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Arbitration Review

Paving the way for third-party dispute resolution funding in Singapore

The Civil Law (Amendment) Act 2017

In 2017 Parliament aligned Singapore with other leading arbitration jurisdictions, such as London, Paris and Geneva, in embracing third-party funding as a viable method in increasing the access to justice of parties involved in specific arbitration proceedings. The *Civil Law (Amendment) Act 2017* (the *Amendment Act*) was passed by Parliament on 10 January 2017 and, along with the *Civil Law (Third-Party Funding) Regulations 2017* (the *Funding Regulations*), came into force on 1 March 2017. These laws abolished the tort of maintenance and champerty and legalised third-party funding in relation to international arbitration proceedings, and related court and mediation proceedings.

Less than one year later, the market for third party funding in Singapore has seen significant activity - with numerous third party funders setting up operations in Singapore and the topic being widely debated in major conferences throughout the region. Practitioners and clients alike are keen to explore the benefits and opportunities associated with third party funding.

In this article we explore the concept, historical approach and new framework for third party funding, as well as implications and considerations for lawyers and clients who may be considering this alternative.

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What is third-party funding?

Third-party funding is a process by which a claimant can finance its claim through a third-party funding company (the third-party funder), who provides cash or other assistance in exchange for a percentage share of judgment sum or settlement sum. The capital provided is generally non-recourse - if the case does not result in settlement and the claimant loses the case, the third-party funder receives nothing and loses the cash or assistance invested. The claimant has no obligation to repay the cash or other assistance to the third-party funder.

The provision of third-party funding is not necessarily limited to a single litigation proceeding – some third-party funders have also begun offering financing for clients' litigation portfolios. Portfolio financing enables companies to use capital provided by third-party funders to flexibly finance fees and expenses for multiple litigation proceedings and also allows the third-party funder to offer lower pricing since the risk of funding is diversified within the litigation portfolio.

Historical position on the law of maintenance and champerty in Singapore

Before the recent legislative amendments, agreements for third-party funding of dispute resolution proceedings generally violated the doctrines of maintenance and champerty and were thus rendered unenforceable. Maintenance refers to the provision of assistance to a party by a person or entity that has no interest in the proceedings, while champerty is the maintenance of an action in return for a share in the proceeds of the action.

Historically, under the common law, maintenance and champerty have been declared unlawful for various reasons, including:

1. To protect vulnerable litigants who are at risk of exploitation by the champertous maintainer due to the unequal bargaining power between the parties, which may result in a subordination of the litigants' interests;

2. To uphold the purity of justice by preventing a proliferation of frivolous litigation and preventing the judicial system from becoming an avenue of speculative business ventures; and

3. To guard against an abuse of the court process in which the champertous maintainer uses his influence to suppress evidence and suborn witnesses.

New legislative framework

The shift in global attitudes towards third-party funding (for example in UK, Australia and Hong Kong) and Singapore's desire to maintain her competitiveness as a leading arbitration hub have culminated in the enactment of the Amendment Act and the Funding Regulations.

The *Amendment Act*, by amending the *Civil Law Act*, abolishes the tort of champerty and maintenance and clarifies that contracts affected by champerty and maintenance may still be unenforceable by virtue of being contrary to public policy or otherwise illegal. However, the *Amendment Act* expressly stipulates that certain contracts regarding third-party funding are valid if they satisfy the following criteria:

1. The third-party funding must be in relation to prescribed dispute resolution proceedings, which includes international arbitration proceedings and related court or mediation proceedings; and

2. The third-party funder must be a qualifying third-party funder, which means it must carry on the principal business of funding dispute resolution proceedings (in Singapore or elsewhere) and must have a paid-up share capital or managed assets of not less than $5 million or the equivalent amount in foreign currency.

A third-party funder that ceases to meet or fails to comply with the qualifying criteria will not be able to enforce its rights under the third-party funding contract, although it is still required to perform its obligations under the contract, in particular its obligation to fund the claim. In such an event, to ensure fairness to the third-party funder, the court or arbitral tribunal may grant relief to the third-party funder if the non-compliance was accidental or due to inadvertence or some sufficient cause, or if the court or arbitral tribunal finds that it is just and equitable to grant relief.

In addition, the *Amendment Act*, by amending the *Legal Profession Act*, permits a solicitor to introduce or refer a third-party funder to a client, as long as the solicitor does not receive any direct financial benefit from the introduction or referral, such as referral fees or a commission. A solicitor is also allowed to negotiate, advise or draft a third-party funding contract and act on behalf of a client in any dispute arising out of the contract.

Updates have also been made to the *Legal Profession (Professional Conduct) Rules 2015*. A legal practitioner must disclose to the court or tribunal and to every party to the proceedings the existence of any third-party funding in relation to the costs of the proceedings and the identity and address of the third-party funder. The disclosure must be made either at the date of commencement of the proceedings or as soon as practicable. A legal practitioner or law practice is also prohibited from holding any financial or other interests in the third-party funder.

In Parliament's Second Reading of the bill, Senior Minister of State for Law, Ms. Indranee Rajah S.C., highlighted the importance of self-regulation amongst arbitrators, lawyers and third-party funders. This has resulted in the promulgation of the following "soft-laws" in an attempt to develop a set of best practices:

1. The Law Society of Singapore and the Singapore Institute of Arbitrators have respectively issued a Guidance Note to lawyers and Guidelines to third-party funders advising the inclusion of certain issues in the third-party funding contract, such as:
    a. Confidentiality and legal privilege for documents disclosed to the third-party funder;
    b. Scope of funding provided and third-party funder's financial liabilities, including for adverse costs orders;
    c. Mechanisms to manage conflicts of interest;
    d. Third-party funder's level of involvement in proceedings; and
    e. The termination of agreement by third-party funder.
2. The Singapore International Arbitration Centre has also issued a Practice Note on arbitrator conduct where the involvement of a third-party funder is permissible, highlighting the following:
    a. A potential arbitrator must disclose to the Registrar and parties involved any circumstances that may compromise his impartiality or independence as soon as reasonably practicable before his appointment, for example any direct or indirect relationships with a third-party funder;
    b. An appointed arbitrator must disclose to the Registrar and parties involved circumstances that may compromise his impartiality or independence, which have arisen or are discovered during the proceedings; and
    c. The tribunal has the power to conduct such enquiries that it deems necessary or expedient, including the disclosure of any funding relationship and if so, the identity of the third-party funder and details of the relationship.

Practical implications and the way forward

In light of the legislative amendments, the balance between the competing policy considerations of the prevention of abuse of vulnerable litigants and the court process, and facilitating the access to justice, has been tilted in favour of the latter.

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This may be because the need to protect vulnerable litigants is reduced in the context of international arbitration proceedings, which usually involve sophisticated parties. The risk of frivolous litigation is curtailed since professional third-party funders are focused on profits – since they will not be repaid unless the funded party wins the case, they will generally not want to fund a case unless they believe that the case has sufficient merit. As the costs of international arbitration proceedings may sometimes be substantial, claimants are now empowered to pursue viable claims through third-party funding. By transferring their risk of losing in such proceedings to the third-party funder, firms will be able to devote their funds to their core business instead of bearing the financial burdens of litigation.

Parliament's decision in only extending third-party funding to international arbitration proceedings highlights its cautious and conservative approach. However, this paves the way for third-party funding for other dispute resolution proceedings in Singapore in the future and parties should remain cognisant of the potential expansion of third-party funding to other areas such as litigation, domestic arbitration and insolvency proceedings.

Implications for lawyers

Lawyers should take the initiative to network with third-party funders and understand the different services that various third-party funders offer. The key consideration that lawyers should be mindful of when evaluating which third-party funder is most suitable for the clients' needs would be the structure of the third-party funder, in particular its staying power. By referring clients to suitable third-party funders in appropriate situations, they will be able to provide better legal services for their clients. This also results in a win-win situation for both lawyers and third-party funders – lawyers are assured of the availability of funds for their remuneration and third-party funders are also awarded the investment opportunity.

However, lawyers must ensure that they do not receive any direct financial benefit from the introduction or referral of a third-party funder to their clients other than for their fees, disbursements and expenses. They should also be familiar with the "soft-laws" released by the respective bodies and draft third-party funding contracts that are consistent with these best practices.

Implications for clients

Clients stand to benefit from third-party funding by being able to bring claims that they would otherwise be unable to due to financial constraints, thus increasing their access to justice.

