# Reporter

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# Feature Article

## E-commerce businesses: Valuation beyond the horizon

### Introduction

E-commerce today has been defined as the buying and selling or provision of goods and services, or the transmitting of funds or data, over an electronic network. This article attempts to highlight the justification for the valuations of e-commerce businesses and whether effective legal due diligence can actually be conducted on such businesses.

After 21 years of being in business, Amazon only recently announced a quarterly profit. This is notwithstanding that it is currently valued at approximately US$370 billion, which is US$150 billion more than that of America's largest retail chain Walmart, even though Amazon has no physical retail stores. Uber, the online transportation network company, was founded in 2009, and is currently valued at approximately US$68 billion. This is US$20 billion higher than auto giant General Motors, which has been in existence since 1908. And Uber does not even create any motor vehicles!

Snapchat, valued at approximately US$24 billion, recently raised US$3.4 billion on the first day of its initial public offering (IPO) on the New York Stock Exchange. While it is "younger" than its e-commerce competitors, and still growing, its rate of growth has declined drastically in the recent months. Snapchat's shares in the first week of its IPO were trading at around US$25 but fell below US$20 two weeks after, closing at more than 4 per cent down and nearing the IPO price of US$17 per share. Crucially, its net asset value (NAV) is US$1.5 billion, and in 2016, it reported an overall loss of US$515 million. It certainly begs the question why a company is valued at US$24 billion, when its NAV is only over a billion US dollars. Besides, it is reporting half a billion US dollars in losses as recently as last year.

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Former eBay executive Dana Stalder, a partner at Matrix Partners, which has funded fashion start-ups, Gilt Groupe and Just Fabulous Inc., stated that current valuations of e-commerce companies were "definitely inflated" and that e-commerce companies are "complex businesses to run. They generally are capital-intensive, have low margins, and therefore the exit multiples are typically one to two times revenue." In addition, Brian Piccioni and Paul Kantorovich from BCA Research suggest that the valuations made by venture capital (VCs) and private equity (PE) firms are indeed fantastical, and predicated mostly on what the shares might be priced at if the companies were sold or taken public.

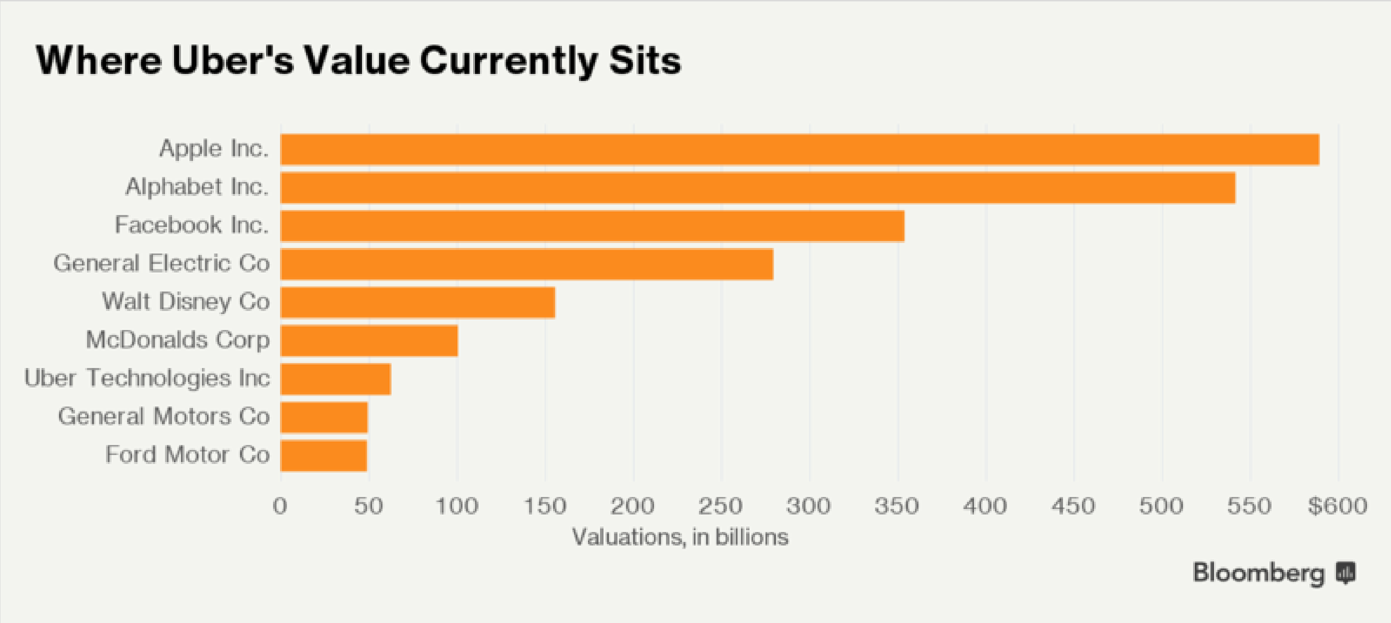
It has been widely reported that valuations of e-commerce entities are comparatively higher than companies in similar industry sectors. Whether these lofty valuations are justified or super e-commerce companies are realistically worth the stratospheric valuations, remain to be seen given that e-commerce is still growing and exits have been infrequent. However, conventional principles and experience suggest they are not, and investors would do well to be cautious. It is very likely that investments by sovereign funds (SFs), mutual funds (MFs), VCs and private equity players (PEs) boost the valuations (whether justified or not), and in order to have a huge rate of return on the investment, the SFs, MFs, VCs and PEs push the valuations even further beyond the horizon.

## Valuation principles in the e-commerce sphere: Traditional methods of valuation vs Untested factors

Traditionally, tried and tested methods such as discounted cash flow, growth and risk estimation have consistently been applied across various retail sectors to value the worth of a business. While these methods continue to be relevant today, it appears that such established fundamentals have been disregarded in the domain of e-commerce valuation.  Increasingly, valuations in respect of e-commerce "shops" are moving away from such established methods towards a consideration of a plethora of factors which vary widely, lack consistency and persons valuing such companies frequently "cherry-pick" the favourable factors to push up valuations.

Factors which are considered nowadays for valuations of e-commerce companies include sales, number of transactions, active users, "hits", the future state of the industry, and potential market size. There seems to be less emphasis on the historical or current profits of a company. The markets also seem to base such valuations on expected growth, market share, extremely optimistic revenue growth and not necessarily profitability. Furthermore, they seem to exclude certain vital data components including qualified human resources, logistics costs, advertising, percentage of orders refused/returned and shopping cart abandonment rate.

This could explain why Uber's significant valuation continues to grow even when it is not reporting profitability. In 2016, Uber's revenue grew approximately 18 per cent, from approximately US$960 million in the first quarter to approximately US$1.1 billion in the second. Nonetheless, in the same periods, Uber lost approximately US$520 million and US$750 million respectively. While Uber managed to raise unprecedented amounts of private and institutional money and is valued at US$68 billion, it continues to incur losses. It is unlikely to list on a stock exchange in the near future given the lack of congruence between the relevant figures. Uber's exit from China will severely impact its ability to grow revenue to justify its valuation.




