into our combination, we have been presented with a myriad of opportunities to better support our clients with cross border needs, and international clients with businesses in Singapore and the ASEAN region. Dentons Rodyk expanded our presence within Southeast Asia with the addition of a new office in Yangon, Myanmar.

At the beginning of 2017, we welcomed Edmund Leow, SC, a former high court judge, who now heads up our Tax and Trusts, Estates and Wealth Preservation practices. Kunal Kapoor, an energy practice partner, who joined us in August 2017, is cited by The Legal 500 Asia Pacific as a Next Generation Lawyer for Energy (international firms). In September 2017, Shobna Chandran, a partner in Litigation & Dispute Resolution, joined us to focus on complex cross border litigation and arbitration as well as contentious regulatory / advisory work.

Our firm and lawyers received many accolades in 2017. Our young partners also made waves, with Zhulkarnain Abdul Rahim being named as one of Singapore's Ten Outstanding Young Persons 2017 by Junior Chamber International (JCI).

We continue to contribute to the broader community with our involvement in various programmes. From a thought leadership perspective, the inaugural Dentons Rodyk Dialogue 2017 organised in partnership with the Singapore Management University (SMU) was a huge success. The second Dialogue in May 2018 will feature leaders in business, politics and academia, which will focus their discussions around international trade and its impact on Singapore and ASEAN. We hope you will plan to join us at this signature event on the legal fraternity's calendar.

IN THIS ISSUE

Investing in the development of our people remains a key tenet of the firm. Our lawyers enjoyed opportunities in 2017 for development through leadership courses, partner development programmes and secondments.

The future is exciting for Dentons Rodyk as we continue on our path from largest to leading. We are developing deep and enduring relationships with our colleagues worldwide in service of clients whose needs cross borders and span continents.

I greatly appreciate the support that you have given me and my colleagues over the years.

I wish you a safe, happy, healthy and prosperous 2018.

Key contact

Philip Jeyaretnam, SC
Regional CEO & Global Vice-Chair

D +65 6885 3605
philip.jeyaretnam@dentons.com

Business Bulletin

Infamy and Public Shaming: The newest risk of using "offshore" entities

What investors, companies and high-net-worth individuals can do to protect their financial reputation

While many companies and businesspeople actively manage their online and social media presence – many overlook the reputational impact of their financial and tax planning decisions. The recent "Paradise Papers" leak illustrates this point – with global audiences paying close attention to the roster of famous (and not-so-famous) names linked to each subsequent information leak. More than 120,000 names of people and companies have been identified.

The Paradise Papers leak involved the hacking of offshore law firm Appleby, and subsequent leakage of 13.4 million files to the Sueddeutsche Zeitung, a German newspaper, and the International Consortium of Investigative Journalists (ICIJ), an organisation known for its lengthy investigations. Global personalities like Shakira, Canadian Prime Minister Justin Trudeau, and US President Trump's son-in-law Jared Kushner have been linked to either offshore accounts or account-holders.

While the trifecta of tax, the law and technology does not usually rise to the ranks of "celebrity gossip" – these scandals are symptomatic of a new risk of using "offshore" corporate entities. Beyond the risk of regulatory compliance – investors must also consider the public "naming and shaming" which may result when using offshore companies to hold property, aircraft, yachts, and investments in stocks and shares – among numerous other assets.

No reports have so far suggested that any of the activities mentioned in the Paradise Papers were illegal. However, the reputational damage alone may affect not only current holdings, but also future professional and investment opportunities. There may also be significant impact for business associates, employees, family members, and friends of the named individuals or entities.

This is not the first scandal of this type. Last year, global attention was captured by the "Panama Papers" scandal. But if there is no illegality, then why is public opinion so negative towards the use of offshore jurisdictions? It appears that part of the explanation relates to the perception that these jurisdictions are engaged in the selling of secrecy, and that people who use such jurisdictions are therefore assumed to have something to hide.

> Read more on page 4

The growing international push for transparency and exchange of information amongst jurisdictions for tax purposes will only make it more likely that the "Paradise Papers" will not be the last of its kind – and high-net-worth individuals should prepare for eventualities. The possibility that many such "leaks" may have resulted from hacking or other illegal activities seems to be ignored, or even defended on various grounds. In such an environment, further "leaks" can only be expected.

Managing these risks is not only possible, but crucial. Many high-net-worth individuals have traditionally managed ownership of their assets in an ad-hoc or casual way – delaying proper tax planning for later years. However, by simply structuring asset ownership carefully and operating out of reputable jurisdictions, many of the reputational risks arising out Paradise-Papers-style hackings can be mitigated.

For example, a jurisdiction like Singapore offers companies and individuals a favourable tax regime, a well-developed legal system, and access to reputed law firms, legal professionals, and financial advisors. It is also a financial and business hub where foreigners and locals locate their business and financial activities for sound commercial reasons. The Singaporean government is also known for its commitment to the rule of law, as well as remaining vigilant of abuses in the financial sector.

Furthermore, Singapore has now made it easier for foreign corporate entities to transfer their company's registration to Singapore and become a Singapore company limited by shares under our Companies Act.

The Paradise Papers is only one instance, of many, of massive hacks of sensitive financial and legal information. However, individuals and companies using offshore accounts can effectively pre-empt reputational damage by engaging in careful tax planning and managing their assets from jurisdictions like Singapore, with strong reputations for financial compliance.

Key contact

Edmund Leow, SC
Senior Partner
Tax

D +65 6885 3613
edmund.leow@dentons.com

Investing Intelligently in an E-Commerce Company: Challenges & Potential Innovations

By 2027, Singapore's e-commerce market is predicted to grow five-fold – to at least US$5.4 billion (S$7.5 billion), according to a study by Google and Temasek Holdings. E-commerce markets in other parts of Asia are also poised to grow significantly – with many Asian businesses venturing out into markets of developed nations with sophisticated data privacy and consumer laws.

Investors and entrepreneurs are faced with unprecedented opportunities – as well as challenges related to their e-commerce venture, including understanding:

- Which factors may impact the value of an e-commerce company, especially when business models defy traditional valuation methods?
- How can e-commerce companies remain compliant with laws and regulations from each of the countries in which it operates?
- As more participants crowd the e-commerce market, how can e-commerce businesses innovate to continue to provide value and capture opportunities?

