

ON THE HONOUR ROLL



When news broke that Indranee Rajah was appointed a Senior Counsel earlier this year, the first thing clients did was to congratulate her. And along with the congratulatory messages, came the crucial question: Would her fees go up? "I was pleased to be able to tell them that my fees hadn't increased," said Indranee.

The appointment is no mean feat as Indranee, at 39, is the fourth and youngest woman to be given the accolade. But she is quick to say that she would not have achieved what she did "without the support of our clients over the years". "They have given me good work which has allowed me the opportunity to go to court to argue interesting principles of law. I'm grateful to them," she added.

Indranee began her sterling legal career at Freshfields, Singapore in 1987. In 1988, she joined Drew & Napier's Litigation Department and became a Partner in 1992. She has been a director of Drew & Napier LLC since corporatisation on 1 May 2001. Her areas of practice include property and commercial litigation with her forte in property, employment and fraud-related matters.

Complementing her strong advocacy skills is her experience in arbitration work, including arbitration related to energy and utilities agreements and multi-jurisdictional fraud. Her arbitration work has already earned her kudos in the 2002/2003 edition of the Asia-Pacific Legal 500, which remarked that she is "well-regarded for her responsive handling of cases".

Indranee assured us that she is not going to rest on her laurels. Being appointed Senior Counsel, she said, is a "great honour" and a form of recognition by her peers and the Bench but it also means "great expectations". "Whatever I do now, I've got to be conscious that it sets an example for the younger members of the Bar," she explained.

She also noted that clients are now more likely to give her bigger and more complex cases "which I look forward to". "But my commitment level will be the same whether the case is complex or not," she said.

Indranee's appointment brings the number of Senior Counsel in Drew and Napier LLC to four. The others being Joseph Grimberg, Davinder Singh and Jimmy Yim.

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Singapore Listed Property Trusts – A Legal Perspective

INTRODUCTION

Singapore recently listed successfully its first two listed property trusts – CapitaMall Trust in July 2002 and Ascendas Real Estate Investment Trust in November 2002. It is likely that more Singapore property companies will set up similar trusts.

For property companies with retail and commercial properties on their books, property trusts represent an attractive new way to unlock the value of these assets and create new sources of income through providing management services to the trusts. For Singapore investors, property trusts constitute a new class of investment which has proved popular with investors in Australia and the US.

In July 1998, the Stock Exchange of Singapore Review Committee made a series of recommendations for further development of Singapore's capital markets and the Monetary Authority of Singapore (MAS) has since accepted and implemented these recommendations. One recommendation was

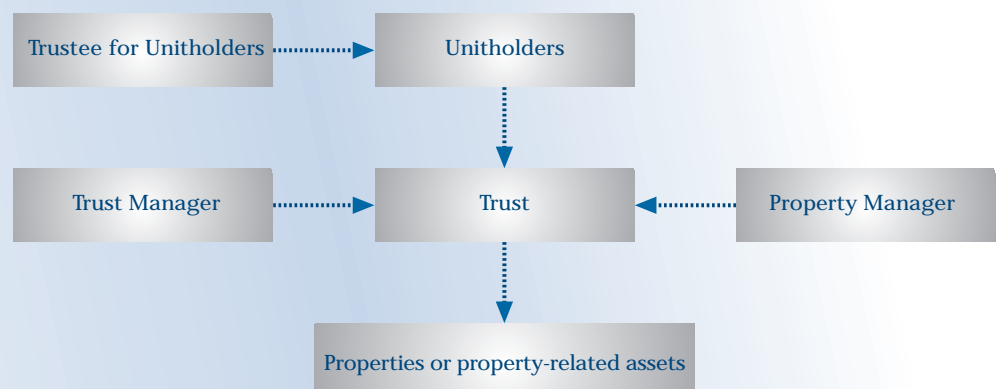
the development of listed property trusts (or real estate investment trusts as they are known in the US) to contribute to the range of instruments available to investors and to assist in the development of the property investment sector.

WHAT ARE LISTED PROPERTY TRUSTS?

Listed property trusts are essentially unit trusts which invest almost exclusively in property or property-related assets. In addition, unlike the common open-ended unit trust where the manager of the trust makes a market in the units, the manager is not generally required to make a market in units of a listed property trust. Investors in such instruments therefore trade units as they would any other listed security and the trust manager will generally not repurchase or redeem units except in limited circumstances.

STRUCTURE OF A TYPICAL LISTED PROPERTY TRUST

The diagram below illustrates the typical structure of a listed property trust.





