Reporter

Issue 03 (2019)

Thailand Seminar @ The Stock Exchange of Thailand

IN THIS ISSUE

In Dentons' recent foray into the Land of Smiles, our partners co-hosted, at the invitation of the Stock Exchange of Thailand (SET), a successful seminar which drew positive responses from over 230 Thai legal luminaries who attended the event in Bangkok at the SET.

Our speakers Senior Partner Valerie Ong, Partner Ira L. Kotel and Partner Eunice Yao presented an interactive and engaging session on the topic "**Working with Outside Counsels**". Valerie and Ira led the session and provided practical insights on the subject matter to the audience from the perspective of Singapore and the US.

Interactions amongst three jurisdictions

The seminar presented an excellent opportunity for interaction amongst the lawyers from Singapore, New York and Thailand, seeing how the laws and trends from three different jurisdictions shared common ground, and was extremely insightful.

The opening address was delivered by Mr. Rongrak Phanapavudhikul, Executive Vice President of SET, Head of Legal Division. In addition to Valerie and Ira, Mr. Seri Chintanaseri, past president of the SET, and Mr. Prasobsuk Boondej, former Appeals Court President, Chief Judge of the Intellectual Property and International Trade Court and the Senate President, elaborated on their experiences in enhancing the collaboration between in-house counsels and outside counsels.

Working with Outside Counsels

In-house counsels work closely with external counsels through the corporate life cycle, from start-up funding rounds to trade sale, to IPO and ultimately becoming global multi-nationals.

The seminar started off with an emphasis of the partnership and synergy between in-house counsels and external counsels. Presenters Valerie and Ira encouraged the in-house counsels in attendance, drawing from their practice experiences in Dentons, to engage with and communicate often with outside counsels as part of a healthy extended partnership.

Funding and effective partnerships at various stages of the corporate life cycle

Valerie and Ira expounded on how at all stages of the corporate life cycle, in-house counsels and outside counsels can, and do, effectively work together to enhance the value and importance of outside counsel engagement to in-house counsels and the value in-house counsels bring to their own organisations.

Walking through the continuum of aspiring start-ups to the phase of more mature enterprises, Valerie illustrated how Dentons' relationships with in-house counsels evolve. She also gave a synopsis of the funding environment in Singapore, while Ira focused on the US stock market and US foreign direct investment.

Corporate Governance Trends

The speakers then shared their experiences working with companies as well as serving as independent directors on the boards of listed companies, noting how good corporate governance is key and beneficial to businesses. Valerie and Ira gave an overview of the best practices, and trends in, corporate governance for public companies on the Singapore and New York stock exchanges. They talked about recent developments, such as board diversity and the rise of activist investors, foreshadowing the need to seek outside counsels' guidance and counsel in their interactions with shareholders and global investors.

Looking ahead

The seminar highlighted the different challenges which in-house counsels face in this new age, wherever their organisations are located. With the ever-evolving demands of stakeholders in relation to financial performance or to comply with sustainability standards, companies and their boards have to adapt their businesses and refresh their strategies continually. These issues are not isolated to any specific jurisdiction but will impact all companies, big or small, in our increasingly connected global ecosystem.

Dentons Rodyk thanks and acknowledges senior associate Yu Herng Lim for his contributions to the seminar and this article.

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Business Bulletin

The Payment Services Act and how it affects FinTech in Singapore

Introduction

Recognising the new risks arising from technology, which is transforming payments, as well as from the merging of services that were previously regulated separately, the Payment Services Act (PSA) was passed into law on 14 January 2019. With the aim of providing for the licensing and regulation of payment service providers, the oversight of payment systems and connected matters under one consolidated act, the PSA seeks to combine the previous Payment Systems (Oversight) Act 2006 and the Money-Changing and Remittance Businesses Act 1979 into a forward looking and flexible framework. At the same time, the PSA aims to create an innovative environment for Financial Technology (FinTech) in Singapore.

In summary, the PSA comprises of two (2) parallel regulatory frameworks – (a) a designation regime which allows the Monetary Authority of Singapore (MAS) to designate significant payment systems which are widely used in Singapore or where operations have an impact on other payment systems in Singapore, to maintain financial stability of the payment services market, as well as ensure efficiency and competition in the financial system to the extent a payment system becomes widely used and dominant and can potentially shut off competition and new innovative players, and (b) a licensing regime which allows the MAS to regulate a wide range of payment services in a way that matches the scope and scale of such services provided by each service provider.

The focus of this article will be on the licensing regime, and will be broken up into three parts:

Part I. General Provisions will examine the provisions in respect of the licensing regime for payment service providers;

Part II. Licences will cover the legal obligations that payment service providers need to comply with; and

Part III. FinTech Activities will broadly analyse how certain blockchain or financial technology (FinTech) activity is affected by the PSA.

Part I. General Provisions

Under the PSA, any entity that engages in the provision of payment services will need a licence in order to provide those services. What constitutes "payment services" under PSA can be broken down into seven broad categories:

1. account issuance;
2. domestic money transfers;
3. cross border money transfers;
4. merchant acquisition;
5. e-money issuance;
6. digital payment token; and
7. money-changing.

While these services and their definitions are broad in nature, there have been specific exceptions, which are provided for under the PSA.

The seven broad categories of payment services will be licensed under three classes of licences, namely the money-changing licence, the standard payment institution licence and the major payment institution licence. The MAS has anticipated that a service provider may provide more than one payment service as part of their business. However, each class of licence is intended to be broad enough to deal with the different combinations of payment services that a service provider may offer, thereby allowing each service provider to hold only one of the three classes of licences. Regulation for each licence holder is scaled in proportion to the risk, which the service provider poses to the public. Please refer to Part II of this article for details on the services covered under each class of licence.

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To combat the risk of payment services being used for any illicit activities, any licence holder will need to comply with the various anti-money laundering and countering the financing of terrorism (AML/CFT) regulations and may in certain situations, need to set up cybersecurity procedures to reduce technological and cyber risks. The main aim of ensuring compliance with these regulations is to protect the everyday consumer against the loss of funds or merchant insolvency.

Part II. Licences

The payment services covered under each class of licence are broadly:

a) the standard payment institution licence is required where the licensee carries on one of the payment services (save for money-changing service) or two or more of the payment services (including money-changing service);

b) the major payment institution licence is required where:

   i. the licensee carries on one or more of the payment services (save for money-changing service or e-money account issuance service) and the average of the total value of all payment transactions by the licensee in one (1) month exceeds S$3 million (or equivalent in foreign currency) for any one of the payment services or S$6 million (or equivalent in foreign currency) for 2 or more of those aforementioned payment services;

   ii. the licensee carries on the business of providing e-money account issuance service and the average over a calendar year of total value in one day of all e-money stored in any payment account exceeds S$5 million (or equivalent in foreign currency); or

   iii. the licensee carries on the business of providing e-money issuance service and the average over a calendar year of the total value in one day of all specified e-money issued by the licensee exceeds S$5 million (or equivalent in foreign currency); and

c) the money-changing licence is required where a licensee carries on a business of providing a money-changing service unless the licensee has a standard payment institution licence or major payment institution licence that allows such licensee to carry on money-changing services.