Clients should also consider entering into portfolio financing agreements with third-party funders if they anticipate being involved in multiple litigation proceedings or, by virtue of the nature of their industry, are exposed to a high volume of litigation proceedings (for example, a large pharmaceutical company).

Third-party funding will invariably help the client relieve cash flow, budget or accounting pressures. However, it should be noted that significant costs may still be incurred from entering into a third-party funding agreement. These costs may stem from the extensive due diligence to be performed and the drafting of the funding contract, which may include special bespoke clauses to safeguard both parties' interests. Ultimately, the onus is still on the client to carry out a cost-benefit analysis to make sure that commencing arbitration proceedings, even with financial assistance from the third-party funder, makes commercial sense.

Dentons Rodyk has experience with third party funding for arbitration and related court proceedings. If you have any questions please contact the author of this article.

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Business Bulletin

Singapore Budget 2018: How will the changes impact businesses and individuals?

The 2018 Singapore Budget Statement, announcing various tax changes, was delivered by Finance Minister Heng Swee Keat on 19 February 2018 – highlighting a record budget surplus of S$9.61 billion for Financial Year 2017 and GDP and productivity growth from previous years.

Below, we discuss how these changes may impact businesses and individuals, including:

A. income tax announcements for corporate and individual taxpayers,

B. goods and services tax (GST) rate increases, and the impact on the digital economy from the introduction of import GST for services,

C. stamp duty rate increases for property purchases,

D. sector-specific tax announcements for the fund industry, financial sector and debt market, and

E. other key tax announcements.

While some tax changes may appear conservative in comparison with the economy's bullish growth, it reflects the Government's efforts to be prudent and address long term challenges whilst laying the foundation for Singapore's future.

A. Income Tax announcements

1. Changes for corporate taxpayers

Key corporate income tax announcements are as follows. Measures were announced during the Budget to bolster research and development (R&D) conducted in Singapore and Singapore's Intellectual Property (IP) tax regime. These measures include increasing existing tax deductions for:

- payments made by businesses to license IP for commercial use,
- IP registration costs, and
- expenditure incurred on R&D carried out in Singapore.

These tax deductions would go toward supporting corporations, big and small, in their efforts to innovate, which we note is one of the goals in this year's Budget.

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i. Research & Development and IP in-licensing

Of particular interest would be the enhanced deductions for qualifying expenses incurred on eligible R&D conducted in Singapore. This enhanced tax deduction is significant – not only does it grant a 250% deduction on staff costs and consumables incurred on qualifying R&D activities performed in Singapore, it also has no monetary cap on expenditure. The proposed enhancement will take effect from Year of Assessment (YA) 2019 to YA 2025.

Without this enhancement, the tax deduction rate would have fallen to 150% from the 400% under the now-lapsed Productivity and Innovation Credit (PIC) Scheme. Under the PIC Scheme, companies could have claimed up to 400% of tax deductions up to S$400,000 or 60% cash pay-out up to S$100,000, for making investments in innovation and productivity improvements.

Another measure which could prove useful is the enhancement of the tax deduction (from 100% to 200%) for costs on IP in-licensing. The tax deduction for qualifying IP in-licensing costs incurred for each year will be enhanced from 100% to 200% for the first S$100,000. The change will take effect from YA 2019 to YA 2025. However, we observe that this enhanced tax deduction would have had a greater impact had there been no restrictions imposed. With the lower expenditure cap and the exclusion of related licensing payments from this tax deduction, the practical utility of this enhancement may be limited.

ii. Intellectual Property Development Incentive (IDI)

The IDI was announced during last year's Budget 2017. However, no further details have been released and the Budget this year did not address the IDI. With the removal of IP income from the Development and Expansion Incentive and Pioneer Incentive, corporations with structures involving IP holding entities would be keen to find out about the details of this new IDI, which may provide concessionary tax rates on income from qualifying IP rights.

The Economic Development Board had announced last year that the introduction of the IDI would be deferred to a later date expected in late 2017. However as mentioned, no further updates or announcements have been made. Pending the release of the full details of the incentive, it is expected that the IDI will incorporate the "BEPs-compliant modified nexus approach".

Simply put, this is a substance-based test. This is not surprising as it is important for authorities to ensure that Singapore's tax incentive regime is compliant with the Action Plan on Base Erosion and Profit Shifting.

iii. Other Corporate Income Tax announcements

Other tax changes include:

- **Enhancement and extension of the Corporate Income Tax (CIT) Rebate**. For YA 2018, the CIT rebate is enhanced from 20% to 40% of tax payable and the rebate cap is raised from S$10,000 to S$15,000. The rebate is also extended to YA 2019, but at a reduced rate of 20% of tax payable, capped at S$10,000.

- **Downward adjustments to the Partial Tax Exemption (PTE) on chargeable income and the Start-up Exemption (SUTE)**. Under the SUTE Scheme, the broad based tax exemption will be adjusted to 75% (down from 100%) of the first S$100,000 chargeable income and 50% on the next S$100,000 (down from S$200,000) chargeable income. Under the PTE Scheme, there is no change to the 75% exemption on the first S$10,000 of chargeable income, though the 50% exemption on the next S$190,000 of chargeable income is a reduction of the S$290,000 amount previously. These changes will take effect on or after YA 2020.

- **Enhancement and extension of tax deduction for costs of protecting IP**. The scheme will be extended till YA 2025. Tax deductions would also be enhanced from 100%

to 200% for the first S$100,000 qualifying IP registration costs incurred for each YA with the changes to take effect from YA 2019.

- **Enhancement of Double Tax Deduction for Internationalisation Scheme.** The S$100,000 expenditure cap for claims without prior approval from IE Singapore or Singapore Tourism Board (STB) will be raised to S$150,000 per YA. This change will apply to qualifying expenses incurred on or after YA 2019 with further details to be released by IE Singapore and STB by April 2018.

However, these changes involve relatively low monetary amounts and lower expenditure caps. Therefore, they may be of greater interest to Small and Medium Enterprises.

2. No significant tax changes announced for individuals

There were no substantial announcements made in relation to individual income tax during the Budget save for the extension of the tax deduction for qualifying donations made to Institutions of Public Character (IPCs). To continue encouraging Singaporeans to give back to the community, the 250% tax deduction on qualifying donations will be extended for another 3 years to cover donations made on or before 31 December 2021.

B. Goods and Services Tax announcements

1. Looming increase in the GST rate

On the GST front, one of two key announcements relate to the potential increase in the GST rate by 2% (to 9%) sometime in the period of 2021 to 2025. It is noted that the announcement has been made well in advance of its implementation, giving taxpayers ample time to prepare for this increase.

2. Taxing the digital economy

Under the existing GST framework, no GST is imposed on imported services like digital purchases. This position represents a tax leakage and also discriminates against local suppliers, in that local suppliers are required to charge GST, whereas overseas suppliers can supply digital or remote services to customers in Singapore without having to charge GST.

The introduction of import GST for imported services seeks to avoid this tax leakage and to level the playing field between local and overseas suppliers. The measures announced to address this are as follows:

- Where there is a B2B (business to business) imported service, GST will be imposed via a reverse charge mechanism.
- Where there is a B2C (business to consumer) imported services, GST will be imposed through an Overseas Vendor Registration. It is proposed that overseas suppliers and electronic marketplace operators making significant supplies of digital services to local consumers (i.e. suppliers with a global turnover exceeding S$1 million making B2C supplies of digital services to customers in Singapore exceeding S$100,000) will be required to register for GST in Singapore.

In relation to the B2B imported services, only businesses that make exempt supplies or do not make any taxable supplies will need to apply the reverse charge. Practically, this means that the reverse charge mechanism would be of limited application since it primarily affects such businesses. These would include banks and companies in the business of letting and selling residential property. Therefore, the majority of businesses that make only taxable supplies would not be affected by the introduction of this reverse charge mechanism.

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In relation to the B2C imported services, pending the announcement and confirmation of the full details, it has been proposed that the overseas vendors would be subject to the same penalties and compliance regime as domestic GST-registered persons. A question that remains is how the authorities would enforce this regime bearing in mind that these overseas vendors are located outside Singapore. We can expect Singapore to turn to jurisdictions that have introduced similar regimes to see what works and what does not. For example, some jurisdictions have explored conferring authorities the power to block access to websites. It is hoped that the costs of compliance with this new regime would not outweigh the GST to be collected.

The implementation of the reverse charge mechanism and overseas vendor registration has been proposed to take effect from 1 January 2020. We understand that an Inland Revenue Authority of Singapore (IRAS) public consultation is now underway and is scheduled to end mid-March 2018. Hence, we would expect further details (if any) to only be released after the public consultation ends and the authorities have had time to consider the response gathered.

