Deals Round-Up

Corporate team completes one of the first foreign-local joint venture transactions in Cambodia

ATMD Bird & Bird has advised a client in the sale of its majority stake in its Cambodian-based supermarket chain and quick service restaurant business to a leading pan-Asian retailer. This high value transaction is one of the first foreign-local joint venture transactions in Cambodia. Partners Tay Beng Chai and Joanna Teng led the transaction.

ATMD Bird & Bird helps Petredex complete successful acquisition

ATMD Bird & Bird has represented Petredex Investments Limited, one of the world’s largest LPG trading companies, in the acquisition of shares held in an LPG import, storage and bottling facility at Mongla Port, Bangladesh. Prior to the acquisition, the shares were held by Wesfarmers Bangladesh Gas Limited. The newly formed J.V. consists of Petredex and the ELPIJI Group from Malaysia. Partner Sandra Seah led the transaction.

ATMD Bird & Bird represents the brand owner of Maison Takuya in its investment by a leading investor

ATMD Bird & Bird has represented Privee Holdings, owner of Maison Takuya (a luxury leather goods brand) in its investment by Symphony International Holdings Limited, a leading investor in lifestyle and branded real estate businesses in Asia-Pacific. The transaction also involved cross-border structuring, IP and employment work, in addition to further investments by existing shareholders. Partner Susan de Silva led the transaction.

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On 14 September 2011, the Singapore Exchange Securities Trading Limited (“SGX”) announced amendments to listing rules to strengthen corporate governance practices and foster greater corporate disclosure. The amendments are undertaken to keep abreast of challenges and developments in the industry and are part of SGX’s ongoing efforts to enhance the quality of the marketplace. These amendments are effective from 29 September 2011 and will apply to the Mainboard Listing Rules and the Catalist Rules where applicable.

Under the new Rule 719(1), an issuer is required to have a robust and effective system of internal controls, addressing financial, operational and compliance risks. The audit committee (or such other committee responsible) may commission an independent audit on internal controls for its assurance, or where it is not satisfied with the systems of internal control. In terms of reporting, the new Rule 1207(10) requires an issuer to disclose in its annual report, the opinion of the board, with the concurrence of the audit committee, on the adequacy of the internal controls, addressing financial, operational and compliance risks. For Catalist issuers, the relevant rules are Rule 719(1) and Rule 1204(10).

On 16 March 2012, SGX issued an advisory note providing guidance to issuers’ boards on compliance with the reporting requirement under Rule 1207(10) (or Rule 1204(10) in the case of Catalist issuers), which is applicable to annual reports issued for financial years ending on or after 31 December 2011. When providing this opinion, it is important that the board and the audit committee demonstrate that it has focused its attention in all 3 areas of risks, namely financial, operational and compliance when assessing the issuer’s internal controls. The issuer should maintain proper documentation of the deliberations of the board and the audit committee.

Where the board is satisfied that the issuer has a robust and effective system of internal controls, the disclosure would need to include the basis for such an opinion, which may include the scope of review by the board and the audit committee. Where the board and/or the audit committee is of the view that controls need to be strengthened or has concerns over any deficiency in controls, the board would have to disclose the areas of concerns and how it seeks to address and monitor the areas of concerns.

Issuers are currently providing disclosures in their annual reports on internal controls in line with the recommendation under the Code of Corporate Governance (the “Code”). For the purpose of the Code, disclosures need not be in any prescribed form and are normally provided in the Corporate Governance section of the annual report. Issuers should note that Rule 1207(10) imposes an obligation on them to provide the specific disclosures detailed in the preceding paragraph above. As the listing rule requires an opinion from the board, it is recommended that this opinion and basis be disclosed in the directors’ report instead of the corporate governance section of the annual report.

The illustrations below provide examples of compliance or non-compliance of the disclosure requirements:

**Illustration 1 - Acceptable**

Based on the internal controls established and maintained by the Group, work performed by the internal and external auditors, and reviews performed by management, various Board Committees and the Board, the Audit Committee and the Board are of the opinion that the Group’s internal controls, addressing financial, operational and compliance risks, were adequate as at [31 December 2011].

(Comments:

a. The factors considered and deliberated by the Board and the Audit Committee in arriving at their opinion are stated.

b. Specific consideration was given to all 3 areas of risks - financial, operational and compliance.)