E-commerce remains a novel area – both in business and law – but with the right guidance, there is no limit to the creative solutions that may abound.

Factors Impacting the Value of an E-Commerce Venture

E-commerce businesses can have valuations which far exceed those of traditional companies within the same industry. For example, Uber, the online transportation network company founded in 2009 is currently valued at approximately US$68 billion – around US$20 billion higher than auto giant General Motors, which has been in existence since 1908. And Uber does not even manufacture cars!

Rather than traditional metrics such as historical profits and logistics costs – e-commerce companies are usually valued based on factors like sales, number of transactions, active users, "hits", the future state of the industry, potential market size, expected growth, and sometimes an extremely optimistic revenue growth.

However, e-commerce ventures are complex businesses to run – generally capital-intensive, with low profit margins – and entail compliance with laws from various jurisdictions, the handling of sensitive consumer information, and a consideration of how the venture impacts market competition in the relevant country. An e-commerce venture may therefore quickly encounter compliance issues which may significantly decrease its value.

Legal Compliance Needs of an E-Commerce Venture

Due to the global nature of many e-commerce ventures, compliance with laws in each of the countries it operates is crucial. For example, failing to comply with data privacy and consumer protection laws could not only impact a company's valuation – but also lead to civil or criminal liability. Below, we highlight some salient compliance issues related to e-commerce– highlighting the importance of hiring legal counsel with a deep understanding of e-commerce compliance needs.

1. Data privacy

When transacting online, consumers almost always share personal data such as their name, contact details, home address and payment card details. Of 194 UNCTAD member states, a total of 107 countries (of which 66 are developing or transition economies) have in place legislation to secure the capture, transmission and use of personal data.

E-commerce businesses are also generally required to implement security measures to prevent unauthorised access, use and disclosure of personal data. Furthermore, customers must be informed of the purposes for which their data is being collected, and consent to the collection, use or disclosure of their personal data. Finally, it is also crucial for any e-commerce venture to implement procedures to handle data breaches which enable the business to notify customers and relevant authorities promptly and investigate and contain the breach.

Because compliance requirements may differ between countries, ventures may need to adopt tailored approaches for each jurisdiction.

2. Consumer protection

Most countries have adopted laws and regulations to protect consumers who may be at the mercy of errant traders and unethical business practices. Common concerns include the truth of online product descriptions and reviews, fairness of merchant terms of sale, and availability of recourse for late or non-delivery, product defects, or other disputes.

> Read more on page 6

In Singapore, for example, consumer protection laws include:

- Unfair Contract Terms Act, which restricts the extent a merchant can limit or exclude liability owed to consumers;
- Consumer Protection (Fair Trading) Act, which prohibits unfair trade practices, including false claims about goods/services or having overly harsh or oppressive terms of sale; and
- Consumer Protection (Trade Descriptions and Safety Requirements) Act, which prohibits traders from using false trade descriptions, including in advertisements for goods

Of the 194 UNCTAD member states, 97 (of which 61 are developing or transition economies) have adopted consumer protection legislation that relates to e-commerce. Likewise, a tailored approach for each jurisdiction may be necessary.

3. Competition laws

All ASEAN member countries have enacted some form of competition legislation and have a regulator to ensure the enforcement of such legislation. Behaviour by e-commerce ventures which may impact a competitiveness analysis may include:

- **Price obfuscation**, which may be seen as anti-competitive. This involves making it difficult for consumers to search and compare prices online, such as by advertising prices of low-quality products on a price comparison website but not making the price of higher-quality upgrades easily observable;
- **Vertical restraints**, on the other hand, may be seen as pro-competitive depending on the context. These are generally non-price-related restrictions imposed by parties on different levels of the distribution chain, and may include restrictions on selling online, submitting offers to price comparison websites, or cross-border sales.

Whether an act may be considered anti-competitive requires complex analysis and professional advice from a qualified legal team should be sought.

Business Model Innovations

As players crowd the market, innovation is necessary for differentiation and value-capture. The “reverse auction” model may be a viable solution – where sellers compete to obtain business from the buyer in real time, often with added transparency around prices and the buyer’s requirements.

This model may change the way firms behave with their suppliers worldwide, improving effectiveness of the sourcing process and facilitating access to new suppliers. It may also minimise anti-competitive behaviour among suppliers. This presents e-commerce portals with an interesting opportunity to offer reverse auction services, and for manufacturers to understand buyer needs more clearly.

Next Steps: Capturing Value

The e-commerce market in Asia is growing rapidly and it remains a challenge to accurately value emerging e-commerce businesses. Furthermore, many Asia-based e-commerce companies are venturing out into markets of developed nations with sophisticated competition, data privacy and consumer laws. In innovating and setting up a viable business model, e-commerce businesses would do well to seek appropriate legal advice in order to gain consumer confidence in their target markets.

Key contacts

Gerald Singham
Deputy Managing Partner
Corporate

D +65 6885 3644
gerald.singham@dentons.com

Gilbert Leong
Senior Partner
Intellectual Property & Technology

D +65 6885 3638
gilbert.leong@dentons.com

S Sivanesan
Senior Partner
Corporate

D +65 6885 3685
sivanesan.s@dentons.com

Opportunities for Venture Capital Investments in Singapore in 2018

Shifting legal landscape and promising technology trends

Introduction

Heading into 2018, we look back on several key developments in the legal landscape in the past year that we expect would provide new opportunities for venture capital funds in Singapore. We also share our thoughts on promising trends in venture technology and emerging growth companies in the year ahead.

A more favourable legal landscape

Simplified rules for managers of venture capital (VC) funds

The Monetary Authority of Singapore (MAS) had on 20 October 2017 announced a simplified regulatory regime for VC fund managers. Previously, the qualifying criteria demanded, inter alia, VC fund managers to have at least 5 years of management experience, high capital capabilities and imposed onerous terms in relation to business conduct – with the new regime, such minimum qualifying criteria have been removed. This will attract a new set of VC managers to Singapore and contribute to the vibrant albeit nascent start-up and growth stage market. For further details on such changes, please see our earlier article (Venture Capital fund managers may begin operations in record time in Singapore).