The authors have also previously written about this issue. To read more about the proposed measures, please click here or refer to Dentons Rodyk Reporter Issue 02 (2017).

Amid these announcements, the online purchases of goods costing below S$400 remain outside of the GST net. No change to this position was announced during the Budget. Therefore, online purchases of goods imported into Singapore by post costing below S$400 will continue to enjoy GST relief. However, given that this position also represents a tax leakage and discriminates against local suppliers, we think some action will be taken in the future. The authorities are certainly aware of this issue but may at present, still be undecided as to measures to resolve this problem.

C. Stamp Duty announcements: Wealth tax in another form?

The Budget announced an increase in the top marginal buyer stamp duty (BSD) for residential property from 3% to 4% with effect from 20 February 2018, applicable to Singapore residential properties with values in excess of S$1 million. Read more about the stamp duty change announced during the Budget here or refer to Property Notes in this issue of Dentons Rodyk Reporter.

With this increase, it should be highlighted that there would also be an impact on the Additional Conveyance Duty (ACD) rates for Buyers.

ACD was introduced in March 2017 and applies to a qualifying acquisition or disposal of equity interests in a property holding entity that owns primarily residential properties in Singapore. It was introduced to address the stamp duty differential that had existed in the past 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%.

This change follows a global trend where a number of jurisdictions have taken similar action to address this issue. Compared to some of the other major financial centres, what Singapore has done is comparatively less drastic. As a side note, IRAS issued the second edition of its e-Tax Guide on Stamp Duty: Additional Conveyance Duties on Property Holding Entities on 19 February 2018, clarifying amongst other things, the meaning of “prescribed immovable properties” and the new ACD rates following the Budget announcements.

It is also noted that this hike in BSD came amidst speculation prior to the Budget of the possible introduction (or re-introduction) of some form of wealth tax. In his Budget speech, the Finance Minister framed the move as one aimed at making the Singapore tax system more “progressive”. Compared to the introduction of a capital gains tax or the re-introduction of estate duty (abolished in 2008), this move makes practical sense as it would be less disruptive and easier to implement. Further, any introduction of a capital gains tax, estate or inheritance tax would damage Singapore's reputation and competitiveness as a hub for wealth management and financial services.

D. Select tax announcements pertaining to the financial sector

1. Developments in the Fund Industry

The Singapore Variable Capital Company (S-VACC) was announced by the Monetary Association of Singapore (MAS) during its public consultation last year, on 23 March 2017. Prior to the Budget, it was not clear how the tax regime for S-VACCs would look like. With the announcements made during the budget, it is now made clear that a S-VACC will be treated as a company and single entity for tax purposes and the tax framework for S-VACCs would be similar to other existing fund structures. The announcements are largely uncontroversial, and are welcomed as it puts S-VACC structures on an equal footing with other funds approved under tax exemption schemes for funds under the Income Tax Act (Cap. 134) (ITA).

Notably, the tax exemption schemes under Sections 13R and 13X of the ITA and the concessionary tax rate under the Financial Sector Incentive-Fund Management (FSI-FM) scheme will be extended to the respective S-VACC and fund managers managing an incentivised S-VACC. The extension of the FSI-FM scheme to such fund managers is consistent with the broader extension of the Financial Sector Incentive Scheme to 31 December 2023, which was scheduled to lapse on 31 December 2018.

MAS will release further details of the tax framework for S-VACCs by October 2018.

In line with the move to cater for more diverse fund structures, the tax exemption under Section 13X of the ITA, i.e. the Enhanced-Tier Fund Scheme, will also be extended to all fund vehicles constituted in all forms. This change will take effect for new awards approved on or after 20 February 2018.

2. Rationalising the WHT exemptions for the financial sector

Interest payments made by a Singapore tax resident or a Permanent Establishment (PE) in Singapore to a non-resident of Singapore would in general be subject to withholding tax (WHT) at a rate of 15%, subject to any applicable double tax treaties that may provide for a reduced WHT rate.

There is currently a range of WHT exemptions for the financial sector. During the Budget, it was announced that a review date of 31 December 2022 will be introduced for current WHT exemptions for certain types of payments, which include “payments made under interest rate or currency swap transactions by financial institutions”.

Currently, payments made under an interest rate or currency swap transaction to a non-resident of Singapore or person without a PE in Singapore, by a financial institution is exempt from tax as stated under the Income Tax (Exemption of Interest and Other Payments for Economic and Technological Development) Notification 2000 (Notification).

If this exemption is subsequently withdrawn, it would be necessary to evaluate the likely impact of this withdrawal in light of the Singapore High Court decision in *ACC v Comptroller of Income Tax* [2011] 1 SLR 1217 (ACC).

The High Court in ACC held (at [33]) that there being no loan or indebtedness in an interest rate swap agreement, payments made pursuant to such an agreement would not be “in connection with any loan or indebtedness” and thus interest rate swap payments should ordinarily fall outside the meaning of Section 12(6)(a) of the ITA. It follows that such payments would not in general be subject to WHT under Section 45 of the ITA when paid to a non-resident regardless of whether there is an express WHT exemption. We note further the High Court in ACC had in fact considered the Notification. However, the High Court did not think that the content of such subsidiary legislation, made by the Minister pursuant to powers conferred under s 13(4) of the ITA, could guide the interpretation of Parliament’s intention in the language used in the ITA (at [42]).

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In the absence of an exemption, one would need to consider the specific circumstances of a swap transaction in order to determine whether such payments were subject to WHT in light of the reasoning of the High Court in ACC.

3. Qualifying Debt Security Scheme (QDS) to be extended but QDS+ to lapse

To support the continued development of Singapore's debt market, the QDS Scheme will be extended till 31 December 2023.

On the other hand, the QDS+ Scheme, which was an enhancement to the QDS Scheme targeted to further incentivise specified debt securities with an original maturity of at least 10 years and Islamic debt securities, would be allowed to lapse after 31 December 2018. Under the QDS+ scheme, all investors are exempt from tax on qualifying income derived from QDS that are the aforementioned specified debt securities.

4. Tax transparency treatment extended to REIT-ETFs

Other significant announcements made for the financial sector include extending the tax transparency treatment for Singapore-listed Real Estate Investment Trusts (REITs) to Singapore-listed REITs Exchange-Traded Funds (ETFs). This is a welcome step because REITs are already tax transparent so it is logical to extend this tax treatment to ETFs.

E. Other key tax announcements

For the insurance sector, the Insurance Business Development – Insurance Broking Business (IBD-IBB) Scheme will be extended till 31 December 2023 while the Insurance Business Development – Specialised Insurance Broking Business (IBD-SIBB) scheme will be allowed to lapse after 31 March 2018.

Other tax changes for businesses include the extending of the Investment Allowance scheme in respect of productive equipment to capital expenditure incurred on newly-constructed strategic submarine cable systems landing in Singapore, subject to qualifying conditions. The change will take effect for capital expenditure incurred between 20 February 2018 and 31 December 2023 (both dates inclusive).

If you are interested in understanding how these changes may affect you or your business, and how to take advantage of the various opportunities in this year's budget, please reach out to any of our tax experts listed below.

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

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Singapore Employment Act Amendments: Expanding coverage to professionals, managers and executives while tightening rules on hiring foreigners

Due to the increasing number of professionals, managers and executives (PMEs) in the Singapore workforce, the Ministry of Manpower has made various changes to the Employment Act of Singapore (the Act) – most notably expanding coverage to PMEs earning more than S$4,500. These changes were mentioned in Parliament on 5 March 2018 and should come into effect by April 1 2019.

Below, we discuss the key changes and how they may affect employers and employees.

Key changes to the Employment Act

1. There will no longer be a salary cap of S$4,500 per month for an employee to be afforded protection under the Act. This means that the Act will cover all workers, including PMEs. Previously, employees who fell outside the ambit of the Act had to rely solely on their contractual provisions of employment.

    - Workers protected by the Act will soon enjoy various benefits, including:
    - A minimum 7 days' annual leave;
    - 11 paid public holidays;
    - 14 days of paid sick leave and 60 days of paid hospitalisation leave;
    - Maternity and childcare leave;
    - Redress for wrongful dismissal; and
    - Protection in relation to number of hours of work, and overtime pay.

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2. **Jobs Bank** - From 1 July 2018, companies with at least 10 workers and looking to hire for jobs paying under S$15,000 a month will need to advertise for such a position on Jobs Bank for at least 14 days before they can hire a foreigner. This is intended to give more Singaporeans a chance to apply for these jobs.