In respect of blockchain and FinTech activities, this Article will be focusing primarily on the standard and major payment institution licences.

A. Standard Payment Institution Licence

For a service provider which wishes to engage in any payment services, it will need to apply to the MAS for a standard payment institution licence. It should be noted that standard payment institutions are subject to specific thresholds. They may only accept, process or execute an average of S$3 million for any one of the above mentioned payment services per calendar year or S$6 million per calendar year for 2 or more of the above mentioned payment services. If the thresholds have been exceeded, then the service provider **must** apply for a major payment institution licence. Standard payment institutions subject to the abovementioned various thresholds will need to comply with the various legal obligations as licence holders.

MAS hopes that with lighter regulation on standard payment institutions, the licensing regime may continue to encourage innovation and enterprise. This can encourage smaller e-money and digital payment token service providers with lower than S$5 million in average daily float, an opportunity to enter into the market without having to be concerned about being heavily regulated as compared with major payment institutions.

Additional shareholding restrictions on licensee

Any individual or entity anywhere in the world is prohibited from becoming a 20% controller of a licensee without first applying for an obtaining the approval of MAS. This is a significant impact and consequence of the legislation because it gives MAS the ability to scrutinise the entities and individuals behind such payment service providers. Furthermore, this restriction is not limited to potential 20% controllers of the company, but also existing 20% controllers. Should MAS raise an objection, that person must then cease to be a 20% controller of the licensee. Indeed, any issue or offer of shares against the direction or restrictions imposed by MAS will be void.

Control of officers of licensees

Appointment of CEOs or partners by a licensee requires the prior approval of the MAS.

Inspections, investigations and emergency powers

The MAS may inspect under conditions of secrecy, the books of the licensee or exempt payment service provider and investigate such licensees or exempt payment service providers to determine whether they are conducting their business in a way that can be detrimental to the interests of their customers, or where there is a suspected offence under the PSA.

In the event that the licensee is unable to meet its obligations, where it appears necessary to the MAS, the MAS may exercise its powers over the licensee, which includes assuming control over and management of the business of the licensee.

Assistance to foreign regulatory authorities

Furthermore, the MAS may even provide to regulatory authorities outside Singapore materials from such digital token payment service providers materials to enable them to carry out an investigation or enforcement when requested to do so.

B. Major Payment Institution Licence

Should a service provider exceed the specified thresholds under the PSA, the service provider will need to apply for a major payment institution licence. Major payment institution licensees are subject to more regulation under the PSA as their scale of operations will pose greater risk to the public.

Besides the general statutory obligations mentioned above, which standard payment institutional licensees are subject to, major payment institutional licensees are also required to maintain with the MAS a prescribed amount for due performance of its obligations to every payment service user who is a customer of the licensee, in the event of insolvency. As prescribed by the PSA, a major payment institution has to put the following safeguards in place: 1) an undertaking or guarantee by any bank in Singapore or prescribed financial institution to be fully liable to the customer for such monies; 2) a deposit in a trust account; or 3) any other safeguards as may be prescribed by MAS.

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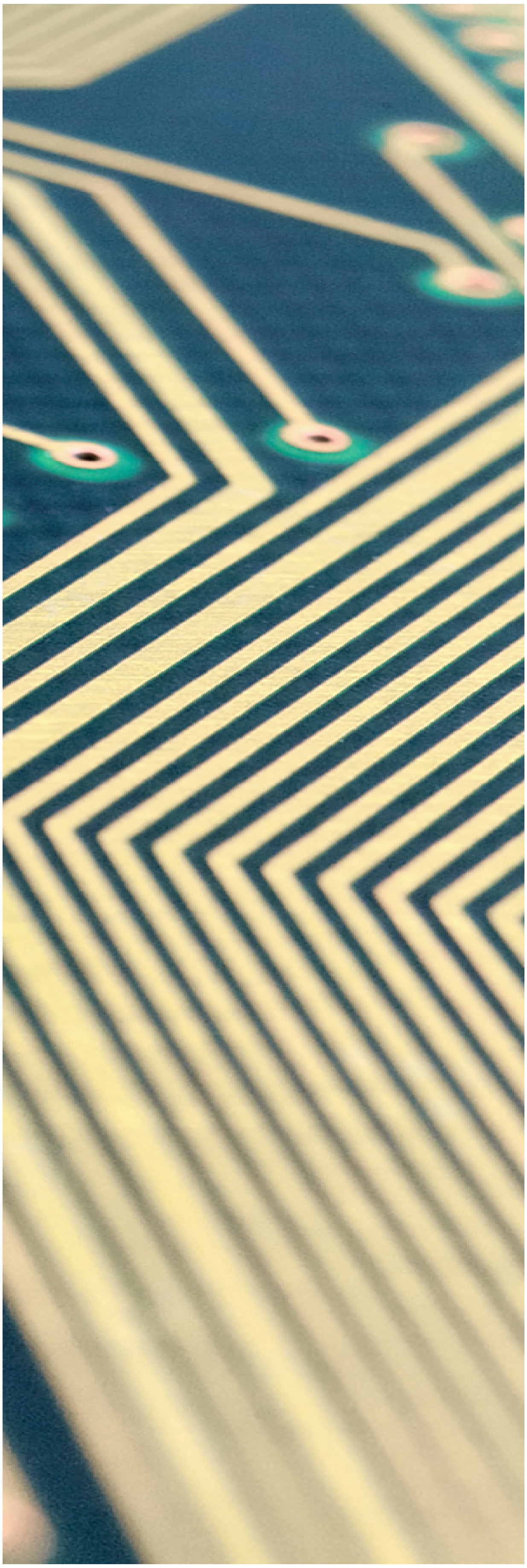

Interoperability

As mentioned, with the influx of payment services in Singapore, the MAS is concerned that payment solutions in Singapore will become fragmented and confusing to the average consumer. As such, the MAS has been encouraging the payment services industry to ensure that the various payment services are interoperable and has introduced a standardised and unified QR code called SGQR. As a last resort under the PSA, MAS has the power to ensure interoperability between payment service providers. Such power to ensure interoperability is only applicable towards major payment institutions, exempt payment service providers or a person exempted under section 100 of the PSA. However, this does not apply to digital token providers and cryptocurrency exchanges because they do not issue payment accounts or operate payment systems within the definition under sections 25 and 26 of the PSA.

Given MAS' stance on interoperability, businesses which are seeking to start up and expand their own payment services business should be mindful while conceptualising or designing their proprietary payment services system or framework, including the software architecture.

Part III. FinTech Activities

With such a broad and expansive scope, how does the PSA affect FinTech activities in Singapore? In the next section of this article, we will be exploring the following three FinTech activities: (A) Digital token exchanges and providers; (B) Platforms with stored values; and (C) Sale and/or issuance of digital tokens.