Source: https://www.bloomberg.com/news/articles/2016-08-17/an-expert-in-valuation-says-uber-may-have-already-peaked

One factor in contention recently is the Gross Merchandise Value (GMV). This measurement, heavily relied on for e-commerce valuations, is highly criticised by brick-and-mortar retailers. It has been critiqued as misleading and unsustainable. Instead of reflecting actual revenue earned by goods and services transacted through the website, it represents the total value of these goods and services and omits the costs of generating this revenue. Further, GMV does not account for any discounts, cancellation or returns. Ultimately, such revenue estimations do not equate to profits.

In addition, another driving factor for the rising valuations is the hype over technology transforming the society and the prevalent use of apps. There seems to be a great degree of "impatience" to push up the valuations without a patient and deliberate analysis of traditional and time-tested criteria. A good balance of both approaches would perhaps yield a more justifiable valuation. However, in doing this, one has to also pay heed to the changing environment stemming from the size and reach of global giants in the e-commerce space. Competition may occur at any time. There is also no loyalty on the internet, and users choose whichever solution which is the most convenient, user-friendly and at the lowest cost!

One could draw on the gladiatorial contests in the Colosseum as a metaphor to what the arena used to be for retails shops and what the arena currently is for e-commerce companies. In the past, barriers of entry for retail shops were high and not many were able to pay the "entrance fee" (in the form of high rentals, wages, etc.) to enter into the Colosseum and commence battle. However, the ones that did make it had fewer competitors and managed to build their businesses and make decent profit. Nowadays, with the advent of technology and the movement of the retail space from a tangible world to an intangible one, the need for retail space and employees has declined and the "entrance fee" is no longer high. However, a graver problem awaits a new challenger who enters the modern Colosseum and this comes in the form of mega gladiators, such as Google, eBay and Amazon. The highly competitive costs of inventory and shipping make it difficult for new, fresh and attractive companies to gain traction and market share, and those that do appeal to consumers can easily be replicated by new players or existing competitors. Therefore, although a fresh new e-commerce company starts with the appeal to be the next Unicorn, market realities and business vicissitudes usually get in the way of its potential quite swiftly.

Overall, considering the aforementioned, it seems that the process of evaluating an e-commerce company is still at an experiment stage, and much research and testing will need to be undertaken before a justifiable and reliable method is formulated to provide realistic valuations.

## Is effective legal due diligence possible?

Assuming investors accept the financial valuations, there are certain legal issues and implications, which directly affect or are affected by such valuations. There are three important legal concerns which have to be considered.

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1. For investments into highly-valued e-commerce businesses, legal due diligence is a challenge. Legal due diligence is meant to investigate the legal basis and validity of a business, its formation, enforceability of contracts, asset ownership, litigation matters and shareholder arrangements – these are critical elements of a business. When an investor intend to place vast sums of funds into companies, it would usually conduct due diligence on the target. Given the lack of clarity on valuation methods, relevant factors and a general consensus on how the target is valued, it is not easy to conduct an effective and thorough due diligence. Many e-commerce mega companies are reluctant to disclose much information to potential investors, citing “confidentiality reasons”. However due to their appeal and strong bargaining position, their response to an investor is to “take it or leave it”. Investors are expected to make a decision without the assurance of an effective due diligence. Although the quantum of investments is much higher in the e-commerce industry, the extent of assurance and security provided in the form of due diligence is notably lacking. Investors nonetheless will proceed so as not to be left out or losing the opportunity to another competitor-investor.

2. Another concern is the availability of exit strategies. Due to the lack of a valid and justifiable basis for valuations and a long line of regulatory and legal risks, many e-commerce companies would prefer to avoid the required due diligence and thorough examination of an IPO process. This process may expose fundamental weaknesses in the business model and therefore damage the reputation or perceived “glamour” image of the company. Essentially, this would immediately put their valuations in question and if they were remarkably inaccurate, the company could find itself in a dire situation. Hence, founders tend to avoid IPOs until absolutely necessary and this may not be in line with the investors’ timelines for exits. In light of the above, it would be prudent for investors (and their advisors) to provide alternative strategies such as redemption, buy-backs, trade sales with drag-alongs and put options in their legal agreements to ensure there is a viable exit strategy.

3. A third concern is enforcement and obtaining damages for breaches by the company. As many e-commerce companies are established and exist on the World Wide Web, there is a growing concern that they are everywhere, yet also nowhere. Many companies have terms and conditions on their websites and although they may include governing laws and dispute resolution processes, once a dispute occurs, questions such as which country’s laws apply and which forum would be the best-placed to hear the legal arguments will be raised. Quite often this “conflict of laws” dilemma must be resolved before the substantive proceedings can commence. Another worry is that many of these companies do not have a main headquarter or permanent establishment and this leads to jurisdictional questions of where to commence an action. One consideration is to determine whether the company has any assets in a particular jurisdiction such that an action is economically justified in that jurisdiction. Finally, the actual party at fault or proper party to sue (i.e. the e-commerce company, the founders, the promoters of the company, etc.) would also have to be determined. These preliminary questions could prove to be major stumbling blocks and may even lead to an investor being unable to claim deserved damages for breaches. It is also not uncommon for companies, founders and promoters of these companies to exempt themselves from any liability to investors in relation to any investment in the companies. Having an extraordinarily extensive list of “risk factors” in the offering memorandum or prospectus shifts the risks to the investor – hence the investor must beware.

## Conclusion

Are these beyond horizon valuations justified and logical? There are not many e-commerce companies which are listed on securities exchanges. This could be due to the unstable geo-political climate, uncertain markets, untested methods of valuation and a general reluctance by the investing public to accept such valuations. Investors would be unwise to throw caution to the wind and accept such valuations blindly and without considering the risks stated above. Legal due diligence will not be comprehensive. In fact it would appear that minimal or limited due diligence is acceptable to investors. It continues to be a brave new world and although these valuations are not fraudulently conceived, circumspection and salt-pinching are certainly necessary when deciding whether to invest in the next promising e-commerce company.

Dentons Rodyk acknowledges and thanks Ann Chia for her contribution to the article.

