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DENTONS RODYK

Business Bulletin

Are Guarantors penalised more heavily than the Borrower in case of the Borrower's default?

An analysis of Pereira, Dennis John Sunny v United Overseas Bank Ltd [2017] SGCA 62 (Pereira)

Guarantors are key elements of many loans – they reduce the need for borrowers to provide collaterals while still giving creditors security of repayment, sometimes by offering their own assets as security for the loans granted to the borrowers. While creditors may choose to seek repayment directly from the guarantor in case of the borrower's default by, amongst others, enforcing a mortgage taken out against the guarantor's property, should courts still consider whether there is a reasonable prospect that the guarantor may be able to redeem the mortgage in full before enforcing the mortgage against him?

The High Court and the Court of Appeal considered this question in *Pereira, Dennis John Sunny v United Overseas Bank Ltd* [2017] SGCA 62 (Pereira) and the Court of Appeal ultimately held that it would have jurisdiction to grant a stay of execution of an order for possession under a mortgage against a guarantor if there is a reasonable prospect that the guarantor would be able to redeem the mortgage in full. The effect of this decision is to accord parallel treatment to both the borrower and the guarantor in terms of the enforcement of mortgages against them, thereby upholding fairness to the guarantor and preserving the commercial viability of providing guarantees.

Below, we explain (A) facts of the Pereira case, (B) the difference in the approach taken by the High Court and the Court of Appeal and (C) the commercial implications of these two decisions.

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A. Facts of the Pereira Case

The United Overseas Bank Ltd (UOB) granted loan facilities to a company (Borrower) which was majority-owned by Mr Pereira. The loan facilities were secured by personal guarantees provided by Mr Pereira (the Guarantor), whose liability under those guarantees was in turn secured by a mortgage over his properties. Subsequently, the Borrower defaulted on the repayment under the loan facilities.

UOB then applied to the court for an order that the Guarantor deliver possession of the properties, which was granted on 24 August 2016 and stayed until 30 November 2016 with respect to one of the properties (the Property). However, even so, the Guarantor could not deliver possession of the Property on the scheduled date.

Therefore, the Guarantor applied for a stay of execution of the order "until 31st March 2017 or such earlier time that the [company's shares] [are] sold or otherwise dealt with, with liberty to apply for an extension if an impending sale is in the midst of completion".

The Guarantor argued that the stay should be granted as there was a reasonable prospect that the Borrower would be able to repay its debt to the UOB soon with a fresh injection of funds into the Borrower if the prospective offer for the acquisition of its shares went through. The Guarantor's application was dismissed by the Assistant Registrar, whose decision was upheld on appeal to the High Court. The Guarantor then appealed to the Court of Appeal.

B. Difference in the approach taken by the High Court and Court of Appeal

The High Court dismissed the Guarantor's application for a stay of execution on three grounds:

1. Since UOB did not have to enforce the debt against the Borrower before seeking remedies against the Guarantor, it was irrelevant whether there was a reasonable prospect that the Borrower would be able to repay its debt to UOB.

2. The High Court distinguished an earlier case, *Hong Leong Finance Ltd v Tan Gian Huay and another* [1999] 1 SLR(R) 755, on the basis that it dealt with the direct enforcement of security between a borrower and a creditor, where the borrower was given a short reprieve to satisfy his debt if there was a reasonable prospect of him doing so. However, there was no legal basis for a guarantor to require a creditor to wait for the borrower's repayment before enforcing against him due to a reasonable prospect of such repayment. Otherwise, the commercial value of a guarantee would be defeated.

3. In any case, there was no evidence of a reasonable prospect of the company in satisfying its debt to UOB.

While the Court of Appeal affirmed the High Court's decision not to grant the Guarantor a stay of execution, it did so on a different ground. Specifically, the Court of Appeal rejected both the first and second grounds of the High Court's decision. While a creditor may elect whom to enforce the debt against, once he has so chosen and the enforcement involves the realisation of a mortgage, the court may stay the execution of an order for possession by the creditor for a short period of time if there is a reasonable prospect of the mortgagor redeeming the mortgage in full. The court may grant the stay irrespective of whether the mortgagor is the borrower or the guarantor.

However, the Court of Appeal ultimately held that while a stay of execution could in principle be granted in favour of the Guarantor, the stay was not granted on the basis that the short reprieve had already been spent.

C. Commercial Implications

The Court of Appeal's approach to grant a short reprieve to both the borrower and the guarantor prior to the enforcement of mortgage against them on the ground of reasonable prospect of the mortgagor redeeming the mortgage in full is a fair one since there is no reason why the treatment of the mortgagor should differ depending on the mortgagor's identity, and a *fortiori*, no worse treatment for the guarantor.

This should be the case so that the commercial attractiveness of guarantees as a security mechanism is not over-enhanced to the point where a creditor is incentivised to constantly look to the guarantor first instead of the borrower due to the relative ease of enforcing the mortgage against the guarantor vis-a-vis the borrower.

This will prevent the scales from being tipped too much in favour of the borrower, thus mitigating issues of potential unfairness to the guarantor of having the mortgage enforced against him, possibly to the point of his bankruptcy, while the borrower may be fully solvent and yet possibly the sole beneficiary of the loan. In such case, the commercial viability of providing guarantees as a form of security will also be preserved in the eyes of potential guarantors.

Dentons Rodyk would like to thank and acknowledge Manager, Innovation & KM Solutions Rocio Perez and Ying Bao Yip for their contributions to the article.