Unitholders purchase units in the trust which in turn uses the funds invested to purchase income-yielding properties or other property-related assets (such as mortgage-backed securities). As the trust has no separate legal personality and no employees, a trust manager is appointed to manage the trust and a trustee is appointed to hold the assets on behalf of the trust and to represent the interests of unitholders. A property manager may also be appointed, if the trust manager does not manage the properties.

The income derived from the properties and other property-related assets is used to meet all the trust's expenses, including the fees of the trustee, the trust manager and the property manager. Any profit made by the trust is distributed as dividends to unitholders. Typically, listed property trusts distribute all or almost all their taxable income.

LEGAL REQUIREMENTS

Unit trusts established in Singapore must comply with the legal requirements in the Singapore Securities and Futures Act and the Code on Collective Investment Schemes published by the MAS. In addition, property trusts must comply with the specific guidelines relating to the property trusts which form the appendix to the Code (the Property Trust Guidelines). Listed property trusts will also need to comply with the Listing Manual of the Singapore Exchange (SGX-ST).

The main requirements are as follows:-

The trustee

The property trust's trustee must be an independent trustee. A public company may act as a trustee if it satisfies the requirements prescribed by the MAS. The general functions and responsibilities of the trustee are stipulated



in the Code on Collective Investment Schemes, the Trust Companies Act, the Securities and Futures Act and the Regulations made thereunder. Specific functions, rights and obligations of the trustee, which may be the subject of negotiation, are set out in the trust deed constituting the units. In addition, the trustee needs to comply with obligations imposed by common law and principles of equity.

The trust manager

Each property trust must have a trust manager, who must have at least five years of experience in managing property funds. The Property Trust Guidelines contain requirements relating to the track record of the trust manager and the Listing Manual also contains requirements to be met by the managers of investment funds. In addition if the trust manager's duties include managing a portfolio of securities, a capital markets services licence (currently issued by the MAS under the Securities and Futures Act) will be required. ►

The trust deed

The basic requirements of the trust deed are stipulated in the Securities and Futures Act and Regulations. The trust deed must deal with the establishment of the trust, terms of appointment of the trustee and the trust manager and the details of the unit trust scheme. The property trust can only be authorised and approved by the MAS if the trust deed complies with the requirements laid out in the Regulations.

Prospectus

All public offers of units in Singapore must be made by a prospectus accompanied by an application form, unless applications are made via bank automated teller machines (ATMs) and wireless application protocol (WAP) phones. The Securities and Futures Act and Regulations set out the content requirements for a prospectus and it must be reviewed by and registered with the MAS before it is distributed. In addition, the prospectus will be reviewed by the SGX-ST.

Advertising

The Securities and Futures Act and Regulations contain both mandatory requirements relating

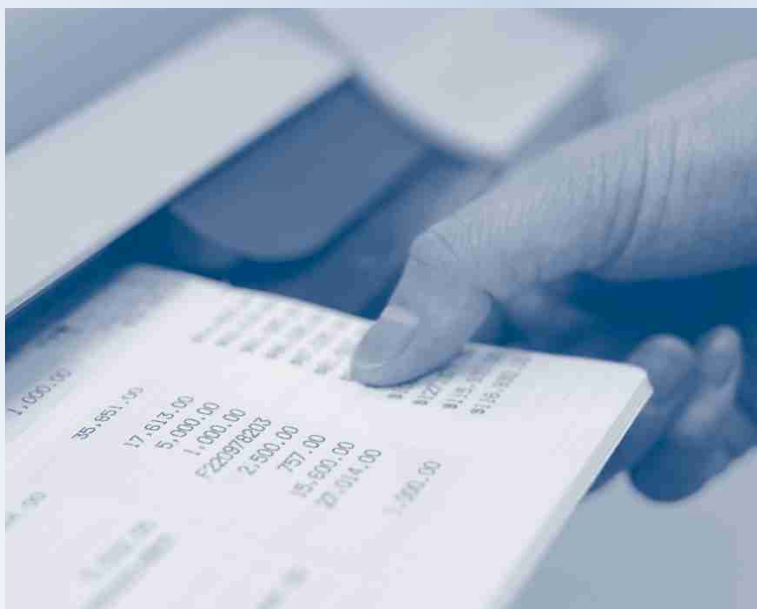
to, and restrictions on, advertising content, including the use of past performance data and forecasts.