A. Digital Token Exchanges & Providers

Introduction

While there appears to be differing but actually overlapping definitions of what a "digital token", "cryptographic token" or "cryptocurrency" is, for the purposes of this article, when referring to a "digital token", we will be referring to the broad category of digitally recorded instruments, whether or not stored on a blockchain, decentralised or encrypted using cryptography. These have taken on many different and increasingly complex characteristics since becoming popular in 2017 and 2018 when offerings of digital tokens became widely popular and were used as an alternative source of fundraising. These range from:

a) pseudo-currencies (commonly known as cryptocurrencies);

b) utility tokens (tokens which allow access to services or products which have been developed or were promised to be developed); and

c) securities tokens (tokens which had features resembling securities, debts or sophisticated financial instruments or products).

Under the PSA, the characteristics or function of the digital token is what determines which relevant licence is to be obtained. Businesses seeking to introduce the use of digital tokens into their existing businesses, whether as a medium of exchange unique to its platform or ecosystem (whether or not pegged to fiat currency), or as a store of fiat currency, will have to grapple with the issue of whether the introduced token and the system on which the tokens circulate, are subject to licensing and regulatory requirements.

Exchanges

Digital token exchanges are websites where one can purchase, sell or exchange digital tokens for other digital tokens or traditional fiat currency such as US dollars. From a business perspective, these websites are broadly categorised into three types:

a) Centralised marketplaces, which allow interaction between buyers and sellers thereby facilitating transactions, with concluded transaction prices reflected. Such websites charge transaction fees;

b) Facilitation of peer to peer transactions, where buyers and sellers are free to set their own prices – sometimes known as decentralised exchanges (DEXes); and

c) Acting as direct counterparties, buying and selling as a principal together with other buyers and sellers.

Similarly, in relation to systems or platforms where digital tokens circulate, these websites may be considered as providing digital payment token services, and may therefore be subject to licensing and regulatory requirements. In addition, to the extent that the tokens fall within the categories of derivatives contracts, securities or units in collective investment schemes, the website can be considered an "organised market" under the Securities and Futures Act (Cap. 289) of Singapore and unless exempted, be subject to licensing and regulatory requirements as an approved exchange or a recognised market operator.

Digital Payment Tokens

Under the PSA, the provision of any service dealing in digital payment tokens or facilitating the exchange of digital payment tokens falls within the ambit of providing a “digital payment token service”. Therefore, so long as the service provider provides the service of purchasing or selling such digital payment tokens in the exchange, or the service of establishing or operating a digital payment token exchange for the purposes of offering or providing an invitation to buy or sell any type of digital payment tokens, the service provider will be considered to be providing such a “digital payment token service”, and will require a licence to operate. A provider of digital payment token services, as well as digital token exchanges (depending on the tokens traded on the exchange) may therefore require a licence entitling it to carry on such business of providing a “digital payment token service”. This is the case even if the provision of such a payment service is “related or incidental to” the primary business, unless an entity is licensed, exempted or regulated under the Financial Advisers Act, Insurance Act, Securities and Futures Act or Trust Companies Act. Even then, the exemption applies only to such extent where the payment services are wholly incidental to or necessary for those entities to carry out the regulated activity under the prescribed legislation.

Service providers, which only provide or exchange “Limited Purpose Digital Payment Tokens” and “Central Bank Digital Payment Tokens” are exempted from the requirement of applying for a licence.

The “Limited Purpose Digital Payment Token” exclusion refers to payment services, which involve non-monetary consumer loyalty or reward points or in-game assets or similar digital representations of value, which cannot be returned to the issuer or sold, transferred or exchanged for money. On the other hand, the “Central Bank Digital Payment Token” exception is one where a central bank or financial institution provides services for dealing in or facilitating the exchange of central bank digital payment tokens. In the former, Parliament has considered such activities to not pose sufficient risk to warrant regulation under the licensing regime. In respect of the latter, the rationale was that such institutions would have already been sufficiently regulated.

B. Platforms with Stored Values

Platforms with stored values include popular service providers such as Grab Pay, Google Pay, Apple Pay and includes EZ-link and NETS cards. Cards such as EZ-link and Nets were previously regulated under the Payment Services (Oversight) Act, which has now been subsumed into the PSA. The definition of “e-money” in the PSA includes electronically stored monetary value that has been paid in advance to enable the making of payment transactions through the use of a payment account. This means that operators of these platforms are now considered as operating an e-money issuance service and will therefore be required to obtain a licence under the PSA. Further, if the e-money stored in e-wallets, accounts or cards are used to purchase goods or services, the service provider will be conducting an account issuance service (through the creation of the e-wallets to hold the stored value) and a merchant acquisition service (usage of the stored value within the e-wallets to purchase goods or services). Operators of stored value platforms may thus have to apply for a single licence that encompasses the aforementioned three services.

It should be noted that e-money issuance service providers are subject to further regulations in addition to those under their licence obligations. Therefore, platforms with stored values are not permitted to on-lend the monies received from customers as payment for e-money, or to use these monies or any interest earned on these monies to finance, wholly or to any material extent, any business carried on by it. This prohibition was introduced to distinguish between e-money issuers and deposit-taking institutions.

Further, e-money issuers have an additional specified threshold under the PSA. Should the average daily value of all specified e-money issued by the licensee exceed S$5 million within a calendar year, the e-money issuer will need to apply for a major payment institution licence. Specified e-money is defined under the PSA to be any e-money that has been issued: (a) to any person whom the issuer of the e-money has determined, according to such criteria as MAS may specify by notice in writing, to be a resident in Singapore; or (b) in Singapore to a person whom the issuer of the e-money has not determined, according to such criteria as MAS may specify by notice in writing, to be a resident outside of Singapore.