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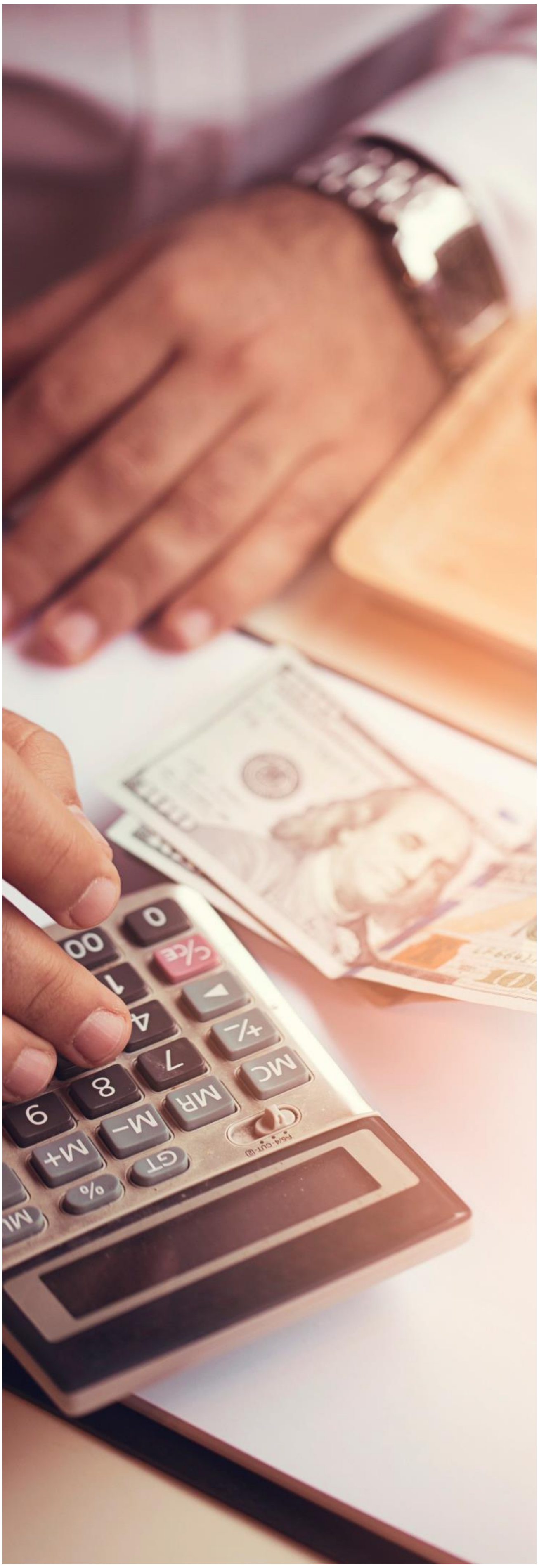
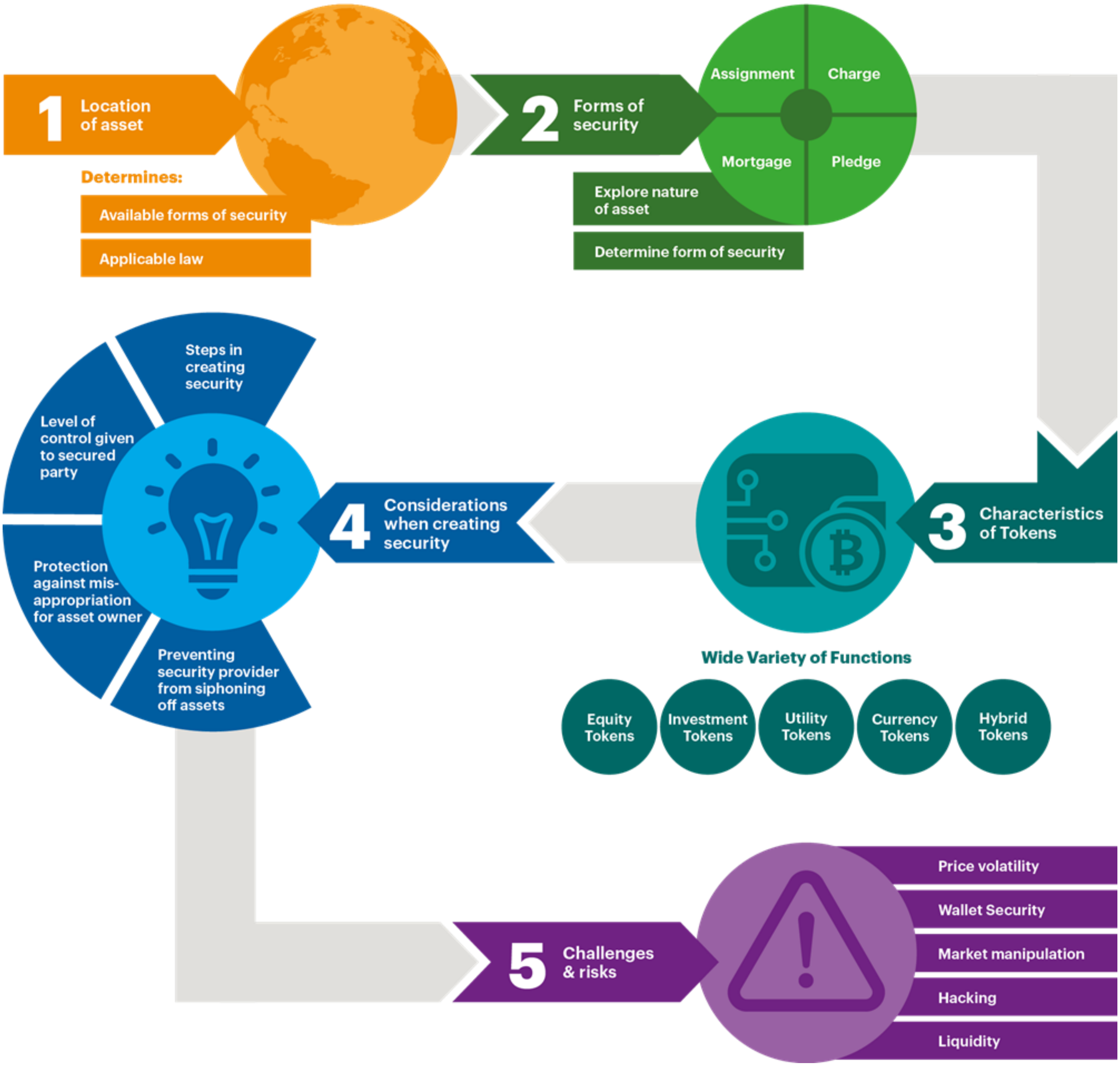


Can cryptographic tokens be used to secure your next loan?

