Reporter

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Dentons Rodyk Dialogue 2018

International Trade in the Age of Brexit and Trump

The many forms of disruptions that have taken place all around us have not spared the realm of international trade. Globally, governments, corporations and individuals are grappling with the impact of these disruptions on international trade, particularly in the wake of Brexit and Trump. Despite, and especially due to, anti-globalisation sentiments and recent trade tensions, countries must stand united in the face of change.

This was the point made by Minister for Communications and Information and Minister-in-charge of Trade Relations, Mr S Iswaran, at the Dentons Rodyk Dialogue 2018, which took place in the Singapore Management University on 8 May. The second annual Dialogue also featured The Right Honourable Stephen Harper, 22nd Prime Minister of Canada and Chairman and CEO of Harper & Associates; Professor Tania Voon of the Melbourne Law School, University Of Melbourne; and Founder and Executive Chairman of Banyan Tree Holdings, and Chairman of the Board of Trustees of the Singapore Management University, Mr Ho Kwon Ping.

All countries benefit from global trade

Bringing up the recently signed Comprehensive and Progressive Agreement for Trans-Pacific Partnership as an example of solidarity between countries, Mr Iswaran noted that countries large and small, developed or developing, are all beneficiaries of open and connected markets. These benefits are not just economic, but extend to the social, cultural and strategic spheres. Also importantly, domestic policies should complement trade and globalisation for fruits to be equitably distributed.

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IN THIS ISSUE

Governments must demonstrate the benefits of trade

As a leader who personally negotiated trade deals to conclusion during his time in office as the Prime Minister of Canada, Mr Harper shared, frankly and openly, his views on the current circumstances and challenges surrounding international trade. He offered his assessment that post-Cold War, it was trade that lifted nearly 1 billion people on the planet out of poverty, and has made our current era the most successful one in the history of humanity in terms of economic and social advancement.

Mr Harper also stressed that trade deals must not be approached dogmatically due to the complexities involved. Apart from his own experiences in trade negotiations, and his understanding as an economist, Mr Harper spoke of a real interest to advance and protect. Mr Harper mentioned that governments need and should specifically demonstrate to its people the benefits of trade agreements, such as how incomes will grow, consumer choices will increase or how opportunities will improve.

Brexit and Trump are symptoms of the current problems

A spectrum of issues with the current approaches to trade and its existing system was pointed out by Professor Tania Voon. This includes failures at both an international and domestic level (in many countries), to deal with the costs of adjustments and disruptions, which can lead to not just inequality within a country, but also between countries. These costs are further amplified by the digital revolution, and by societal changes in labour markets. Professor Voon also shared that Brexit and Trump are simply symptoms of problems within the current system, which is widespread across the globe.

"Fair trade is rarely fair; and free trade is never free"

Prominent businessman Mr Ho, lauded as one of Singapore's leading entrepreneurs, gave the final speech and contrasted the preceding speakers of the Dialogue with several deliberately provocative viewpoints. Mr Ho's opening line alone was stirring – "fair trade is rarely fair; and free trade is never free".

Mr Ho addressed topics from Donald Trump's antipathy, to the need for a rules-based approach to international trade.

An engaging panel discussion steered by the Global Vice-Chair and ASEAN CEO of Dentons Rodyk, Mr Philip Jeyaretnam, SC followed. The audience seized the opportunity to raise perceptive questions during this discussion, with specific concerns regarding how best to adapt to a digital economy, and the impact that global economic openness can have for future generations. Rather than skirting around these difficult issues, the panel was impressively forthcoming, with each of the different panellists offering their input from their own specialised fields.

The Dentons Rodyk Dialogue 2018 demonstrated that there is a multitude of legal issues in relation to international trade that transcends both public and private law spheres. Even in the age of Brexit and Trump, globalisation remains a key driver of economic progress, but en route we can certainly expect the unexpected.

There were close to 400 attendees from business, government and law firms who turned up for the Dialogue.

The Dentons Rodyk Dialogue 2018, the second partnership between Dentons Rodyk and Singapore Management University's Centre for Cross-Border Commercial Law in Asia, was successfully concluded on Tuesday, 8 May 2018

Dentons Rodyk acknowledges and thanks Xiao Tong Lim and our Marketing department for their contributions to the article.

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Business Bulletin

Commingled assets of a liquidated company with competing secured claims – how do we fairly distribute the secured mix?

Determining a just and equitable distribution amongst creditors whose security assets have been commingled – The Pars Ram Brothers case

What is a fair and just method of distribution of an insolvent company's assets amongst creditors if its assets have been commingled into a single mixed bulk, and the proceeds are insufficient to satisfy every secured claim?

This issue arose for determination in the recent Singapore High Court decision of *Pars Ram Brothers (Pte) Ltd (in creditors' voluntary liquidation) v Australian & New Zealand Banking Group Ltd and others* [2018] SGHC 60. The High Court considered the distribution of commingled assets (i.e. mixed four categories of stocks of black pepper corn) of Pars Ram Brothers (Pte) Ltd (the Company) amongst its secured and general creditors, all of whom have a security interest in the mixed bulk assets, and none of whom are wrongdoers vis-à-vis each other.

Prior to this decision, there was a paucity of Singapore case authority on the issue. In this article, we explore (A) a brief background of the facts in the Pars Ram Brothers case, (B) the basis of the Court's reasoning in favouring the *"rolling charge"* method of distribution; and (C) some practical implications for creditors.

A. Brief Background Facts

Prior to its liquidation, the Company was in the spice business, trading primarily in pepper and cashew nuts and financing its import mostly through trade financing facilities granted by banks. The banks would disburse funds directly to the relevant stock supplier upon proof of the Company's purchase and subsequently release relevant shipping documents to the Company to allow the Company to sell the stock to its end-customers. In exchange, the Company would execute a trust receipt in favour of the banks on terms that the Company would hold the financed stock or proceeds of sale on trust for the bank.

The Company subsequently became insolvent and its Liquidators proposed that the stock in the Company's possession (which included 17 different categories of pepper) be sold and the proceeds distributed. In a separate judgment, it had been determined that four of the 17 categories of pepper would be distributed amongst secured and general creditors of the Company – the issue for determination in this case was what an appropriate method of distribution should be used since there was no enough stock / proceeds to pay off all interested creditors.

