ANDERSON MŌRI & TOMOTSUNE

SINGAPORE LAW NEWSLETTER

August 2021

Contents

This August issue of the newsletter looks into new developments in the area of Insolvency Law, as well as new guidance issued by SGX RegCo concerning the appointment and role of company directors. Finally, as Singapore finally emerges from yet another Covid-19 lock down, we also consider the important issue of the electronic execution of documents during the ongoing pandemic.

I. Electronic Execution of Documents During the COVID-19 Pandemic

Sherman Ng, Attorney-at-law

1. Introduction

Even prior to the advent of COVID-19, the practice of executing a document by electronic means was already fairly prevalent, as opposed to the more traditional approach of having parties affix their "wet ink" signatures to a hard copy of a document in the physical presence of the other party(ies). However, as movement restrictions and social distancing become the norm during the COVID-19 pandemic, the electronic execution of documents has become practically a necessity. Singapore law accommodates the electronic execution of documents, but there remains some uncertainty around whether the electronic execution of a document is valid in certain circumstances and types of transactions. In this article, we will briefly touch on some of the more prominent issues with executing a document electronically, as well as the main types of documents that should not be executed electronically.

2. Electronic Execution of Documents

The electronic execution of documents often take the form of virtual signings, where parties in different physical locations affix their signatures to a copy of the document, scan the signed document, and send an electronic copy (usually in PDF format) of the signed document to the other party(ies). Typically, the signatures will be either "wet ink" signatures, or electronic signatures.

The Electronic Transactions Act (Chapter 88) of Singapore ("**ETA**") was first enacted in July 1998 to (amongst other things) give certainty to contracts formed electronically and provide for the legal enforceability of electronic signatures. Under Section 8 of the ETA, where any rule of law requires a signature, such requirement is generally deemed satisfied in relation to an electronic record[1] if:

(1) a method is used to identify the person and to indicate that person's intention in respect of the electronic record; and

(2) such method is either —

(i) as reliable as appropriate for the purpose for which the electronic record was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) proven in fact to have fulfilled the functions described in paragraph (1), by itself or together with further evidence.

What this effectively means is that if an electronic signature meets the aforesaid requirements, they may be used in lieu of a "wet ink" signature to execute a document. However, certain exclusions apply to this general rule, as will be explored below.

The effect of Section 8 of the ETA is such that an electronic signature can potentially take many forms, ranging from the simple pasting of an image of the signature in a soft copy document, to the more secure digital signature using software such as DocuSign or Adobe Sign. It is however noted that Section 8 of the ETA effectively requires an electronic signature to be appropriately reliable in the circumstances. This would likely necessitate, amongst other things, an assessment of the transaction and/or document to ascertain whether execution by electronic means would be suitable, having regard to a range of issues such as the risk of a dispute occurring, or the value of the transaction (where traditional means of execution may be more suitable for high value transactions). Care should also be taken to ensure that measures are in place to protect the electronic signature from forgery or tampering.

[1] "electronic record" is defined in the ETA as a record generated, communicated, received or stored by electronic means in an information system or for transmission from one information system to another. This could, for example, include an electronic copy of an agreement.

3. Excluded Matters Under the ETA

Under Section 4 (read together with the First Schedule) of the ETA, the following documents and transactions are excluded from the remit of Part II of the ETA (which includes the aforesaid Section 8 of the ETA):

(1) the creation or execution of a will;

(2) the creation, performance or enforcement of an indenture, declaration of trust or power of attorney, with the exception of implied, constructive and resulting trusts;

(3) any contract for the sale or other disposition of immovable property, or any interest in such property; and

(4) the conveyance of immovable property or the transfer of any interest in immovable property.

(the "**Excluded Matters**").

In other words, under the ETA, electronic signatures cannot be used as a valid means of execution for the documents and transactions above. While the Excluded Matters appear to cover a wide range of documents and transactions, it should be noted that Section 4 of the ETA does not necessarily prevent such documents from being executed electronically. All it means is that the ETA cannot be relied on to establish that a document in respect of an Excluded Matter has been validly executed electronically. It may still be possible for a document in respect of an Excluded Matter to be executed electronically, or for it to satisfy any requirement that it be signed without reliance on the ETA[2].This would then be subject to the relevant laws and legal requirements governing that document and transaction.

The Infocomm Media Development Authority ("**IMDA**") has conducted various public consultations on the review of the ETA, which recently culminated in (amongst other things) the removal of negotiable instruments, documents of title, bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money, from the Excluded Matters on 19 March 2021. In its recent consultation paper[3], the IMDA proposed that most of the Excluded Matters be removed, unless there are overriding public interest considerations.[4] While this was not wholly carried

---

[2] As shown in the case of SM Integrated Transware Pte Ltd v. Schenker Singapore (Pte) Ltd [2005] 2 SLR(R) 651, where a lease agreement was concluded through the exchange of e-mail correspondence between the parties. This constituted an Excluded Matter under the ETA, meaning the ETA could not be relied upon to fulfil the requirements under section 6(d) of the Civil Law Act (Chapter 43) of Singapore for such a contract to be "in writing" and "signed", but on the facts, electronic execution was nonetheless found to have satisfied such requirements.