Continuing requirements

The Code on Collective Investment Schemes and the Property Trust Guidelines and the Securities and Futures Act also set various ongoing requirements relating to the management of the trusts, for example in relation to the keeping of registers and records and the production of periodic reports.

RESTRICTIONS ON INVESTMENTS/ACTIVITIES

The Property Trust Guidelines contain restrictions on the types of activities a property trust may engage in. These include a prohibition on property development, investing in property development companies and investing in mortgages (other than mortgage-backed securities). At least 35 per cent of the trust's 'deposited property' (which refers to the proceeds of capital raising) must be invested in 'real estate' within 24 months from the close of the first launch or offer. This term refers to both real property and shares in special purpose companies which own only real property. In addition, at least 70 per cent of the trust's deposited property (including the aforementioned 35 per cent) must be invested in real estate and 'real estate-related assets', which refer to listed and unlisted debt securities and listed shares issued by property companies, mortgage-backed securities, other property funds and assets incidental to the ownership of real estate. Other thresholds apply to other sub-classes of real estate and real estate-related assets, and the Property Trust Guidelines also contain guidance on ongoing compliance with these restrictions.



A property trust must be reasonably diversified ►

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in terms of its investments taking into account the type and size of the trust, its investment objectives and the prevailing market conditions, unless otherwise stated in the prospectus.

LIMITATIONS ON BORROWING

On 28 March 2003, the MAS raised the gearing level for property funds to 35 per cent. Previously, property trusts could only incur debt equal to no more than 25 per cent of the value of their deposited property when the borrowing was incurred. Such trusts are not prohibited from mortgaging their assets to secure their borrowings.

In addition, a property fund may be allowed to borrow more than 35 per cent of the fund's deposited property if a rating of "A" has been given to:

- (i) the total borrowings in the property fund made via debt issues; and
- (ii) the property fund itself.

The rating must be given at the time of borrowing by one of the following credit rating agencies:

- (i) Fitch Inc.;
- (ii) Moody's; or
- (iii) Standard and Poor's.

Should the ratings fall below "A" due to property market conditions which adversely affect property values or income, no corrective action needs to be taken. However, the property fund should not incur additional borrowing. In addition, the fund should not alter the composition of its properties if doing so would consequently lead to the downgrade of these ratings.

The MAS needs to be consulted if the requisite "A" rating is proposed to be obtained through credit enhancement, for example a guarantee.



OTHERS

The Property Trust Guidelines also contain rules relating to interested party transactions, the valuation of the trust's real estate investments and the redemption of units. In addition, there are requirements applicable to investment funds and listed securities generally, which are contained in the Listing Manual of the SGX-ST.

KEY LEGAL AND REGULATORY ISSUES

Listed property trusts are a relatively new product for the Singapore market. As with any new product, legal and regulatory issues can be expected to arise.

Preliminary prospectus

One issue is the use of preliminary prospectus or 'red herring' in the marketing of an offer of units in a listed property trust.

Under current Singapore law, the publication of any statement which refers to an offer of securities where a prospectus is required, is prohibited before the registration of the prospectus, except in permitted circumstances or where conditions are complied with. The publication of a red herring in the context of an offer of shares or debentures ►

or units of shares or debentures has been exempted from this prohibition. However, the relevant exemption does not extend to offers of units in a unit trust. The reason for this distinction is not known. Until the CapitaMall Trust offering, unit trusts tended to be unlisted, open-ended funds, marketed in a distinctly different way to offerings of listed securities.

Unless this anomaly is addressed through legislation or ministerial order, public offers of listed property trusts will not be permitted to pre-market using preliminary prospectuses. This may hamper efforts to market new offerings, given the importance of the preliminary prospectus in permitting underwriters to gauge investor interest and adjust pricing.

Forecasts

One key aspect of Australian offering documents for listed property trusts is the use of dividend forecasts to aid the marketing process. The CapitaMall Trust offering also included forecasts in the prospectus. In the Singapore context however, the use of forecasts in the marketing of unit trusts is prohibited by the Securities and Futures Regulations. An offeror wishing to market its units on the basis of forecast yields will therefore need to obtain a waiver from the continuing

prohibitions against the use of forecasts from the MAS. There are prohibitions both for prospectuses and post-prospectus advertising. Should consent be given, the authorities may impose conditions on the use of forecasts.