Redomiciliation

On 11 October 2017, Singapore formally adopted a re-domiciliation regime that allows certain foreign companies to be registered as a Singapore company limited by shares. With the enactment of new “Transfer of Registration” provisions under Part XA of the Companies Act (Chapter 50 of Singapore), foreign start-ups may find it compelling to re-domicile in Singapore to capitalise on its unique position as a reliable and efficient international business hub with access to various Asian markets, as well as its favourable tax regime.

> Read more on page 8

In addition to increasing the pool of potential investee companies, the re-domiciliation regime would be a boon for VCs and PEs who may be reluctant to invest directly into a foreign jurisdiction whose laws may be comparatively complicated or uncertain. Instead of requiring the founders of the foreign start-up to incorporate a Singapore holding company and to effect various transfers of assets and shares to the Singapore holdco, start-ups can make use of the re-domiciliation regime to transfer the registration of their existing entity to a Singapore company for purposes of the VC/PE's investment, without the hassle of operational disruptions. This also dovetails the general preference for Singapore as a forum for dispute resolution in the region.

Enhanced Debt Restructuring Regime / Super-priority for Rescue Financing

A suite of debt restructuring reforms consolidated in the Companies Act came into force on 23 May 2017. The enhanced debt restructuring regime is a hybrid that builds upon existing legislation and combines key features of Chapter 11 US Bankruptcy Code provisions. With at least six workout cases filed in the Singapore courts to-date and a new Insolvency Bill to be enacted in 2018 that will further streamline and update its insolvency laws, Singapore will continue its push to establish itself as a debt restructuring hub in Asia and beyond.

Of particular interest to funds and corporates would be the super-priority for rescue financing enhancements to the scheme of arrangement and judicial management regimes (under Sections 211E and 227HA of the Companies Act respectively). Singapore courts can now order that the debt arising from rescue financing be accorded super-priority over existing debt, which will encourage the injection of critical funds to salvage distressed companies and envigorate the debt recovery market. Investors looking to capitalise on such opportunities to bridge the lending gap will do well to follow this space and nascent jurisprudence closely.

MAS Regulations

Against the backdrop of continuous technology disruptions in the financial industry (and beyond), MAS has created a conducive ecosystem for FinTech experimentation in Singapore. MAS' aim is for innovations to be tested and developed in a safe and well-defined regulatory sandbox before wider adoption locally and abroad.

It was announced at the Singapore FinTech Festival organised by MAS in November 2017 (where over US$2 billion of capital was available for investment in start-ups) that MAS will expedite sandbox application assessments and further loosen the regulatory boundaries for solutions where the risks do not outweigh the potential benefits to consumers. Its recent venture with the Association of Banks in Singapore (ABS) in developing blockchain prototypes for more efficient inter-bank payments would also benefit all stakeholders looking to ride on the FinTech wave, including in the spheres of cybersecurity, payment gateways and digital currencies. With MAS continuing the drive to establish a thriving FinTech ecosystem, investment in this sector should remain relatively steady in 2018.

Promising Technology Trends

Legal Technology (LegalTech)

Consider a reality where legal contracts are enforced by machines; or a world where 'intelligent legal assistants' provide real-time updates on case law and legislation from all over the world. From America to Asia, start-ups and law firms have jumped on the bandwagon, transforming the way one gets access to legal developments and services.

Dentons had recently launched Nextlaw Labs and its investment arm Nextlaw Ventures, LegalTech ventures jointly focused on incubating, investing in, developing and deploying new technologies to transform the practice of law. Nextlaw Ventures' portfolio of legal technology innovators include ROSS Intelligence, a leading artificial intelligence company that leverages IBM Watson-powered cognitive computing to refine expert legal research, which had secured US$8.7 million in Series A funding in October 2017.

In Singapore, Singapore Academy of Law (SAL) has swung to the rhythm of LegalTech, with the official launch of the Future Law Innovation Programme (FLIP) in January 2018. Not only does FLIP aim to encourage innovation in Singapore's legal practice, the launch of its FLIP Accelerator (touted as South East Asia's first legal tech accelerator program) will boost the growth and development of LegalTech start-ups in the region. Dentons Rodyk is a featured international law firm participant - in line with our strategy of redefining the client experience and leveraging technology to promote seamless collaboration.

Property Technology (PropTech)

Reports show that investment in PropTech has been steadily rising on a global scale, and that in recent years PropTech start-ups in Asia-Pacific have secured more investments that their American and European counterparts (close to US$5 billion in funding since 2013). In addition to PropTech that is developed

primarily for consumers (such as property portals, virtual-reality tours, data analytics and market research, and various smart home/offices features and offerings in the Internet of Things), blockchain technology has already been adopted by some countries for their land registries. As a sign of the potential of the PropTech industry, dedicated funds have been set up by various property and construction groups in Singapore to invest exclusively in start-ups in the PropTech vertical.

Deep Technology (DeepTech)

DeepTech start-ups focus on developing technology based on unique scientific and/or engineering innovation and are built around intellectual property that is proprietary or hard to replicate, compared to the ubiquitous consumer tech companies that rely mainly on existing technology. While consumer tech companies continue to expand, the potential for unabated growth is theoretically limited by technology that is only available today as well as the risk of market saturation.

Investors are looking to DeepTech start-ups as an alternative. Amongst various other initiatives, SGInnovate, a Singapore government-owned innovation platform, unveiled late last year its “Deep Tech Nexus” Strategy for 2018 to develop the DeepTech ecosystem in Singapore, with a focus on three technology areas: (i) artificial intelligence; (ii) blockchain; and (iii) medical technology (discussed below).