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B. Various Methods of Distribution

Three possible approaches were identified and considered by the High Court, as summarised in the table below:

S/No.	Approach	What is it?	Supported by
1.	*"First in, first out"* (famously known as the rule in Clayton's Case)	When sums are mixed in a bank account as a result of a series of deposits, withdrawals are treated as withdrawing the money in the same order as the money was deposited.	All parties confirmed that they were not advocating this approach.
2.	*Pari passu*	The *pari passu* sharing of the total pool of assets according to what each of the claimants are owed, ignoring the dates on which they have made their respective investments.	5th and 6th Defendants (DBS Bank Ltd and Indian Bank)
3.	Rolling charge	Similar to *pari passu* method in that calculations are done on a *pari passu* basis, but additionally, the contributor's rateable interest in the mixed fund vis a vis the other contributors are to be recalculated at every instance of withdrawal	2nd Defendant (Bank of Baroda) and Liquidators.

The High Court ultimately preferred the **rolling charge** method for the following reasons: -

(a) The *"first in first out"* method favours later contributions over earlier contributions and could be perceived as arbitrary and unfair. For this reason, this method should only be used on an exceptional basis.

(b) As between the *pari passu* and rolling charge method, the rolling charge method more fairly takes into account the rateable interests of each contributor to the mixed fund immediately before any withdrawal, and is thus more precise and deemed to produce *"the most just result".*

(c) That said, High Court also acknowledges that the *pari passu* method is often preferred for considerations of costs, practicality and relative simplicity in implementation. Hence, unless the rolling charge method was impracticable or unworkable (e.g. because of a prohibitively large number of claimants or transactions), it should be the preferred method.

On the facts of the case, the High Court found that the objections to adopting the rolling method were not made out on the facts for the following key reasons:-

(a) First, there was no system for incoming stock to be stored in the Company's warehouse (as appeared to have been suggested) which would make the adopting of a rolling charge method objectionable.

(b) Second, and contrary to the objectors' argument that there was evidential uncertainty regarding the order of same-day entries in the warehouse ledger, the High Court found that the order in which the entries were recorded was the order in which incoming and outgoing shipments were made. Hence, there was no insuperable difficulty in applying the rolling charge method.

Additionally, a key consideration relevant on the appropriate method to adopt is the parties' intentions, whether express, inferred or presumed.

The High Court found that the terms of the trust receipts in this case (stating that the Company should hold or store goods in a manner capable of separate identification) pointed away from the creditors' intention to accept a *pari passu* distribution.

C. Practical Implications for Creditors

The tenor of the Pars Ram Brothers decision suggests that the rolling charge method of distribution is likely to be the way forward in such situations, provided that such application would not be too complicated or costly.

When providing lending facilities, lenders should ensure that their security, as well as any proceeds of sale held on trust for them, are clearly segregated or paid into a separately designated account. This would go towards demonstrating that any monies held on trust for the lender is intended to be treated separately / being capable of separate identification, and not to be distributed on a *pari passu,* or even on a rolling charge, basis in the event of a borrower's liquidation.

Lenders are also reminded to undertake practical checks from time to time on the mechanisms and obligations of segregation to ensure that their interests continue to be safeguarded.

Dentons Rodyk acknowledges and thanks senior associate Priscilla Wee for her contribution to the article.

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Recent developments on moneylending

Introduction

In the recent case of *Ang Ai Tee v Resource Credit* [2017] SGHC 159, the High Court set aside the defendant's statutory demand for repayment of debt on the ground that the loan refinancing scheme imposed excessive interest and that the loan transactions were unconscionable or substantially unfair.

Background

On 1 October 2015, significant changes to the interest and charges that licensed moneylenders can impose on personal loans were made in the Moneylenders (Amendment) Rules 2015 (MLR 2015). The changes included a cap on the administrative fee at 10% of the loan principal.

Holding

This case involved a loan refinancing scheme in which the defendant, Resource Credit Pte Ltd, charged a 10% administrative fee each time the same loan to the plaintiff, Ang Ai Tee, was refinanced, for a total of 18 times.

In determining whether excessive interest was charged and whether the loan transactions were unconscionable or substantially unfair, the 18 transactions were taken as a whole instead of being treated as 18 separate transactions which each ostensibly complied with the MLR 2015.

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The interest charged was found to be excessive as the administrative fee was not a “permitted fee” under s2 of the Moneylenders Act. The administrative fee was unjustified as the defendant did not provide fresh funds to be administered in each refinanced loan. As such, the administrative fee was construed as a form of “interest”. Further, if the defendant’s claim were to succeed, the plaintiff would be paying more than double the amount of the principal sum. This would be in breach of r12A of the MLR 2015 which only allowed the defendant to claim for interest, late interest or permitted fees of up to an amount equivalent to the principal sum.

The loan transactions were unconscionable or substantially unfair as the plaintiff’s liability with loan refinancing was more than double that without loan refinancing. Additionally, the defendant had entered into the loan refinancing scheme with the plaintiff clearly to skirt the boundaries of MLR 2015 as the defendant implemented the loan refinancing scheme only for debts created after MLR 2015 was introduced. Therefore, the defendant’s intention to profit from the repeated imposition of administrative fees for each refinanced loan was obvious.

Conclusion

The High Court has shown that it will adopt a purposive approach to protect borrowers from falling prey to “creative” loan refinancing schemes of unscrupulous moneylenders. Whilst there may be instances where moneylenders genuinely wish to assist borrowers by offering loan restructuring, this is definitely not the case when moneylenders know that their loan refinancing schemes would make it difficult for borrowers to pay back the principal or interest at the end of the term of the loan and would the borrowers have no choice but to pay the administrative fee (for refinancing) to prevent the moneylenders from calling on the loans.

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Reducing the impact of stamp duty on share transfers

The 2018 Stamp Duties (Agreements for Sale of Equity Interest) (Remission) Rules

The Stamp Duties (Agreements for Sale of Equity Interest) (Remission) Rules 2018 (the 2018 Rules) came into operation almost imperceptibly on 11 April 2018. The Rules serve to clarify much of the uncertainty that was created by the changes to stamp duty announced and passed in Parliament in March 2017 via the Stamp Duties (Amendment) Bill.

The April 2018 Rules essentially serve to reverse the effects of the changes in March 2017, insofar as they affected a majority of share transfer transactions. For example, under the new 2018 Rules, no stamp duty is payable on an agreement for the sale of the shares of a listed company. Furthermore, the stamping for share transfers that do not attract ACD may once again be done when the transfer instrument is executed at completion (with a 14 day grace period).

Below, we discuss the effects of the 2017 changes on stamp duty and key developments in the 2018 Rules.

The Effect of the Stamp Duty Announcements in March 2017

On 10 March 2017, the Stamp Duties (Amendment) Bill was passed in Parliament where all three readings were done in a single Parliament sitting on the same day (the 2017 Act). The changes came into effect the very next day on 11 March 2017.