[3] The consultation paper issued by the Infocomm Media Development Authority on the "Review of the Electronic Transactions Act (ETA) (Cap. 88)", dated 27 June 2019 (the "**Consultation Paper**").

[4] Paragraphs 2.3.2 and 2.3.4 of the Consultation Paper.

out in the recent round of amendments to the ETA, the IMDA has commented that the Singapore Government will continue to study the feasibility of extending the applicability of the ETA to "*more types of items which are currently excluded*"[5]. This would be a welcome change that would facilitate transactions in not only an increasingly digitalised world, but also one where living and doing business with COVID-19 is the new normal.

4. Deeds and Other Issues

In Singapore, the validity of deeds executed electronically is still not settled law, due to some uncertainties and complications including the potential for a deed to constitute an "indenture"[6] under the Excluded Matters, and the legal requirement for a witness to be physically present to attest to the execution of a deed in some cases (which the witness will not be able to do if the deed is executed electronically). Considering the above, it is not recommended to rely on electronic signatures for the creation or execution of a deed, at least for the time being until there is further clarity in the law on this issue.

While the electronic execution of certain types of documents is generally recognised under the ETA (as explained above), this is subject to any legal form requirements imposed by (i) other applicable laws[7], or (ii) private agreement[8] or arrangement between the parties. In the context of a cross-border transaction, the laws of the foreign jurisdiction to which the entity is subject and/or in which the document is to be used, as well as how the document is intended to be used there, will also have to be taken into account in determining whether a document can (and should) be executed electronically. The document may, for instance, need to be executed before a notary and/or submitted in a certain format to the foreign authorities, which would preclude execution by electronic means.

5. Conclusion

Due to their ease of use, electronic signatures have seen increased popularity in recent years, especially during the COVID-19 pandemic. While electronic signatures afford greater convenience, parties should fully consider the implications and risks of executing a document electronically prior to doing so, and consult their lawyers for advice on whether a document may or should be signed using an electronic

---

[5] https://www.imda.gov.sg/news-and-events/Media-Room/Media-Releases/2021/Electronic-Transactions-Act-Amended-To-Facilitate-Electronic-Transactions-Providing-Convenience-And-Strengthening-Singapores-Trade-Competitiveness

[6] The word "indenture" appearing in the list of Excluded Matters is not defined in the ETA, but by its plain meaning in English, it can be understood to broadly mean a binding document between two or more parties, which would arguably include a deed.

[7] Other legislation may preclude the use of electronic signatures even if the ETA applies. For instance, the Wills Act (Chapter 352) of Singapore requires (amongst other things) that the testator signs at the foot of each page, and that the will is signed by the testator in the presence of two witnesses.

[8] Such as the constitution of a company, which is essentially a private agreement between the members of a company as to how the affairs of the company are to be conducted. The constitution of a company may prescribe requirements for documents to be executed in a particular way, over and above that which is prescribed under law.

signature, if they are uncertain.

II. Extension of Application Period for the Simplified Insolvency Programme

Hannah Tay, Attorney-at-law

On 26 July 2021, the Ministry of Law announced that the application period of the Simplified Insolvency Programme ("**SIP**") (which was originally stipulated to end on 28 July 2021) would be extended by 12 months to 28 July 2022.

The SIP was introduced under the Insolvency, Restructuring and Dissolution Act of 2018 ("**IRDA**") with the objective of providing simpler, faster, and lower-cost proceedings for micro and small companies ("**MSC**s") that require support to restructure their debts to rehabilitate the business, or wind up the company as the business has ceased to be viable.

In order to be accepted into the SIP, a company must be a qualifying MSC. MSCs are defined as micro and small companies with an annual sales turnover not exceeding SGD 1 million and SGD 10 million respectively. In addition, the MSCs must also satisfy the following requirements:

(i) annual sales turnover not exceeding $10 million;
(ii) not more than 30 employees;
(iii) not more than 50 creditors;
(iv) the liabilities of the company (including prospective and contingent liabilities) not exceeding $2 million;
(v) the value of realisable unencumbered assets of the company does not exceed $50,000 (for SWUP (defined below) only);
(vi) not a foreign company (i.e. the MSC is incorporated in Singapore); and
(vii) there are no circumstances that make the MSC unsuitable for the SIP which include but are not limited to the MSC having commenced or being in other insolvency proceedings.