Medical Technology (MedTech)

The interplay of technological advances, aging populations and vast areas of unmet medical needs in many Asian countries herald a new era of MedTech start-ups, and Singapore has been identified as being well-positioned to act as a gateway to tap into the MedTech industry in the region. A recent boost for MedTech start-ups and emerging growth companies was provided in June 2017 when the Singapore Exchange Limited (SGX) and ETPL, the commercialisation arm of the Agency for Science, Technology and Research (A*STAR), signed a two-year memorandum of understanding, making it more accessible for MedTech companies to tap on innovative technologies and access growth capital from private and public capital markets to grow their businesses.

Conclusion

VC and private equity investment in South East Asia has been growing in recent years as funding in Asian companies continue to increase globally and even exceed amounts invested in their Western counterparts, according to public reports. In light of the developments and technology trends discussed above, we believe there will be ample opportunities in Singapore as well as the region in the coming years.

Dentons Rodyk acknowledges and thanks Xuan Rong Liow for her contribution to the article.

Key contacts

Wan Hong Chan
Senior Partner
Corporate

D +65 6885 3668
wanhong.chan@dentons.com

Nigel Chia
Partner
Corporate

D +65 6885 3735
nigel.chia@dentons.com

Litigation Brief

Approval for Super Priority Rescue Financing – What does an applicant need to show a Singapore court?

A case study of Re: Attilan Group Ltd [2017] SGHC 283

Introduction

For the first time, the Singapore High Court has ruled on whether to grant 'super priority' for debts arising from rescue financing under the amended insolvency laws via the Companies (Amendment) Act 2017 (the Act). 'Super priority' was one of the central topics discussed in Dentons Rodyk's series of seminars for financial institution clients held in September 2017 over 3 days.

These provisions were inspired by the Chapter 11 bankruptcy process in the United States, allowing for "Debtor-In-Possession" (DIP) financing to be arranged by a company under the United States Bankruptcy Code 11 USC (Chapter 11) bankruptcy process.

In its decision, the Singapore High Court declined to grant priority status to funds to be advanced to the Attilan Group, finding that the applicant must first expend reasonable efforts to seek out non-priority sources of financing (and provide supporting evidence thereof), before seeking super priority rescue financing.

Below, we discuss the implications of the High Court's decision in *Re: Attilan Group Ltd* [2017] SGHC 283 (Re: Attilan) for companies seeking 'super priority' for debts arising from rescue financing.

Background & Executive Summary

The Singapore Parliament recently made extensive changes to Singapore's insolvency laws via the Companies (Amendment) Act 2017 (the Act). The amendments are part of Singapore's efforts to make it an international debt restructuring hub and include mechanisms to 'supercharge' scheme of arrangements, facilitate easier access to judicial management, and enhance moratoriums against creditors – all of which are intended to aid companies trying to navigate out of deep debt.

In September 2017, Dentons Rodyk conducted a seminar series over 3 days for financial institution clients which touched on these recent changes, where leading insolvency experts from Dentons US, UK and Australia provided a comparative perspective of the laws and shared their "war stories" from their jurisdictions.

One of the central provisions discussed during the Dentons Rodyk seminars was section 211E of the Companies Act (Cap. 50) relating to super priority for debts arising from rescue financing. Now, in Re: Atillan, the Singapore High Court has provided guidance to this new provision where the applicant sought, *inter alia*, for proposed rescue financing to be given super priority in the event of the applicant's winding up. This case is notable for being the first reported case on section 211E and provides an insight into how the Singapore court will approach this new provision in the future.

After considering both the parties' submissions, as well as taking guidance from similar provisions in, and US cases relating to Chapter 11, the High Court declined to grant super priority to the proposed rescue financing.

The Applicant must expend reasonable effort to seek out less disruptive sources of financing

In *Re: Attilan*, Attilan Group Limited (the Applicant) sought for sums to be disbursed by a subscriber under a subscription agreement to be treated as rescue financing and be afforded super priority over other creditors' claims (in the event of a winding up). The Applicant sought this in conjunction with a scheme of arrangement which would turn around its poor financial status. Phillip Asia Pacific Opportunity Fund Ltd, one of its creditors, (Phillip Asia) opposed both the scheme and the application for super priority.

The Honourable Justice Aedit Abdullah, notwithstanding Phillip Asia's opposition to the scheme to be put to the creditors, allowed the calling of a meeting of the Applicant's creditors to consider the scheme. However, the learned Judge rejected the application for super priority on several grounds. Most notably, the learned Judge noted that while the Companies Act was silent on the necessary standard of proof, the court "*must be sufficiently satisfied on a balance of probabilities that there is a basis*" to grant the application. In this regard, the company making the application must put forth evidence that it has taken **reasonable efforts** to attempt to secure financing that would not be disruptive to the expected priority of creditors.

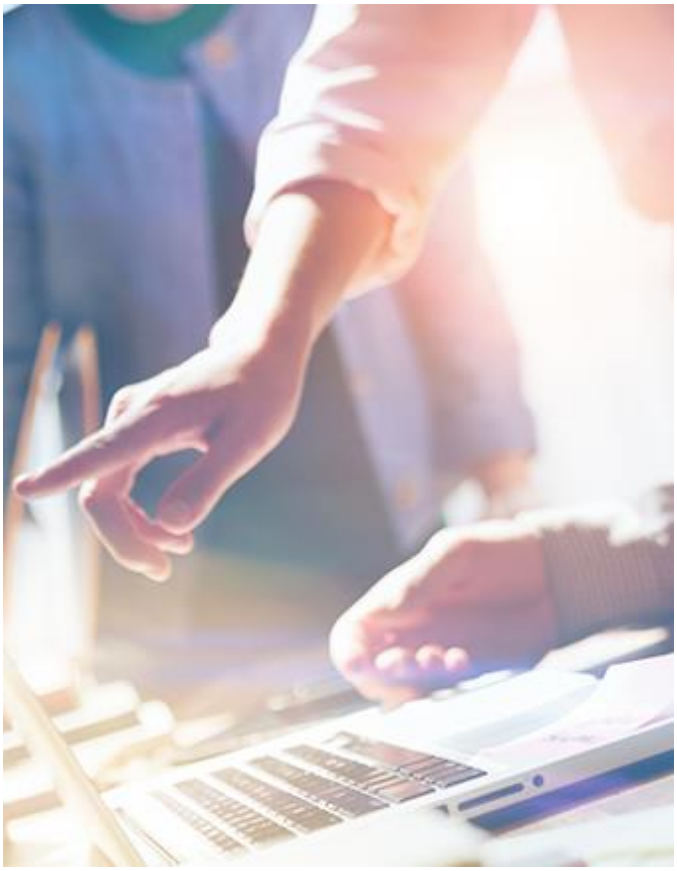
In other words, a company must

(i) first try to obtain financing without super priority terms and

(ii) show in evidence that it has done so. Mere allegations or unsubstantiated assertions would hold no water with the Court.