Listing rules

Some of the listing rules in the Listing Manual of the SGX-ST, such as those dealing with interested person transactions and conflicts of interests, are difficult to apply to listed property trusts without adaptation. Applicants for listing will need to work closely with the SGX-ST to ensure that its requirements are satisfactorily addressed. However, now that there have been two property trust IPOs, this is probably less of an issue.

Tax transparency

Both Australian listed property trusts and US real estate investment trusts (REITs) offer investors 'tax transparency', in other words, the income of the trust is not taxed at the trust level, but is paid in full (or in the case of REITs, all but a maximum of 10 per cent of taxable income is paid) to investors. The income is thereafter taxed in the hands of investors at their applicable corporate or personal income tax rate.

Singapore tax regulation does not currently grant tax transparency to listed property trusts. Individual applications to the tax authorities will be required for such treatment to be granted to the relevant trusts. CapitaMall Trust achieved a first in Singapore, by successfully obtaining a private tax ruling granting tax transparency to the trust. One issue that needs to be carefully considered and managed in a tax transparent trust, is potential mismatches between taxable income and accounting income, because tax authorities require all (or in the US, almost all)



▶ the trust's taxable income to be paid out to the investors. If the trust's taxable income is greater than its accounting income, the trust may not have sufficient cash to distribute to all its taxable income to unitholders.

THE FUTURE

Listed property trusts provide an interesting alternative for creating liquidity out of property assets. In 2001, it was estimated that Singapore banks alone owned 26 per cent of Singapore property which they are required to spin off by 2004 in order to ring-fence their core banking activities. Non-banks are also likely to be interested in listed property trusts as a method of breaking the current restructuring impasse as "the strategies of many listed entities including the banks are precariously pegged to the divestment of property assets" (ING Barings Report, May 2001).

The problem faced by listed property trusts is how to provide attractive enough returns to investors who have typically demanded returns which are 2 to 3 per cent above returns available from fixed income securities. This rate of return may be difficult to achieve given the relatively



gloomy rental market unless companies making the divestments are willing to take a loss (or at least be content with modest returns) on the sale of their property holdings. In this regard, the two listed property trusts in Singapore have managed to meet, and exceed, their projected forecast distribution.

This article is updated from a Freshfields Drew & Napier Client Brief and was first published in January 2002.

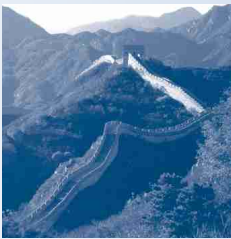


Leena Pinsler is a Consultant in the Banking and Finance Department at Drew & Napier LLC. She is also the Head of the India Desk. Leena has nearly 20 years of experience at Drew & Napier LLC in areas of practice that include regulation of the Banking, Securities and Insurance Industries, Loan and other Structured Finance Products, Derivatives and other forms of Commodity-Based Financing, Establishment and Marketing of Private and Retail Funds and other Asset Management Work, and Mergers and Acquisitions. She is recommended as one of the leading lawyers in the field of company, commercial and mergers and acquisitions in Chambers Global: The World's Leading Lawyers, and is recommended in the Euromoney Legal Media Group's publication, Expert Guides (2000) as a leading Capital Markets Lawyer. Leena can be contacted at +65 6531 2240 or email her at leena.pinsler@drewnapier.com.

Forms of Direct Foreign Investment in China

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Foreign Investment in China



INTRODUCTION

Direct foreign investment in China is subject to a host of governmental approvals, regulations and restrictions. However, with the liberalisation of the economy and China's access to the World Trade Organisation, the laws in China have become more flexible. In general, direct foreign investment may be made by a foreign investor in the following forms:

- (i) A Contractual Joint Venture (CJV) between the foreign investor and a Chinese entity;
- (ii) An Equity Joint Venture (EJV) between the foreign investor and a Chinese entity; and
- (iii) A Wholly-Foreign Owned Enterprise (WFOE).

JOINT VENTURES IN CJVs

CJVs are enterprises that are jointly established through a contract between the foreign investors and Chinese companies, enterprises or other economic organisations. The legal form of a CJV is a non-Chinese legal person or a limited liability company.

All major issues concerning the establishment of the CJV are based on the terms of the contract. These include the terms for investment, the distribution of profits or products, the sharing of risks and losses, the manner of operation and management and the ownership of assets at the time of the termination of the contractual joint venture.

Capital Contribution and Profit Distribution

The proportion of the foreign investor's capital contribution in a CJV cannot be less than 25 per

cent of the total capital contribution of a CJV.