The SIP comprises two separate programmes:

a) **Simplified Debt Restructuring Programme** ("**SDRP**") - Restructuring debts and potential rehabilitation of viable businesses; and

b) **Simplified Winding Up Programme** ("**SWUP**") - Orderly winding up of non-viable businesses.

1. Simplified Debt Restructuring Programme

The SIP adapts the existing pre-packaged scheme of arrangement in the IRDA by allowing an MSC to work out a debt restructuring proposal with its creditors out of Court. Under a pre-packaged scheme of

arrangement, the MSC and the creditors reach an agreement as to the repayment of the MSC's debts which can be enforced by the Singapore courts. Once the restructuring proposal is finalized it is then submitted to the Court for approval. Accordingly, as an MSC will not be required to apply for leave of Court to conduct a creditors' meeting to propose the scheme of arrangement, and can directly proceed to work out the proposal with its creditors, this reduces the number of applications to the Court from two (required under the typical scheme of arrangement process) to one.

While the MSC is in the SDRP, an automatic moratorium against creditors' actions and restrictions on ipso facto clauses will apply to the MSC which allows the MSC breathing room to propose its restructuring plans.

The SDRP also allows for a lower creditor approval threshold. In a typical scheme of arrangement process, a creditor approval threshold of a majority in number holding 75% in value approving the scheme is required. However, under the SDRP, a lower creditor approval threshold (two-thirds in value) is sufficient.

2. Simplified Winding Up Programme

This process allows an MSC to make an application to the Official Receiver to be accepted into the SWUP under the SIP, thereby removing the need to make an application to Court to be wound up.

However, if the MSC is subsequently determined as unsuitable for the SWUP, it may be placed into a Court-ordered winding up (i.e. existing "non-simplified" process) on the application of the Official Receiver or an interested party.

Where the liquidator takes the view that the assets of the MSC are insufficient to meet the expenses of winding up, and its affairs do not require further investigation, the company may be dissolved thereafter without the need to take further steps for the administration of the winding up, such as further realisation of assets and distribution of dividends. This is targeted to complete within 90 days of being accepted into the SWUP. However, in cases which involve the realisation of assets, the MSC will be placed into dissolution within one year of being accepted into the SWUP, subject to the circumstances of the case and the complexity involved in realising the assets under administration.

The scope of the liquidator's functions is also reduced, given the profile of companies in simplified winding up. For instance, creditors' meetings will not be convened under the simplified winding up programme and the liquidator may only commence legal proceedings to preserve the rights of the company.

3. Concluding words

The SIP allows qualifying MSC to take advantage of a simpler, faster and more cost effective winding up or restructuring process, and the extension of the SIP is therefore welcomed for MSCs that lack the

resources to restructure their debts or wind up their businesses.

III. Expectations of SGX RegCo in Director Appointments and Resignations

Henry Tan, Attorney-at-law

On 1 July 2021, the Singapore Exchange Regulation ("**SGX RegCo**")[9] published a Regulator's Column on the matters a company should consider in the event of a director's appointment or resignation. The following is an outline of the key points in the Regulator's Column.

1. The Fiduciary Role of Directors

The 2018 Code of Corporate Governance (the "**Code**")[10] provides that "Directors are fiduciaries who act objectively in the best interests of the company and hold management accountable for performance." SGX RegCo explained in this regard that a fiduciary is a person who has undertaken to act on behalf of others in circumstances that give rise to a relationship of trust, confidence and loyalty.

Accordingly, importance is placed on the process by which directors are selected and appointed. Disclosures in relation to director resignations are similarly important. Practice Guidance 4 of the Practice Guidance dated 1 July 2021[11] (the "**PG**"), issued by the Corporate Governance Advisory Committee, provides guidance on the board nomination process.

2. Assessment of Independent Directors

Practice Guidance 2 of the PG sets forth the need for a board of directors ("**Board**") to have a strong and independent element. A company's Board and Nominating Committee ("**NC**") should exercise judgment in assessing the independence of directors to determine whether there exists any circumstance or relationship that may affect a director's independence, or the perception of such independence. A Board which determines a director to be independent despite the existence of such circumstances or relationships, should disclose the relevant relationships and the reasons for the Board's assessment.

---

[9] SGX RegCo is a wholly-owned subsidiary of Singapore Exchange (SGX). It undertakes all frontline regulatory functions on behalf of SGX and its regulated subsidiaries.

[10] The Code aims to promote high levels of corporate governance in Singapore. It applies, on a comply-or-explain basis, to companies listed in Singapore. The Code can be found at: https://www.mas.gov.sg/-/media/MAS/Regulations-and-Financial-Stability/Regulatory-and-Supervisory-Framework/Corporate-Governance-of-Listed-Companies/Code-of-Corporate-Governance-6-Aug-2018.pdf

[11] The Practice Guidance can be found at: https://api2.sgx.com/sites/default/files/2021-06/Practice%20Guidance%20%281%20Jul%202021%29.pdf

3. Assessing Directors' Ability to Discharge Duties

Practice Guidance 4 of the PG recommends for the Board and NC of a company to consider the number of directorships and principal commitments of each director in assessing the director's ability to discharge his or her duties. Some boards do this by limiting the number of directorships and principal commitments of each director, while others consider whether an individual director holds a full-time executive position (and if so, whether this would reduce the director's capacity to perform his or her duties).