3. **Employment Claims Tribunal** – Wrongful dismissal claims will soon be heard by the Employment Claims Tribunal instead of the Ministry of Manpower. This will offer employers and employees a "one-stop service" as dismissal-related claims are often coupled with salary issues.

Implications for companies hiring foreign workers

The amendments to the Act also seek to tighten rules around hiring foreign workers. For example, the minimum qualifying salary to apply for an S-Pass for foreign mid-level skilled staff will be raised from S$2,200 to S$2,400. The hike will take place over two phases which are scheduled to take effect on 1 January 2019 and 1 January 2020.

The Government has also indicated that Employment Pass applications for foreign workers will be scrutinised more closely. Companies will be more closely monitored if they are assessed to:

1. Employ a high proportion of foreigners;

2. Not have plans to recruit and train more Singaporeans; and

3. Have a low contribution to the economy and society.

Going forward, such companies may find it harder to receive approvals for employment pass applications.

Foreigners currently make up about one third of Singapore's workforce, or about 1.1 million out of a total workforce of 3.4 million.

Conclusion

If you would like to explore further how these changes affect your business, hiring practices or existing employment agreements, please do not hesitate to reach out to the Dentons Rodyk employment law experts listed in this article.

Dentons Rodyk acknowledges and thanks senior associate Vyasa Arunachalam for his contribution to the article.

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Stricter compliance measures for listed companies

Deadline approaching to submit comments – let us help to get your views heard!

The Corporate Governance Council (the CG Council), through its recently issued consultation paper, has proposed amendments to the Singapore Code of Corporate Governance (the CG Code 2012) and the Listing Rules of the Mainboard of the Singapore Exchange Securities Trading Limited (SGX Listing Rules). Accordingly, companies listed on the Mainboard of the Singapore Exchange Securities Trading Limited (Listed Companies) have until 15 March 2018 to submit comments on the proposed amendments.

The proposed amendments would result in stricter compliance measures for Listed Companies, and concern:

1. Director independence & training
2. Remuneration
3. Internal controls & risk management systems
4. Stakeholder engagement

The proposed amended compliance framework for Listed Companies is as follows:

	SGX Listing Rules	***Revised CG Code 2012 (Revised Code)***	***Practice Guidance***
Purpose	**Mandatory Compliance:** Sets out key requirements and baseline market practices	**Comply or Explain:** Provides overarching principles of good corporate governance and actionable steps to guide compliance with such principles	**Voluntary Compliance:** Provides guidance for compliance with the Revised Code as well as setting out best practices
Key Changes	Guidelines in the CG Code 2012 which are considered important requirements or baseline market practices are proposed to be shifted to the SGX Listing Rules for mandatory compliance Key changes are further discussed below	The definition of “comply or explain” should be clarified to strengthen the emphasis on thoughtful and meaningful communication between Listed Companies and their stakeholders Key changes are further discussed below	The introduction of the Practice Guidance is recommended to complement the Revised Code, but is non-binding and will apply on a voluntary basis. 24 prescriptive or less essential details, which are currently contained in the CG Code 2012, are recommended to be incorporated in the Practice Guidance instead

Below, we discuss the key changes that would affect current operations of Listed Companies. If you or your company would like to assess your company's current position or submit comments to the proposed amendments, please reach out to us.

1. Director Independence & Training

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
"Independent" director ratio on board of directors of the Listed Company (Board)	Guideline 2.1: There should be a strong and independent element on the Board, with independent directors making up at least one-third of the Board.	**Mandatory compliance**: It is proposed that this become a mandatory rule under the SGX Listing Rules, such that independent directors would have to form at least one-third of the Board.
"Independent" director ratio on the Board, where the chairman of the Board (Chairman) is not independent	Guideline 2.2: The independent directors should make up at least half of the Board where: (a) the Chairman and the chief executive officer (or equivalent) (the CEO) is the same person; (b) the Chairman and the CEO are immediate family members; (c) the Chairman is part of the management team; or (d) the Chairman is not an independent director.	**Comply or explain**: It is proposed that this Guideline be revised to provide that independent directors are to comprise a majority of the Board where the Chairman is not independent.
"Independent" director tests	Guideline 2.3: The Board should determine, taking into account the views of the nominating committee, whether the director is independent in character and judgement. The Board should state its reasons if it determines that a director is independent notwithstanding the existence of relationships or circumstances which may appear relevant to its determination. Examples of relationships or circumstances which would deem a director to be not independent are set out in this Guideline. If the Board wishes, in spite of the existence of one or more of these relationships or circumstances, to consider a director as independent, it	**Mandatory compliance**: The proposed tests for director independence provide that a director will not be considered independent where: (i) he is employed by the Listed Company or its related corporations for the current or was employed in any of the past three (3) financial years; or (ii) his immediate family member is employed by the Listed Company or its related corporations for the current financial year or was employed in any of the past three (3) financial years, and such family member's remuneration was determined by the Listed Company's remuneration committee; or

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
	should disclose in full, the nature of that director's relationship or circumstance and bear responsibility for explaining why that director should be considered independent.	(iii) he is, or has an immediate family member who is, a substantial shareholder of the Listed Company; or *Option (i) – to incorporate the "nine (9) year rule" as a hard limit* (iv) he has served on the Board for more than nine (9) years since the date of the director's first appointment (before or after listing). ***OR*** Option (ii) – *to subject independent directors who would like to serve more than nine (9) years to a two-tier vote* (iv) such director has been a member of the Board for an aggregate period of more than nine (9) years before or after listing and his continued appointment as an independent director has not been sought and approved in separate resolutions from: (A) all shareholders; and (B) shareholders excluding any controlling shareholder and associate of the controlling shareholder. The 9-year rule is not a term limit, as it does not prevent an independent director who has served on the Board for nine (9) years, to continue as a non-independent director. Additionally, a transition period of three (3) years is recommended, regardless of which option is adopted, to give companies sufficient time to adjust their Board composition and/or search for new independent directors. The remaining tests of director independence from the CG Code 2012 are proposed to be shifted to the non-binding Practice Guidance.
Shareholding threshold for "independent" directors	Guideline 2.3: An "independent" director is one who has no relationship with the company, its related corporations, *its 10% shareholders* or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgement with a view to the best	**Mandatory compliance**: It is proposed that the shareholding threshold in relation to determining director independence be lowered from 10% to 5%, and that this become a mandatory rule under the SGX Listing Rules.

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
	interests of the company.	
First-time director training	Guideline 1.6: Incoming directors should receive comprehensive and tailored induction on joining the Board, and companies should provide training for first-time director in areas such as accounting, legal and industry-specific knowledge as appropriate, as well as regular training on relevant new laws, regulations and changing commercial risks.	**Mandatory compliance**: It is proposed that this become a mandatory rule under the SGX Listing Rules, requiring any first-time directors to undergo training in the roles and responsibilities of a director.

2. Remuneration

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
Disclosure on relationship between remuneration and performance	Guideline 9: Every company should provide clear disclosure of its remuneration policies, level and mix of remuneration, and the procedure for setting remuneration, in the company's Annual Report.	**Comply or explain**: It is proposed that this Guideline be revised to provide for Listed Companies to disclose the relationship between remuneration and value creation. In particular, the proposed revised Principle provides that the company be transparent with its remuneration policies, and, among other things, its procedures for setting remuneration, and the relationships between remuneration, performance and value creation.
Remuneration of employees who are, or directly related to, substantial shareholders	Guideline 9.4: For transparency, the annual remuneration report should disclose the details of the remuneration of employees who are immediate family members of a director or the CEO, and whose remuneration exceeds S$50,000 during the year. This will be done on a named basis with clear indication of the employee's relationship with the relevant director or the CEO. Disclosure of remuneration should be in incremental bands of S$50,000. The company need only show the applicable bands.	**Comply or explain**: It is proposed that this Guideline be revised to provide for Listed Companies to disclose the names and remuneration of employees who are substantial shareholders or immediate family of substantial shareholders (in addition to employees who are immediate family members of a director or the CEO, as in the CG Code 2012), where such remuneration exceeds S$100,000 during the year (revised from S$50,000 currently), in bands no wider than S$100,000 (revised from S$50,000 currently).