Exploring the possibility of using cryptographic tokens to provide security for loans and other business transactions

Considerations – An Infographic Summary



I. Introduction

The secured loan market in Singapore was worth roughly US$420 billion in 2017 – with loans primarily backed by traditional assets such as property, inventory, or gold. In 2018, however, the global cryptographic token market peaked at a total market capitalisation of US$832 billion on 7 January 2018, and is presently hovering at around US$236 billion. Meanwhile, JP Morgan published a 70-page "Bitcoin bible" asserting that "cryptocurrencies are here to stay" on 8 February 2018. Even the Monetary Authority of Singapore (the MAS) is exploring the implications of "tokenising" the SGD using distributed ledger technology.

As a result, both lenders and cryptographic token holders may want to explore ways to make better use of such coins or tokens (generally referred to as "tokens" in this article) to achieve their business objectives. Given that security can be taken over almost anything that is deemed sufficiently valuable – where then, does Bitcoin (or any one of the 1597 other tokens presently available) stand?

Are these tokens a form of up-and-coming asset class, ripe to be used as security? What are the possible challenges? Should secured parties consider accepting tokens as security for loans?

The idea of using tokens as an asset for security is still in its infancy, and there is a dearth of precedent or legislation surrounding such use. This article primarily examines the nature of tokens and explores the issues to be addressed when evaluating cryptographic tokens as an asset for security.

II. The applicable law depends on where the asset is situated

Available forms of security interests vary by jurisdiction. Thus, the first hurdle to determining whether security can be taken over coins is to understand where the asset is "located" - given that the location of the asset will determine the applicable law and the type of security interest which can be taken over the asset.

While this may be a non-issue when dealing with immovable assets such as land, the answer is not as clear when it comes to tokens, which are electronic in nature and would be considered intangibles. Even though the tokens may be seemingly "stored" in a physical location, such as a hardware wallet (a storage device for certain types of tokens), they are actually encoded (stored) in the blockchain. This means that every transaction is recorded in a public ledger that is held and independently validated (corroborated) by each participating node (a connected computer) in the blockchain network. This makes it difficult to site the asset since it is both "here" **and** "everywhere".

Where a token can be easily traced to a particular tangible object, it may be easier to argue that the location of that object is where the currency is located. For example, in the case where tokens are stored in a literal token, such as a Casascius Coin (a physical coin that can be used to store bitcoin), or a hardware wallet like the Nano Ledger S or Trezor wallet, it is easier to argue that the asset should be deemed as being located with that physical object in which it is stored. In India, for example, it has been suggested that for taxation purposes the location of an intangible asset can be linked with such tangible property with which it is most closely connected, such as an operating server.

In the absence of a literal token or a physical hardware wallet, one could argue that the location of the asset should be the physical location of the server where the wallet data file is stored.

The above being said, in the absence of case law, legal precedent or legislation, a definitive pronouncement cannot be made.

III. Form of security

Security is commonly given under financing or other transactions to protect the secured party's interests in the event of a default or other specified trigger. Generally, the nature of the asset and the law of the jurisdiction where the asset is situated would determine the type of security which can be taken over an asset. In a case where Singapore law may apply, traditional common law forms of security interests such as the assignment, mortgage, charge, and pledge may be considered. Each of these security interests functions differently, involves different legal formalities and creates different legal rights and obligations. A brief overview of the types of security is as follows:

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Assignment	Mortgage
An assignment involves a transfer of a one's rights and obligations to another party through a written agreement. Assignments can be granted of over choses in action, and consequently, the right of enforce payment of a debt.	A mortgage is a transfer of one's ownership interest in an asset by way of security upon the express or implied condition that ownership will be re-transferred to the debtor on discharge of his obligation. Since it does not require delivery of possession, both tangible and intangible assets may be mortgaged.
Charge	**Pledge**
A charge is an encumbrance on an asset that gives the chargee a right of appropriation. A charge may be fixed or floating, depending on the degree of control the debtor has over the asset and charges can typically be created over any form of asset.	A pledge is the actual or constructive delivery of possession of the asset to the creditor by way of security. Since pledges depend on possession, only assets reducible to possession may be pledged, such as goods.

There is currently no case law, legal precedent or legislation in Singapore specific to the use of tokens as security. A logical starting point to explore how security can be taken would be to look at the nature and characteristics of tokens, and use this to find a nexus to an appropriate governing law and to the form of security which should apply.

IV. Characteristics of tokens

Apart from determining the location of a token (and thus the applicable governing law), we would also have to look at what kind of an asset a token is in order to place it into an asset class.

There are no homogenous rules which set out what characteristics tokens are supposed to have, and in fact, tokens serve a wide variety of functions. Currently, there are various common types of tokens, which include, but are not limited to:

Type of Token	Brief Description
Equity Tokens	These grant token holders a share in the company, such as the tZERO Preferred Equity Token.
Investment Tokens	These do not grant their holders equity, but offer dividend-like rights with payouts based on a percentage of the company's profits, such as KuCoin Shares (KCS), which equally distributes 50% of all daily trading fees paid to the KuCoin exchange amongst all KCS tokens.
Utility Tokens	These confer rights to use or consume certain products developed by the issuing company and deposited on the blockchain, like tokens from Filecoin (the largest ICO in history, raising US$257 million), which give holders the right to use empty computer storage space distributed and managed via the blockchain.
Currency Tokens	These act as currencies that can be used as a means of payment and can be held as a store of value, such as Bitcoin.
Hybrid Tokens	These share two or more different characteristics above to different degrees.