The parties to the CJV may distribute the profits of the CJV in the form of dividends, manufactured products or in any other agreed form. If the parties agree that the Chinese investor will acquire the ownership of all fixed assets of the CJV upon the termination of the contract, it is usual then to allow the foreign investor the right to recover his investment before expiry of the contract by increasing the foreign investor's profit distribution ratio while keeping shareholdings unchanged.

Establishment

To establish a CJV, the Chinese investor should apply for a certificate of approval with the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) or its authorised government authorities. The documents to be submitted are:

- (i) Project proposal of the CJV approved by MOFTEC;
- (ii) Feasibility study report prepared by the parties to the CJV;
- (iii) Duly executed CJV contracts and articles of association;
- (iv) Business licences, registration documents, financial credit standing certificate and identity certificate of the legal representatives of the parties;
- (v) Names of the Chairman, Deputy Chairmen and members of the Board of Directors or Joint Management Committee; and
- (vi) Other documents as deemed necessary by MOFTEC.



Upon approval of the application for the establishment of a CJV, the parties shall, within 30 days of receipt of the certificate of approval, file an application with the relevant registration authorities for obtaining a business licence. The date on which the business licence is issued shall be the date of the establishment of the CJV.

Preferential Taxation

General preferential tax policies are available to a CJV where:

- (i) The CJV is established in the manufacturing sector with a minimum production period of ten years;
- (ii) The CJV is an export-oriented CJV;
- (iii) The CJV utilizes advanced technology in its business;
- (iv) The CJV is established in certain industries or localities which are encouraged by the Chinese State and/or provincial governments.

The import of goods and materials including raw materials for the production of export commodities by the CJV would under certain circumstances enjoy tax exemptions and reductions.

The export commodities produced by a CJV, except those commodities whose export is restricted by China, will also enjoy tax exemptions and reductions. A CJV may under certain

conditions apply for VAT tax refund for procurement of equipment made in China.

Finance and Accounting

A CJV must establish its account books within the territory of China, file its accounting statements according to relevant provisions and accept supervision by the finance and tax authorities.

JOINT VENTURES IN EJVs

EJVs refer to enterprises that are jointly established and operated by foreign companies or owners of Chinese companies, enterprises or other economic organisations. The legal form of an EJV is a limited liability company.

Capital Contribution

The proportion of the foreign investors' investment in an EJV shall, in principle, be not less than 25 per cent of its registered capital. The parties to the EJV shall share the profits, risks, and losses in proportion to their contributions to the registered capital. The contribution towards the registered capital by the parties may be paid by installments over a period of years which is negotiated between the parties. However, at least 15 per cent of the total amount of each party's capital contribution has to be paid within three months from the date of issuance of the business licence of the EJV.

Establishment

To establish an EJV, both the foreign investors and the Chinese investors shall jointly apply for a certificate of approval from MOFTEC or its authorised government authorities. Some of the documents to be submitted are:

- (i) Application letter for the establishment of the EJV;
- (ii) Feasibility study report jointly prepared by the parties;
- (iii) Duly executed copies of the joint venture contract and articles of association;
- (iv) Names of the chairman, vice-chairman and directors of the EJV appointed by the parties; and
- (v) Other documents stipulated by MOFTEC.

Upon approval of the application for the establishment of the EJV, the parties shall, within 30 days of receipt of the certificate of approval, file an application with the relevant registration authorities for a business licence. The date on which the business licence is issued shall be the date of the establishment of the said enterprise.

Preferential Taxation

General preferential tax policies are available to



an EJV where:

- (i) The EJV is established in the manufacturing sector with a minimum production period of 10 years;
- (ii) The EJV is an export-oriented EJV;
- (iii) The EJV utilizes advanced technology in its business;
- (iv) The EJV is established in certain industries or localities which are encouraged by the Chinese State and/or provincial governments.

The import of goods and materials including raw materials for the production of export commodities by the EJV would under certain circumstances enjoy tax exemptions and reductions.

The export commodities produced by an EJV, except those commodities whose export is restricted by China, will also enjoy tax exemptions and reductions. An EJV can apply for VAT tax refund for procurement of equipment made in China under certain conditions.

Finance and Accounting

The fiscal year of an EJV begins from 1 January and ends on 31 December of each calendar year. The quarterly and annual financial statements of an EJV has to be submitted to the Finance and Tax authorities.