On the face of the announcement, it seemed that the changes intended to target the transfer of shares in residential property holding entities. Notably, one of the key changes announced in 2017 was the imposition of Additional Conveyance Duty (ACD), a new type of stamp duty on the transfer of equity interests in residential property holding entities. Read more about “*New stamp duties on shares transfer - Acquisition and disposal of equity interests in residential property holding entities”* in Dentons Rodyk Reporter Issue 02 (2017).

ACD was introduced to address the stamp duty differential that had existed between a direct acquisition or disposal of residential properties, and the indirect acquisition or disposal of residential properties via an entity. In the latter situation, stamp duty was payable on the market value of the shares of the entity at a lower rate of 0.2%.

The official press release also clarified that the intent of the legislative changes "is not to impact the ordinary buying and selling of shares in such entities by retail investors, where the entities are listed on the Singapore Stock Exchange". However, it was observed that another change introduced in the 2017 Act in section 22(1) of the Stamp Duties Act (Cap. 312) (the Stamp Duties Act) did in fact have such an impact. Read more about *"Stamp duty changes for all share transfers – including listed companies?"* in Dentons Rodyk Reporter Issue 03 (2017).

As a result of the March 2017 amendment to section 22(1) of the Stamp Duties Act, all transfers of shares in Singapore companies, whether private or listed, and whether holding residential property or not, were impacted by the changes as follows:

- The time of stamping of all share transfers had shifted forward. Whereas, prior to March 2017, stamp duty was to be paid at the execution of the *instrument of transfer* at completion (with a 14 day grace period), it was now to be paid at the execution of the *agreement* for the transfer, where there is such an agreement (with a 14-day grace period);

- Since the timing of stamping had been shifted to the execution of the agreement, it appears from the strict wording of the Stamp Duties Act that stamp duty would apply to an agreement for transfer of shares in a Singapore listed company. Prior to this change, transfers of shares traded on the Singapore Stock Exchange were generally not subject to stamp duty because there is no instrument of transfer executed – shares are generally deposited with and registered in the name of the Central Depository under the scripless system. Although normal trading on the Stock Exchange does not require a written agreement, agreements would still be created in situations like a general offer in a takeover.

Remissions Granted under the 2018 Rules

The 2018 Rules in effect confirm that the changes in the 2017 Act had the unintended impact of imposing a duty on an agreement for the sale of listed shares and did not intend to impose stamp duty on certain transactions where there was no transfer at all.

Under the Rules, stamp duty is remitted (*i.e*. exempted) on the following:

- Agreements for the sale of stock or shares not subject to ACD;
- Agreements for the sale of book-entry securities including such securities subject to ACD *i.e.* scripless shares; and
- Subject to certain conditions, aborted agreements for the sale of equity interests in an entity, on or after 11 March 2017.

The Practical Effect of the 2018 Rules

As a result of the 2018 Rules, the position has effectively reverted to what it was prior to 11 March 2017 for the majority of share transfer transactions. Namely - no stamp duty is payable on an agreement for the sale of the shares of a listed company and the timing of stamping for share transfers that do not attract ACD is also back to when the transfer instrument is executed at completion (with a 14 day grace period).

In the two scenarios mentioned above, there is no longer a need to make an application for remission to the Commissioner of Stamp Duties, as there is now an automatic remission of stamp duty. Prior to the Rules, parties had to apply for remission on a case by case basis.

If you would like to further understand the effects of the 2018 Rules on your transactions, please contact any member of the Dentons Rodyk tax team listed.

Dentons Rodyk acknowledges and thanks associate Jeremy Goh for his contribution to the article

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IP Edge

EU's General Data Protection Regulation (GDPR) and what it means for Singapore organisations

In 2016, the European Union Member States issued a new body of rules on data protection - the General Data Protection Regulation 2016/679, which will come into force on 25 May 2018.

Extra-territorial application

The GDPR has extra-territorial effect, and applies to organisations which are not established in the EU, but which offer goods or services to individuals in the EU, or which monitor the behaviour of individuals in the EU. This means that Singapore based organisations such as hotels, banks, insurance companies and e-commerce websites which offer goods or services to individuals located in the EU will all have to ensure that their practices and processes are compliant with the GDPR, failing which, there is risk that they may be subject to the penalties under the GDPR.

Penalty

The penalty for non-compliance with the GDPR is a fine of up to 4% of the global annual turnover or €20,000,000, whichever is higher. There is a tiered approach to penalties, and this is the maximum fine that can be imposed for the most serious breaches of the GDPR, for example, if the necessary consents have not been obtained from individuals, or where the core data protection principles have not been complied with.

Where a Singapore organisation does not have a presence within the EU, this may not be seen as a huge risk as it may be unlikely that the European data protection authorities would act to penalise an organisation without a presence in the EU. However, where a Singapore organisation has a presence in the EU, the risks are very real.

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Singapore organisations providing services to EU data controllers

A Singapore organisation which processes personal data for data controllers within the EU would also have to ensure that its practices and policies meet the requirements in the GDPR as the GDPR requires data controllers in the EU to only appoint those data processors which provide sufficient guarantees to implement processes that meet the requirements of the GDPR and which ensure the protection of the rights of the data subject.

Salient requirements of the GDPR

The GDPR provides that personal data shall be processed in accordance with the following principles:

(a) personal data must be processed lawfully, fairly and in a transparent manner ('lawfulness, fairness and transparency');

(b) personal data must be collected and used only for specified, explicit and legitimate purposes ('purpose limitation');

(c) personal data collected must be limited to what is necessary ('data minimisation');

(d) personal data collected must be accurate ('accuracy');

(e) data must not be kept in personally identifiable form for any longer than is necessary for the purposes for which the personal data is processed ('storage limitation');

(f) personal data must be secured and protected against unauthorised access, accidental loss, destruction or damage ('integrity and confidentiality').

The GDPR provides individuals with a number of rights: right to be informed, right of access, right to rectification, "right to be forgotten", right to restrict processing, right to data portability and right to object. The data controller must, without undue delay (generally, within one month), take the action legitimately requested by data subjects.

The GDPR also imposes a significant number of new practices on data controllers including the need to maintain of records of how it processes personal data, the appointment of a Data Protection Officer, the need to conduct Data Protection Impact Assessments, and the requirement to take greater care in the selection and engagement of their data processors.