The learned Judge further explained that having a requirement for hard evidence was grounded in policy, due to the disruptive nature of a successful super priority application.

Applying the above to the facts of *Re: Attilan*, the learned Judge agreed with Phillip Asia in that the Applicant had failed to show adequate evidence of any efforts, let alone reasonable efforts, being expended by it to secure funding without any super priority. While it was accepted on the face of the Applicant's affidavit that the Applicant had indeed entered into discussions and



negotiations to seek out financing, it was not obvious that these negotiations were in respect of financing without super priority terms. There was no concrete evidence adduced, such as correspondence with financial institutions clearly indicating rejection or negotiation.

As such, it was correctly deduced that it would be "*next to impossible*" for the court to determine whether the Applicant had access to other funds without tangible evidence being produced. On a separate note, the learned Judge rejected the Applicant's argument that its unstable financial position made it pointless to even attempt to search for other sources of financing.

On the basis of the above, the learned Judge declined to grant super priority status to the proposed rescue financing.

> Read more on page 12

Possible guidance from US law

The learned Judge made numerous references to the provisions of Chapter 11 and to US case law, which may provide us with further guidance as to how Singapore courts will be approaching the new section 211E. For instance, the case of *In re Western Pacific* was raised by Phillip Asia and considered by the learned Judge in the judgment. In that case, it was held that in order for the court to give super priority to a debt, four conditions had to be fulfilled: (a) the proposed financing has to be in the exercise of sound and reasonable business judgment; (b) no alternative financing is available on any other basis; (c) such financing is in the best interest of the creditors; and (d) no better offers, bids or timely proposals are before the court. Although the learned Judge considered these factors largely irrelevant to *Re: Attilan*, he did acknowledge that they could potentially be relevant considerations in future cases involving super priority applications.

What is clear from this judgment is that the Singapore Court will chart its own course although US caselaw "*…could be helpful in illuminating the appropriate construction of the newly enacted provisions in the CA concerning rescue financing…*". The learned Judge emphasized that "*…the US authorities and doctrine are referred to only as a useful guide as [Singapore] develop[s] our own law in this area. [The Singapore court] may stick close to the US position, or we may depart from it: much will depend on the arguments put before us.*"

Implications and Lessons Learnt

There are three key lessons which should inform future efforts by companies to obtain 'super priority' rescue financing.

1. As we highlighted at our September 2017 seminar series, US caselaw will be highly persuasive but the Singapore Court, bearing in mind the differences between the US Chapter 11 regime and what has been introduced in Singapore, will chart its own course. This was the approach taken by the learned Judge in *Re: Attilan*.

2. It is common for courts to ask: where is the evidence? This is amplified in this case where the Court held that: "*the grant of super priority should not ordinarily be resorted to and the courts would be slow to do so unless it is strictly necessary*". Would-be creditors and distressed companies would do well to keep this in mind, and should exercise due care and diligence in making sure that all reasonable options are exhausted before super priority rescue financing is sought. If it is truly the case that no practical options remain, parties would do well to adduce clear contemporaneous documentary evidence to this effect in their applications. Bare assertions will not meet the mark.

3. Potential applicants should further note the comments of the learned Judge at [56] of the judgment:

   "*some thought should be given by applicants to the appropriate type or level of super priority sought, and they should also be prepared to provide the rationale for what they seek*". In the same vein, potential applicants should specify right at the start of proceedings which limb of section 211E they are relying on; it is important to do because any opposing creditor can then formulate its submissions accordingly.

Ultimately, thorough planning and effort must be expended before a company applies to court for super priority, given its impact on all stakeholders. Singapore courts have made it clear they will not simply rubber-stamp an applicant's proposal.

Dentons Rodyk acknowledges and thanks associate Ashwin Nair for his contribution to the article.

Key contacts

Herman Jeremiah
Senior Partner
Litigation, Dispute Resolution and Arbitration

D +65 6885 3614
herman.jeremiah@dentons.com

Kia Jeng Koh
Senior Partner
Litigation and Dispute Resolution

D +65 6885 3698
kiajeng.koh@dentons.com

Taking and documenting informed consent: When is it not enough?

A case study of Jen Shek Wei v Singapore Medical Council [2017] SGHC 294

Introduction

Maintaining adequate medical documentation is a challenge for many doctors working in a busy practice or healthcare institution. However, when it comes to informed consent, doctors should place high priority on ensuring that consent is appropriately taken and comprehensively documented in order to avoid potential civil liability or disciplinary proceedings.

Below, we discuss the recent Court of Three Judges decision on Dr Jen Shek Wei's failure to obtain informed consent prior to removing a patient's ovary, the applicable standard of conduct for obtaining and documenting informed consent, and finally, tips on taking and documenting informed consent.

Case summary

Dr Jen Shek Wei, an Obstetrician and Gynaecologist in private practice, faced two charges before the SMC Disciplinary Tribunal (SMC DT), for:

(1) Advising the Patient to undergo surgery to remove a pelvic mass without conducting further evaluation and investigation of her condition, when further assessment was warranted. His failure amounted to serious negligence which objectively portrayed an abuse of the privileges which accompany registration as a medical practitioner (i.e. the first limb of professional misconduct as per *Low Cze Hong v Singapore Medical Council* [2008] 3 SLR(R) 612 (*Low Cze Hong*); and

(2) Performing a left oophorectomy on the Patient without having obtained her informed consent, in breach of Guideline 4.2.2 of the SMC's Ethical Code and Ethical Guidelines (ECEG), and that such conduct was an intentional, deliberate departure from standards observed or approved by members of the profession of good repute and competence (i.e. the second limb of professional misconduct as per *Low Cze Hong*).