Differences between CJVs and EJVs

Some differences between a CJV and an EJV are:

- (i) The share of profits, risks and losses of the CJV between the parties is governed by the agreement entered into between them. On the other hand, the parties to the EJV shall share the profits, risks, and losses in proportion to their contributions to the registered capital.
- (ii) A CJV may be formed as a non-Chinese legal



person or as a company with limited liability while an EJV has to be established in the form of limited liability company.

(iii) Transfer of a party's interest in a CJV may be more complex than in an EJV as the obligations and benefits under the agreement between the joint venture parties may not be proportional to the amount of capital invested by each party. Further complications will arise if there are tangible assets owned by the CJV.

WFOEs

The WFOE is in the form of a limited liability company with the shares held solely by the foreign investor.

Capital Contribution

For capital contribution towards the share capital of the WFOE, the foreign investor may use foreign currencies, equipment, and/or industrial property, and any proprietary technology owned by them. The aggregate value of the industrial property and proprietary technology shall not exceed 20 per cent of the registered capital of the WFOE.

The capital contribution of the foreign investor towards the registered capital of the WFOE may be paid by installments over a period of three years from the date of establishment of the WFOE, however at least 15 per cent of the total amount of the registered capital shall be paid within 90 days of the issuance of the business licence.

Establishment

To establish a WFOE, the foreign investor shall first apply for a certificate of approval with MOFTEC or its authorised government authorities. Some of the documents which are required to be submitted to MOFTEC are:



- (i) The written application for the establishment of a WFOE;
- (ii) A feasibility study report;
- (iii) The articles of association of the WFOE;
- (iv) The name-list of the legal representative (or members of the board of directors) of the WFOE;
- (v) The legal identity documents and documents evidencing the financial standing of the foreign investor;
- (vi) The government's written approval at or above the county level at the place where the WFOE is to be established;
- (vii) An inventory of goods and materials required to be imported; and
- (viii) Any other documents that are required to be submitted at MOFTEC's discretion.

If two or more foreign investors are establishing the WFOE there should also be submitted to the authorities a duplicate copy of the agreement made between them regulating their rights and obligations.

Upon approval of the application for the establishment of a WFOE, the foreign investor shall, within 30 days of receipt of the certificate of approval, file an application with the relevant registration authorities to obtain a business licence. The date on which the business licence is issued shall be the date of the establishment of the said enterprise.



► Preferential Taxation

Preferential tax policies are available to a WFOE where:

- (i) The WFOE is established in the manufacturing sector with a minimum production period of ten years;
- (ii) It exports its manufactured products out of China;
- (iii) The WFOE utilizes advanced technology in its business;
- (iv) The WFOE is established in encouraged industries or localities

The import of goods and materials including raw materials for the production of export commodities by the WFOE would under certain circumstances enjoy tax exemptions and reductions.

The export commodities produced by a WFOE, except those commodities whose export is restricted by China, will also enjoy tax exemptions and reductions.

A WFOE can apply for VAT tax refund for procurement of equipment made in China under certain conditions.

Finance and Accounting

The fiscal year of a WFOE begins from 1 January and ends on 31 December of a calendar year. The

annual accounts of a WFOE shall be prepared according to Chinese rules and regulations and be audited by registered accountants in China. The annual audited accounts, audit report, assets and liabilities statements and profit and loss statements of a WFOE shall be submitted to the Finance and Tax authorities annually and lodged with MOFTEC and the registration authority.

The Regulations governing WFOE have undergone substantial changes and are still evolving. Any foreign investor intending to establish a WFOE in China should ensure that they are familiar with these regulations and laws at both the State and Provincial level.

FURTHER OPTION

A further option is available for foreign investors who may not have an intention as yet to invest in China. A foreign investor may establish a Foreign Representative Office and the nature of this office is akin to a marketing office. No direct business activities in China may be undertaken by this Office. The foreign investor will bear all responsibility for the activities of this Office.

CONCLUSION

Each form of direct foreign investment has its own characteristics and advantages. Foreign investors are recommended to choose a form based on its individual situations.

Drew & Napier LLC has been assisting our clients with China related matters for a number of years. Our China Desk was set up in the early '90s in response to the growing demand for China-related advice. Since being granted a licence to operate a Shanghai office in 2000, and an expansion of the office in September 2002, our team in Shanghai now consists of senior lawyers from both Singapore and China. The team is supported by the rest of the China team based in Singapore. Drawing our expertise across our practice areas in Corporate, Intellectual Property, Litigation & Dispute Resolution and Property, our China Business Group brings our experience in serving the needs of our domestic and international clients, and delivers solutions that are characterised by our ethos of complete client service and a high standard of work.