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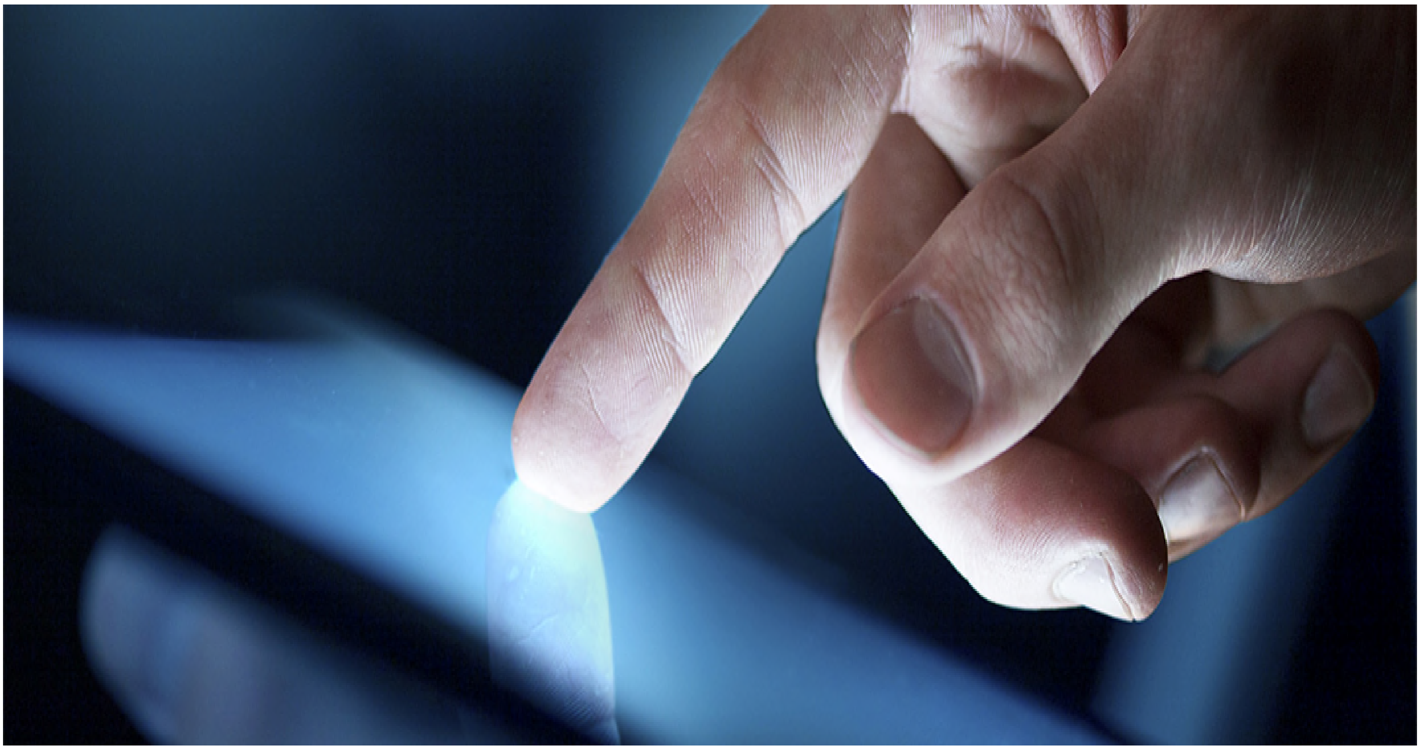
However, a notable exception is that any service provider providing “Limited purpose e-money” is not considered by the PSA as providing a payment service. The definition of “limited purpose e-money” seems to confine the use of any e-monies to Singapore and tries to limit the use of such e-monies to a single merchant, issuer or public authority. This exception will include electronic gift cards, club reward cards and anything with value stored within them.

C. Sale and/or Issuance of Digital Tokens

Initial Coin Offerings (ICOs) have become an alternative source of fundraising for companies around the world in recent years. In summary, ICOs are usually held prior to the launch of a project to fund the project’s development. Early backers of the project will purchase tokens during the ICO, which may grant certain perks to the token holder. These tokens usually entail access to the particular platform, service or product being developed, but can also include privileges such as voting powers in relation to the project, or the opportunity to earn returns. To the extent that these tokens fall within the definitions of securities, securities-based derivatives contracts or capital markets products under the Securities and Futures Act (Cap 289) of Singapore, these will be subject to the requirements under such act, including the requirement for a prospectus to be registered with the MAS.

The initial sale price of the tokens are determined by the token issuer, usually with reference to market demand. After the initial distribution from the ICO, the tokens are typically listed and traded on a cryptocurrency exchange, after which the price of the tokens are determined by market forces of supply and demand. Once the tokens are listed on a cryptocurrency exchange, token holders have the option of cashing out to any fiat-backed currency or converting the tokens into other forms of cryptocurrency. Some digital token exchanges have also undertaken initial distribution of such tokens in what are known as initial exchange offerings (IEOs).

Due to the flexible nature of such tokens, it will be impossible to generalise on the regulatory position of every iteration of tokens that can be structured or devised. Based on the definition of “digital payment token” as well as “e-money” found in the PSA, many tokens in the market today can be viewed as either e-money or digital payment tokens as such tokens are intended as mode of payment for services whether on the networks that such tokens are associated or for services offered by third party network. It is therefore pertinent in any such ICO to analyse the business model and the functions of the types of tokens to be issued when considering any licensing implications under the PSA, if any, particularly in respect of use of the tokens subject of the ICO. Early consultation with legal advisors is therefore recommended even at ICO stage.



Summary Table

<table>
<tr><th>Activity</th><th>Services under the PSA</th><th>Licence required</th><th>Licence requirements</th></tr>
<tr><td>Digital token exchanges and providers</td><td>Digital payment token and account issuance services</td><td rowspan="2">Below the specified thresholds under section 6 of the PSA: standard payment institution licence

Above the specified thresholds under section 6 of the PSA: major payment institution licence</td><td rowspan="2">Standard payment institution:
a) Disclosure requirements
b) AML/CFT requirements
c) Technology risk management requirements (as applicable)
d) Duty to apply for variation of licence before thresholds are breached
e) Approval for appointment of CEO or partners
f) Approval for change in control of shareholding

Major payment institution:

a) Same as the above
b) Requirements on safeguarding e-money float or funds</td></tr>
<tr><td>Platforms with stored value</td><td>E-money issuance, account issuance and merchant acquisition services</td></tr>
</table>

Conclusion

The PSA is expected to take effect in the later part of 2019, together with subsidiary legislation, which can provide substantive licence application forms, processes and procedures. Prospective businesses seeking to start or venture into a FinTech business in Singapore are strongly encouraged to seek professional advice from qualified legal practitioners to ensure that their proposed activities are in compliance with all applicable regulations in Singapore.

Dentons Rodyk acknowledges and thanks Practice Trainees Ian Xu and Ulanda Oon for their contributions to this article.

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Variable Capital Company – Review of new corporate entity from an administration viewpoint

Singapore intends to launch a new corporate structure in 2019 in a bid to attract more investment funds and foreign private capital to Singapore and encourage more fund managers to domicile their funds in Singapore. This new structure would add to Singapore's full service offerings for any type of fund to be based in this jurisdiction. The new corporate entity would be known as the Variable Capital Company (VCC) and it would be regulated by the Variable Capital Companies Act 2018 (VCC Act passed in Parliament on 1 October 2018). The new structure is tailored for collective schemes and would be open to both open-end and closed-end funds, traditional and alternative funds. It can be a stand-alone entity or an umbrella entity with multiple sub-funds. Although the VCC Act is expected to take effect in 2019, a specific date for commencement is yet to be notified at the time of this article.

(Background: MAS recently issued its Consultation Paper on the Proposed Framework for Variable Capital Companies Part 2 on 30 April 2019 to consult on, amongst other things, the proposed new regulations for the VCC framework. The Consultation closed on 30 May 2019.)