Below we discuss a few ways to look at tokens as an asset class, in order to decide the form of security which should be applicable to it.

a. Tokens as securities

In July 2017, the U.S. Securities and Exchange Commission (the US SEC) released a report which highlighted that tokens can be subject to the full scope of US securities regulation. It has also been suggested that pure investment tokens be considered securities under EU securities regulation. On 11 December 2017, the chairman of the US SEC released a statement stating that whether a token is considered securities depends on the facts. In particular, he highlighted that where the promoters of a token offering (i) emphasize the secondary market trading potential of these tokens or the potential for increase in value or otherwise (ii) profit from the tokens based on the efforts of others, these would be considered hallmarks of securities, and presumably, that token would be considered securities.

While it is possible that pure equity tokens qualify as securities under Section 2 of the Securities and Futures Act of Singapore (Chapter 289, 2006 Rev Ed) (the SFA), where “securities” is defined as, among others:

- debentures, stocks or shares issued or proposed to be issued by a corporation or body unincorporate; [or]
- any right, option or derivative in respect of any such debentures, stocks or shares”,

as it currently stands, such tokens would not be considered “book-entry securities” to which the regime for taking security over book-entry securities under the SFA would apply.

b. Tokens as Currency

The biggest cryptocurrency, Bitcoin, broadly regarded as the gold standard of the cryptocurrency market, was initially sought to be used as an alternative to fiat currency so as to decentralise currency from within the control of traditional banks. In fact, Singapore’s first cashless café recently opened up its doors several months ago, accepting among other forms of cashless payment, Bitcoin or its own cryptocurrency token, the Ducatus coin. However, unlike traditional fiat currency, cryptocurrency tokens may only be stored in hardware wallets or online coin wallets.

c. Tokens as goods

In the case where tokens are embodied in physical form, such as a Casascius Coin, that physical embodiment can be seen as a valuable object capable of being delivered as security to the creditor. However, unlike traditional valuables, the value of such a physical embodiment is rarely intrinsic. Its value as an asset only exists insofar as it functions as a store of value. Value (in the form of Bitcoins) stored in these physical coins can be accessed using private keys, but once the Bitcoins are redeemed, the physical coin loses its digital worth.

In the case of a hardware wallet such as the Nano Ledger S, the physical possession of the wallet is required in order to realize the value in it. The value in the wallet can be accessed by using private keys and various other mechanisms which are in-built into a particular type of wallet, but again however, the physical hardware wallet is only as valuable as the value of the tokens stored in it.

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V. Possible forms of security over tokens

To the extent that Singapore law applies, from a conceptual point of view (and this may be oversimplifying the issue), it would appear that an assignment, mortgage or charge could all be applicable to tokens categorised as securities or currency (when stored in online wallets). To the extent that physical cryptographic token wallets can be considered goods or personal chattels, it would be possible for these to be pledged as security.

In reality, however, the answer may be more complicated.

Namely – what are the steps needed to create the security and the appropriate level of control to be given to the secured party? Very much of this depends on how each token works and how its value can be accessed.

How can we retain some protection for the asset owner against misappropriation by the secured party since, in certain instances where the token is stored online, anyone with the requisite password(s) or private key(s) can access and deal with the tokens, and essentially "own" the tokens? Furthermore, unlike bank accounts or securities accounts where transfer restrictions may be set in place, most, if not all of the storage mediums for tokens do not contemplate such controls by third party intermediaries. This is perhaps where parties can consider having more than 1 private key (perhaps 2 or 3 which are required to be used together), held by escrow agents, to potentially reduce the risk posed by rogue intermediaries with private keys.

Also, how can one prevent a security provider from restoring the contents of a pledged hardware wallet to a new device, thereby siphoning off assets which are supposed to be secured?

Given their plethora of functions, it would be necessary to delve into the exact features of any particular token before one is able to determine what kind of asset it is, whether the traditional forms of security are suitable or applicable to it, and whether other mechanisms (such as escrows, which do not ring-fence the asset in insolvency) would be more appropriate for a beneficiary to access the value of a token when a trigger event occurs.

VI. Other challenges & risks

One of the central risk factors for tokens is price volatility, which would be a key concern to the extent that security is given to a beneficiary primarily for the latter to realize the value of the secured asset upon occurrence of a trigger event.

Since cryptocurrencies are not backed by any country's central bank, the value of tokens which purport to be currency tokens are derived purely from the market forces of demand and supply, and with that, cryptocurrency values are susceptible to large fluctuations (many have likened cryptocurrencies to Dutch Tulips). This is readily apparent from looking at the fluctuations in market capitalization. In March 2017, the entire market capitalisation of cryptographic tokens worldwide was just shy of US$24 billion. By January 2018, it had peaked at US$832 billion, before presently hovering at US$236 billion, just 6 months removed from its peak. The value of other forms of tokens such as utility tokens would be even more difficult to ascertain unless traded on a cryptographic token exchange or unless they have otherwise evolved into widespread acceptance. The same argument for the value of such tokens being derived purely from market forces of demand and supply would apply even more so.

Furthermore, wallet security and the potential for market manipulation and scams also pose concerns. In June 2017, the price of Ethereum crashed from US$319 to 10 cents within seconds following a multi-million sell order on the GDAX cryptographic token exchange. While prices eventually recovered, the vulnerability of cryptographic tokens to such market manipulation is definitely a factor for consideration.

Moreover, market manipulation is not the only external factor that potential token-based security holders need to watch out for. Given how "young" (and volatile) cryptographic tokens are, any news regarding its regulation has the tendency to alarm pundits, which often results in significant drops in prices, especially when stop-loss mechanisms result in a cascading effect. In early January 2018, the South Korean Justice Minister's announcement regarding the government's plans to ban cryptocurrency trading resulted in a steep sell off, causing both Bitcoin and Ethereum to fall by 14%. Likewise, news of potential cryptocurrency bans in India and China have elicited similarly large fluctuations.