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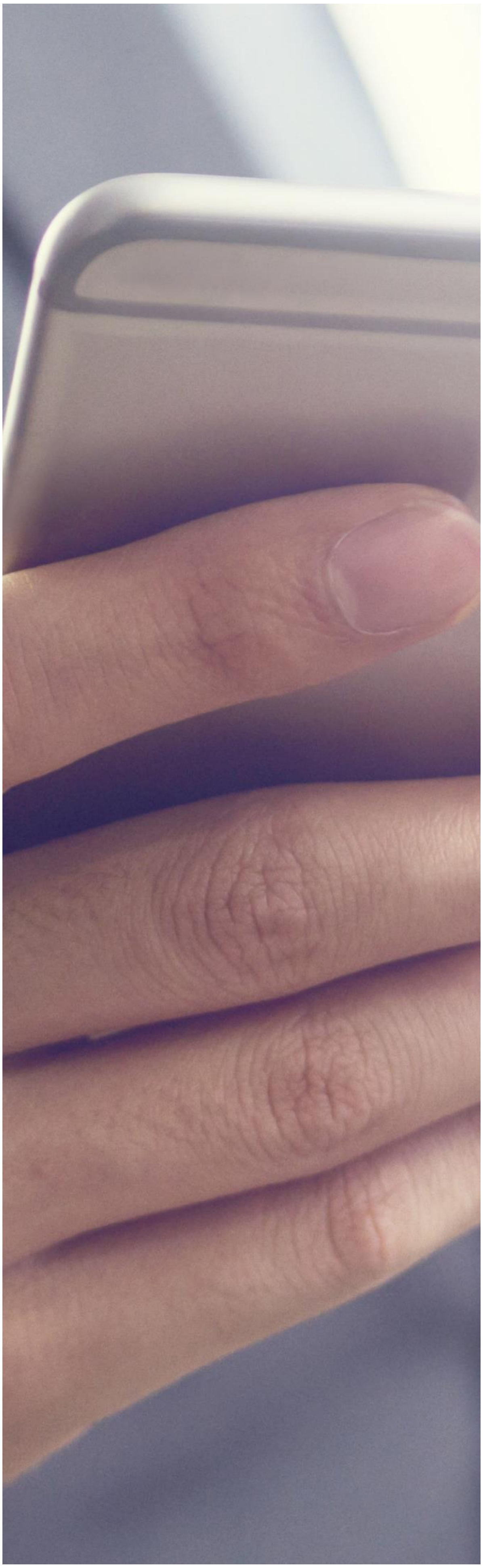

# Business Bulletin

## Of "Likes" and Luck: Social media and gaming regulations

### Introduction

It is increasingly common for companies to organise marketing promotions using social media, perhaps, due to the ease and relatively low cost of doing so. It may come as a surprise to some, that such seemingly innocuous promotions could attract the application of statutes that regulate lotteries and gambling in Singapore.

These statutes include the Common Gaming Houses Act and the Remote Gambling Act (RGA). Due to the increased use of social media and the internet in marketing promotions, this article highlights the application of the RGA on these promotions. For the purpose of illustrating the application of the RGA, we have used a hypothetical example where a promotion requires members of the public to take certain photos and to "tag" these photos using a social media platform for entry into a prize draw (the Promotion).

### Scope of the Remote Gambling Act

Section 4(1) of the RGA defines "gambling" to include all or any of the following: betting, gaming and participating in a lottery. "Lottery" is defined under the RGA to include "*any game, method, device, scheme or competition whereby money or money's worth is distributed or allotted in any manner depending upon or to be determined by chance or lot, whether the same is held, drawn, exercised or managed inside or outside Singapore*".

Further, section 5 of the RGA defines "remote gambling" as "*gambling in which a person participates by the use of remote communication, even if the gambling is done only partly by means of remote communication*" and "remote communication" is defined to include communication through the internet or "*any other kind of electronic or other technology for facilitating communication*". This definition of remote communication is likely to encompass the use of social media or mobile phone applications.

Finally, section 5(3) defines a "remote gambling service" to mean "*a gambling service provided to customers for them to participate in gambling by the use of remote communication.*"

To illustrate a potential application of the RGA, the Promotion would likely fall within the definition of "lottery" because the prize is distributed based on an element of chance, as well as "remote gambling", due to the use of remote communication *via* the social media platform.

### Offences under the Remote Gambling Act

The Promotion may trigger the contravention of certain provisions under the RGA. A potential offence is provided in section 11 of the RGA, which provides that a "*person who provides a Singapore-based remote gambling service*" may be liable upon conviction to a fine of between S$20,000 to S$500,000 or to imprisonment for a term up to seven (7) years or to both. A person is deemed to be providing a remote gambling service where the person does, among other things under section 5(4), any of the following in the course of carrying on a business:

a) provides facilities for remote gambling by others in accordance with arrangements made by the person;

b) organises, manages or supervises remote gambling by others in accordance with arrangements made by the person; or

c) distributes a prize offered in remote gambling in accordance with arrangements made by the person.

Additionally, assuming the Promotion is considered to be a remote gambling service, the publication of materials to advertise this promotion could contravene section 15(1) of the RGA and result in a fine, upon conviction, of up to S$20,000.

In the scenario where the target group for the Promotion is youths, the organiser should also be aware of the potential offence under section 13(1) of the RGA, where a "*person who invites, or causes or permits, a young person to gamble in Singapore by means of remote communication*" may be liable upon conviction to a fine of between S$20,000 to S$300,000 or to imprisonment for a term up to six (6) years or both. "Young Person" is defined to be a person below 21 years old. Therefore, additional care should be taken when a promotion


involves an aspect of chance and has youths as the specific target audience.

It is possible to seek an exception for the Promotion under section 26 of the RGA, which provides that "*the Minister may, upon the application of any person, issue a certificate of exemption that authorises the person to provide a Singapore-based remote gambling service with a Singapore-customer link of such type as is specified in the certificate*". Another possible method of exemption is through compliance with the Remote Gambling (Exempt Persons) Order 2015 (the Order). Certain kinds of promotions, defined within the Order, would be exempt from specified sections of the RGA if a number of conditions are complied with. These conditions include notifying the Criminal Investigation Department, the details of the promotion and the prizes to be distributed, at least four (4) weeks prior to the start of any advertising publicising the promotion. Alternatively, in a situation where a promotion is considered to be incidental to another event and the requirements under Paragraph 3 of the Order are complied with, the lottery could be automatically exempt from the specified sections of the RGA.

## Concluding thoughts

Unquestionably, social media has now become a commonly used vehicle in marketing promotions. It may perhaps be conceptually difficult to identify marketing promotions with "gambling", and social media promotions with "remote gambling", but as we have discussed above, these are real issues which should be taken seriously, because of the potential offences these social media promotions can attract under the RGA.

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

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# Re-examining purpose clauses and Quistclose trusts

## Introduction

In *CCM Industrial Pte Ltd (in liquidation) v Chan Pui Yee* [2016] SGHC 231 (CCM Industrial), the liquidators of CCM Industrial Pte Ltd (the Company) brought a claim for the recovery of certain payments (the Payments) to the defendant, Madam Chan Pui Yee, in the lead up to the Company's liquidation. The defendant attempted a defence which was discussed by the court in three paragraphs and although dismissed as "an afterthought and a non-starter", such defence may have practical implications which might affect unsecured lenders and borrowers and thus, may impact on the purpose clauses in lending agreements.

## Quistclose trust

The Quistclose trust is essentially a principle that is derived from the decision in *Barclays Bank Ltd v Quistclose Investments* [1970] AC 567 – namely, that moneys advanced by a lender to a borrower for a specific purpose were impressed with a trust for that purpose and does not become part of the borrower's estate. The lender is entitled to a right that such moneys are applied towards the specified purpose and to prevent the use of the moneys for any other purpose. Once the moneys have been applied for that specified purpose, the lender has the normal remedy in debt.

The defendant in CCM Industrial attempted to argue that the Payments arose from a S$3 million loan (the Loan) made by the Company's managing director to the Company, of which S$1 million was intended to be set aside for the Payments, and that as a result, a Quistclose trust was created over the Payments. On the facts, the court found that as the Loan had not been segregated for the specific purpose of repaying the defendant and had been deposited into and commingled with other moneys in the Company's general account, which in turn had been overdrawn and from which numerous withdrawals had been made, the whole of the Loan had been fully withdrawn before the cheques comprising the Payments were made to the defendant and as such, the moneys used to make the Payments could not be considered to have been held under a Quistclose trust.