4. Resignations and Related Disclosure

Directors who resign their directorships are required to promptly announce such resignations via an SGXNet filing. The template for such announcements requires detailed reason(s) for the resignation to be specified. For this purpose, stock statements like "to pursue personal interest" or "for personal reasons" are insufficient.

Departing directors are also required to ensure that any concern about the company, whether with regard to corporate governance, internal controls or otherwise, is made clear in the announcement. Examples of clearly stated reasons for a director's resignation would include board renewal, retirement, inability to properly discharge his/her fiduciary duties, and inability to share the same vision with the board members on the strategic direction and business plans of the company. Overboarding could also be a reason for a director's resignation. Ultimately, directors should clearly state the reasons for their resignations, particularly if they involve material governance or management concerns.

5. Relevance of Past Performance as Directors

NCs have to perform stringent due diligence on every director candidate, including looking into the candidate's past performance as a director of an SGX-listed company (if applicable), to satisfy themselves as to the suitability of the candidate. This would include seeking clarification on matters that would have a bearing on a candidate's suitability in situations where a candidate is or has been under investigation by professional associations or regulatory authorities or where a candidate had previously resigned from the Board of an SGX-listed company.

Generally, directors who are thinking of leaving Board or management positions should consider if their resignation would place the company in jeopardy or compromise the company's ability to address matters of concern. They should also bear in mind that generally, by staying to address such matters, shareholders' interests would be better served.

An instance where directors should stay on to resolve matters of concern are where they are part of a company's Audit Committee ("**AC**"), as AC vacancies are difficult to fill, particularly when the company

has going concern issues. Another example is where issues or transactions specific to the company are highlighted in short seller or media reports.

6. Companies Listed on Catalist

Continuing sponsors[12] will be responsible for determining the suitability of each director in companies listed on Catalist. Specifically, such sponsors are required to conduct due diligence and satisfy themselves as to the suitability of each director candidate, in line with the guidelines for "Assessing Suitability of Directors and Executive Officers"[13] dated 20 July 2018, issued by the SGX.

7. SGX RegCo Monitoring and Discretion

SGX RegCo closely monitors situations where directors "desert" a company at times of trouble. SGX RegCo has the right to object to, and publicly query the appointment of, directors with previous conduct of "desertion". In such circumstances, a company's NC (and continuing sponsor, if applicable) will have to publicly respond to SGX RegCo's queries. Where such responses are not satisfactory, SGX RegCo has the discretion to object to the appointment of that candidate.

8. Compliance in Form and Substance

Companies and directors are reminded that they should not seek mere compliance with the SGX listing rules. Instead, directors are required to remain committed, both in form and substance, to their roles and responsibilities through a company's vicissitudes.

---

[12] Continuing sponsors, in respect of companies listed on Catalist, are sponsors who are authorised by the SGX to conduct certain activities, on a continuing basis, in relation to those companies. These activities include, among others, advising companies on corporate governance matters and on compliance with the relevant listing rules.

[13] These guidelines can be found at: https://api2.sgx.com/sites/default/files/2019-01/Catalist%20Sponsors%20-%20Assessing%20Suitability%20of%20Directors%20and%20Executive%20Officers%20%2820%20Jul%202018%29_3.pdf

- This newsletter is prepared in collaboration with DOP Law Corporation. AMT Singapore is pleased to be a member of Anderson Mori & Tomotsune – DOP Law, a Formal Law Alliance with DOP Law Corporation licensed by the Singapore Ministry of Law under the Legal Profession (Legal Practice Entities) Rules. Under the Formal Law Alliance, AMT Singapore and DOP Law Corporation will handle matters according to each firm's expertise and regulatory qualifications. For advice concerning Singapore law, such queries will be handled by lawyers from DOP Law Corporation.

- This newsletter is published as a general service to clients and friends and does not constitute legal advice. Should you wish to receive further information, please contact the following editors:

  Mariko Nagata, Attorney-at-law（mariko.nagata@amt-law.com）
  Leon Ryan, Attorney-at-law（leon.ryan@amt-law.com）
  David Ong, Advocate & Solicitor (davidong@dop.sg)
  Adalia Ong, Advocate & Solicitor (adaliaong@dop.sg)

- If you wish to unsubscribe from future publications, kindly contact us at General Inquiry.

- Previous issues of our newsletters are available here.