Other potential issues include:

1. hacking incidents, such as the hacking attack on the DAO (Decentralized Autonomous Organization; an investor-directed venture capital fund based on the Ethereum blockchain), where US$50 million was stolen; and
2. liquidity concerns (at its peak in December 2017, the average time to make a bitcoin transaction was 1,188 minutes, which is an eternity given the price volatility).

The above being said, cryptographic tokens do possess a tremendous potential for growth; the 154,300% surge in the value of Ethereum between Dec 2015 and Jan 2018 (US$ 0.90 to US$ 1389) is testament to that.

VII. Conclusion

With cryptographic tokens and blockchain surging in popularity and with an increasing number of new products and tokens being created for different uses, it is likely to only get harder to dismiss cryptographic tokens as pure speculation.

However, even as cryptographic tokens become less and less foreign to the business community, and token holders look to further unlock the potential of the cryptographic tokens they hold, there are still challenges which need to be overcome to use tokens as security assets. The individual nature of each token and the underlying technology behind it could be key to its suitability and the measures required to utilise it as security assets, and lawyers would have to work hand in hand with technology experts in order to realise their potential.

Dentons Rodyk acknowledges and thanks Innovation & KM Solutions Manager Rocio Perez and Joshua Woo for their contribution to the article.

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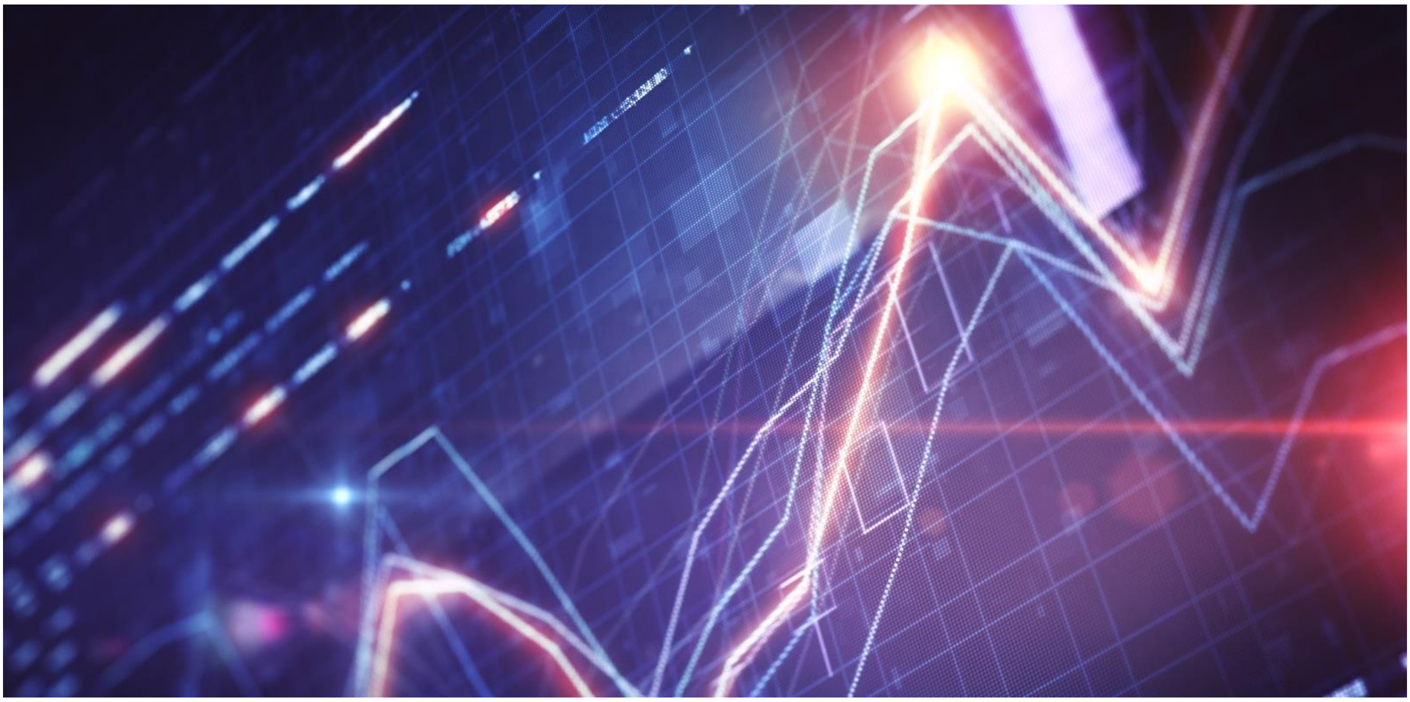

Corporate and individual bankruptcy under one roof

What to expect in the upcoming Insolvency Bill

A new Insolvency Bill in the works is expected to further transform Singapore's bankruptcy landscape, perhaps most notably by consolidating the existing individual and corporate bankruptcy legislation. At present, the rules relating to corporate and personal insolvency are generally housed separately- within the Companies Act (Cap 50, 2006 Rev Ed) and the Bankruptcy Act (Cap 20, Rev Ed 2009) respectively. This Bill would impact virtually every type of company as many will find themselves concerned with insolvency laws during their lifecycle.

In this article we explore the business rationale behind the changes and the nature of the expected amendments.

Phases of transformation

Singapore has made great strides to become an international debt restructuring hub. The Singapore Parliament last year made extensive changes to Singapore's insolvency laws via the Companies (Amendment) Act 2017 (the Act), drawing on the experience of other jurisdictions.

Indeed, Singapore became the first common law jurisdiction in recent years to introduce a hybrid scheme mixing the best elements of the UK regime with those of the US, seeking to create the optimum environment for businesses and investors involved in debt restructuring.

However, as Minister for Law K Shanmugam pointed out in his keynote address at the Singapore Insolvency Conference 2017, there is still work to be done. Separate regimes for corporate and personal bankruptcy carry the potential for each to develop independently of the other, despite the obvious commonalities between them. Certain provisions also straggle behind in subsidiary legislation, such as the Companies (Application Of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Rev Ed). This creates uncertainty as to how the interplay between both Acts is to be balanced.