What Singapore organisations should do

Singapore organisations should take appropriate measures to comply with the GDPR (depending on their level of exposure) such as:

- Reviewing practices and processes to ensure that all personal data is processed in accordance with the principles set out in the GDPR;
- Reviewing practices and processes to give effect to the expanded rights of data subjects provided in the GDPR;
- Reviewing privacy policies, data protection and retention policies to ensure that these provide individuals with the level of protection required by the GDPR

Singapore organisations having a presence in the EU would have to ensure that they are in full compliance with the GDPR, failing which the risk of a penalty would be high.

Singapore companies offering data processing services to EU data controllers would also have to ensure that they comply with the GDPR, failing which the continuity of their business with EU data controllers may be at risk.

At the lowest end of the scale, Singapore companies offering goods or services to, or which monitor the behaviour of individuals within the EU should also endeavour to comply with the GDPR, as far as is practicable.

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Personal Data Protection Act – Need to document Data Protection Policies and Practices

Singapore's Personal Data Protection Act 2012 (PDPA) came into force in 2012. By now, most organisations are familiar with the obligation to obtain the requisite consent when collecting, using and disclosing personal data, the obligation to check the Do Not Call Registry, and the need to implement privacy statements which are typically placed on websites.

However, there is one area where many organisations are still lacking. This is the obligation to develop and implement data protection policies and practices. Recent decisions by the Personal Data Protection Commission (PDPC) highlight the necessity for organisations to ensure that they have developed and implemented suitable policies and practices for the protection of personal data.

Section 12 of the PDPA provides that an organisation has the obligation to:

(a) develop and implement policies and practices that are necessary for the organisation to meet the obligations of the organisation under this Act;

(b) develop a process to receive and respond to complaints that may arise with respect to the application of this Act;

(c) communicate to its staff information about the organisation's policies and practices referred to in paragraph (a); and

(d) make information available on request about —

   i. the policies and practices referred to in paragraph (a); and

   ii. the complaint process referred to in paragraph (b).

Most organisations would have developed and implemented external / customer facing documentation such as privacy policies to comply with their consent and notification obligations under the PDPA. Often, what may be overlooked is another equally important area – *internal-facing policies and practices* intended for an organisation's employees so as to guide them in handling personal data.

Recent decisions by the PDPC

This issue of internal-facing policies and practices were considered in the recent cases of *M Star Movers [2017] SGPDPC 15 and Jiwon Hair Salon [2018] SGPDPC 2*. These cases involved respectively, a moving company and several hair salons. They had been under investigation PDPC for potential breaches of the PDPA, and in the course of the investigations were asked to demonstrate and present their internal data protection policies and practices to the PDPC.

The organisations in both cases were not large corporations, nor even businesses handling large amounts of personal data. They were, by most measures, modest in size and operation. Understandably, developing and implementing data protection policies for their employees was not a priority. Nevertheless, the PDPC's expectation was for them to have developed and implemented data protection policies and practices appropriate to their business. As these organisations did not develop and implement such policies and practices, they were eventually found by the PDPC to be in breach of their obligations under Section 12.

In each of these cases, the PDPC stated the following in their grounds of decision:

> *"At the very basic level,* ***an appropriate data protection policy should be drafted to ensure that it gives a clear understanding within the organisation*** *of its obligations under the PDPA and* ***sets general standards on the handling of personal data which staff are expected to adhere to.*** *To meet these aims, the framers, in developing such policies, have to address their minds to the types of data the organisation handles which may constitute personal data; the manner in, and the purposes for, which it collects, uses and discloses personal data; the parties to, and the circumstances in, which it discloses personal data; and the data protection standards the organisation needs to adopt to meet its obligations under the PDPA.*
>
> ***An overarching data protection policy will ensure a consistent minimum data protection standard across an organisation's business practices, procedures and activities*** *(e.g. communications through social media)."* ***[emphasis ours]***

The message by the PDPC is clear – *all organisations, large or small, must have internal personal data protection policies and practice*s, and must be able to *demonstrate and show* compliance with these policies and practices when called upon to do so.

While an organisation may have data protection policies and practices in place, it is equally pertinent that these policies are clearly documented. If an organisation's policies and practices are not clearly documented and is simply a corporate practice / tradition e.g. through custom or verbal instructions, it would inevitably be difficult to demonstrate compliance when called upon to do so by the PDPC.

Insofar as what constitutes appropriate data protection policies and practices, this would vary from organisation to organisation, depending on its business and operations. For example, in the *M Star Movers* case, the PDPC went so far as to state its expectations that organisations with a social media presence / platform used to communicate with customers ought to have specific policies to address the risk of disclosing personal data through these platforms:

> ***"Organisations with a social media or other online presence*** *(e.g. social media forums), particularly those that rely on such platforms to communicate with its customers,* ***ought to develop appropriate policies, practices and procedures that amply address the risks of disclosing personal data on social media or other online sites.*** *Together, these policies, practices and procedures should seek to (i) ensure that staff who communicate through an organisation's social media account or similar platforms are* ***aware of the organisation's data protection obligations*** *and the importance and need to protect personal data; (ii)* ***crystallise the organisation's position*** *on the circumstances in which it may be appropriate to disclose personal data on these platforms for example, disclosures for which individuals have already consented to; (iii) ensure that the organisation maintains an* ***appropriate level of control on the content*** *posted on these platforms (e.g. by limiting the number of staff who are allowed to post and placing conditions on these staff such as requiring them to undergo relevant data protection training); (iv)* ***crystallise the organisation's retention rules*** *in respect of posts on such platforms; and (v)* ***provide an avenue to escalate issues or queries*** *to the appropriate function or role within the organisation."* ***[emphasis ours]***

What are the chances of an investigation by the PDPC?

Between 2015 and 2017, the PDPC received over 8,600 complaints, with over 2,200 complaints in 2017 alone. Consequently, it is not a question of whether, but when, an organisation would be the subject of a complaint that prompts investigations by the PDPC. In the course of such investigations, the organisation would be expected to demonstrate and show all its data protection policies and practices to the PDPC to demonstrate compliance, and avoid sanctions.

Immediate action steps needed

Reactive organisations that wait until such investigations to start developing and implement their data protection policies and practices would be placed in an unfavourable position when defending themselves against enforcement action by the PDPC. At the very least, organisations should develop policies and practices relating to:

- what type of personal data it may collect, and what should not be collected
- storage and security of personal data
- how long data would be kept for
- how data would be deleted or destroyed

The policies cannot be templated documents. They must relate to the business carried out by the organisation, and must be commensurate with the nature and amount of personal data it handles as well as the risks to individuals. These policies will shape the behaviour of staff within the organisation, avoid breaches of the PDPA, and act as a mitigating factor in the event of an inadvertent breach.