The SMC DT convicted Dr Jen on both charges, and ordered that he (a) be suspended for a period of eight months, (b) pay a fine of $10,000, (c) be censured, (d) give a written undertaking to the SMC that he would not

engage in the conduct complained of or other similar conduct, and (e) pay the costs and expenses of the disciplinary proceedings, including the costs of the SMC's solicitors.

Dr Jen appealed against the DT's decision to the Court of Three Judges, which upheld the DT's decision on both conviction and sentence.

This article will focus only on the second charge against Dr Jen for failing to obtain informed consent in breach of Guideline 4.2.2 of the SMC ECEG 2002 Edition, and the standard of conduct applicable in the context of SMC disciplinary proceedings.[1]

Brief background facts

The Patient consulted an Orthopaedic surgeon for a "very bad backache". After conducting investigations, the Orthopaedic surgeon referred the Patient to Dr Jen, whom she had previously consulted for fertility treatment.

Dr Jen performed a transvaginal scan on the Patient and found that there was a lump in each of her ovaries. (As the disciplinary proceedings against Dr Jen only concerned the lump on the left ovary, the following references to "the mass" only refer to the lump on the left ovary.)

According to the Patient (which the Court of 3 Judges accepted), Dr Jen had advised her to remove the lumps as the mass was "quite huge" and there "may be cancer". Dr Jen's own account of his diagnosis was similar: he believed that the mass might be malignant, and that it should be removed for histological examination.

> Read more on page 14

[1] For an exposition of the appropriate standard of care of a medical practitioner in the provision of medical advice, please refer to Dentons Rodyk Reporter article on *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38 (Issue 3 2017)

Dr Jen offered the Patient a choice of two surgical procedures: (a) laparoscopy or (b) open laparotomy. After Dr Jen explained that there was a risk of the cancerous cells spreading to other areas with the laparoscopy, the Patient and her husband decided to go with the open laparotomy. They also opted to have the mass sent to the laboratory for testing after surgery, and depending on the test results, the Patient could decide whether or not to go for further treatment.

On the day of the operation, the Patient signed the consent form in the hospital's admission office. According to the Patient, the name of the procedure (i.e. open left oopherectomy) was not filled in at the time of signing. (The DT did not make a finding on this.) Dr Jen was absent when the Patient signed the consent form. He only signed it before the operation when he saw the Patient in the operating theatre. During the operation, Dr Jen decided to remove the Patient's left ovary due to "suspicious" features observed. As the left fallopian tube was, in his view, badly damaged, it was removed as well together with the left ovary. The subsequent histopathological report stated that the ovarian tissues were benign.

The Patient only found out that her left ovary was removed some eight months later, when she consulted another Obstetrician and Gynaecologist for her pregnancy. She subsequently filed a complaint to the SMC against Dr Jen.

The DT's decision and appeal to the Court of three Judges

The DT convicted Dr Jen based on the following findings:

(a) There was no contemporaneous evidence that Dr Jen had obtained informed consent through a process of explaining the risks, benefits and possible complications of the left oophorectomy apart from the hospital's consent form;

(b) Based on Dr Jen's documentation, it was not clear what clinical procedure he had advised the Patient to undergo;

(c) Dr Jen's oral evidence during the inquiry was "somewhat evasive and repetitive";

(d) Little weight was given to the evidence of Dr Jen's four witnesses; and

(e) Dr Jen failed to ensure that the Patient was adequately informed about her medical condition and options for treatment so that she was able to participate and make informed decisions about her treatment. Significantly, Dr Jen did not document the details of the surgery advised and his taking of informed consent.

On appeal, the Court of Three Judges affirmed the DT's decision and findings. We highlight some of the Court's observations in the present case which is of general applicability:

(a) A signed consent form alone may not be sufficient to raise a reasonable doubt in the Prosecution's case. It is at best an indicator that the obligation has been discharged, but it is not a conclusive defence. The key is whether the doctor had explained and the patient understood the nature of the operation and the required matters (such as the risks and complications) relating to the operation.

(b) The obligation to obtain informed consent is rooted in *process* and not a mere signed piece of paper. The process requires the doctor to *explain* the required matters.

(c) Informed consent must be documented in "sufficient detail so that any other doctor reading them would be able to take over the management of a case"; mere documentation of the name of the procedure or "explained risks" is inadequate and insufficient.

(d) It is too late to obtain informed consent in the waiting area of the operating theatre. In reality, patients who turn up at the hospital would not be in the proper frame of mind to receive and evaluate any advice on risks and treatment options.

The applicable standard of conduct of obtaining and documenting informed consent

The current applicable standard of conduct for obtaining informed consent is set out in Guideline C6 of the SMC ECEG 2016 Edition. Notably, the ethical obligation to *document* consent from patients for "tests, treatments, or procedures that are considered complex, invasive or have significant potential for adverse effects" is expressly set out in the same Guideline.

The importance of documenting informed consent is further underscored by the separate and distinct duty to maintain clear and accurate medical records as set out in Guideline B3 of the SMC ECEG 2016 Edition, where the doctor's ethical duty to include *all clinical details* about discussions of investigation and treatment options, informed consents, results of tests and treatments and other material information is set out.

There is a strong presumption that doctors have knowledge of the applicable standard of conduct in the

SMC ECEG, which is in fact the *minimum* standard required of all doctors. Any non-compliance with the applicable standard of conduct is automatically an intentional and deliberate departure from the applicable standard, thereby constituting professional misconduct under the first limb of *Low Cze Hong*.

Crucially, the Court of Three Judges had in another recent case (Judgment of Lam Kwok Tai Leslie v Singapore Medical Council [2017] SGHC 260) noted that in light of the requirement of the SMC ECEG 2016 Edition, it would "expect that the SMC, moving forward, will consider preferring charges for failure to keep proper records". In these situations, a doctor may be found guilty of professional misconduct notwithstanding that the *process* of obtaining informed consent was carried out, but proper documentation was not kept.