In that same keynote address, the Minster for Law announced that we may soon expect a new Insolvency Bill that will bring, under an omnibus legislation, laws governing both personal and corporate restructuring and insolvency. This feature is just one amongst other new features that serve to further develop laws that aid businesses in distress. We discuss some of the key changes we can expect to be made via the new Insolvency Bill below.

Expected changes

i. Consolidation

One primary expected change is the consolidation of the personal and corporate insolvency regimes which could iron out the kinks in each Regime and to bring each into alignment.

For instance, the current rules concerning the avoidance of transactions will likely be streamlined to apply to companies and individuals equally. Under the corporate insolvency regime, in the time leading up to the filing of the winding up petition, certain debtor companies may be tempted to dispose of their assets by transferring to other entities within the group so as to place these assets out of the reach of creditors.

The existing insolvency laws allow the liquidator to take steps to avoid such transactions if certain requirements are met. In the case where the recipient company is related (i.e. an "associate"), these requirements are easier to meet. However, when it comes to companies in a similar position – matters become more complicated since provisions defining an "associate" and governing avoidance are located within the Bankruptcy Act.

The Court of Appeal encountered such a problem in *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd and another* [2002] 2 SLR(R) 1143: it was then not clear whether an associate of the insolvent Show Theatres would include two companies which exercised certain control over it. The Court rightly pointed out at [17] that *"much of the difficulty arose because provisions meant to be applicable to the bankruptcy of an individual are made to apply to the winding up or judicial management of companies."*

Although the specific issue concerning whether a company exercising control constitutes an associate has been clarified, the current misalignment between the

Bankruptcy Act and Companies Act persists in other areas. Thus, an omnibus piece of legislation that dovetails the respective provisions certainly holds promise.

ii. Outstanding Recommendations of the Insolvency Law Review Committee

In his speech, the Minister for Law also announced that the proposed Insolvency Bill would cover areas that were recommended by the Insolvency Law Review Committee (the Committee) that have not yet been enacted in the 2017 changes. In particular, the Minister made reference to a framework within which insolvency practitioners would be governed, increasing accountability and the general quality of services.

It seems that we can also expect other recommendations that the Committee made, but have yet to be covered by the existing regulations. Some of the substantive recommendations include:

1. Standardisation on the rules of proof of debts across all insolvency proceedings. Presently, section 327(1) which makes "all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages" provable in winding up, contains a carve-out for the winding up of insolvent companies. The carve-out would instead be governed by the separate set of rules embodied in section 87(3) of the Bankruptcy Act. As a result, currently, some debts which are not provable in an insolvent liquidation are provable in the liquidation of a solvent company. These rules are important to businesses as they dictate what debts may be recovered in the event of insolvency.

2. Imposition of a bar on the realisation of security after 12 months from the winding up order. This would extend the existing equivalent rule under the Bankruptcy Act into the corporate sphere. At present, it is not clear on the face of the provisions, whether this bar in section 76(4) of the Bankruptcy Act, applies to corporate insolvency pursuant to section 327(2) of the Companies Act. If this recommendation is adopted, businesses who intend to look to security must therefore remain vigilant in the enforcement of security; delay could cost them dearly.

3. A noteworthy proposal relating to matters other than harmonisation of the regimes is the introduction of summary liquidation. If adopted, the Official Receiver or private liquidator will be able to seek an early dissolution where the following conditions are met:

   a. The realisable assets of the company are insufficient to cover the winding-up expenses;

   b. The affairs of the company do not require any further investigation;

   c. The creditors and contributories are given reasonable notice; and

   d. In the case of a private liquidator, the Official Receiver's consent is obtained.

This would improve efficiency in clear-cut cases, and enable creditors to more quickly recover as much of their debts as possible. In the context of liquidation, any lost time may exacerbate the already depreciating value of some of an insolvent company's assets.

Conclusion

The Minister suggested that the Insolvency Bill was likely to be presented in the latter half of 2018. Ultimately, this Bill would impact virtually every type of company as many will find themselves concerned with insolvency laws during their lifecycle – whether as creditor, shareholder, supplier, potential claimant or lender to an insolvent company, or indeed as the beneficiary of an insolvency regime. It would therefore serve businesses to keep an eye on developments as Singapore's dynamic bankruptcy legislation continues to progress.

Dentons Rodyk acknowledges and thanks Zoe Pittas for her contribution to this article.

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Property Notes

Embracing the Assisted Living Model for Singapore

The real estate industry is a natural beacon of innovation – where architects, designers, engineers, developers and planners come together to define how we live, work, and connect with each other. As the industry faces a wave of disruptive technology, automation and digitisation, there is no time like the present to find innovative ways to serve the segments of our population with distinct and pressing needs.

For example, as Singapore's population ages, the real estate industry needs to forge transformative collaborations between the Government, entrepreneurs, developers, healthcare providers and non-profit groups to provide effective solutions for senior living – even if this requires broad-based reforms.

These challenges are not unique to Singapore and we have the opportunity to leverage on both traditional and novel industry resources to come up with solutions such as the assisted living model, commonly followed in the west. This model provides appropriate levels of support and care environments to suit the needs of the seniors at different levels of physical and mental capacities, allowing them to age in place. The emphasis is on preventative and rehabilitative environments that provide long term care and which will reduce the burden on the public health cost and on the younger generation.

This may challenge all industry players to consider:

- new types of property ownership schemes;
- architectural designs which foster community and make services, such as groceries and healthcare more accessible; and
- how to integrate into the building design smart home technologies suited to senior living.

When more senior housing options such as the assisted living model are presented and find acceptance, the key players in the industry must be ready to step up to the task to help bring the issue to a socially responsible and economically rewarding resolution. Even as society is faced with a disruptive and changing landscape, it is imperative that we embrace innovation and transformation as we face up to these new challenges.