In arriving at this conclusion, the court applied the principles governing Quistclose trusts which were discussed by the High Court in the recent case of *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 (AHPETC) in the Singapore context. In AHPETC, the court adopted the model of the Quistclose trust set out by *Lord Millett in Twinsectra v Yardley* [2002] 2 AC 164 (Twinsectra) as the law in Singapore.

While much academic and judicial ink have been spilled on the nature and description of a Quistclose trust, two points are certain:

(i) The Quistclose trust is a resulting trust for the lender who retains the beneficial interest in the moneys, subject to the borrower's right to apply the moneys towards the specified purpose in accordance with the lender's instructions, and if the purpose fails, the borrower is obliged to return the moneys to the lender since the resulting trust is no longer subject to any power on the part of the borrower to make use of the moneys (Proposition 1).

(ii) Notwithstanding (i) above, the same analysis should apply to those situations in which parties enter into a commercial arrangement which permits one party to have a limited use of the other's moneys for a specified purpose such that the first party does not have the freedom to apply the moneys for any other purpose and that party must return the moneys if for any reason the purpose cannot be fulfilled (Proposition 2).

In order to constitute a Quistclose trust:

(1) The subject matter must be clear, i.e., it must be made clear what property is or is not subject to the trust.

(2) The objects must be certain, i.e., the beneficiary of the trust must be clearly identified and the right to apply the trust moneys for the stipulated purpose must be sufficiently clarified so that one can determine whether the purpose is still capable of being fulfilled or if the moneys had been misapplied. If the purpose is not made clear, case law would seem to suggest that this would work to the benefit of the lender and the borrower will have to return the moneys to the lender under the trust since the borrower has no authority to apply the moneys for any other purpose.

(3) There must be a clear intention to create a Quistclose trust, which is discussed in more detail below.

## What intention is required?

In Twinsectra, the court had held that "[a] settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them." In applying this, it would be the mutual intention of the parties as expressly stated in the terms of the transaction, or as objectively ascertained from the circumstances of the transaction, that justifies the creation of a Quistclose trust.

In applying Twinsectra, the court in AHPETC gave the following guidance as to what constitutes a clear intention to create a Quistclose trust:

(a) In all Quistclose trusts, only the intention (or lack thereof) of the lender (as donor) is relevant and a trust may therefore be created even if no contract is made.

(b) In an express trust, it must be clear that the lender (as donor) intends to "constitute the [borrower] as [a] trustee" thereby imposing on the borrower the full suite of duties incident to a trusteeship. In such instance, in the absence of explicit clauses creating a trust, a segregation of the moneys advanced by the lender will be crucial in determining whether the moneys amounted to trust property. If the moneys were commingled with the borrower's other funds, it may be hard to argue that a trust had been created.

(c) In a resulting trust, it must be clear that the lender (as donor) only grants the borrower the right to apply the moneys towards a specific purpose. In order to constitute a resulting trust therefore, there must be certainty that the moneys advanced by the lender cannot be freely applied by the borrower and that such moneys do not fall within the borrower's general funds.

(d) A Quistclose trust does not arise simply because the moneys were paid for a particular purpose (for example, a buyer making payment for goods or a lender advancing sums for earning interest), as it would not make commercial sense that each payment made in the ordinary course of business would create a trust.

While the above guidance may appear helpful, it could be argued that the court's observations lean towards a conservative interpretation of Twinsectra. In particular:

(A) While the court held that a Quistclose trust "may be either express or resulting", it is clear from the analysis that followed that the question of whether a Quistclose trust arises will be a retrospective construction by the court based on the facts of the case and not an exhaustive statement on the type of Quistclose trust created (for example, there may be situations in Proposition 2 which cannot be characterised as falling within Proposition 1, where a Quistclose trust is created but such trust is neither an express trust nor a resulting trust).

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(B) Although the segregation or commingling of moneys may be helpful in determining the intention of the lender (as donor), this does not necessarily imply that a Quistclose trust has been created and a broader examination of the facts at hand has to be taken to determine the lender's intention. If such intention can be established, the principles of equity then apply to make it unconscionable for the borrower to obtain money on terms as to its application and then to disregard the terms on which it received from the lender who had placed trust and confidence in the borrower to ensure that the moneys advanced were properly applied.

In applying the above, it would appear that excessive weight has been placed on the lender's intention as donor and the statement that "only the intention (or lack thereof) of the donor is relevant" by the court in AHPETC may seem to be a step too far in light of the emphasis on mutual intention in the cases that preceded AHPETC. This is particularly so in the context of a financing transaction where the parties are sophisticated and have the benefit of legal advice and the question remains as to why the purpose clause in the underlying loan agreement, negotiated between sophisticated commercial parties, should not be sufficient to bind a borrower without the parties having to apply their minds to the concepts of "trusteeship" or "beneficial interest".

Unfortunately, since the judgment in AHPETC on this point was not examined or discussed on appeal and the Court of Appeal had merely held that "[i]t is not appropriate, on the facts of the present case, to add such private law overlays to the statutory relationship between the Minister and the Town Councils", it is unclear whether the defence of a claim of beneficial interest under a Quistclose trust would be upheld.

## Lenders beware

Without further scrutiny by the Court of Appeal, lenders should be advised that while the segregation of moneys into separate accounts may be helpful in determining whether a Quistclose trust has arisen, this is not necessarily conclusive. Additionally, the more tightly drafted a purpose clause is, the easier it would be to justify the existence of a Quistclose trust. Where the moneys are to be used for a sole or express purpose and to the exclusion of all other purposes, the requisite intention may be found. However, the absence of restrictive words, together with other factors such as the lack of fund segregation, may suggest that no Quistclose trust was intended. Such absence of restrictive words in the purpose clause itself is not fatal, however, as there may be other factors which exist which may be sufficient to evidence the requisite intention. The presence or absence of undertakings to apply the moneys to the specified purpose, and whether application of the moneys to other purposes amounts to a default, may also be relevant in such enquiry. It is also noteworthy that the courts usually undertake a holistic examination of all the circumstances in determining whether a Quistclose trust has arisen and it would therefore be prudent for lenders (in particular, unsecured lenders) to seek advice in connection with the purpose clauses to be incorporated into the lending agreements if they are concerned with the issues raised above.

Dentons Rodyk acknowledges and thanks associate Hong Chengyi for his contribution to the article.

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# S-VACC: Future of the Singapore fund industry

## Introduction

The Monetary Authority of Singapore (the MAS) had on 24 April 2017 concluded its public consultation with various stakeholders on the Singapore Variable Capital Company (S-VACC) concept. The aim of the S-VACC framework is to improve Singapore’s competitiveness as a domicile for global investment funds.

While the legislation has yet to be finalised, we will explore the features and usefulness of this proposed structure and if it will be the vehicle of choice moving forward.

## What is an S-VACC?

- The S-VACC would be a company registered with the Accounting and Corporate Regulatory Authority under the existing company incorporation framework and supervised by the MAS through the Securities and Futures Act (the SFA).

- The S-VACC structure may be used for all types of investment funds (i.e. unit trust funds, mutual funds, hedge funds, private equity and real estate funds) and schemes (i.e. authorised, restricted and exempt) in Singapore.