Nonetheless, this article seeks to review the VCC in comparison to that of a private limited company (which is regulated by the Companies Act Cap. 50 – CA) so that readers can be informed of the principal similarities and differences through an easy glance:

<table>
<tr><th></th><th>Variable Capital Company</th><th>Company</th></tr>
<tr><td>Legal Form</td><td>Body corporate incorporated under the VCC Act for investment funds and having a separate legal personality.
It can be set up as a stand-alone entity or an umbrella entity with multiple sub-funds. VCC will be a single legal entity, with its sub-funds operating as separate cells (each without legal personality).</td><td>A business form which is a legal entity separate and distinct from its shareholders and directors.</td></tr>
<tr><td>Legislative Framework</td><td>Variable Capital Companies Act 2018 for the incorporation, operation and regulaton of the structure (with certain provisions ‘borrowed’ from the Companies Act i.e. registration of charges etc)</td><td>Companies Act, Cap.50</td></tr>
<tr><td>Administering authority</td><td>Accounting and Corporate Regulatory Authority (ACRA) will administer the VCC Act. (For matters relating to anti-money laundering and countering the financing of terrorism, the administering authority would be MAS.)</td><td>ACRA</td></tr>
<tr><td>Owned by</td><td>Subscribers to the constitution of the VCC and every other person who agrees to become a member of the VCC and whose name is entered in the register of members.</td><td>Exempt Private Company - 20 members or less and no corporation holds beneficial interest in the company’s shares
Private Company - 50 members or less
Public Company - more than 50 members.</td></tr>
<tr><td>Legal status</td><td colspan="2">A separate legal entity from its members and directors, entity can sue or be sued in own name and also own property in own name.
For VCC, a sub-fund of an umbrella VCC is not a legal person separate from the VCC, but the VCC may sue or be sued in respect of a sub-fund. The property of a sub-fund is subject to orders of a court as it would have been if the sub-fund were a separate legal person.
Members have limited liability.
For VCC, the liability of a member of the VCC is limited to the amount, (if any) unpaid on the shares held by the member.
Members not personally liable for debts and losses of company.</td></tr>
<tr><td>Yearly statutory obligations</td><td>Annual returns must be filed after its AGM and within 7 months after the end of its financial year.</td><td>Annual returns must be filed after its AGM (a) in the case of a listed company, within 5 months after the end of its financial year; and (b) in any other case, within 7 months after the end of its financial year.</td></tr>
</table>

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Accounting and governance	Wider scope of accounting standards to be used in preparing a VCC's financial statements thus allowing more flexibility in financial reporting: • Apart from Singapore accounting standards and recommended accounting principles, the use of International Financial Reporting Standards and US Generally Accepted Accounting Principles would also be permitted. • Subject to audit by a Singapore based auditor • Accounting standards should be consistently applied across all the sub-funds • Umbrella VCC must also keep separate accounting and other records for each sub-fund that sufficiently explains the transactions and financial position of each sub-fund.	Singapore accounting standards and recommended accounting principles for companies which are consistent with Singapore Financial Reporting Standards
Re-domiciliation	Foreign corporate fund structures similar to VCCs can re-domicile as VCCs in Singapore. • This will encourage fund managers with funds domiciled in offshore jurisdictions such as Cayman Islands, to shift fund domiciliation with their fund management activities to Singapore.	Inward Re-domiciliation Regime in Singapore: Foreign corporate entity can re-domicile to Singapore and become a Singapore entity (provided the host country recognises or authorises re-domiciliation).
Appointment of company secretary and auditors	**Company secretary:** Must appoint at least 1 company secretary within 6 months of incorporation. **Auditor:** Must appoint an auditor within 3 months after incorporation, unless the company is exempt from audit requirements.	
Requirement for fund manager	VCC must appoint a fund manager that is regulated by MAS to manage its investments. • This will facilitate supervisory oversight on the use of the VCC, including to prevent a VCC from being abused for unlawful purposes and to help ensure that it is not used as an offshore vehicle without actual investment management activities in Singapore.	No requirement for fund manager.

Number of shareholders and directors	**Shareholders:** At least one shareholder. (Note: s16 and s17 VCC Act states that any person may incorporate a VCC and the subscribers to the constitution of a VCC are considered to have agreed to become members of the VCC) **Director:** • Must have (a) at least one director who is ordinarily resident in Singapore; and (b) at least one director (who may be the same as (a)) who is either a director or a qualified representative of the manager of the VCC. • Directors of a VCC must also be “fit and proper persons”. • At least one Singapore resident director for non-authorised schemes and at least 3 directors for authorised schemes	**Shareholders:** At least one shareholder. **Director:** Must have at least one director who is ordinarily resident in Singapore.
Registration requirements	The registering party must submit to ACRA: a) the constitution of the proposed VCC and other prescribed documents; b) the name of the manager of the proposed VCC; c) the names of the director(s) of the proposed VCC; d) provide ACRA the last day of the first financial year of the proposed VCC and such other information as may be prescribed; and e) pay ACRA the prescribed fee. Declaration by either a registered qualified individual engaged in the formation of the VCC or a director or secretary of the proposed that all requirements for formation of company have been complied with and identities of subscribers and officers of the VCC have been verified.	The registering party shall submit to ACRA: a) the constitution of the proposed company and such other documents as may be prescribed; b) furnish ACRA with the last day of the proposed company’s first financial year and such other information as may be prescribed; and c) pay ACRA the prescribed fee. Declaration by either a registered qualified individual engaged in the formation of the proposed company or a director or secretary of the proposed that all requirements for formation of company have been complied with and identities of subscribers and officers of the proposed company have been verified.

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Requirement for Annual General Meeting (AGM)	An AGM must be held at the end of a financial year within 6 months. However, a VCC need not hold an AGM if: a) its directors give at least 60 days' written notice to the members before the last date on which the AGM must be held; or b) the VCC has sent to all persons entitled to receive notice of general meetings a copy of the financial statements, or copies of the consolidated financial statements and balance sheet, relating to the relevant financial year, and accompanied by the auditor's report on them, no later than 5 months after the end of the financial year. However, one or more members with 10% or more of the total voting rights may by notice to the VCC require the AGM to be held.	An AGM must be held after the end of financial year within (a) 4 months in the case of a public company that is listed; or (b) 6 months in the case of any other company. However, a private company need not hold an AGM for a financial year if: a) a resolution has been passed to dispense with the holding of AGM, b) the company has sent to all persons entitled to receive notice of general meeting of the company a copy of the financial statements, or copies of the consolidated financial statements and balance sheet, relating to the relevant financial year, and accompanied by the auditor's report on them, no later than 5 months after the end of the financial year. However, two or more members with 10% or more of the total number of issued shares of the company or, if the company has not a share capital, not less than 5% in number of the members of the company or such lesser number as is provided by the constitution may call a meeting of the company.
Taxes	• Tax treatment remains the same as a Singapore company. • Enhanced Tier Fund (ETF) Scheme and Singapore Resident Fund (SRF) Scheme under the Income Tax Act will apply to a stand-alone VCC similar to how it would apply to a Singapore company.	Profits taxed at corporate tax rates.
Continuity in law	A VCC has perpetual succession until it is wound up.	A company has perpetual succession until it is wound up or struck off.