This article first appeared in REDAS 58th Anniversary Dinner Book: "Transforming the Real Estate Industry" on 14 November 2017, as a message from Melanie Lim, Honorary Legal Adviser of REDAS.

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Proposed changes to Act to enable stamp duty on electronic contracts for Real Estate

The Government has just tabled a Bill to amend the Stamp Duties Act (Cap. 312) with the main objective of applying the Act to an electronic record that wholly or partly effects a property or share transaction, or evidences such a transaction.

In this regard, a new Part VIIIA titled "Application of Act to Electronic Instruments" has been added to the Act, comprising definition section 59 and sections 60 and 60A-H.

What is an Electronic Instrument?

An Electronic Instrument is an electronic record, or a combination of electronic record and a physical document. An electronic record has the meaning given by section 2(1) of the Electronic Transaction Act (Cap. 88) which legitimises electronic transactions. For example, anything sent by email, SMS or any internet-based messaging service is an electronic record.

Stamp duty is chargeable under the Stamp Duties Act on certain instruments that effect a transaction as provided in the relevant Schedules of the said Act. Proposed new section 60A states essentially that a reference to an instrument that effects a transaction includes -

a) an electronic record that effects, or an electronic record and a physical document that together effect, the same transaction, and

b) an electronic record that concludes the same transaction which is effected by a verbal communication and electronic record.

The proposed new section 60C(1) elucidates that an electronic instrument which is an electronic record is treated as signed when an electronic signature is applied to it. An "electronic signature" means any electronic method used to identify a person and to indicate that person's intention in respect of the information contained in an electronic record.

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An electronic instrument comprising of an electronic record and a physical instrument is treated as signed -

a) if the transaction is concluded by the electronic record, when an electronic signature is applied to the electronic record, or

b) if the transaction is concluded by the physical instrument, when the physical document is signed.

Section 60C(3) elaborates that the time and place of the signing of the electronic document shall be the time when and the place where the signing party does an act that results in the application of the electronic signature to the electronic record. For instance, A sends an email from outside of Singapore offering to sell a property in Singapore to B. The latter then sends an email from Singapore accepting the offer of A. If there is a contract concluded, the electronic instrument comprising of the 2 emails is treated as executed in Singapore and at the time B sends the second email accepting the offer.

It is also made clear in section 60(5) that reference to the signing party includes a person authorised by the signing party to apply the electronic signature on the signing party's behalf. However, it excludes online intermediary which provides the facility for the application of such electronic signature.

Impact of these new provisions

These new provisions of the Stamp Duties Act are not expected to have any immediate impact in the real estate industry. For avoidance of doubt, there is no change in stamp duty rates or the principles thereof.

The changes do set the stage for electronic contracts for real estate transactions which is widely viewed as a necessary stage in the move towards the total digitisation of the real estate industry. In this regard, we can expect further changes in the law, including the Electronic Transaction Act which appears to exclude real estate transaction in its application.

It is foreseeable in the near future that real estate lease or tenancy contracts might be concluded via electronic contracts. This will help improve the efficiency in the process of the leasing of apartments which generally do not involve large sums of money passing between parties.

In the meantime, the large monetary value of real estate may stand in the way of people's willingness to use electric records to conclude a real estate transaction for sale and purchase cases. In this regard, real estate transactions of larger quantum in value (like collective sales) will continue to be managed by professionals who can ensure the authenticity and accuracy in such transactions amid advising on many legalities of important aspects of the deal.

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IP Income and Tax Incentives in Singapore

Recent efforts to address global concerns around base erosion and profit sharing (BEPS)

Introduction

As of May 2018, Singapore has excluded intellectual property (IP) income from the Pioneer Service Incentive (PC-S) and the Development and Expansion Incentive (DEI), both of which are awarded by the Economic Development Board (EDB) to companies investing in Singapore.

This is a result of the recent changes under the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act 2018 (Amendment Act) and the Economic Expansion Incentives (Relief from Income Tax) (Intellectual Property Income) Regulations 2018 (Regulations).

These changes are part of a broader international effort to address concerns around tax planning practices that may lead to base erosion and profit sharing (BEPS). They not only demonstrate Singapore's commitment to fostering a conducive business environment in line with global tax trends, but may also incentivise companies with IP holdings in Singapore to shift more substantial business activities to Singapore.

Background on IP Income exclusions

IP is frequently used in the tax planning of multinational corporations (MNCs) because it is mobile and valuable. With its favourable tax environment and robust business infrastructure, Singapore has proven to be an attractive destination for MNCs to house their IP. However, in recent years, there have been concerns that such practices, amongst others, give rise to opportunities for base erosion and profit shifting (BEPS).

Put simply, BEPS occurs when there is a mismatch between where profits are booked and where profits are generated, leading to a reduction of taxable base for certain countries. As such, certain practices of global tax planning, such as IP holding, have since faced greater scrutiny. Most notably, in 2013, the OECD and G20 countries have adopted a 15-point Action Plan to address BEPS (BEPS Action Plan). Singapore has accordingly committed to making amendments to its tax regime.

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The BEPS Action Plan identified 15 actions along three key pillars, with the overarching goal of "aligning taxation with value creation". It involves changes to both domestic law and practice, and international treaty provisions. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) in 2017 is one key milestone of the BEPS Action Plan. With MLI, signatories can modify their existing double tax agreements (DTAs) to implement the BEPS minimum standards and other tax treaty measures. Singapore was one of the 67 countries which signed the MLI.

Changes to Singapore's approach to taxing IP Income

On the international front, Singapore has thus far taken a cautious approach – making provisional commitments to adopt certain provisions, while reserving the right to not adopt others. Potential modifications to Singapore's DTAs may affect when Singapore taxes profits arising within its territory. Companies therefore need to keep up with upcoming changes to Singapore's DTAs and domestic laws, as they will affect tax planning.

Singapore is also reforming the current tax incentives pertaining to IP income. As mentioned, the new legislation excluding IP income from PC-S and DEI has taken effect. The Regulations consider royalties or other income to be received as IP income if they are receivable as consideration for the commercial exploitation of the IP right.