3. Internal Controls & Risk Management Systems

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
Disclosure on internal controls and risk management systems	Guideline 11.3: The Board should comment on the adequacy and effectiveness of the internal controls, including financial, operational, compliance and information technology controls, and risk management systems, in the company's Annual Report. The Board's commentary should include information needed by stakeholders to make an informed assessment of the company's internal control and risk management systems.	**Mandatory compliance**: While the SGX Listing Rules currently require Listed Companies to comment on their internal controls, it is proposed that these rules be amended to enhance disclosures on the adequacy and effectiveness of Listed Companies' internal controls and risk management systems. In particular, there is an additional requirement for disclosure of the Listed Company's weaknesses, and steps to address them.

4. Stakeholder Engagement

It is proposed that a provision be introduced in the Revised Code to provide for Listed Companies to consider and balance the needs and interests of material stakeholders, as well as accompanying provisions setting out expectations for Listed Companies to:

(a) have arrangements to identify and manage relationships with material stakeholder groups;

(b) disclose key focus areas in relation to their management of stakeholder relationships; and

(c) maintain a current corporate website for all stakeholders to stay informed of material updates in a timely manner.

5. Conclusion

Ultimately, the proposed measures would impose stricter compliance requirements for Listed Companies. If you or your company would like to submit comments to the proposed amendments, please reach out to us prior to 15 March 2018. We are also available to help you assess your company's current position and determine the next steps under the proposed amendments.

Dentons Rodyk acknowledges and thanks legal executive Sean Gallagher, associates Julian Foo and Randall Lee for their contributions to the article.

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Competition Law Alert

Indonesian Business Competition Supervisory Commission (KPPU) Chair hints of enforcement against foreign companies arising from amendments to Indonesian Competition Law

The Chair of the Indonesian Business Competition Supervisory Commission (the KPPU), Syarkawi Rauf, has hinted at "taking action against foreign companies" that violate Indonesian Competition Law (*Source: PaRR, 26 January 2018*). This follows from the extra-territorial jurisdiction provisions provided in the proposed amendments to the country's competition laws which have been approved by the Indonesian Parliament on 28 April 2017 (the Bill).

Currently pending before Indonesian President Joko Widodo, the Bill extends the definition of "business actors" to include companies established outside Indonesia with activities that affect the Indonesian economy. At present, this is limited to business actors located within Indonesia.

Once passed into law, the amendments mark a significant milestone for the KPPU which has already indicated its desire to resume its probe into Singapore-based freight forwarding firms in Batam. This development is likely to significantly impact the commercial practices of multi-national companies active in Indonesia even if they are physically located outside Indonesia.

The move by the KPPU is consistent with the competition law practices in other regional jurisdictions. Singapore's Competition Act (Cap. 50B), for example, similarly prohibits any anti-competitive conduct which has the effect or object of preventing, restricting or distorting competition in Singapore and this extends to conduct taking place overseas. This is evident by the Competition Commission of Singapore's various record-breaking penalty decisions against international cartels where the offending conduct had taken place overseas but which conduct had ultimately affected competition in Singapore.

As competition authorities continually seek to expand the ambit of their enforcement powers, multi-national companies and businesses are now no longer sheltered behind "jurisdictional safe houses" and must continuously review their business practices to ensure alignment and compliance with the competition legislation in every jurisdiction in which they operate. Audit and compliance efforts must be similarly stepped up to ensure relevance with the prevailing competition laws as well.

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Construction & Arbitration Update

Setting aside an SOP Act adjudication determination: The right of all parties to be heard

The Building and Construction Industry Security of Payment Act (Cap 30B) (SOP Act) gives parties in Singapore a way to quickly resolve construction payment disputes on a "temporary finality" basis with the right to fully and finally resolve all disputes in Court or in arbitration (where the parties had agreed to arbitration).

If a party is aggrieved by the outcome in the adjudication proceedings, it may apply to set aside the adjudication determination where there are grounds to do so, including if they were not properly heard by the adjudicator.

In the recent case of *Bintai Kindenko Pte Ltd v Samsung C&T Corp [2017] SGHC 321*¸ the Singapore High Court further clarified what would amount to a breach of natural justice on the part of the adjudicator, such that the Court would exercise its power to set aside the adjudication determination.

In particular, this case highlights the importance of an adjudicator having to apply his/ her mind to all of the essential arguments raised by parties in the adjudication. Otherwise, there is a risk that the adjudication determination may be set aside by the Court for being in breach of natural justice.

Facts

The plaintiff sub-contractor, Bintai Kindenko Pte Ltd (Bintai Kindenko) applied for adjudication against the defendant main-contractor, Samsung C&T Corp (Samsung). The claims by Bintai Kindenko and Samsung are summarised as follows:

Issue	Bintai Kindenko's Claim (Sub-Contractor)	Samsung's Claim (Main-contractor)
Retention Monies	S$2,146,250.00	-
Variation Works (certified and paid in earlier payment responses, but now reversed in the disputed payment response)	-	S$1,605,711.42
Backcharges	-	S$585,252.20
Total	**S$2,146,250.00**	**S$2,190,963.62**

The adjudicator ruled in favour of Bintai Kindenko. Specifically, the adjudicator excluded the two issues raised by Samsung, and stated expressly in its adjudication determination that the dispute "*centred solely on the release of the first retention monies, and not the variations or backcharges*". However, in the adjudication conference, neither party had sought to limit the scope of the adjudication to the issue of retention monies only.

When Bintai Kindenko sought to enforce the adjudication determination in Court, Samsung then applied to set aside the adjudication determination on the basis that the adjudicator had breached the rules of natural justice by failing to consider the two issues which it had raised in the adjudication.

Below, we discuss the important legal principles in relation to the breach of natural justice.

➤ **Read more on page 20**

Key takeaways

There will be a breach of natural justice if (1) the adjudicator fails to deal with all the essential issues in dispute, and (2) the breach was material and caused real and serious prejudice to the aggrieved party.

A. The adjudicator must deal with all essential issues in the adjudication application

An issue would be essential if it was of such major consequence and so much to the forefront of the parties' submission that no adjudicator could, in good faith, have regarded the issue as requiring no specific examination in the reasons for determination.

In this case, the Court found that the two issues of backcharges and variation works were repeatedly flagged out in both Bintai Kindenko's and Samsung's submissions to the adjudicator as important issues in dispute. Thus, this would support the point that the two issues were essential. By failing to consider the two essential issues in dispute, the Court found that the adjudicator had acted in breach of natural justice.

B. The breach of natural justice must be material, and must cause real and serious prejudice to the aggrieved party

Even if the aggrieved party can show that the adjudicator was in breach of natural justice, the Court has to be convinced that such **breach was material and caused real and serious prejudice** to the aggrieved party. In this regard, the test of materiality was whether the breach could *reasonably* have made a difference, and not whether it would necessarily have done so. The crux is whether the omission to consider the issues in question might have had some prospect of changing the adjudicator's mind in respect of his decision.

Ultimately, the Singapore High Court concluded that the adjudicator had not dealt with the two issues raised by Samsung. Further, the two issues which the adjudicator had excluded could certainly have changed the adjudicator's mind as to the final outcome, since the sum disputed in relation to these two issues was greater than Bintai Kindenko's claim for the first half of the retention monies. Thus, the Court decided that there was real and serious prejudice occasioned to Samsung, and allowed Samsung's application to set aside the adjudication determination.

Conclusion

When the adjudicator renders his/ her adjudication determination, one should always scrutinize the decision to see if the adjudicator had considered all the essential issues raised by the parties, which is likely to have a bearing on the eventual outcome of the case.

If the adjudicator did not rule in your favour, and you feel that the adjudicator had failed to consider some of the essential issues at hand which should have been properly considered, this may very well constitute a ground for setting aside the adjudication determination. In which case, it would be advisable to seek legal advice to assess whether you have a good case for setting aside the adjudication determination.

Dentons Rodyk acknowledges and thanks associate Ting Wei Tan for her contribution to the article.

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Litigation Brief

Protecting against foreseen risks – is a boilerplate indemnity clause sufficient?

Analysing the "General Indemnity" clause in CIFG Special
Assets Capital I Ltd v Ong Puay Koon and others and
another appeal [2017] SGCA 70 (CIFG)

Introduction

When entering into a contract, parties are increasingly relying on indemnity clauses to allocate risks that may arise. However, generic or boilerplate indemnity clauses, which are not tailored to the relevant situation, may leave parties at a disadvantage.

In *CIFG*, a generic boilerplate indemnity was inserted into a series of agreements towards the end of the negotiations. The indemnified party believed the newly-inserted clauses provided unlimited and general indemnity and would allow it to claim the entirety of its losses arising from default.