Closing the business	Winding up - voluntarily by members or creditors, or compulsorily by the High Court. When winding up a sub-fund, all shareholders of a sub-fund should redeem their shares (where appropriate) and the VCC shall be required to submit an application to the MAS to be de-authorised. • No striking off for VCC unlike for companies under the CA (Background: The provisions in the VCC Act relating to insolvency of a VCC and its sub-funds are adapted from the CA. It was mentioned in the April consultation paper that a VCC Amendment Bill would be tabled later in 2019 to replace these provisions with the provisions under the Insolvency, Restructuring and Dissolution Act 2018, which has not come into effect at the time of this article.)	• Winding up - voluntarily by members or creditors or compulsorily by High Court. • Striking off

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This author views the following points as worth noting by any party looking to set up a VCC:

a) The VCC would be regulated by both ACRA and MAS;

b) A VCC must have "VCC" as part of and at the end of its name;

c) There would be a requirement for a Singapore-based licensed or regulated fund manager for a VCC (unless exempted under regulations);

d) Directors of a VCC can dispense with need to hold an annual general meeting (AGM) with at least 60 days' written notice to the members prior to the last date to hold AGM (thus lowering operating costs). In contrast, for companies, all members must pass a resolution at a general meeting to dispense with the need to hold an AGM;

e) Another key difference between a VCC and a company from an administrative standpoint is that there is no need for shareholders' approval for a VCC to redeem shares thereby providing flexibility in the distribution and return of capital. In contrast, companies under CA are subject to restrictions on capital reduction and can only pay dividends out of profits;

f) Financial statements are not required to be made public; and

g) Unlike companies, VCCs' shareholder registers are not required to be made public (but open to inspection by a public authority) – thus offering privacy to investors.

The VCC is intended to complement the existing structures available for use by fund managers in Singapore (namely unit trusts, companies incorporated under the CA and limited partnerships governed under the Limited Partnerships Act). It is hoped that this new corporate structure with corresponding tax benefits and the attractiveness of doing business in Singapore would spur more funds to be domiciled in Singapore and enable Singapore to continue its growth as a full-service international fund management hub.

Dentons Rodyk acknowledges and thanks Practice Trainee Claudia Lee for her contributions to this article.

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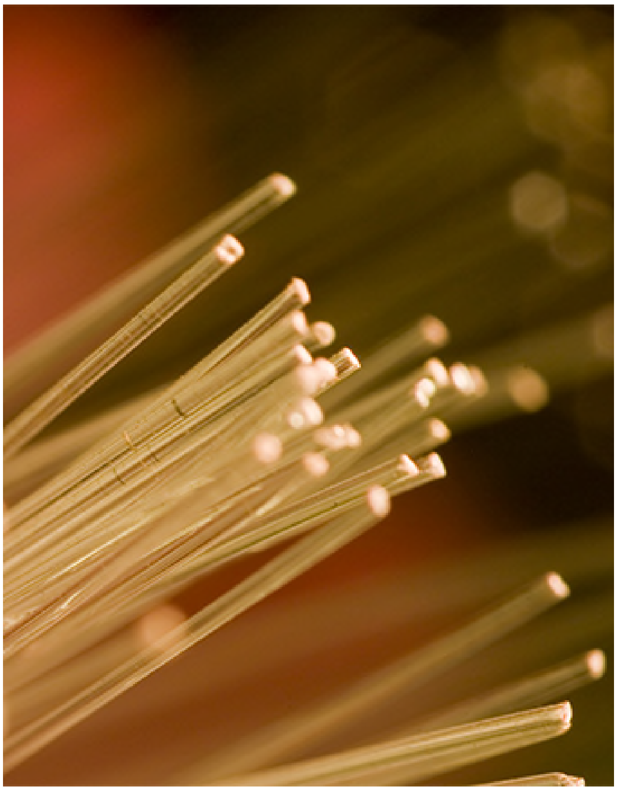

Gaining popularity of green loans in Singapore

1. Introduction

Green loans are increasingly gaining prominence in the corporate lending market in Singapore. We observed that the changing corporate social responsibility (CSR) direction of both banks and borrowers have contributed significantly to such growth.

A key feature of a green loan facility is the “green” purpose clause, whereby proceeds of the facility can only be used to finance or re-finance green projects which deliver environmental benefits. For instance, the development of commercial or residential properties with environment-friendly features can be financed by green loans.

Notably, a S$1.2 billion syndicated green loan facility was granted to an indirect wholly-owned subsidiary of Frasers Property Limited (Frasers) in September 2018.

The facility was a first of its kind in Singapore, and used by Frasers to refinance its existing loans related to the development of Frasers Tower and an adjacent three-storey cascading retail podium. Frasers Tower is a 38-storey Premium Grade A office tower located in the Central Business District of Singapore, and utilises recycled water for irrigation purposes.

With the Building and Construction Authority of Singapore’s (BCA) goal of ensuring 80% of the buildings in Singapore are certified “green” by 2030, the real estate sector could potentially be a key beneficiary of green financing.

➢ **Read more on page 18**

We are acting for DBS Bank in its grant of a S$300 million multi-currency sustainability-linked loan to CapitaLand. Whilst this is not strictly a green loan, the five-year term loan and revolving credit facility is the first and largest sustainability-linked loan in Asia's real estate sector. It is also Singapore's largest sustainability-linked financing provided by a sole lender. The multi-currency loan is linked to the developer's listing on the Dow Jones Sustainability World Index, which tracks established firms in areas such as environmental, social and governance efforts. Unlike green loans, where the funds are used for certain types of projects, CapitaLand is able to use the loan for general corporate purposes.

This article seeks to provide a brief overview on the general principles applicable to green loans and the key reasons spurring its demand in Singapore. Potential limitations that may hinder the development of the green loan market are also highlighted.

2. Green Loan Principles – a useful benchmark

The Green Loan Principles (GLP) was jointly released by the Loan Markets Association and Asia Pacific Loan Market Association in March 2018. The GLP includes a non-exhaustive list of eligible green projects and provides guidance on the characteristics of a green loan. This facilitates the growth of the green loan market in a coherent manner by having a consistent framework in place for parties to adopt.

The GLP is based on four core components, namely: -

(i) use of proceeds;

(ii) process for project evaluation and selection;

(iii) management of proceeds; and

(iv) reporting.

Essentially, there has to be clear specification on the use of loan proceeds for green projects only and the loan proceeds should as far as possible be credited to a designated projected account. The borrower's environmental sustainability objectives should also be clearly communicated to the lender(s).

Additionally, the borrower should perform regular reporting to the lender(s) regarding how the loan proceeds are being used or allocated. This allows consistent monitoring on the usage of loan proceeds, thereby maintaining the integrity of the overall green loan market.