- The S-VACC shall only carry out the activity of a collective investment scheme (CIS) as defined by the SFA.

## Features

- The paid-up share capital of the S-VACC shall be at all times equal to the net assets of the S-VACC. The shares of the S-VACC shall be purchased or redeemed only out of the assets of the S-VACC. Therefore, any entry or exit of the S-VACC will be based on the net asset value, except for a listed CIS.

- The S-VACC will need to have at least two members at all times and their liability will be limited to the amount (if any) unpaid on the shares held by them respectively.

- The S-VACC must have a minimum of one director who is ordinarily resident in Singapore (who may also be the sole shareholder); and must have at least one director who is a director of the fund management company. For the avoidance of doubt, the sole director may also be the director of the fund management company.

- The S-VACC may be set up as an umbrella fund or a standalone fund and can be used for open-ended or close-ended structures. The sub-funds must have the same fund manager but may consist of restricted, authorised and / or exempt schemes.

- Custody of the assets of the S-VACC will be handled by an approved custodian.

- Anti-money laundering obligations may be outsourced by the S-VACC to the fund manager. However the S-VACC will still be ultimately responsible to the MAS.

## Usefulness

### Pros

- The S-VACC will not be required to disclose its register of shareholders to the public but may be required to disclose such information to supervisory and / or law enforcement agencies. Also, the financial statements of the S-VACC will not be required to be publicly accessible. This will afford the S-VACC shareholders increased privacy and anonymity as opposed to the current regimes.

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- It is not necessary to hold annual general meetings, hence resulting in lower operating costs.
- The S-VACC will be able to benefit from the more than 80 tax-treaties that Singapore is party to.
- Passporting of funds under the ASEAN CIS will allow the S-VACC to target retail investors in Malaysia and Thailand as well, hence widening the pool of potential investors.
- Foreign investment funds may be re-domiciled in Singapore, creating more business for service providers.
- With the S-VACC, the fund's directors will not be required to make solvency statements prior to the repayment of capital. In the past, directors have raised concerns as they may be personally liable for any lapses in the solvency of the fund.
- The variable capital structure of the S-VACC will allow investors to subscribe and redeem shares or units at will. This will bring Singapore in line with other jurisdictions such as Ireland and Luxembourg.

### Cons

- The S-VACC must be managed by a Singapore-based fund manager who is regulated or licensed by the MAS, unless exempted – i.e. a bank, finance company or insurance company. Therefore, fund managers currently exempt from licensing and registration due to the real estate funds exemption or entities relying on the related party exemption will not be able to use the S-VACC structure. We are of the view that this structure should also be expanded to allow fund managers, who are exempt from regulations (i.e. real estate fund managers and fund managers managing the assets of related parties), to also take advantage of the S-VACC, as allowing such expanded use would not lower any of the existing regulatory thresholds imposed on fund managers.
- The changes and proposed improvements to make Singapore more attractive for funds to be domiciled here also raise issues of investor protection. The lack of an annual general meeting, the removal of transparency afforded by publicly accessible registers of shareholders or financial statements may result in retail investors bearing the brunt of a fraudulent or negligent fund manager.
- When such funds are marketed to retail investors in our neighbouring countries, any significant losses to the investors in those countries may result in a political backlash, and may put increased pressure on the authorities in Singapore to hold those responsible to account.

## Conclusion

In order for the S-VACC to be the vehicle of choice for global fund managers and to truly increase the competitiveness of Singapore as a fund management hub, we believe that the S-VACC legislation must be expanded to allow for fund managers who are not based in Singapore to take advantage of the S-VACC structure. For example, a US-based fund manager should be allowed to domicile a fund in Singapore using the S-VACC structure, provided the fund manager and the fund meet the regulatory thresholds.

In respect of the Singapore-based fund managers, we believe that the S-VACC will be the future vehicle of choice given its flexibility.

The proposed framework offers increased opportunities for cross-border collaboration, growth for stakeholders in the fund industry and a wider investor base for fund managers to tap on. However, while the S-VACC framework increases the competitiveness of Singapore and improves the ease of doing business in Singapore as a fund manager, it also reveals the potential pitfalls for inexperienced investors.

## Disclaimer

Our views expressed in this article are based solely on the consultation paper and draft legislation issued by the MAS on 23 March 2017.

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# Litigation Brief

## Medical Negligence – The new legal test in Singapore to determine the standard of a doctor’s duty in advising his patient

A case study of *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38

### Introduction

The Singapore Court of Appeal has in its recent judgment in the case of *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38 (*Hii Chii Kok v London Lucien Ooi*) delivered on 12 May 2017, decided that the Bolam test (as supplemented by the *Bolitho* addendum) (referred to herein simply as “the Bolam test”) is no longer the applicable legal test to adjudicate on the appropriate standard of care of a medical practitioner in the provision of medical advice to his patient. The Court of Appeal has ruled that a new 3-stage, patient-centric legal test ought to be applied.

In the area of medical negligence, the contentious aspects of medical care can be broadly categorised into three aspects, namely, (a) diagnosis – establishing what the patient’s medical condition is; (b) advice – presenting information regarding what should be done (treatment options), reasonable alternatives, and the risks attendant on the various options; and (c) treatment.

Previously, the Singapore Court had applied the Bolam test to adjudicate the standard of care required in all three aspects of medical care, in order to determine whether there was medical negligence on the part of the doctor. Under the Bolam test, a doctor is not liable in negligence if he can demonstrate that there is a respectable and responsible body of medical opinion, logically arrived, that accepts the doctor’s practice as proper.

The decision of the Court of Appeal in *Hii Chii Kok v London Lucien Ooi* is that:

a. Diagnosis and Treatment: The Bolam test should continue to apply; and

b. Advice: There is a new 3-stage test.

### The Court of Appeal’s explanation for not applying the Bolam test to the issue of standard of care for a doctor’s advice to his patient

The Court of Appeal considered that the material difference between the three aspects of medical care lies in the degree of passivity on the part of the patient. With regard to diagnosis and treatment, the patient is a passive participant. In contrast, when advice is being furnished to the patient, it is the patient who is in charge and must make the choices and decisions, that is, the patient assumes an active role. The doctor’s function is to empower and enable the patient to make that decision by giving him the relevant and material information.

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At the time the Bolam test was articulated (in 1957), much less emphasis was placed on the principle of autonomy than the principle of beneficence. Doctors were thought to know best and thus, it was considered acceptable to keep a patient in the dark as to the risks and alternative treatment relating to his illness if this would make him more likely to undergo the treatment that was, in the doctor's opinion, best for the patient's health.

There has since been a "*seismic shift*" in "*medical ethics*" and "*societal attitudes towards the practice of medicine*", that warrants a new legal test to adjudicate the advice aspect of a doctor-patient relationship. In arriving at this view, the Court of Appeal observed, among others, the emphasis placed by the Singapore Medical Council's Ethical Code and Ethical Guidelines (2016 Edition) (2016 ECEG), which came into force on 1 January 2017, on the need to respect patient autonomy and the doctors' obligation to uphold their patient's "*desire to be adequately informed and (where relevant) their desire for self-determination*". The Court of Appeal noted that the 2016 ECEG reflected the fact that the "*nature of the doctor-patient relationship has evolved together with the level of education and access to knowledge of the ordinary Singaporean*". The discussion on which treatment to pursue is "*now best seen as a collaborative process involving the doctor and the patient*".