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Litigation Brief

Creditors’ ability to enforce judgements via Writ of Seizure and Sale where the judgment debtor is a joint tenant

Case Update: Peter Low LLC v Danial Patrick Higgins [2018] SGHC 59

Creditors who have commenced legal proceedings and obtained judgements or orders against their debtors can now enforce such judgments or orders by obtaining a Writ of Seizure and Sale (WSS) against the judgment debtor’s interest in jointly-owned property (regardless of whether such interest is held under a joint tenancy or tenancy in common).

Previously, a judgment for the payment of money could not be enforced by way of a WSS against a judgment debtor’s interest in immovable property which is held under joint tenancy. This meant that the creditors’ mode of enforcement of judgment debt was limited.

The recent High Court decision in *Peter Low LLC v Danial Patrick Higgins* [2018] SGHC 59 (Peter Low) clarified that a joint tenant’s interest in immovable property is exigible to a WSS under the statutory framework applicable in Singapore. This allows creditors to enforce judgment debts by obtaining a WSS against the judgment debtor’s interest in jointly-owned property (regardless of whether such interest is held under a joint tenancy or tenancy in common).

Below we discuss (A) the legal arguments accepted by the High Court in *Peter Low v Danial Patrick Higgins*, (B) past cases discussing whether a judgment for the payment of money can be enforced by way of a WSS, (C) prior difficulties when executing WSS against interest in property held in joint tenancy, and (D) the legal effect of registering a WSS after *Peter Low v Danial Patrick Higgins.*

A. Legal arguments accepted by the High Court in Peter Low v Danial Patrick Higgins

A judgment or an order may be enforced by way of a WSS, under which the judgment debtor's property can be seized and sold to satisfy the judgment debt. However, execution of a judgment debt by a WSS had its limitations. Namely, a judgment debtor's interest in property held under joint tenancy was not exigible to execution by way of a WSS, as established by the High Court *in Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 (Malayan Banking). The same position was adopted in *Chan Lung Kien v Chan Shwe Ching* [2017] SGHC 136 (Chan Lung Kien).

In the recent decision *of Peter Low v Danial Patrick Higgins*, the High Court held that a joint tenant's interest in immovable property is exigible to a WSS under the statutory framework applicable in Singapore. It was also held that, when a WSS is issued against a joint tenant's interest in land, the joint tenancy is severed when the debtor's interest is seized and this seizure occurs when the WSS is registered. The High Court made clear that this decision is confined to the interest of a joint tenant in land and does not extend to other firms of jointly held assets, such as joint bank accounts.

The following key considerations (amongst others) led the High Court to hold that a WSS can be executed against a judgment debtor's interest in property held in joint tenancy:

a) the overwhelming weight of Commonwealth authorities in favour of allowing execution against the interest of a joint tenant in immovable property;

b) the severability of the joint tenancy and the ability of a joint tenant to alienate his aliquot share (or potential aliquot share) without the consent of other joint tenant(s);

c) the notion that severance occurs upon execution appears well accepted among Commonwealth jurisdictions;

d) the limited marketability of a partial interest in land should not in itself be a reason for disallowing execution against the joint tenant's interest in land; and

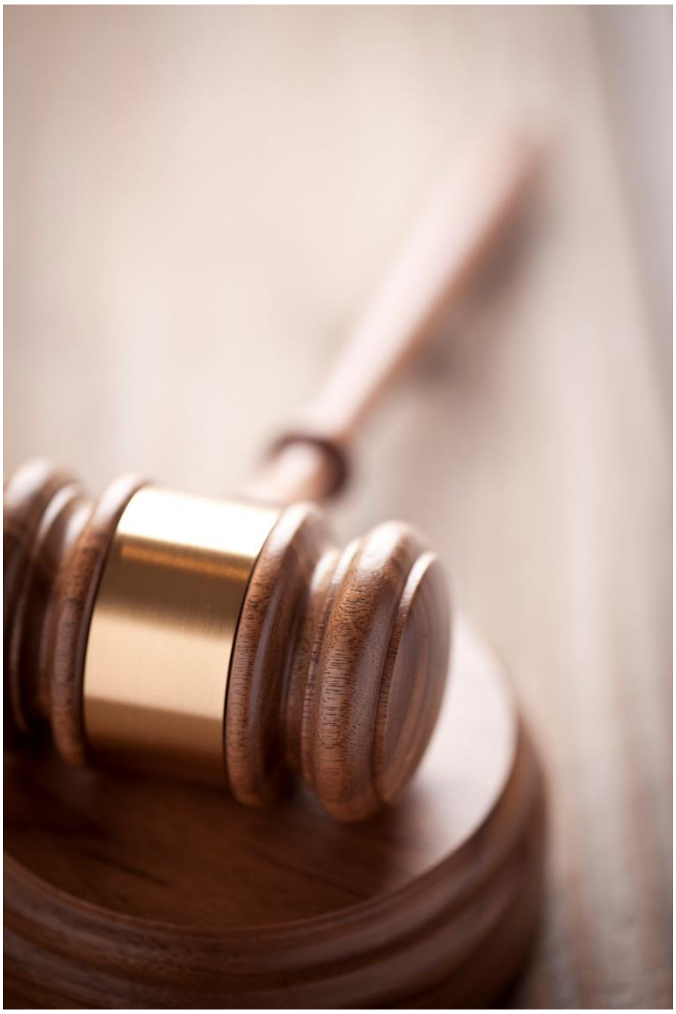
e) judgment creditors are, and should be, generally placed in a more advantageous position than other unsecured creditors insofar as judgment creditors are entitled to levy execution against the judgment debtors' properties.

In clarifying that a WSS can be executed against a judgment debtor's interest in property held in joint tenancy, the High Court took a leap forward in holding that a joint tenancy would be severed once a WSS is registered on the subject property.

In the absence of evidence to the contrary, the court, sheriff and judgment creditor should be entitled to proceed on the basis that the joint tenants would, upon severance of their joint tenancy, hold the land in equal shares both at law and in equity. Given that there are avenues for the interested joint tenants to prove that their beneficial interests are not held in equal shares, no injustice would be caused to any joint tenant.

It was previously undisputed that the registration of a WSS over a property held in joint tenancy (if allowed) does not sever the joint tenancy.