3. Reasons for demand in green loans

Corporate borrowers' perspective

Many large corporates are motivated to exhibit responsible corporate behaviour as this leads to long term reputational enhancement. "Green" culture is growing prevalent as each organisation seeks to reduce its carbon footprint in a bid to mitigate the effects of climate change. This translates to a greater alignment between the business decisions made by large corporates with environmental and sustainability goals.

Large corporates are increasingly keen to take up green loans as they value the intangible benefits of tying their ecologically responsible behaviour with their funding options. By securing green loans, it is an effective way to display the company's commitment towards improving environmental sustainability. Portraying itself as a responsible "green" corporate citizen will also be a positive credential which can be shared with shareholders and relevant stakeholders.

Banks' perspective

Over the years, banks have gradually shifted their focus towards building a sustainable future whilst promoting the banks' performance and business growth. Banks recognise that by providing green financial solutions, it would be a great opportunity to create a positive impact in the global collective effort towards mitigating climate change. The provision of green financial solutions also aid banks in the diversification of their portfolios to a more sustainable one.

Furthermore, the Monetary Authority of Singapore takes into consideration the bank's sustainability practices as part of its supervisory assessments over banks licensed in Singapore. This will invariably influence the manner in which banks conduct their businesses and the development of their financial products.

4. Potential limitations

It bears noting that the integrity of the "green" label can only be maintained if market players are disciplined in adopting and adhering to the GLP. Whilst market players are encouraged to adopt the GLP in the structuring of a green loan facility, it is still subjected to the agreement between the parties.

With the growth of the green loan market, it also carries the risks of green-washing. Green-washing refers to incidences where projects have the appearance of bringing about environmental benefits, but in substance do not. The current green loan market is largely self-regulated and the lack of a unified "green" definition poses the risk of green-washing occurring.

Further, green covenants such as regular review and reporting requirements are not typically stipulated as events of default in green loan documentation. In the event of a failure to comply with these covenants, it will only lead to a declassification of the facility. As such, accountability of how loan proceeds are utilised throughout the loan tenor may remain an issue.

5. Conclusion

Moving forward, we expect the growth of the green loan market to accelerate with increased worldwide environmental awareness. Banks and corporate borrowers ought to continuously monitor the progressive development of market principles, which will shape the way in which green loan facilities are structured in future.

Dentons Rodyk acknowledges and thanks Practice Trainee Ashlyn Toh for her contributions to this article.

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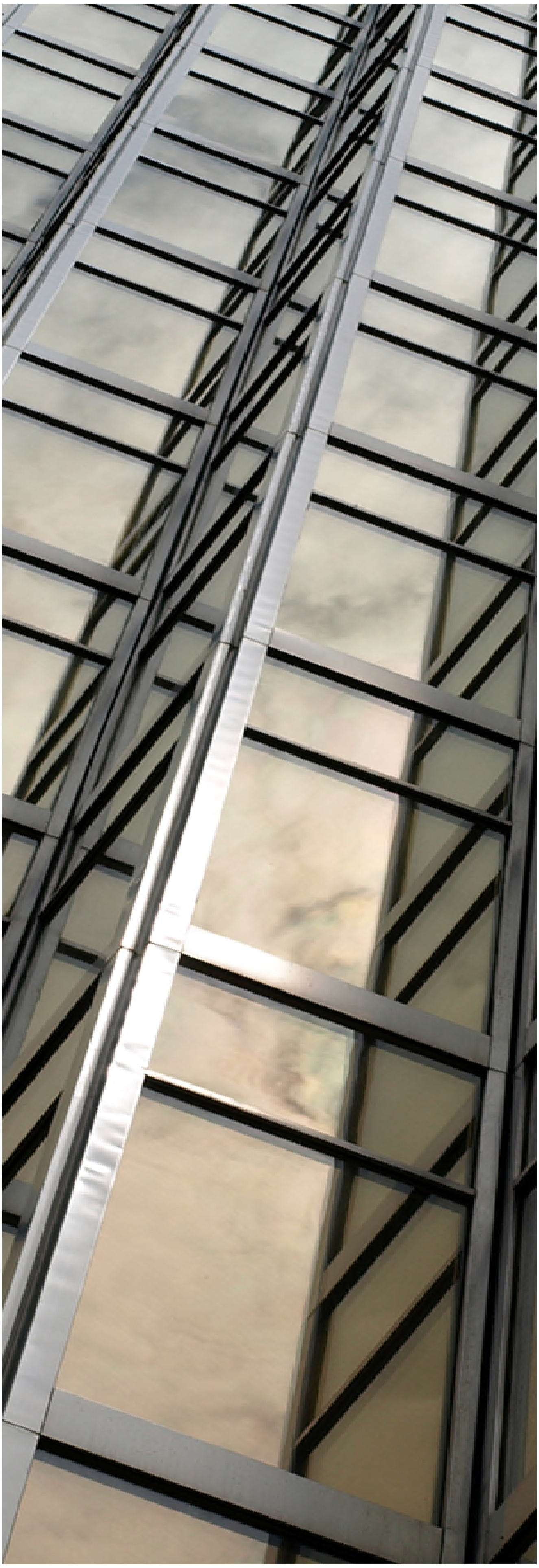

Shifting sands, Changing tides – Anchoring your business and investments in Singapore

Introduction

The trend towards economic nationalism, along with heightened global political instability, has given rise to increased risks and uncertainties for individuals and businesses worldwide, in respect of their assets and investments whether held onshore or offshore. One prime example is recent pressure placed by the European Union (EU) on the offshore jurisdictions, leading to the enactment of economic substance legislation, and some consequent erosion in the traditional use of tax haven holding structures.

This article discusses how individuals and businesses with offshore structures are generally affected by such legislation, as well as how Singapore could function as a safe haven in these uncertain times.

Enactment of economic substance legislation in offshore jurisdictions

Introduction

In 2017, the EU Code of Conduct Group for Business Taxation (COCG) undertook an assessment of the tax policies of several international financial centres. The review resulted in the publication of a list of non-cooperative jurisdictions for tax purposes on 5 December 2017, identifying certain jurisdictions which were deemed to lack economic substance requirements for companies incorporated in those jurisdictions. Subsequently, the British Virgin Islands (BVI), the Cayman Islands, Bermuda, Jersey, Guernsey and the Isle of Man enacted new legislation which came into force on 1 January 2019. Even the United Arab Emirates has recently introduced economic substance legislation with the aim of being removed from the EU's blacklist of uncooperative jurisdictions.

The purpose of the respective legislation is, for example, illustrated in the BVI's draft Economic Substance Code (the Draft Code), which states that the legislation is aimed at BVI-registered entities that take advantage of the BVI's zero tax regime, while carrying on their business substantially in another jurisdiction. Such offshore structures have hitherto been ubiquitous in both personal and family holdings, as well as in the business and commercial context.

We take a closer look at the Draft Code below for the purposes of illustration, whilst noting that the scope and effect of the economic substance legislations are substantially similar across the various offshore jurisdictions.

Scope of the legislation

The economic substance requirements however apply to companies that carry on specific relevant activities in the jurisdiction.