For assistance, please contact David Chin at +86 21 6335 1628 / +65 6531 2304 or email him at david.chin@drewnapier.com.

Classification of Industries for Foreign Investment in China

All industries and projects are generally classified into four categories for foreign investment: Encouraged, Permitted, Restricted and Forbidden. The Catalogue provides a detailed list of industries and projects for these four categories. (See table below).

The nature of the industry, together with some other considerations such as the total amount of investment, will determine the type of approval required and the government level at which such approval has to be obtained.

Categories for Foreign Investment

Category	Criteria
Encouraged Category	<ul style="list-style-type: none"> • New agricultural technologies projects, comprehensive agricultural development projects, energy projects, transportation and major raw materials industry. • Projects using advanced technologies, new equipment or materials that may improve product performance or with technological and economic benefits, or increase the domestic production capability of China. • Projects that cater to market demand, improve the product quality and which will develop new markets, or enhance China's international competitiveness. • Projects of new technologies and new equipment, those that economise energy sources and the use of raw materials or projects that utilise renewable resources that prevent and control environmental pollution. • Projects that maximise human and natural resources of central and western China, while complying with the State's industrial policies.
Permitted Category	<ul style="list-style-type: none"> • Any industry or project that is <u>not</u> covered in the Catalogue would be classified under the Permitted category.
Restricted Category	<ul style="list-style-type: none"> • Projects using low-end technology. • Projects that do not economise resources or affect adversely China's ecological environment. • Projects that involve the prospecting and exploitation of mineral resources restricted by the State. • Projects in industries where foreign investment is allowed on a restricted basis.
Forbidden Category	<p>No foreign investment is allowed in:</p> <ul style="list-style-type: none"> • Projects which endanger state security or public interest. • Projects which cause environmental pollution, undermine natural resources or cause harm to human health. • Projects that require large areas of cultivated land or are not beneficial to the use and development of land resources. • Projects that threaten the security of military installations and their operations. • Projects that manufacture products using processes or technology exclusively owned by China.

| Samsung Wins Right to Domain Name

INTRODUCTION

Recently, our lawyers successfully represented Samsung Electronics Co., Ltd (Samsung) in the case of Samsung Electronics Co., Ltd. v Funexpress. com.sg Pte Ltd (Singapore Domain Name Dispute Resolution Service Administrative Panel) Case No. SDRP-2002-0004(F). The Panelist decided in favour of Samsung and ordered that the domain name in question be transferred from Funexpress. com.sg Pte Ltd (Funexpress) to Samsung.

FACTS

Samsung filed a complaint under the Singapore Domain Name Dispute Resolution Policy (SDRP) to obtain a transfer of the domain name samsungmobile.com.sg. The domain name was registered on 1 July 2002 by a local company, Funexpress.

Funexpress was not an authorised dealer of Samsung, had no business dealings with Samsung, and did not have the prior consent of Samsung to register the domain name. Even though the website "samsungmobile.com.sg" bore a notice that it was "under construction", it appeared to be used for providing goods and services such as ringtones that were compatible with Samsung mobile phones, or information on Samsung products and services.

RELEVANT PROVISIONS

The SDRP framework, implemented on 1 January 2002, is modeled closely after the Internet Corporation for Assigned Names and Numbers (ICANN) Uniform Dispute Resolution Policy (UDRP). Under Paragraph 4(a) of the SDRP, an application

can be made to cancel or transfer a ".com.sg" domain name if the following requirements are satisfied:

- (i) The domain name is identical or confusingly similar to a name, trade mark or service mark in which the Complainant (Samsung) has rights;
- (ii) The Respondent (Funexpress) has no rights or legitimate interests in respect of the domain name; and
- (iii) The domain name is registered and/or is being used in bad faith.

THE DECISION

Funexpress did not file any response to the complaint lodged by Samsung. As such, the Panelist had to decide whether all of the above requirements were met based on the complaint submitted.

The Panelist was satisfied that Samsung had proved all the above three requirements, and ordered that the domain name be transferred from Funexpress to Samsung.

REASONS FOR THE DECISION

- (i) Whether the domain name was identical or confusingly similar to a name, trade mark or service mark in which the Complainant (Samsung) had rights.