The Singapore Court of Appeal, however, did not agree. After the Court took into account the relevant context against which that boilerplate indemnity was to be construed, it held that the boilerplate indemnity did not work as desired by the indemnified party and provided only limited protection.

Below, we discuss the background and holding of *CIFG*, the key lessons learnt, and the implications on your business.

Background and holding

In *CIFG*, the plaintiff (CIFG Special Assets Capital I Ltd) entered into a set of convertible bond subscription agreements (CBSAs) pursuant to which it provided funds to the first defendant (Polimet Pte Ltd) by subscribing for convertible bonds issued by the first defendant.

Apart from the plaintiff and the first defendant, the initial shareholders of the first defendant (Initial Shareholders), i.e. the second to fifth defendants, were also parties to the CBSAs. The first defendant eventually defaulted on the CBSAs and the plaintiff brought a claim against the defendants for the recovery of monies.

The issue before the Singapore Court of Appeal was whether the Initial Shareholders were liable to the plaintiff for the first defendant's default, under the following indemnity clause (Clause 12.1) contained in the CBSAs:

- 12.1 **General Indemnity**. The Initial Shareholders and the Issuer hereby jointly and severally agree and undertake to fully indemnify and hold the Bondholder and its shareholders and their respective fund managers, directors, officers and employees (the Indemnified Parties) harmless from and against any claims, damages, deficiencies, losses, costs, liabilities and expenses (including legal fees and disbursements on a full indemnity basis) directly or indirectly caused to the Indemnified Parties and in particular, but without prejudice to the generality of the foregoing, for any short-fall, depletion or diminution in value of the assets of the Issuer, the Group or any Group Company resulting directly or indirectly from or arising out of any breach or alleged breach of any of the representations,

warranties, undertakings and covenants given by the Initial Shareholders and/or the Issuer under this Agreement or for any breach or alleged breach of any term or condition of this Agreement.

The Court held that Clause 12.1 did not work as desired by the plaintiff, namely – it did not make the Initial Shareholders jointly and severally liable for its entire losses arising from the first defendant's default.

The following reasons were critical to the Court's decision:

First, the language of Clause 12.1 was extremely broad, particularly in terms of: (i) the class of beneficiaries and (ii) the matters conceivably covered by the indemnity. The extremely broad breadth of Clause 12.1 would therefore make it absurd to construe the clause on its plain terms without regard to its relevant context.

Second, a wide construction of Clause 12.1 would be inconsistent with the relevant context in this case, in particular:

i. the entirety of the CBSAs and the way the contracts as a whole was drafted, including the fact there were other obligations throughout the CBSAs that already provided for the specific allocation of risks variously to the first defendant, the Initial Shareholders or a combination of some or all of them;

ii. the entirety of the commercial documents that were entered into as part of the transaction, including the various term sheets and other documents which indicated that the plaintiff pursued and obtained personal guarantees from only two of the Initial Shareholders and for only half of the total liability; and

iii. the circumstances in which Clause 12.1 was admitted into the CBSAs, namely that it was inserted into the first draft CBSA (after the final term sheet had been signed) as a boilerplate provision to complete the document and that there was neither any mention of Clause 12.1 at the relevant time that it would change the commercial structure of the deal nor any discussion of its scope and effect.

It was therefore impossible to contend that a generic boilerplate provision, which made its way into the CBSAs at the last stages of discussion, could have the effect of overriding the commercial structure of the deal and the calibrated allocation of risk that is reflected elsewhere in the suite of agreements that were entered into by the parties.

Key lessons and implications

There are several key lessons emerging from the *CIFG* decision, which should inform future efforts to incorporate an effective indemnity clause.

Namely, commercial parties should:

i. avoid generally the use of a boilerplate indemnity clause which is often broadly worded and generic in nature;

ii. tailor the indemnity clause to suit the particular circumstances of the transaction;

iii. set out clearly the scope and effect of the indemnity clause, particularly if there is a known or specific risk which the intended indemnified party requires protection;

iv. ensure that the indemnity clause is consistent with the other contractual obligations and/or allocation of risks in the entirety of the related documents; and

v. negotiate the insertion of the indemnity clause in a manner that does not compromise its desired effect (for example, by avoiding the insertion of such a clause in a surreptitious and belated manner).

➢ **Read more on page 24**

Conclusion

The *CIFG* decision serves as a timely reminder that special care must be given to the negotiating and drafting of an indemnity clause as they may affect the scope and effect of that indemnity.

To avoid any unintended and costly consequences, parties are advised to seek professional advice on the drafting of commercial clauses in order to, among other things, effectively allocate the risks as desired.

Current indemnified parties and indemnifiers are also advised to seek professional advice on the scope and effect of their indemnities in question. If you require such advice or would like to know how this decision might affect your business, we are happy to assist.

Dentons Rodyk acknowledges and thanks associate Kwang Guan See for his contribution to the article.

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Property Notes

Budget 2018 – Buyers Stamp Duty changes

The Minister for Finance, in his Budget Statement 2018, announced changes to the tax rate for buyers stamp duty for acquisitions of residential properties in Singapore. This change came amid a property market which saw an uptick in prices after successive quarters of decline since 2013, and an active enbloc sales market which saw eight deals worth slightly more than S$3.1 billion sealed in the first six weeks of the year.

For contracts to purchase inked prior to 20 February 2018, the buyers' stamp duty (BSD) rates are:- 1% for first S$180,000, 2% for second S$180,000, and 3% for such part of the price above S$360,000. The formula for price or value above S$360,000 is 3% less S$5,400.

With effect from 20 February 2018, the BSD rates are:- 1% for first S$180,000, 2% for second S$180,000, and 3% for next S$640,000, and 4% for such part of the price above S$1 million. The new formula for price or value above S$1 million is 4% less S$15,400.

As part of transitional tax provisions, Options to Purchase issued on or before 19 February 2018 may be stamped at the "old" tax rates if they are exercised by the relevant buyer on or before 12 March 2018, or by the date of expiry of the option validity period in the said Option (without any extension of the validity period), whichever is the earlier. Such affected buyers may apply to IRAS for remission on prescribed application form within 14 days from the date of execution of the said Option.

Application for special remission may also be made to IRAS for purchase of residential properties/land which will be used for whole or part non-residential purposes whether in accordance with planning restrictions or otherwise. Approval for such remission may be granted on such conditions determined by IRAS including undertaking not to develop and/or use such part of the gross floor area of the property for residential purpose.

➢ **Read more on page 26**

We wish to highlight the following:-

1. There is no change to the existing rules and rates for Additional Buyers Stamp Duty (ABSD). Unlike ABSD, BSD is payable by all buyers of properties in Singapore. From that perspective, Singaporeans, like foreigners and PRs, and all companies and entities are similarly and equally affected by the change in the BSD rate structure.

2. The New BSD rate structure applies only to residential properties. The definition of residential properties is defined by approved permanent use where the subject property is part of a building. However, in the case of acquisition of land or whole of building (for eg enbloc purchase and Government Land Sale purchase), one has to consider the master plan zoning of the relevant land so as to determine if the subject property is residential.

3. Acquisitions of non-residential properties continue to be stamped at the "old" BSD tax rate as at 19 February 2018.

4. The prevailing remission rules for special cases of transfers (including those pursuant to divorce or intestate events) remain applicable to the new BSD rate regime.

Implications of the new BSD rate regime

This new BSD tax regime has been introduced as part of the Government's progressive tax regime. The property tax rate regime was drastically changed a few years back to tax more the properties with higher annual value. In this case, the assumption is that the wealthy people will be the ones buying properties costing more than S$1 million, and they should pay a bit more of stamp duty.

As most private residential properties cost less than S$2 million, the impact on buyers should not be significant. An extra $10,000 for a S$2 million acquisition should not deter as it is probably lesser than any renovation cost to be incurred.

Property cooling measure?

Several Developers opined that the additional 1% for the part of the price above S$1 million should not deter them from acquiring sites which they like and need for their property development business. But one wondered if this is a signal of more changes to come if the land buying fever continues unabated. Despite the exceptionally active enbloc sale market in the first few weeks of this year, many market observers believed that Developers have become more circumspect in their tender prices. Most of the recent enbloc deals were done at or near their respective reserve price.

In summary, the new BSD rate regime for residential properties purchases should add meaningfully to the government tax revenue in the light of an improved property market, but should not significantly impact buying sentiments of genuine home buyers and property developers who need to replenish their depleting land bank.

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Short-term home sharing in Singapore: is it here to stay?