**Illustration 2 - Acceptable**

The Board, with the concurrence of the Audit Committee, after carrying out a review, is of the opinion that the internal controls of the Group are adequate to address operational, financial and compliance risks. In arriving at the opinion, the Board is of the view that the internal controls of the Group have reasonable assurance about achieving the objectives set out below.

For the purpose of the Board expressing its opinion and in line with the Committee of Sponsoring Organizations of the Treadway Commission (COSO) Internal Controls Integrated Framework, “internal controls” is broadly defined as “a process effected by an entity’s board of directors and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories:

a. effectiveness and efficiency of operations;

b. reliability of financial reporting; and

c. compliance with applicable laws and regulations.
The first category addresses an entity’s basic business objectives, including performance and profitability goals and safeguarding of assets. The second category relates to the preparation of reliable published financial statements, including interim and full year financial reports and financial information derived from such statements, reported publicly. The third category deals with complying with those laws and regulations to which the entity is subject."

Illustration 3 - Unacceptable
The Board, with the concurrence of the Audit Committee, believes that there are adequate internal controls in the Company.

(Comments:
  a. The rule requires an opinion from the Board with the concurrence of the Audit Committee. A statement that the Board, with the concurrence of the Audit Committee, believes that the internal controls are adequate is not acceptable.
  b. The statement must make specific reference to financial, operational and compliance controls.
  c. The disclosure must state the basis for the opinion or the scope of review by the Board and the Audit Committee.
  d. The opinion required is in respect of the Group's and not the Company's internal controls.)

If you have any queries regarding the above, kindly contact Marcus Chow at marcus.chow@twobirds.com.

MAS ramps up on listed companies’ corporate governance

Introduction
On 2 May 2012, the Monetary Authority of Singapore ("MAS") accepted all recommendations made by the Corporate Governance Council ("Council") on the Code of Corporate Governance ("Code"), and issued the revised Code of Corporate Governance.

The Code, which was first introduced in 2001, was last revised in 2005. The key changes to the Code are focused on the areas of director independence, board composition, director training, multiple directorships, alternate directors, remuneration practices and disclosures, risk management, as well as shareholder rights and roles.

We take a look at the key changes to the Code.

Key Changes to the Code

(a) Director independence
The revised Code clarifies the term “independent director”. 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 judgment.

Relationships with external organizations - If a director of a company or his immediate family member is also a 10% shareholder, or a partner with at least 10% stake, or an executive officer or director to any organisation to which the company or its subsidiaries had made or received significant payments or material services in the current or immediate past financial year, he will be deemed non-independent. Payments aggregated over any financial year in excess of S$200,000 should be deemed significant (CCG Code 2.3(d)).

Relationships with substantial shareholders - A director who is a 10% shareholder, or an immediate family member of a 10% shareholder, or is or has been directly associated with a 10% shareholder in the current or immediate past financial year would be considered non-independent (CCG Code 2.3(e) & (f)).

A director will be considered “directly associated” with a 10% shareholder when the director is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the 10% shareholder in relation to the corporate affairs of the corporation. A director will not be considered “directly associated” with a 10% shareholder by reason only of his or her appointment having been proposed by that 10% shareholder. (Footnote 6 to CCG Code 2.3(d))

A director who has served on the Board beyond 9 years should be subject to particularly rigorous review (CCG Code 2.4)

(b) Board Composition
The revised Code recommends that independent directors make up at least half of the Board where the Chairman and CEO (i) is the same person; (ii) are immediate family members; (iii) are part of the same management team; or (iv) if the Chairman is not independent (CCG Code 2.2).

(c) Other issues related to directors
Director training - Companies should be responsible for training directors (CCG Code 1.6) and the Board should disclose in the Annual Report the details of such training. The Nominating Committee (“NC”) should make recommendations to the Board on professional development programmes to the Board (CCG Code 4.2).