➢ **Read more on page 16**



B. Past cases discussing whether a judgment for the payment of money can be enforced by way of a WSS

The issue of whether a judgment for the payment of money can be enforced by way of a WSS against the judgment debtor's interest in immovable property held under joint tenancy has been discussed in the following three cases:

1	*Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 (Malayan Banking)	The High Court held that the interest of a joint tenant in land was not exigible to execution by way of a WSS on the following grounds: (a) Given that each joint tenant has no distinct share in the land, to seize one joint tenant's interest under a WSS is to seize the interest of the other joint tenant as well, *unless a WSS concomitantly severs the joint tenancy.* i. Each joint tenant holds the whole interest in the property with the other joint tenant(s) but holds nothing by himself. ii. The "interest of the judgment debtor" attachable under a WSS must be a distinct and identifiable one. iii. A WSS should only seize the judgment debtor's interest and no more. (b) The registration of a WSS does not effect a severance of the joint tenancy. It would be "creating a fine mess" if a joint tenancy is severed upon the registration of a WSS. i. A WSS can lapse or can be withdrawn without before the sale of the property, thus it is not an order that necessarily results in a sale. (c) There is also a conceptual difficulty on the share of the property to attach to the judgment debtor upon severance of the joint tenancy.
2	*Chan Shwe Ching v Leong Lai Yee* [2015] 5 SLR 295 (Chan Shwe Ching)	The High Court, despite agreeing that a WSS does not sever a joint tenancy at the time of registration, took a differing view that a joint tenant's interest in property can be identified and seized under a WSS on the following grounds: (a) Case law in Commonwealth jurisdictions appeared to support the view that the interest of a joint tenant in land was exigible to execution. (b) Even though a joint tenant did not have a distinct share of the land, he has an interest that was identifiable and capable of being determined – the interest of a joint tenant can be converted into distinct shares by alienation (i.e. severance of the joint tenancy). (c) Given that the interest of a joint tenant in land is capable of being identified and it is commonly accepted that severance of a joint tenancy will occur when the sheriff sells the land, there was no reason why a WSS cannot be issued against a joint tenant's interest in land. (d) The challenge of having to particularise the exact interest of the judgment debtor is not insurmountable as the courts were capable of deciding this in the event of a dispute.
3	*Chan Lung Kien v Chan Shwe Ching* [2017] SGHC 136	The High Court decided to follow *Malayan Banking*, and also gave additional reasons for disallowing a WSS to attach to a joint tenant's interest in property: (a) By focusing on the interest that could be seized at a later stage after the severance of the joint tenancy instead of the exact interest seized when the WSS was issued, *Chan Shwe Ching* implicitly recognised that there was nothing for the WSS to bite onto until the joint tenancy was converted into a tenancy in common (i.e. severed).

		(b) Before the court orders the issuance of a WSS, it must be satisfied that the interest sought to be seized was capable of being seized. If the nature of the joint tenant's interest was such that it cannot be seized under a WSS, it could not be an answer to say that the joint tenant's interest would be converted into that of a tenant in common which can be seized under a WSS. (c) A seizure of the joint tenant's interest in the property is not the same as seizure of the property itself. Therefore, it would not be possible to sell the property following the seizure of the joint tenant's interest under a WSS without the agreement of all joint tenants.

C. Prior difficulties when enforcing a WSS against a property held in joint tenancy

Clearly, the main roadblock to allowing a joint tenant's interest in property to be taken in execution under a WSS is the nature of a joint tenancy. In a joint tenancy, all joint tenants together own the whole property and are seen as one owner. The interest of each joint tenant is identical and lies in the whole of the property. No one joint tenant holds any specific or distinct share of the property. Therefore, joint tenants must act jointly to bind the estate which they hold jointly.

Further, the hallmark of a joint tenancy is the rights of survivorship. A joint tenant has all the rights of ownership except the right to alienate his interest upon his death. A joint tenant cannot devise his interest in his will because the right of survivorship will take precedence over any testamentary disposition. A joint tenant can dispose of his interest only during his lifetime upon severance of the joint tenancy and creation of a tenancy in common, which notionally demarcates his undivided share.

Without severing the joint tenancy, the following inconsistencies between the nature of joint tenancy and the mechanism of a WSS stood in the way:

(a) There would be no distinct interest for the WSS to attach to or be executed against.

(b) Even if a WSS was registered on the judgment debtor's interest, held in joint tenancy, the Sheriff would not be able to sell the judgment debtor's interest without the consent of all joint tenants.

(c) The right of survivorship meant that the WSS may yield nothing if the judgment debtor passes before the joint tenancy is severed.

By holding that a joint tenancy is severed upon registration of a WSS (in execution of a judgment debt on a joint tenant's share in immovable property), the inconsistencies due to the nature of joint tenancy are removed. Upon severance, the judgment debtor's interest in the property (previously held in joint tenancy) becomes identified, and is a distinct one on which a WSS can attach.

A joint tenant has a real ownership interest which is capable of immediate alienation without the consent of the other joint tenant(s). By severing the joint tenancy upon registration of a WSS, it will no longer appear incompatible with the nature of the joint tenancy to hold that a joint tenant's interest in land is exigible to a WSS. Upon severance, the seizure of the judgment debtor's interest would also no longer be seen as a seizure of the interest of the other co-owner(s), who remain free to deal with his / their aliquot share independently of the debtor.

D. Legal effect of registering a WSS after Peter Low v Danial Patrick Higgins

A WSS against a joint tenant's interest in land confers real value to a judgment creditor.

Upon registration of a WSS, the joint tenancy is severed, and the judgment debtor's interest in the property is seized. The sheriff can sell the interest of the debtor, which has been seized by a WSS.

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Although the WSS (executed only over the debtor's share) does not allow the sheriff to sell the land as a whole, it confers a real benefit to the judgment creditor. It prevents dealings in the land by the other 'innocent' co-owner(s), which may serve as an incentive for the 'innocent' co-owner(s) to:

(a) settle the judgment debt so as to get the WSS lifted;

(b) buy over the debtor's share from the sheriff; or

(c) consent to the sale of the whole property by the sheriff to unlock the full economic value of his / their aliquot share.

The severance of the joint tenancy may be reversed in the event the judgment debtor makes payment to the creditor (i.e. satisfies the debt) and extinguishes the WSS prior to execution of a sale of the property.

Conclusion

Creditors who have commenced legal proceedings and obtained judgements or orders against their debtors can now enforce such judgments or orders by obtaining a WSS against the judgment debtor's interest in jointly-owned property (regardless of whether such interest is held under a joint tenancy or tenancy in common).

This creates additional avenues of enforcement for creditors and may make it easier to collect on outstanding judgment debts.

Dentons Rodyk's disputes team has extensive experience on debt recovery and enforcement of judgements, and are available to answer any questions you may have.