Accordingly, the Court of Appeal declared that the Bolam test should no longer be applied to the aspect of a doctor's advice to his patient given that it "*does not allow any room for the patient's perspective*".

## The new 3-stage test applicable to determine the standard of care in respect of a doctor's advice to his patient

### Stage 1

The first stage assesses the sufficiency of information given to the patient from the patient's perspective. At this first stage, the patient is required to identify the exact nature of the information that he alleges was not given to him and establish why it would be regarded as relevant and material. Information which should be disclosed is (a) information that would be relevant and material to a reasonable patient situated in the particular patient's position, or (b) information that a doctor knows is important to the particular patient in question.

Information which should be disclosed is not limited to risk-related information. Information that should be disclosed includes (a) the doctor's diagnosis of the patient's condition; (b) the prognosis of that condition with and without medical treatment; (c) the nature of the proposed medical treatment; (d) the risks associated with the proposed medical treatment; and (e) the alternatives to the proposed medical treatment, and the advantages and risks of those alternatives.

The inquiry at this first stage is "*largely a matter of common sense*." Remote risks with minor consequences or very severe consequences with very low chances of occurring will generally be deemed immaterial, and do not have to be disclosed.

The Court of Appeal made clear that the doctor's duty to advise is not satisfied by conducting an "*information dump*", which tends to cause the patient to be more confused and less able to make a proper decision. The doctor must ensure that the "*information given is presented 'in terms and at a pace' that allows the patient to assimilate it, thereby enabling him to make informed decisions*".

A contextualised approach is also adopted at this stage of inquiry to determine the personal circumstances of the patient. While a doctor has "*no open-ended duty to proactively elicit information from the patient and will not be at risk of being found liable owing to idiosyncratic concerns of the patient unless this was made known to the doctor or the doctor has reason to believe it to be so"*, it should be borne in mind that information may be rendered relevant and material pursuant to the particular questions asked or particular concerns expressed by the patient.

### Stage 2

The Court determines at this second stage of the inquiry whether the doctor was in possession of the information (which pursuant to the first stage of the inquiry is relevant and material).

The inquiry stops at this stage if the doctor is shown to not have the information at the material time. A separate inquiry may arise in respect of any negligence in diagnosis or treatment (but not advice) if the doctor does not have the information "*because he did not conduct the procedure which would have discovered that information or because he lacked the factual or technical knowledge to realise that a particular risk or alternative treatment existed".*

### Stage 3

If the Court is satisfied that the doctor possessed the information which the patient has demonstrated is relevant and material, at this third stage of the inquiry, the doctor has the burden to justify why he chose to withhold the information.

The assessment at this stage is from the doctor's perspective. The Court will decide if the doctor was justified to withhold the information having regard to "*the doctor's reasons for withholding the information and then considering whether this was a sound judgment having regard to the standards of a reasonable and competent doctor*". Expert evidence may be helpful but not necessarily determinative in the consideration of whether the doctor's withholding of information was a sound judgment (otherwise, it will effectively be the application of the Bolam test).

Three instances whereby the withholding of information may be justified:

a. Waiver situation – Where the patient expressly indicated that he does not want to receive further information about the proposed treatment or alternatives;

b. Emergency situation – Where life-saving treatment is required and the patient temporarily lacks decision-making capacity and no appropriate substitute decision-maker can be found. The Bolam test will continue to apply in this context; and

c. Therapeutic privilege – Where although the patient has mental capacity, his decision-making capabilities are impaired to an appreciable degree such that the doctor reasonably believes that the very act of giving particular information would cause the patient serious physical or mental harm. For example, patients with anxiety disorders.

## Implications and takeaways

As there is now a need to determine the sufficiency of information based on a reasonable patient situated in the particular patient's position, doctors may have to apply their minds to whether any questions posed or concerns expressed by the patient during the consultations are out of the ordinary. Such information obtained from the patient will assist in the determination of how much more the doctor has to discuss with the patient, in order to empower the patient to make his or her decision. The doctor has to carefully consider whether there are additional risks, possible complications or any other information which may be material to this particular patient, and for which the doctor should raise for discussion with the patient.

Simply going through the list of risks and possible complications in patient information sheets and consent addendum forms may not be sufficient. Doctors have to constantly apply their minds to the issue of whether there is anything on top of what is contained in the consent documents which needs to be raised with the patient.

Lastly, the importance of careful documentation by doctors of discussions with their patients was specifically underscored by the Court of Appeal in *Hii Chii Kok v London Lucien Ooi* in response to the argument raised that there could be situations whereby even properly informed patients may pursue negligence advice claims, for instance whereby perhaps under the fog of illness, the patient denies ever being apprised of a risk.

Dentons Rodyk acknowledges and thanks senior associate Yvonne Ong for her contribution to the article.

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# Property Notes

## Stamp duty changes for all shares transfers – including listed companies?

On 10 March 2017, an urgent bill was passed, with all three readings done in a single Parliament sitting on the same day. A joint press release (the Press Release) was released on the same day by the Ministry of National Development, Ministry of Finance and the Monetary Authority of Singapore, announcing “measures relating to residential property” on this particular bill, the Stamp Duties (Amendment) Bill (the Bill). The changes in the Bill are effective from 11 March 2017 (the Effective Date).

One of the primary changes announced in the Bill, was the imposition of a new type of stamp duty, coined the “Additional Conveyance Duties” (ACD) on a transfer of equity interest in an entity holding residential property. The Press Release states that the intent of the legislative changes “is not to impact the ordinary buying and selling of shares in such entities by retail investors, where the entities are listed on the Singapore Stock Exchange”.

However, the actual wording of the amendments in the Bill, in particular to section 22(1) of the Stamp Duties Act (Cap. 312) (the Act), in fact indicate that all transfers of shares in Singapore companies, whether private or listed, and whether holding residential property or not, are impacted by the changes in that:

a) Under the amended section 22(1), the time of stamping of all share transfers, whether or not the target company holds residential properties directly or indirectly, have shifted forward, from the execution of the instrument of transfer at completion (with a 14-day grace period), to the execution of the agreement for the transfer, where there is such an agreement (with a 14-day grace period); and

b) Prior to the Effective Date, transfers of shares traded on the Singapore Stock Exchange were not subject to stamp duty, as there was no instrument of transfer executed—the shares are all deposited with and registered in the name of the Central Depository under the scripless system. Now however, with the timing of stamping being shifted to the execution of an agreement under section 22(1), it would appear from the wording of the legislation that stamp duty applies to any agreements signed for the transfer of shares in a Singapore listed company, for example, in privatisation exercises.

There is currently no legislated special exemption or exclusion in the Act for shares registered on the Central Depository, except in very specific circumstances, such as in a Companies Act amalgamation, and in a conversion of a firm or private company into a limited liability partnership. In addition, the Press Release characterises the measures as relating to residential property, and does not explain that the amendment of section 22(1) impacts all companies regardless of whether they are connected with residential property. Therefore, there is a danger that other companies may not be aware of the impact on them, and this is particularly true of listed companies which may not be concerned with residential property. It is not clear, despite what is stated in the Press Release, whether this is the intended effect of the amendment to section 22(1).