The Panelist had little difficulty in finding that Samsung had rights to the name "SAMSUNG" on the basis of its worldwide trade mark registrations and the fame of the "SAMSUNG" mark. He also held that the domain name "samsungmobile.com.sg" was confusingly



similar to Samsung's name. The word "mobile" was wholly descriptive of the mobile phones that Samsung sold, and therefore the inclusion of the word "mobile" in the domain name did not reduce the confusingly similarity with the name "SAMSUNG".

- (ii) Whether the Respondent (Funexpress) had rights or legitimate interests in the domain name.

The Panelist found that Funexpress had no legitimate rights or interests in the domain name. Following an earlier World Intellectual Property Organization (WIPO) decision in *Nokia Corporation v Nokia Ringtones & Logos Hotline* (WIPO Case No. D2001-1101), the Panelist held that Funexpress could not claim a legitimate interest in the domain name even if they were merely offering products and services which were compatible with Samsung's products. The Panelist also found no evidence to suggest that Funexpress was making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain. In fact, the facts suggested that the converse was true: that Funexpress was using the domain name for commercial use, and would benefit from attracting visitors to its website.

- (iii) Whether the domain name was registered and/or was being used in bad faith.

The Panelist agreed with Samsung that Funexpress had registered and used the

domain name in bad faith. Given the fame of the "SAMSUNG" mark, and the lack of any explanation by Funexpress, the Panel drew the inference that Funexpress intended to register and use the domain name to attract Internet users to the website by falsely creating the impression that the website and Funexpress' services were sponsored, endorsed and affiliated to Samsung.

COMMENTS

Earlier decisions by the WIPO had been divided as to whether the use of a domain name by an unauthorised user to promote or provide information on the Complainants' products or services would give rise to questions of "legitimate rights" or indicate bad faith.

The present decision, the fourth made under the SDRP since its framework was implemented, is likely to be welcomed by all trade mark owners as it indicates the position taken by Singapore. That is, the user cannot claim a legitimate interest in the domain name even if it were merely providing goods, services or information which were compatible with the trade mark owner's products.

Although the SDRP provides a framework to handle domain name disputes in Singapore, trade mark owners can avoid such disputes altogether by actively registering their domain names in Singapore. This is because domain name registrations work on a "first come, first served" basis.

Drew & Napier LLC has the largest intellectual property practice in Singapore led by Morris John, Managing Director. All matters undertaken by the group, whether complex or routine, are characterised by Drew & Napier LLC's ethos of complete client service coupled with a high standard of work. In addition, our IP litigation team handles all aspects of intellectual property litigation. Our lawyers also advise on various aspects of technology transfer, and draft and review agreements to develop, license, procure and finance all IP rights including computer software and hardware projects.

For assistance, please contact Morris John at +65 6531 2503 or email him at mj@drewnapier.com.

DREW & NAPIER LLC

Your Legal Partner for the 21st Century

.cn Domain Names in China

From 17 March 2003, the China Internet Network Information Centre (CNNIC) opened for registration a second-level .cn domain name to the world on a "first come, first served" basis. Second-level .cn domains refer to domain names followed by the .cn suffix (e.g. mycompany.cn).

Previously, only third-level domain names, such as those registered under the .com.cn domain, were available for registration to international businesses and organisations on a "first come, first served" basis.

This launch comes after the end of an exclusive priority period from 6 January 2003 to 28 February 2003 for owners of third-level .cn domain names and proprietors of well-known trade marks to apply for corresponding second-level domain .cn names.

Another notable change to the domain name system is that CNNIC no longer sells the domain names directly to end-users, but through 23 accredited registrars (21 from mainland China, one from Hong Kong and one from US).

Domain names are critical in protecting your business' goodwill and activities. We recommend that you:

- (i) Identify important trade or service marks as well as abbreviations, phrases or slogans by which you are identified;
- (ii) Consider the harm of infringement, confusion and mischief (e.g. domain names ending with "sucks", misspellings or hyphenated versions);
- (iii) Register for all existing domain names which you currently possess;
- (iv) Consider filing for domain name protection in all Top Level Domains - .net, .org and .com; and
- (v) Stringently enforce your trade and service mark rights instead of losing them to infringers or cybersquatters.

For assistance on domain name registrations, please contact Morris John at +65 6531 2503 or email him at mj@drewnapier.com.

THANK YOU

For the sixth time last year, the World IP Survey named Drew & Napier LLC as number one in Singapore in both Trademark and Patent practices. Once again, we wish to thank you, our clients, for your support in the past year. The survey was conducted by UK based Managing Intellectual Property, a leading international IP magazine with over 10,000 readers around the world.

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