Transitional provisions

As there are a large number of companies which have obtained existing tax incentives which grant concessionary tax rates for IP income, the new legislation includes transitional provisions for such companies.

Companies whose PC-S or DEI is approved or extended on or after 1 July 2018 would cease to enjoy the concessionary tax rate for its IP income from the date of the approval or extension onwards. For companies whose PC-S or DEI was approved before 1 July 2018, the transitional provisions would apply in the interim period from 1 July 2018 to 30 June 2021. Transitional treatment would depend on whether the income is derived from "New IP Rights" or "Existing IP Rights".

Existing IP Rights are those acquired before 1 July 2018 and are not a right under sub-section (b) of the following definition of New IP Right. New IP Right refers to:

a) IP that comes into the ownership of the company on or after 1 July 2018; or

b) IP acquired from related parties after 16 October 2017 but before 1 July 2018 where the main purpose or one of the main purposes of the IP acquisition is to avoid income tax in Singapore or elsewhere.

IP income derived from Existing IP Rights will be grandfathered and subject to the concessionary tax rate under the existing PC-S or DEI until 30 June 2021, while IP income derived from New IP Rights will not be.

Companies seeking to take advantage of the transitional provisions would need to track their IP income derived from Existing IP Rights and New IP Rights. The Regulations provide some guidelines as to how the tracking should be done.

The Amendment Act also gives the Minister power under the Economic Expansion Incentives (Relief from Income Tax) Act to amend the concessionary tax rates of companies that have been granted the DEI. The Minister can exercise such discretion on his own initiative or on application by the company.

IP Development Incentive

In place of these incentives, the IP Development Incentive (IDI) has been proposed in Budget 2017. It is expected to incorporate the modified nexus approach, which is essentially a substance-based test, and should therefore comply with the BEPS Action Plan. It is hoped that further details will be released soon.

Conclusion

As a small and open economy, Singapore has earned a reputation for being business-friendly. Committing to comply with the BEPS Action Plan is not only an act of international comity, but one which opens up new opportunities for the economy. In light of the changes in the global tax environment, it is likely that MNCs will take greater advantage of Singapore's conducive business environment and shift more substantial business activities here, in order to comply with the BEPS Action Plan, and to qualify for tax incentives.

If you are interested in understanding how these changes would affect your tax planning, please feel free to reach out to us.

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Accolades

International Tax Review Indirect Tax Leaders 2018

Dentons Rodyk Senior Partner and Head of Tax practice Edmund Leow, SC has been listed as one of the world's leading indirect tax practitioners by International Tax Review 2018. Now in its seventh year of publication, the *Indirect Tax Leaders* guide identifies the leading individuals working in indirect tax around the world, as selected by their fellow tax professionals – market leaders chosen by market leaders.

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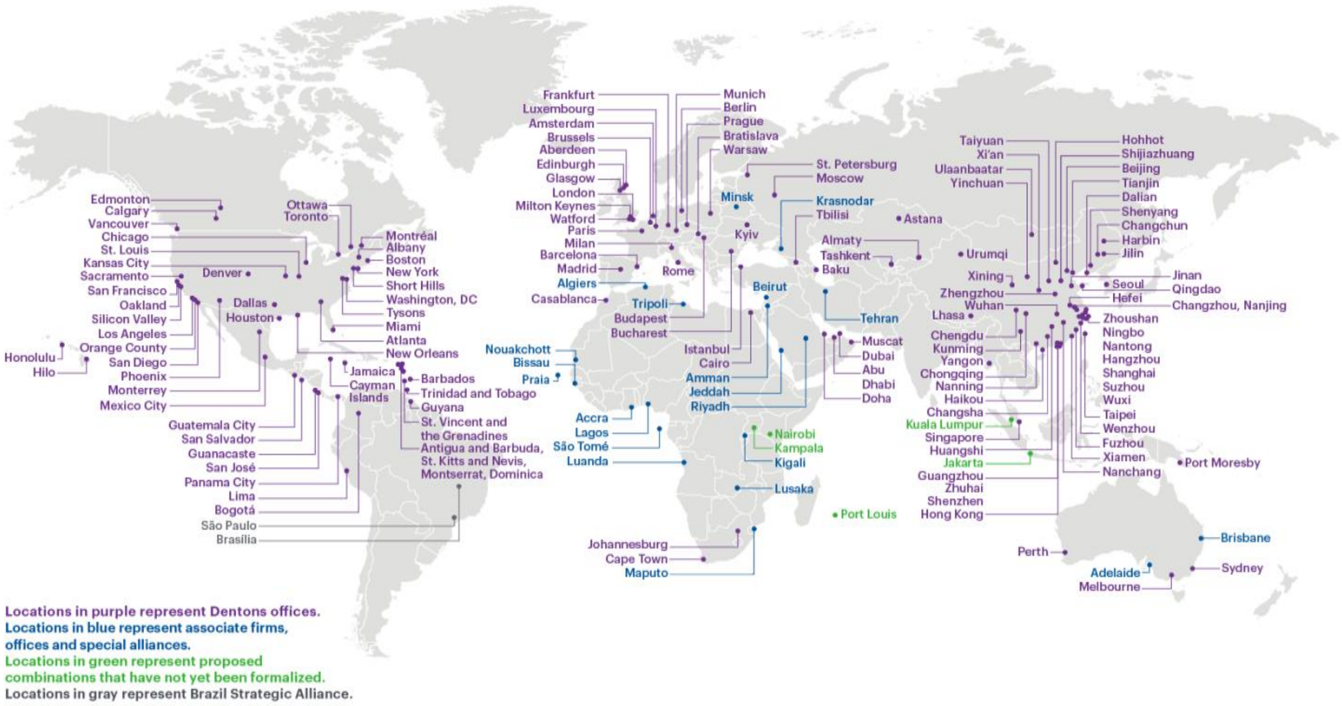

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