Dentons Rodyk acknowledges and thanks senior associate Ling Yi Quek for her contribution to the article.

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Costs recovery in the SICC: A different regime

The question of recovery of costs in the Singapore International Commercial Court came into sharp focus in the recent decision *of CPIT Investments Limited v. Qilin World Capital Limited and another* [2018] SGHC (I) 02 in which Ramsey IJ decided that recovery of costs in legal proceedings in the general High Court and recovery of costs in the SICC proceeded on different principles.

In *CPIT Investments,* the plaintiff sued two defendants in in the general High Court and the case was subsequently transferred to the SICC. The plaintiff failed to establish liability on the part of the first defendant and succeeded only one of three of its causes of action against the second defendant. The plaintiff sought costs on the basis that it was, on the whole, successful in the litigation and said that any discount ought to be no more than 15%. The plaintiff also asked for costs on an "indemnity basis" because it had served an unbeaten offer to settle. The defendants argued that the plaintiff should not be entitled to recover the whole of the costs and submitted that an issue-based approach gave rise to recovery of only 40% of the plaintiff's costs. Ramsey IJ's decision, rearranged here in litigation sequence to aid understanding, contained the following principles or guidelines:

1) Costs rules and practice directions in the general High Court apply until such time when the case is transferred to the SICC.

2) At the time of transfer, the general High Court or the SICC may direct that the costs guidelines to general High Court litigation apply or the parties may agree application.

3) Absent any direction or party agreement, the SICC can (but is not obliged to) take the costs guidelines into account.

4) The basis for costs orders in the SICC was the costs rules and practice directions relating to proceedings in the SICC and not the costs rules relating to proceedings in the general High Court.

5) The SICC can take the fact of an unbeaten offer to settle into account in determining costs recovery.

6) It is essential that the SICC Court is provided with a sufficient breakdown of the costs so that the paying party can make appropriate comments on the reasonableness of the costs and understand the work carried out for those costs, better still if there was an identification of the work with costs broken down into hours spent at hourly rates.

In order to appreciate the full importance of what Ramsey IJ has said it is necessary to understand that the SICC was created to enhance Singapore's status as a leading forum for legal services and commercial dispute resolution. The SICC rules provide that "[t]he unsuccessful party in any application or proceedings in the Court must pay the reasonable costs of the application or proceedings to the successful party, unless the Court orders otherwise". This rule should be understood in an international context. It is language that is more familiar to those involved in civil law countries and in international arbitration. One should consider that just as litigation in the SICC can be conducted by Singapore-qualified lawyers on both sides, it can also be conducted by Singapore-qualified lawyers instructed by international law firms on one or both sides. It can also be conducted by foreign lawyers who have registered with the SICC, including barristers and Queen's Counsel on one or both sides, or with registered foreign lawyers and Singapore-qualified lawyers as co-counsel.

Material that might be relevant for submission to an SICC judge may range from the UNIDROIT Principles of Transnational Civil Procedure to principles in international arbitration that costs are recovered through the concept of reasonableness and proportionality. Future cases on costs recovery in SICC litigation are likely to develop and refine the texture of the traditional, underlying indemnity philosophy in costs recovery that "[c]osts as between party and party are given by the law as an indemnity to the person entitled to them". For now, litigants are well advised to pay close attention to the guidance given by Ramsey IJ.

The article was first published on *SICC News* on 9 March 2018. For a longer version with full details, please contact us at sg.academy@dentons.com

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“Limited recognition” of foreign insolvency proceedings in Singapore where the circumstances warrant it

Finding a balance between public policy considerations and fairness to all parties concerned – the Re: Zetta Jet case

Creditors and anyone seeking recognition of foreign insolvency proceedings in Singapore should consider how the presence of an injunction or an adverse court order may affect the chances of successful recognition.

The recent Singapore High Court decision of *Re: Zetta Jet Pte Ltd and others* [2018] SGHC 16 sheds light on the matter. There, the Court declined to grant full recognition to a trustee of a US insolvency proceeding on public policy grounds, having found that the trustee was appointed in breach of a Singapore injunction order. However, in an effort to reach an equitable arrangement, the Court exercised its discretion to grant limited recognition for the purposes of setting aside or appealing the Singapore injunction.

Re: Zetta Jet is Singapore’s first decision dealing with the recognition of foreign insolvency proceedings under the UNCITRAL Model Law on Cross-Border Insolvency (Model Law), since it was implemented with some modifications in March 2017 via the Companies Act (Cap 50).

In this article, we explore (1) the basis of Zetta Jet’s application, (2) the Court’s effort to balance public policy and fairness considerations through “limited recognition”, and (3) practical implications for creditors and interested parties.

The basis of Zetta Jet’s application

Zetta Jet Pte Ltd (Zetta Jet Singapore), a company incorporated in Singapore, wholly owns Zetta Jet USA, Inc (Zetta Jet USA), a company organised under the laws of the State of California.

On 15 September 2017, voluntary proceedings under Chapter 11 of the US Bankruptcy Code were commenced in respect of the Zetta Jet entities in the US Bankruptcy Court in the Central District of California, Los Angeles Division.

On 19 September 2017, in the Singapore High Court, two shareholders of Zetta Jet Singapore obtained an injunction against Zetta Jet Singapore and two other shareholders, restraining them from carrying out any further steps in and relating to the Zetta Jet Chapter 11 proceedings.

After the injunction was granted, a Chapter 11 Trustee of the Zetta Jet entities was appointed. On 4 December 2017, due to financing issues, the Chapter 11 proceedings were converted to Chapter 7 proceedings, which are essentially liquidation proceedings under US law. The same Chapter 11 Trustee was appointed as the Chapter 7 Trustee.

With the authorisation of the US bankruptcy court, the Trustee commenced recognition proceedings in Singapore under the Model Law. Asia Aviation Holdings Pte Ltd (Asia Aviation), a shareholder of Zetta Jet Singapore, appeared as intervener to oppose recognition. Asia Aviation was also one of the 2 shareholders who applied for and successfully obtained the Singapore injunction.

The Court proceeded to consider the application for recognition of the Chapter 7 proceedings in accordance with the Model Law, given that the Zetta Jet entities had commercial dealings in the US where the Chapter 7 proceedings are taking place.

Limited recognition: The Court’s effort to balance public policy and fairness considerations

Under the Model Law, a Singapore court can deny recognition of a foreign insolvency proceeding if the recognition would be contrary to Singapore public policy.