Tips on taking and documenting informed consent

While doctors do face time constraints in a busy practice, it is nevertheless important for doctors to maintain "accurate and contemporaneous documentation of each and every consultation" especially those where discussions relate to obtaining informed consent.

We set out below some tips on taking and documenting informed consent:

(a) Take the time to comprehensively document discussions with patients on the treatment plan, including the benefits, risks, complications and alternatives that were explained to the patient. Where appropriate, use tools such as anatomical models, drawings, online videos and document how these tools were used. Where drawings are made and given to the patient, the doctor should keep a copy in his patient records.

(b) Note that e-mail correspondence or instant messages (such as WhatsApp or WeChat) with a patient on a procedure or course of treatment can form part of the informed consent process. The doctor should be careful to preserve all such records.

(c) Prepare standard form addendums, patient information leaflets or checklists for commonly performed treatments and procedures, detailing the benefits, risks and complications, and alternatives to each procedure. These can be used as an aid in explaining treatment options to patients, and can be filed with the relevant consent forms or patient records as evidence of the discussion. The doctor should also make a note of any patient education materials given to the patient.

(Do note that these may not be sufficient for every patient, as doctors will have to constantly apply their minds to the issue of whether any *additional* information needs to be conveyed to a particular patient given his individual circumstances.)[2] If additional information is discussed, this should also be documented in the doctor's case notes.

(d) As far as possible, ensure that the completed consent form is signed and witnessed in the doctors' clinic prior to the patient's admission to the hospital.

(e) As far as possible, give the patient sufficient time to consider the benefits, risks and complications, and alternatives to the procedure offered, especially if the procedure carries significant risk of mortality or morbidity. If there are repeated discussions with the patient where risks, options or complications have been reinforced, the doctor should still take care to document each discussion in detail.

In light of the recent the judicial observations, doctors may wish to take the opportunity to re-evaluate the manner in which they currently take consent from their patients and decide whether any changes need to be made to reinforce their existing consent-taking processes.

Doctors and healthcare institutions may also seek the assistance of their medical defence organisations or legal advisors to update their consent forms and patient education materials to reduce the risk of civil liability or professional disciplinary proceedings.

Dentons Rodyk acknowledges and thanks senior associate Audrey Sim for her contribution to the article.

Key contact

Vanessa Lim
Senior Partner
Litigation, Dispute Resolution and Arbitration

D +65 6885 3637
vanessa.lim@dentons.com

[2] See Dentons Rodyk Reporter article on *Hii Chii Kok* (Issue 3 2017)

IP Edge

NRIC and Data Protection

Why businesses should review their practice of collecting and using NRIC

The NRIC or "National Registration Identity Card" is issued to individuals who are lawfully resident in Singapore and who have been registered under the National Registration Act (Cap. 201). The NRIC contains personal details such as the name, address, date of birth, gender, blood type and the national registration number of the person to whom it is issued.

It is an offence for any person to

a) part with possession of his NRIC without lawful authority; or

b) obtain an NRIC other than his own without lawful authority or reasonable excuse.

The penalty is a fine not exceeding $10,000 or to imprisonment for a term not exceeding 10 years or to both.

The information contained in an NRIC is also protected as personal data under the Personal Data Protect Act 2012 (PDPA).

Despite these laws, Singaporeans and organisations in Singapore do not seem to consider the NRIC as a confidential document. The following practices are common in Singapore:

- Individuals are required to hand over their NRIC in order to gain entry into buildings or events;
- Organisations often scan an individual's NRIC to download details;
- Organisations routinely request individuals to provide their NRIC numbers for lucky draws, membership registration, subscription etc.

Proposed Advisory Guidelines on the Personal Data Protection Act for NRIC Numbers

With increased use of the internet and cloud based services, identity theft has become a big concern. Hence, it is very timely that the Personal Data Protection Commission (Commission) had called for public consultation on its *Proposed Advisory Guidelines on the Personal Data Protection Act for NRIC Numbers* (Draft NRIC Guidelines). The public consultation on the Draft NRIC Guidelines closes on 18 December 2017, and the finalised NRIC Guidelines are now eagerly anticipated.

The Draft NRIC Guidelines clarifies that the information contained in an individual's NRIC is personal data protected under the PDPA, and that the collection of a physical copy of an NRIC is tantamount to collecting the personal data contained within the NRIC. The Draft NRIC Guidelines provide that organisations should not collect, use or disclose an individual's NRIC number or the physical NRIC except where:

- It is required under the law, for example, when seeking medical treatment or when subscribing to a mobile telephone line; or
- It is necessary to accurately establish and verify the identity of the individual, for example, when entering into high value contracts or when applying for travel insurance.

The Draft NRIC Guidelines does not set new law, but merely clarifies the legal position under the PDPA. The PDPA provides that an organisation should consider what a reasonable person would consider to be appropriate in meeting its obligations under the PDPA. Arguably, it would not be reasonable for an organisation to demand for a physical copy of the NRIC or to collect, use or disclose an individual's NRIC number except where it is required under the law or when it is necessary to accurately establish the identity of the individual. Keeping in mind that the NRIC contains information on an individual's blood type, it is difficult for many organisations to justify their reasons for collecting such information!

The Draft NRIC Guidelines state that organisations will be given a period of 12 months to review and implement necessary changes to their current practices.

Although it may be some time before the finalised NRIC Guidelines are issued, organisations should take immediate steps to examine current practices, and consider whether the collection, use or disclosure of NRIC numbers or a physical copy of the NRIC is reasonable.

Is the current practice of collecting NRIC numbers reasonable?

Many organisations would seek to justify their current practices as reasonable because their systems are built to use NRIC numbers as identifiers. If it is possible for other identifiers to be used in place of NRIC numbers, arguably, it would not be reasonable for the organisation to continue to use NRIC numbers as identifiers because of potential risks to the individuals in the event of a data breach.

The Commission has issued the *Proposed Technical Guide to NRIC Advisory Guidelines* which assists organisations in considering whether alternative identifiers may be used in current systems and new systems. This indicates that the Commission requires organisations to make changes to existing systems by replacing the NRIC numbers with other identifiers, and that the cost associated with making such changes would not, in itself, be sufficient justification for not making the necessary changes.