Clients who have existing or proposed sales, purchases, or transfers of shares in a Singapore company, whether privately held or listed, are urged to approach their legal counsel to verify if, and what, the stamp duty implications for such transfers are.

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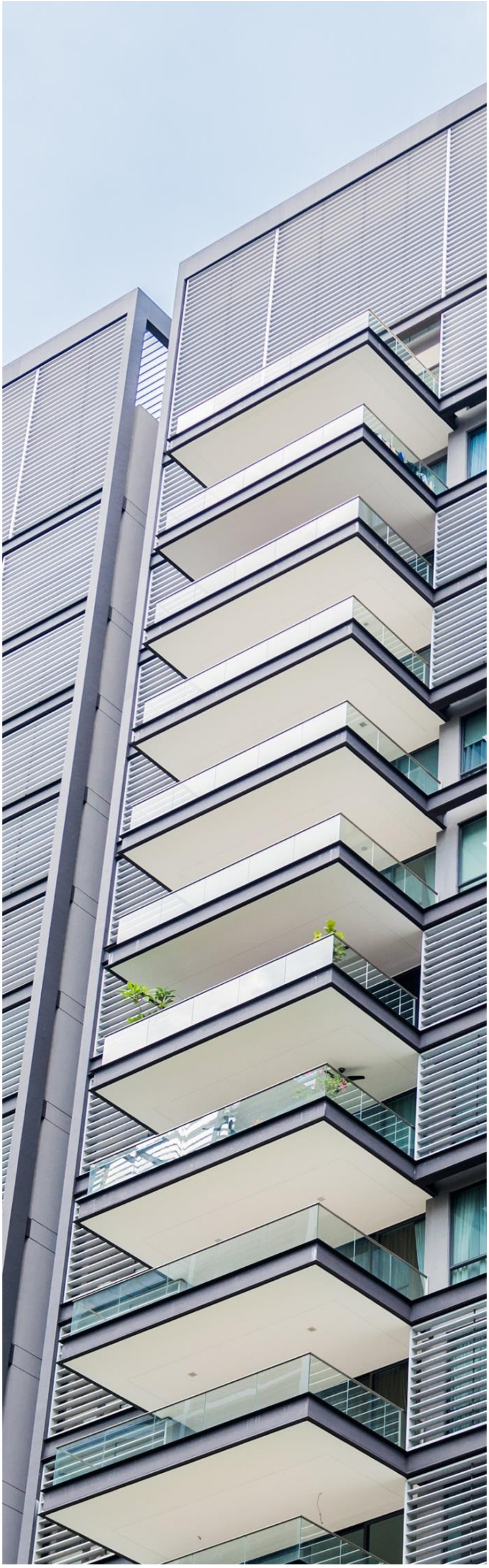
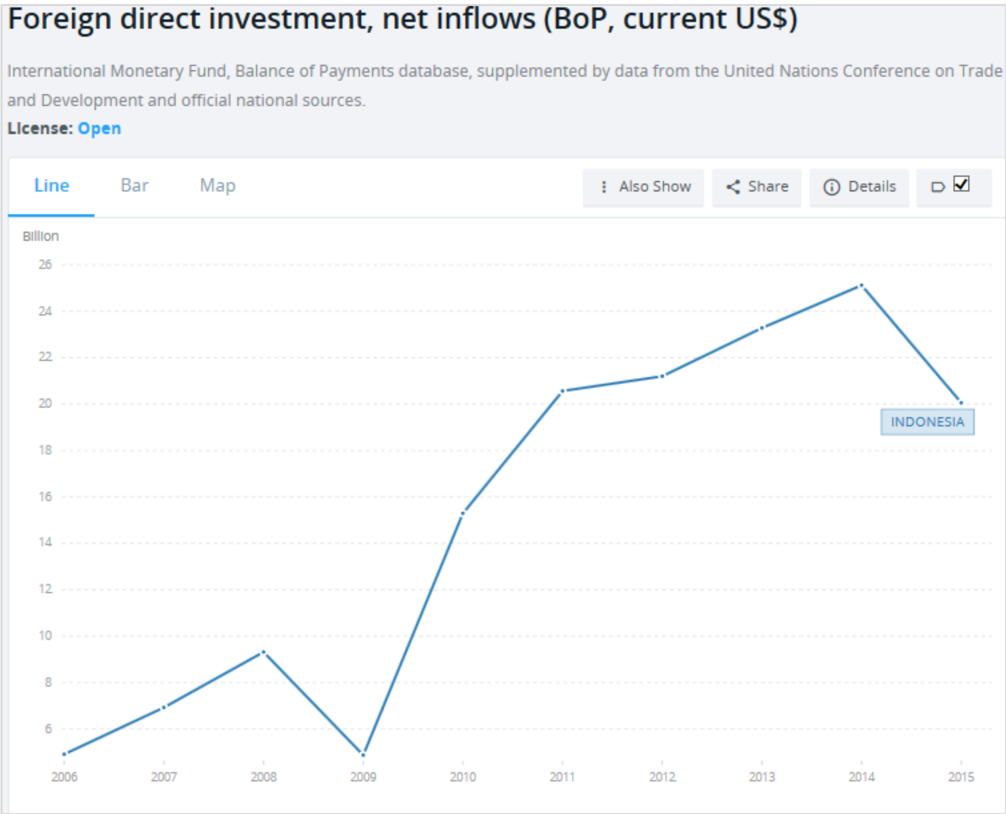


# Regional Report

## Foreign investment in Indonesia

Indonesia is the largest economy in Southeast Asia. It is rich in natural resources, such as coal, minerals and metals, oil and gas, and agricultural products such as rice, rubber and cocoa. With the fourth biggest population in the world, and a growing middle class, it is expected that Indonesia's economy will continue to grow. Just between 2006 and 2015, the inward foreign direct investment in Indonesia has already quadrupled from US$4.9 billion to US$20 billion.




Source: data.worldbank.org

## Investment considerations

### Investment vehicles

There are generally three common investment vehicles in Indonesia used by foreign investors:

(a) limited liability company with foreign investment (Penanaman Modal Asing (PMA)) status (the PMA Company);

(b) branch of foreign company; and

(c) representative office.

The most common of which is the establishment of a PMA Company. More restrictions are placed on a representative office, while branches of a foreign company can usually only be established by a foreign bank or an oil and gas company.

## Setting up a PMA company

Based on Law Number 40 of 2007 concerning Limited Liability Companies (the Indonesian Company Law), the PMA Company typically comprises the following:

(a) Shareholders;

(b) Board of Commissioners; and

(c) Board of Directors.

The PMA Company shall have:

(a) at least two shareholders;

(b) at least one commissioner; and

(c) at least one director.

For a PMA Company, while there is no requirement that at least one director or commissioner must be an Indonesian citizen, the Indonesia Investment Coordinating Board (Bada Koordinasi Penanaman Modal (BKPM)) has recommended that each company should have at least one local director. Further, there is a requirement that at least one director must have a tax identification number (Nomor Pokok Wajib Pajak) as well as a work permit (Kartu Izin Tiggal Sementara).