In this case, a prior Singapore injunction prohibited the continuation of the US bankruptcy proceedings which led to the Trustee’s appointment. As the Trustee was appointed in breach of a Singapore injunction, the Court hesitated to grant full recognition of the Chapter 7 proceedings on the grounds that it would be against the public policy of Singapore.

Nonetheless, the Court identified that without some form of recognition, the Trustee would not be able to deal with the injunction at all. In the interest of fairness, the Court granted limited recognition to the Chapter 7 proceedings only for the purposes of setting aside or appealing the Singapore injunction.

Re: Zetta Jet underscores the correct approach when it comes to a breach of or non-compliance with a Singapore court order. In the words of the Court, *"…ignoring an injunction granted by a Singapore court undermines the administration of justice".* In particular, a party who does not comply with a Singapore court order generally cannot seek the assistance of the courts unless the non-compliance is rectified or purged.

Nonetheless, as evident from *Re: Zetta Jet*, the Singapore courts will aim to strike a balance between the administration of justice and fairness to parties involved.

Practical implications for debtors, creditors and interested parties

Before commencing insolvency proceedings against an entity (especially an entity with a presence in multiple jurisdictions), you may wish to seek legal advice and check which jurisdictions you wish to seek recognition in.

As *Re: Zetta Jet* has demonstrated, the presence of an injunction may hamper or delay the process of gaining recognition in Singapore. As the Model Law is also applicable in numerous other jurisdictions, the presence of an injunction may have the same effect in these other jurisdictions. Hence, it is advisable to seek legal advice and strategise the way forward, particularly when an adverse party may apply for injunctive relief from the Courts of a particular jurisdiction. There is a real need to be vigilant and to act fast when warranted.

If an injunction or an adverse court order is already in place, you should seek further legal advice on how to best deal with the injunction. You may wish to consider setting aside the injunction before applying for recognition. If the injunction cannot be set aside, you may wish to focus on seeking limited recognition to deal with the injunction in the first instance instead of pushing through for full recognition.

Dentons Rodyk acknowledges and thanks associate Qiu Li Lee for her contribution to the article.

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Accolades

Asian Legal Business (ALB)

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Dentons Rodyk was named the Real Estate Law Firm of the Year at the *Asian Legal Business* (ALB) SE Asia Law Awards 2018, held at the Mandarin Oriental, Singapore on Thursday, 10 May 2018. The Firm also won the Equity Market Deal of the Year (Midsize) award for the Keppel-KBS US real estate investment trust initial public offering, which raised gross proceeds of approximately US$553.1 million on the Singapore Exchange. Corporate Senior Partner Nicholas Chong and Finance Senior Partner Doreen Sim led the matter. Read more here.

IP Rankings 208

Dentons Rodyk's Intellectual Property practice received top-tier recognition in the Asian Legal Business (ALB) IP Rankings 2018. This year, the Firm was ranked Tier 1 for Singapore Patent and Tier 1 for Singapore Trademarks/Copyright. Read more here.

Innovation List 2018

Dentons Rodyk has been recognized in the Asian Legal Business (ALB) Innovation List 2018. We were noted for our market-leading expertise and demonstrated capabilities in the area of blockchain and initial token sales, with our team led by Senior Partners Kenneth Oh and Li Chuan Hsu. View the report here.

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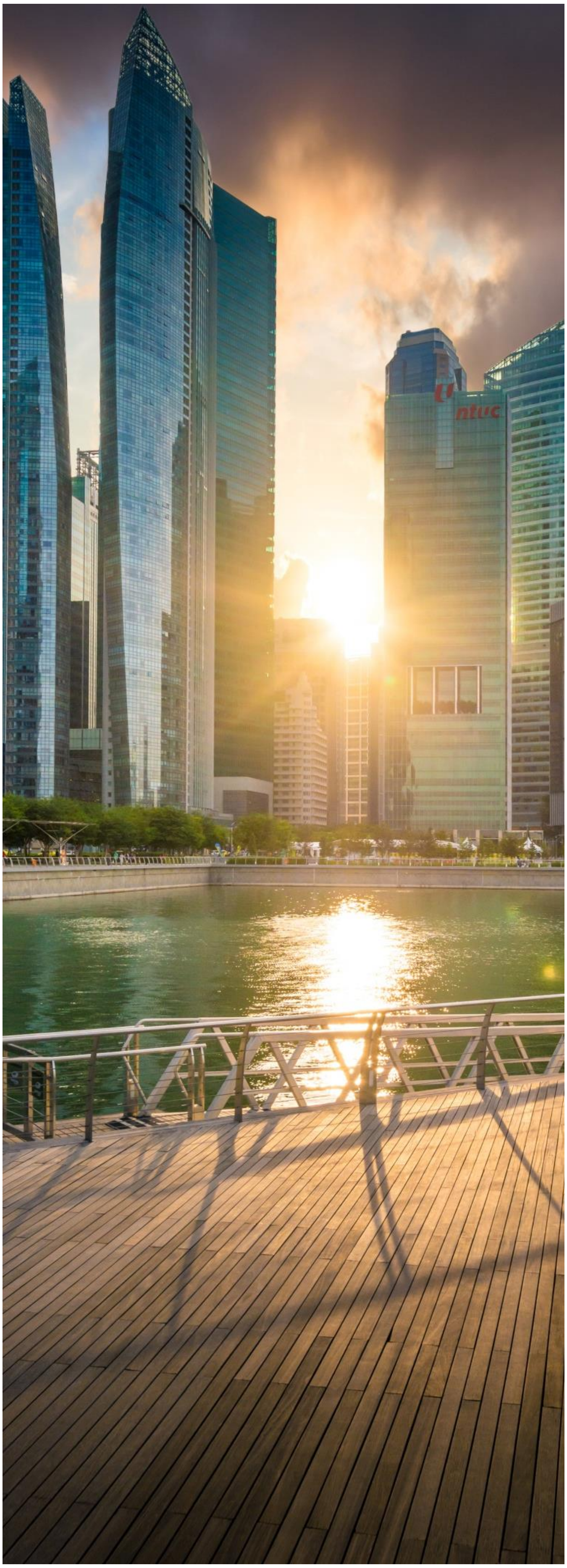
Dentons Rodyk is pleased to announce that 14 of our lawyers have been recognised in Asialaw Leading Lawyers 2018: Ai Ming Lee, Alvin Lim, Chai Chong Low, Doreen Sim, Eng Leng Ng, Gerald Singham, Jen Wei Loh, Joo Thye Tan, Lawrence Teh, Liat Yeang Lee, Marian Ho, Nicholas Chong, Philip Jeyaretnam, SC, Woon Ee Tang. Read more here.



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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.

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