As mentioned above, the Draft NRIC Guidelines has not introduced new law, but merely clarifies the law. In the circumstances, we recommend that organisations take immediate steps to review their practices and processes without waiting for the finalised NRIC Guidelines. The risks to the individuals would have to be considered against the costs to the organisation to revamp its systems. All findings and conclusions should be documented especially if the organisation determines that, on a balance, it will not use another identifier in place of the NRIC number.

How we can help

We help our clients to review their practices and processes, and to develop alternative practices and processes which are in compliance with the relevant laws.

We offer a full suite of services to help organisations comply with data protection laws of Singapore, and those of other countries which apply to them.

Key contact

Woon Chooi Yew
Senior Partner
Intellectual Property & Technology

D +65 6885 3609
woonchooi.yew@dentons.com

Accolades

Chambers Asia Pacific 2018

Eleven Dentons Rodyk practices and fifteen lawyers were ranked in the 2018 edition of Chambers Asia Pacific, with the Firm marking its first Band 1 ranking for Projects & Energy (Domestic – Singapore).

Other significant improvements this year include the Investment Funds practice being noted as a Recognised Practitioner (Domestic – Singapore), Singapore CEO and Global Vice-Chair **Philip Jeyaretnam, SC** being ranked for Construction (Domestic – Individual), and more individuals mentioned and commended in the guide's editorial write-up compared to last year.

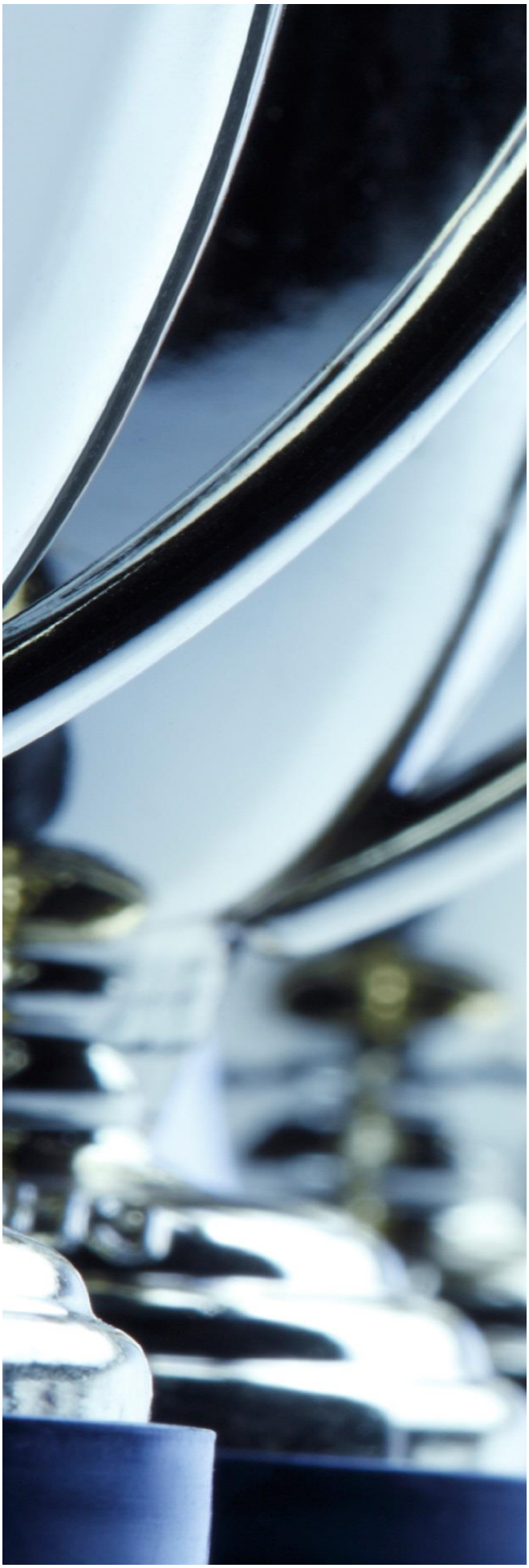
The Legal 500 Asia Pacific 2018

Sixteen Dentons Rodyk practices and four lawyers have been ranked in the 2018 edition of The Legal 500 Asia Pacific. Our Real Estate practice maintained its Tier 1 ranking, and other notable achievements include the Investment Funds practice being ranked for the first time, and the Tax practice's ranking rising to Tier 2.

Singapore CEO and Global Vice-Chair **Philip Jeyaretnam, SC**, Senior Partner **Lawrence Teh** and Senior Consultant **Lee Ai Ming** were recognised as Leading Individuals. Partner **Kunal Kapoor** was also listed as a Next Generation Lawyer for Energy (foreign firms).

Who's Who Legal Arbitration 2018

Dentons' International Arbitration Group had ten of its partners featured in Who's Who Legal Arbitration 2018, which included three Thought Leaders and two Future Leaders. Singapore CEO and Global Vice-Chair **Philip Jeyaretnam, SC** was named as a Thought Leader, and Senior Partner **Lawrence Teh** was also recognised in the guide**.**



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
- Trusts, Estates and Wealth Preservation

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.

About Dentons

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com

Key contacts

Philip Jeyaretnam, SC
Global Vice Chair & Regional CEO
D +65 6885 3605
philip.jeyaretnam@dentons.com

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

Edmund Leow, SC
Senior Partner
D +65 6885 3613
edmund.leow@dentons.com

Wan Hong Chan
Senior Partner
D +65 6885 3668
wanhong.chan@dentons.com

Herman Jeremiah
Senior Partner
D +65 6885 3614
herman.jeremiah@dentons.com

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

Gilbert Leong
Senior Partner
D +65 6885 3638
gilbert.leong@dentons.com

Vanessa Lim
Senior Partner
D +65 6885 3637
vanessa.lim@dentons.com

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

Woon Chooi Yew
Senior Partner
D +65 6885 3709
woonchooi.yew@dentons.com

Nigel Chia
Partner
D +65 6885 3735
nigel.chia@dentons.com

Our locations