In recent times, there has been a rising trend of tourists using Airbnb and other homestay type accommodations as opposed to more traditional short-term accommodation options like hotels and service apartments while vacationing abroad. It is no surprise then that many property owners in Singapore are eager to get into the game and tap on this trend.

In Singapore, however, the use of private residential properties to provide short-term accommodation (i.e., for less than three months) remains illegal.

While the government of Singapore, an innovation-driven and entrepreneurial engine, is actively considering ways to regulate the home sharing market, interested parties should adopt a wait-and-see approach and operate with prudence, within the confines of the law.

In this article we explore (1) the law applicable to short-term homestays, (2) proposals to regulate short-term letting, and (3) whether tenancy agreements with creative termination clauses can withstand legal scrutiny.

The law

In Singapore, the Planning Act (Cap. 232) (the Act) prohibits the use of private residential properties for providing short-term accommodation for a period of less than three consecutive months in return for the payment of rent or other consideration. It is noteworthy to mention that the Act's provisions work this way:

- section 12(1) of the Act prohibits the carrying out of any development without planning permission;
- section 3(3)(ca) of the Act defines "development" to include any use of a building constructed as a dwelling-house for a purpose specified in the Fourth Schedule;
- the Fourth Schedule lists the use of any dwelling-house for the purposes of providing short-term accommodation of less than three consecutive months; and
- section 12(4) makes a breach of section 12(1) an offence.

Therefore, the Act makes the use of any dwelling-house for purposes of providing short-term accommodation without planning permission an offence; and to avoid committing an offence under the Act, homeowners planning to do short-term letting of less than three months must obtain planning permission from the Urban Redevelopment Authority of Singapore (URA).

Offenders are liable to be fined up to S$200,000 and repeat offenders may also be imprisoned for a term not exceeding one year, in addition to the S$200,000 fine. Those who persist in renting out their property even after conviction may be subject to a further fine of S$10,000 at the maximum for every day or part of a day during which the offence continues.

URA is empowered under the Act to serve information notices on suspected offenders and enforcement notices on offenders, and enter upon the property in question if it has reason to believe that there has been a breach of the Act.

Two persons were recently charged on 5 December 2017 for allegedly failing to obtain URA's permission to rent out four units at D'Leedon, a condominium along Farrer Road, for a term shorter than the minimum stay duration under the Act. This will be the first prosecution of its kind under the Act.

➢ **Read more on page 28**

The future of short-term letting of private properties

Despite its present illegality, it is not all doom and gloom for interested parties, being home sharing platforms, tourists, homeowners and developers with units to let. To begin with, the lowering of the minimum stay duration from six months to three months with effect from 30 June 2017 is a step forward.

Minister of National Development, Lawrence Wong, has stated that he is hopeful that there is room for short-term letting of private homes in Singapore, provided that there are proper safeguards and controls in place. URA's chief concern is that short-term letting goes against the preservation of the residential character of a private housing estate. Some homeowners have admitted to being ill at ease with the presence of transient occupants, usually tourists, in their private housing estates, citing reasons of security and the maintenance and upkeep of facilities being compromised.

As the frontrunner in the home sharing scene not just locally but worldwide, Airbnb (which has its Asia-Pacific headquarters located in Singapore) is certainly invested in the future of short-term home sharing in Singapore and has directly engaged URA in discussions on establishing a policy framework and setting regulatory parameters for short-term home sharing locally. Some of Airbnb's proposals to ameliorate URA's and other dissenters' sentiments include:

- capping the number of nights a property may be rented out for annually,
- only renting out spare rooms in homeowners' primary residences,
- performing background checks on short-term tenants, and
- sharing rental commissions with the development's Management Corporation Strata Title (the MCST) by channelling a percentage of the profits made from the short-term letting into the MCST's management fund for the benefit of all residents in the community.

At URA's end, URA has been examining the option of creating a new use category for private residences that could allow homeowners of such properties to engage in short-term rentals of less than three months in duration. An upcoming public consultation to scope out the general public's views on the array of proposed measures in relation to this new use category is set to occur in the near future.

Practical implications for tenancy agreements with creative termination clauses

Some "hosts" appear to have attempted to circumvent the required minimum three month stay duration by inserting a diplomatic clause into tenancy agreements that allows a tenant to pre-terminate at any time a tenancy of three or more months at short notice without penalty. This means that, notwithstanding a stipulated lease term of three months and upwards for instance, the actual lease term may potentially span only a few days or weeks and would end after the tenant serves a pre-termination notice without the tenant having to compensate the landlord. These tenancy agreements do not require a minimum stay of three months before pre-termination can take place.

Our view is that this practice is a neither a water-tight nor fool-proof way to get around the prohibition against short-term letting. It is possible that URA may see through these attempts and consider them an obvious effort to flout the minimum stay period. As such, any tenancy agreement which allows a tenant to pre-terminate before the three months without compensating the landlord for the pre-termination would arguably run the risk of being in breach of the Act.

Conclusion

The sharing economy has taken off globally and the government of Singapore is fully cognisant that this is not a passing fad. The legalisation of short-term home sharing in Singapore is therefore positively on the cards. Until then, interested parties should adopt a wait-and-see approach and operate with prudence, within the confines of the law.

Dentons Rodyk acknowledges and thanks associate Amanda Tai for her contribution to the article.

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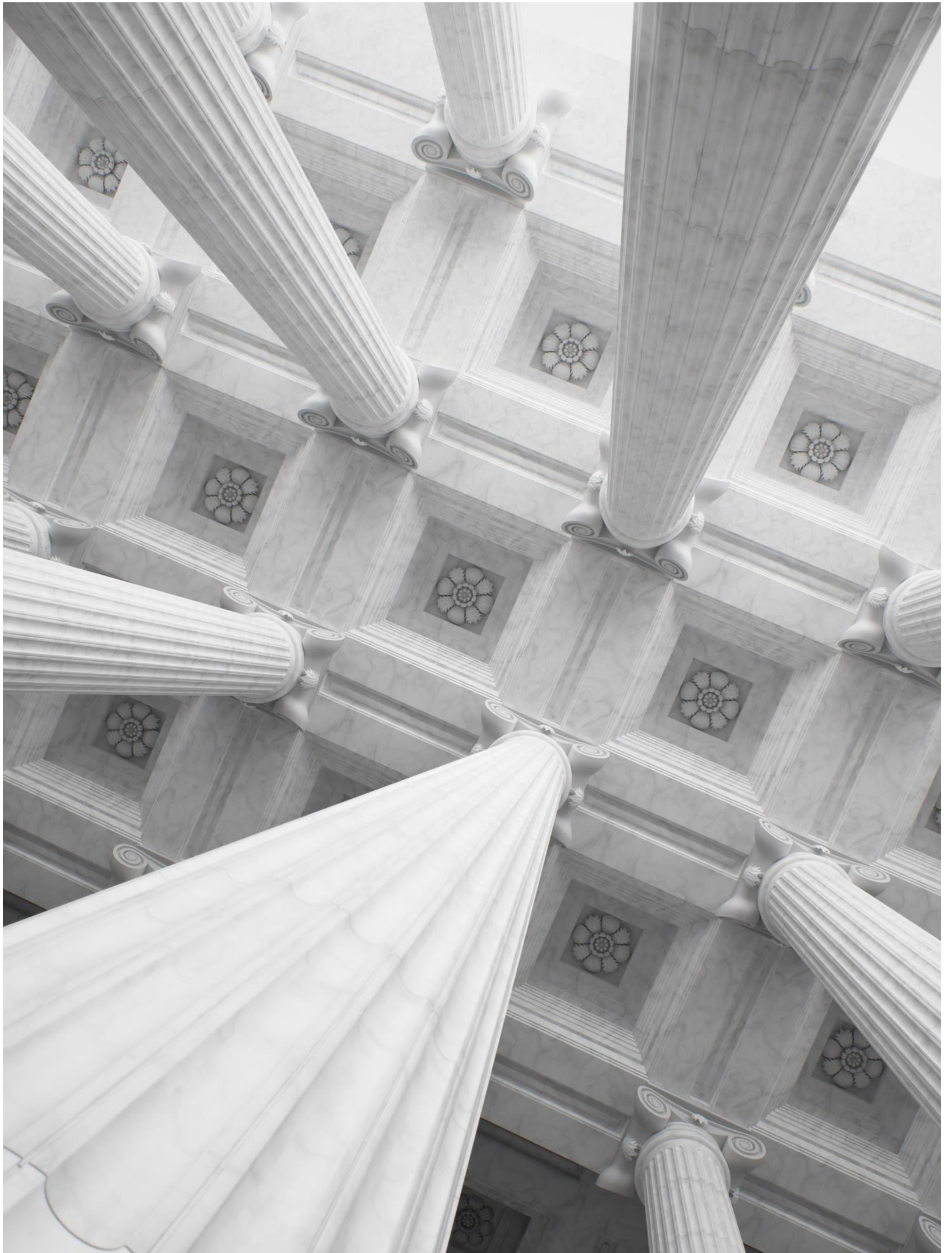


Accolades

GRC 100

Dentons' global Competition and Antitrust practice was ranked among the leading firms for competition law in the 2018 edition of the GCR 100. Dentons was recognized in 11 jurisdictions, including being listed as a Highly Recommended firm in Singapore with Deputy Managing Partner Gerald Singham and Senior Partner Ajinderpal Singh being mentioned. Read more here.