The minimum official investment to start a PMA Company is IDR10 billion (approximately US$750,000). The source of investment can be in the form of equity or debt, and a debt to equity ratio in the range of 3:1 is permitted by BKPM. The minimum issued and paid up capital of the PMA Company is IDR2.5 billion (approximately US$190,000) and each shareholder shall hold at least IDR10 million (approximately US$750) of shares in the PMA Company.

## Restrictions on foreign investment

There are restrictions on foreign investment set out in the 2016 Negative Investment List (Daftar Negatif Investasi) as issued under Presidential Regulation No. 44 of 2016 Concerning Lists of Business Fields That Are Closed To and Business Fields That Are Open with Conditions to Investment.

The 2016 Negative Investment List revokes and replaces the 2014 Negative Investment List, and is seen as intending to increase foreign direct investment to boost Indonesia's economy.

The key categories under the 2016 Negative Investment List are as follows:

(a) Open Business Fields – Business fields which are open to foreign investment without conditions.

(b) Restricted Business Fields – Business fields which are open to foreign investment with certain conditions.

(c) Closed Business Fields - Business fields which are closed to foreign investment activities.

Foreign investors should check the Negative Investment List to understand the restrictions that may be relevant to the industries or business fields they may be looking to invest in.

Some restrictions under the Restricted Business Fields category include restrictions on foreign capital ownership to 49% for certain agricultural related fields, divestment obligations for mineral and coal mining businesses and specific licensing requirements.

# Protection of foreign investors in Indonesia

Protection of foreign investors in Indonesia is regulated under Law No. 25 of 2007 regarding Investment (Law 25/2007), the key provisions of which are summarised as follows:

(a) Equal treatment - Article 6 of Law 25/2007 requires the Government to provide the same treatment to any investors originating from any countries making investment in Indonesia pursuant to the provisions of laws and regulations.

(b) Equal Liability - Article 16 of Law 25/2007 provides that every investor shall be liable to:

(i) secure capital originating from any sources not in violation with the provisions of laws and regulations;

(ii) bear and settle any obligations and losses if such investor halt or leave or abandon its business activity unilaterally in accordance with the provisions of laws and regulations;

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(iii) create healthy competitive business climate, refrain from monopoly practice, and any other matters that inflict damage to the state;

(iv) preserve the environment;

(v) provide safety, health, convenience, and prosperity to workers; and

(vi) comply with all of the provisions of laws and regulations.

Domestic and foreign investors have the same responsibility and obligation to comply with the laws of Indonesia, e.g. in the event there is an obligation of domestic investor which remains outstanding, such foreign investor is entitled to file a claim to the court and the domestic investor is obliged to fulfil its obligation.

(a) No Nationalization Assurance - Article 7 of Law 25/2007 provides that the government shall neither nationalise nor take over the ownership right of any investors, except through the law. In the event that Government either nationalises or takes over the ownership right of any investors, the Government is required to pay compensation whose amount is stipulated based on market price.

(b) Repatriation and Transfer of Capital - Article 8 of Law 25/2007 provides that:

(i) Any investors may transfer their assets to another party they choose in accordance with the provisions of laws and regulations.

(ii) Any investors shall have the right to transfer or repatriate in foreign currency to, among others capital, profit, bank interest, dividend, and any other revenue, proceeds of asset sale set forth in paragraph (i) above, etc.

(c) Dispute Settlement - Article 32 of Law 25/2007 provides that a dispute in investment sector between Government and any foreign investors may be settled through international arbitration based on the agreement between them.

## Financing environment

### Sources of financing

Based on the Regulation of Chairman of Indonesia Investment Coordinating Board No. 14 of 2015, the sources of financing for investment in Indonesia may be in the following forms:

(a) capital injection;

(b) profits which are reinvested;

(c) domestic loan; and/or

(d) offshore loan.

### The restrictions on offshore loan

In December 2014, Bank Indonesia (BI) issued BI Regulation No. 16/21/PBI/2014 and Circular Letter No. 16/24/DKEM regarding the Implementation of Prudential Principles in the Management of Offshore Borrowing for Non-Bank Borrowers. In addition, BI issued BI Regulation No. 16/22/PBI/2014 and Circular Letter No. 17/3/DSta on the Reporting of Foreign Exchange Flows and Implementation of Prudential Principles in the Management of Offshore Borrowing for Non-Bank Borrowers. They set out the restrictions that are implemented on domestic Indonesian companies taking out offshore loans.

### 1. Prudential Requirements

There are three prudential requirements that have to be met:

(a) Hedging ratios - The BI Regulation requires borrowers to hedge at least 25% of their open foreign exchange positions that fall due within six months. The hedging transactions in fulfilment of Hedging Requirements must be with Indonesian banks.

(b) Liquidity ratios - Borrowers are required to maintain a minimum liquidity ratio of 70%.

(c) Credit ratings - Borrowers are required to maintain a minimum credit rating equivalent to BB-. The credit rating must be issued by the rating agencies recognised by BI.

### 2. Reporting

Borrowers are required to submit reports and supporting documents including audited accounts for the financial year or quarterly financial reports to Bank Indonesia to evidence the fulfilment of its prudential requirements. Under BI Circular Letter No. 17/3/DSta dated 6 March 2015, the reporting is divided into four reports (the Implementation Activities of Prudential Principles Report (IAPP Report) /Laporan Kegiatan Penerapan Prinsip Kehatian-hatian) as follows:

(a) IAPP Report, covering the foreign currency assets and foreign currencies liabilities which are due within the next three months and six months. This report shall be submitted every three months, at the latest at the end of third month of the end of the quarterly report;

(b) IAPP Report, which has passed the attestation procedure, made by a public accountant. This report shall be submitted at the latest in June of the following year;

(c) the information concerning the achievement of credit rating. This information shall be submitted at the latest at the end of the next month after the underlying agreement/ document evidencing the external debt is signed/ issued; and

(d) the financial report covering the unaudited quarterly financial report, which shall be submitted at the latest at the end of the third month of the end of the quarterly report and the audited annual financial report (which shall be submitted at the latest in June of the following year).

### 3. Sanctions for non-compliance in reporting

Furthermore, the Bank Indonesia Regulation Number 16/22/PBI/2014 concerning the Reporting of Foreign Exchange Flows and Implementation of Prudential Principles for the Management of External Debt of the Non-Bank Corporation regulates the following administration sanctions:

(a) if the IAPP Report is submitted incomplete or is stated incorrect and has not been resolved, the reporter can be imposed with a penalty in the sum of IDR50,000 per incomplete and/or incorrect line (record) and in a maximum of IDR10 million;

(b) if the IAPP Report is submitted incomplete or is stated incorrectly, the reporter can be imposed with a penalty in the sum of IDR500,000 per IAPP Report;

(c) if the IAPP Report is submitted after the reporting period, the reporter can be imposed with a penalty in the sum of IDR500,000 per day, and in a maximum of IDR5 million; and

(d) if IAPP Report is not submitted, the reporter can be imposed with a penalty in the sum of IDR10 million.

Dentons Rodyk acknowledges and thanks associate Kevin Kam and legal executive Ng Teng Wei for their contributions to the article.

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- Life Sciences
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- Real Estate
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