Multiple Directorships - When a director has multiple board representations, the NC should decide if a director is able to carry out duties as a director, taking
Restrictive covenant (RC) clauses are common in Singapore employment contracts, with the Singapore courts generally taking a strict approach towards enforcing them. The Singapore High Court in the recent case of Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart [2011] SGHC 266 too dismissed a dental clinic’s ("Smile") claim to enforce certain RCs against its former employee. However, what is interesting about this case is the Court's approach in its analysis of the issues. The Court's approach was:

- First - interpret the RCs;
- Second - decide if the employee was in breach of the RCs, without regard to the legality or illegality of the RCs;
- Third - if there was a breach, whether the RC which was breached was void as being contrary to the public policy against covenants in restraint of trade.

As to whether a RC was void, the Court laid out the test as follows:

"... the test is three-fold and all three limbs have to be satisfied:

a. is there a legitimate proprietary interest to be protected?

b. is the restrictive covenant reasonable in reference to the interests of the parties?"
c. is the restrictive covenant reasonable in reference to the interests of the public?

(or)

....

d. whether the [RC] went further than what is necessary to protect the interests concerned.”

The Court was of the view that there is no substantive distinction between the two “reasonableness” tests at (b) and (c) and the test at (d).

In this case, the employee’s contract contained 3 post-termination RCs:

a) Radial Clause - restricting practising within 3 km from Smile and its affiliate clinics;

b) Non-Solicitation - restricting soliciting or procuring Smile’s patients for himself;

c) Non-Dealing - restricting dealing with Smile’s patients.

The employee set up his dental clinic before resigning from his employment a month later. Subsequently, Smile found that 716 of its patients had sought treatment in its former employee’s new clinic. Smile claimed against the employee on the grounds (inter alia) that he had breached the RCs in his employment contract.

Smile’s claims failed as the Court held that the covenants were unenforceable on various grounds, including that the covenants had no time limit and that the Radial Clause purported to prevent the employee from competing for new patients in the restricted location.

The Court refused to read down the RCs to make them enforceable and said - “If employers want to protect their trade connections or pool of clients... then they would do well to draft a reasonable restraint of trade provision rather than to try and get the maximum protection which their employees will agree to”. (emphasis added)

Energy and Resources

Singapore’s participation in C40

By Sandra Seah

On 23 March 2012, Singapore signed a historic Memorandum of Understanding (MOU) with the C40 Cities Climate Leadership Group (C40) to participate in the C40 as an observer city.

The C40 is a network of cities committed to implementing meaningful and sustainable climate-related actions locally that will address climate change globally. C40 cities include Berlin, Johannesburg, Los Angeles, London, New York, Seoul and Tokyo. C40 collaborates with organizations such as the World Bank, OECD and the Clinton Climate Initiative on climate change-related initiatives.

Singapore was invited to join the C40 in recognition of its achievements in sustainable development, and as a global city with a proven record in achieving economic growth and environment sustainability. For instance, faced with the challenge of water scarcity, Singapore has been motivated to constantly innovate and develop new water management and treatment technologies such as water reclamation and desalination. Over the last four decades, Singapore has also built a sizeable and innovative environmental industry and has also established a diversified and sustainable water supply from four different sources - water from local catchment areas, imported water, reclaimed water (NEWater) and desalinated water.

Beyond water, Singapore is also nurturing the environmental industry which includes waste management and pollution control. For instance, the government offers seed funding programs to build up technological competencies and to support a growing ecosystem of companies and researchers undertaking R&D in waste management. Grants are made available to R&D projects on a competitive basis specifically in the areas of energy recovery, materials recovery and special waste treatment with the aim of identifying sustainable and cost-efficient environment solutions that are applicable to Singapore. Grants are also provided to encourage Singapore-registered companies to undertake environmental protection and public health related projects that would contribute to the long-term environmental sustainability of Singapore, such as initiatives that speed up environmentally sustainable applications.

Due to its unique circumstances as a city-state, Singapore will participate as an observer and will not be party to the communiqué issued by the C40 group. Singapore’s involvement in the C40 will allow Singapore to share its experience on sustainable development and at the same time, learn the best practices and engage major cities around the world. This is yet another positive step in line with Singapore’s vision to be a climate change resilient global city that is well-positioned for green growth.

The content of this update is of general interest and is not intended to apply to specific circumstances. The content should not therefore, be regarded as constituting legal advice and should not be relied on as such. In relation to any particular problem which they may have, readers are advised to seek specific advice. Further, the law may have changed since first publication and the reader is cautioned accordingly.