IP Stars 2018

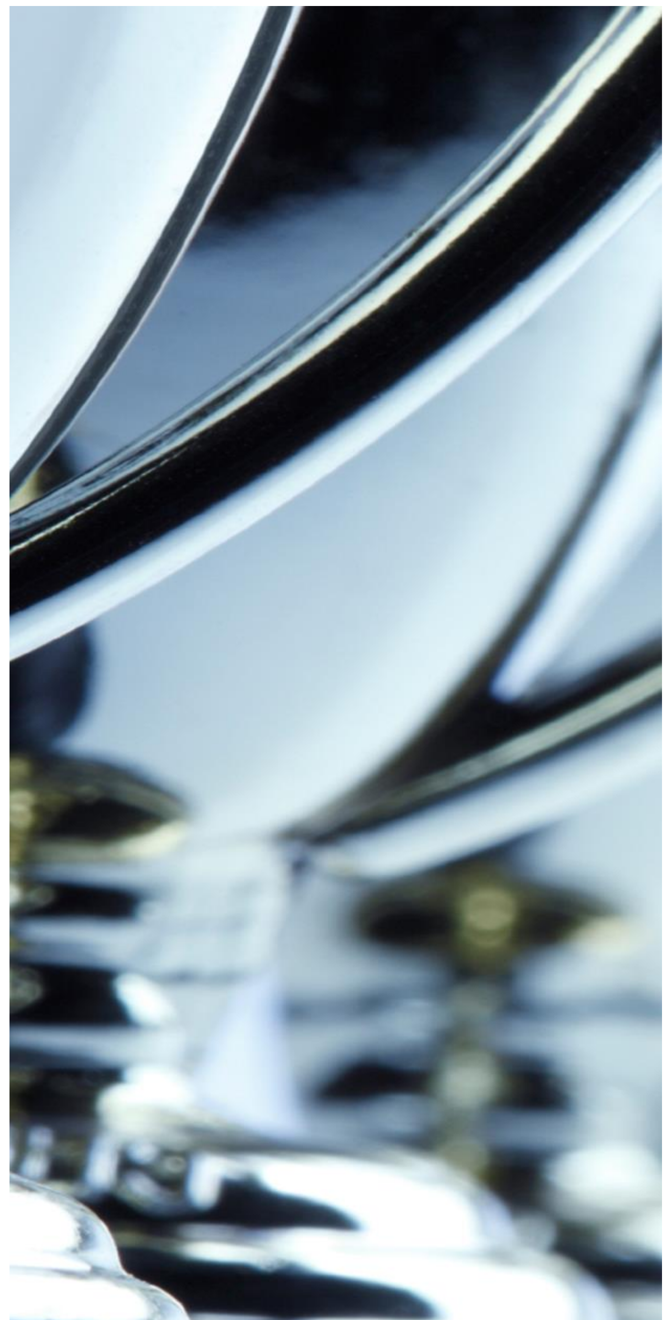
Dentons Rodyk's Intellectual Property practice has been ranked Tier 2 in IP STARS 2018 for Trade Mark Contentious and Trade Mark Prosecution. The Firm has also been shortlisted for the inaugural Managing IP Asia-Pacific Awards in the categories of Patent Contentious (Singapore) and Trade Mark Contentious (Singapore). The shortlist is based on information obtained during the research for IP STARS 2018. For more information on the IP STARS 2018 rankings for trade mark work, please click here.

The Asia Legal Awards 2018

Dentons Rodyk has been listed as a finalist in two categories for The Asia Legal Awards 2018. The Firm was shortlisted for Real Estate Deal of the Year (Mercatus Co-operative Ltd.'s $1.7B acquisition of Jurong Point) and Energy and Infrastructure Project of the Year (Rosneft's $19B Tuban refinery project). Read more here.

Singapore Business Review most promising legal luminaries aged 40 and under 2017

Dentons Rodyk partner Shobna Chandran has been recognized in Singapore Business Review's list of most influential lawyers aged 40 and under for the 2017 edition. Now in its fourth year, the 20 lawyers listed were selected from hundreds of nominees with specializations ranging from disputes resolution and litigation, mergers and acquisitions, finance, and construction to intellectual property, copyright, media law, family law, and energy. Read more here.



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 around 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
- Construction
- Corporate
- Employment
- Energy
- Franchising and Distribution
- Infrastructure and PPP
- Insurance
- Intellectual Property and Technology
- Islamic Finance
- Life Sciences
- Litigation and Dispute Resolution
- Mergers and Acquisitions
- Privacy and Cybersecurity
- Private Equity
- Real Estate
- Restructuring, Insolvency and Bankruptcy
- Tax
- Trusts, Estates and Wealth Preservation
- Trade, WTO and Customs
- Transportation
- White Collar and Government Investigations

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.

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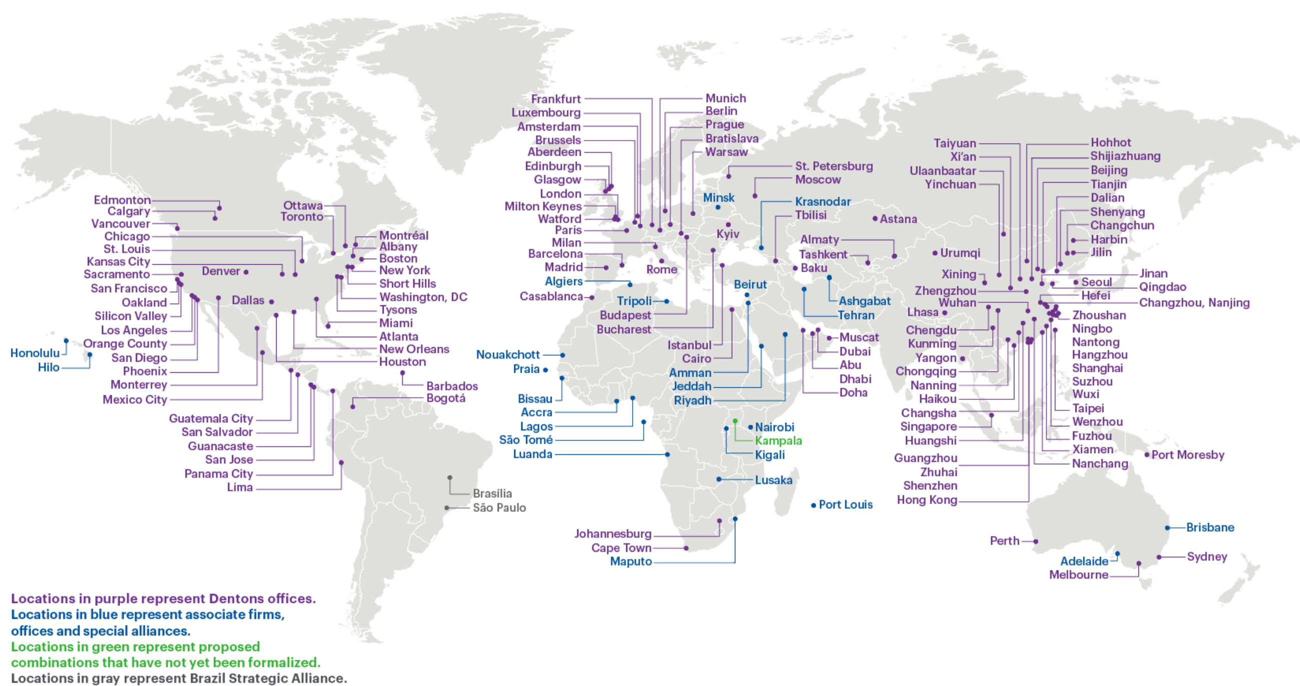
Our locations



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