A "relevant activity" is defined as:

a) banking business;

b) distribution and service centre business;

c) financing and leasing business;

d) fund management business;

e) headquarters business;

f) holding business;

g) insurance business;

h) intellectual property business; or

i) shipping business.

Though an investment fund business is <u>not</u> a relevant activity and hence falls outside the scope of the economic substance requirements, the COCG is expected to provide further technical guidance on the economic substance requirements for collective investment funds.

Generally, to satisfy the test for economic substance, the entity must:

a) conduct core income generating activity (CIGA) in the jurisdiction;

b) be directed and managed in the jurisdiction;

c) have an adequate number of employees;

d) incur adequate expenditure in the jurisdiction; and

e) have physical premises in the jurisdiction.

It would appear that assessments will have to be made as to whether the test for economic substance would be met in many of the existing offshore holding structures, due to the applicable requirements of physical activity or presence in the relevant offshore jurisdiction.

Uncertainty over application of legislation

As far as a "holding business" is concerned, which applies to a substantial proportion of entities established in the offshore jurisdictions, the legislation is currently limited to legal entities that only hold equity participations in other entities and only earn dividends and capital gains. Such entities are subject to a reduced economic substance test in that they are not required to be directed or managed in the jurisdiction or conduct CIGA in the jurisdiction. However, they would still need to have adequate employees and premises in the jurisdiction.

The legislation does not define what amounts to adequate or sufficient employees or physical presence, and indeed the Draft Code merely states that such terms are interpreted according to their ordinary meaning. At present, it is uncertain how these requirements may be satisfied.

The corollary of the current definition of "holding business" is that an entity that holds assets other than equity participations, such as cash or real property, would fall outside the scope of the legislation. It is also unclear whether private trust companies (PTC) are caught by the legislation (note: Singapore PTCs are discussed in greater detail below). However, given the relative novelty of the legislation, it would not be prudent to assume that the definition will not be changed to include other forms of asset holding.

In addition, the Draft Code, as well as the equivalent guidelines in other offshore jurisdictions, have gone through several rounds of amendments as negotiations with the EU have progressed. There is thus no certainty at the moment that the draft guidelines on the application of the economic substance legislation as they stand presently will not be subsequently amended further.

Considerations for individuals and businesses owning companies incorporated in offshore jurisdictions

The economic substance requirements come on the back of a global push towards greater transparency and disclosure. Entities that fail to comply with the requirements are subject to substantial penalties.

This results in a conundrum for individuals and businesses that rely on offshore structures as to how their structures should be regularized—should they maintain more than just a nominal presence in the relevant offshore jurisdictions, leading to greater costs and inconvenience? Or given the present and potential future uncertainties in the scope and reach of the economic substance regulations, should they restructure their assets holdings so as to reduce or remove reliance on offshore structures altogether?

Singapore as a safe haven

Where a restructuring of existing arrangements or the establishment of new structures is being contemplated, investors should consider Singapore as one of the preferred destinations to hold their assets and investments. We explore below, a number of the factors to be considered, both from the private wealth, as well as the commercial perspectives.

General factors

Singapore is a well-established, leading jurisdiction for offshore wealth management and foreign investments, which is underpinned by, among other things, its open economy, strong rule of law, sound financial regulation, stable political environment, and global accounting and legal standards.

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In a 2018 study conducted by the Asian Private Banker, Singapore's robust banking sector was identified as its most important strength as an offshore investment and wealth management hub, followed by its efficient regulatory framework, and high quality workforce. This is congruent with Singapore's reputation as a recognised international financial centre due to, among other things, its breadth and depth of institutions that provide ease of access to global financial markets, and developed wealth management services.

Singapore enjoys unique advantages, being strategically located within proximity to Southeast Asia, and having relative political neutrality and regulatory machinery that is aligned with global standards.

Additionally, the regulatory environment in Singapore is exceptionally accommodative to offshore wealth and foreign investment particularly because of its favourable individual and corporate tax regimes, which this article will explore further.

Private Wealth Perspective

Singapore is an increasingly popular destination for high and ultra-high net worth individuals and families who wish to move their assets to a legitimate jurisdiction with a strong reputational advantage. This is due in part to its commitment to global tax transparency, but also the variety of tax incentives available for foreign individuals who set up structures in Singapore. With a well-established wealth management and succession regime, Singapore has flourished as a private wealth hub.

The Single Family Office

In recent years, there has been an influx of family offices being established by foreigners in Singapore. A "family office" is commonly understood as an arrangement put in place to manage the assets and wealth of high net worth families or individuals. The objectives of setting up a family office include ensuring a smooth intergenerational transfer of wealth, reducing the risk of intra-family disputes, providing for a governance and management structure, ensuring alignment of interests, leading to potential higher returns, centralisation of risks and services, and provision for succession planning.

The term "family office" is not defined under Singapore law, however, the regulatory treatment of a "single family office" (SFO) was recently clarified by the Monetary Authority of Singapore (MAS). This added clarity enhances Singapore's attractiveness as a jurisdiction for setting up family offices.

Under the Frequently Asked Questions on the Licensing and Registration of Fund Management Companies issued and updated by the MAS (the Fund Management FAQs), it is provided that, among other things, an SFO is not defined under the Securities and Futures Act (Chapter 289 of Singapore Statutes), and "*typically refers to an entity which manages assets for or on behalf of only one family and is wholly owned or controlled by members of the same family*". Further, the Fund Management FAQs state that the MAS does not intend to license or regulate SFOs, and goes on to highlight that there are existing exemptions from licensing for SFOs under the SFA and the Financial Advisers Act (Chapter 110 of Singapore Statutes) for provision of fund management and financial advisory services, respectively, to its related corporations (e.g. where the SFO manages or advises an investment fund entity that shares a holding company with the SFO).

In the keynote address by Ng Yao Loong, Assistant Managing Director of the MAS, at the Euromoney Asia Private Banking Seminar on 13 September 2018, it was stated that, in order to strengthen Singapore's value proposition as a centre of excellence for managing family wealth, the MAS will "*raise the level of sophistication and professionalism of family wealth professionals by partnering institutes of higher learning to develop training targeted at family office professionals*" and "*strengthen networks between family offices in Singapore, to facilitate mutual learning and participation in investments*". This highlights the facilitative approach of the MAS towards SFOs in Singapore, which together with the tax incentives that would apply to SFOs, the various options to structure an SFO, and the general factors (each of which we have touched on above in this article), make Singapore an ideal location for families and/or high net worth individuals to base and carry out their wealth and investment management operations.

Under the Global Investor Programme (GIP), individuals, their spouses, and unmarried children below the age of 21 are eligible to apply for Singapore Permanent Residence (PR) status if they invest at least S$2.5 million in a start-up or expansion of an existing business, or in a GIP-approved fund that invests in Singapore-based companies. Investors applying for PR under the GIP must have (a) a substantial business track record of at least 3 years; and (b) a successful entrepreneurial background of at least 3 years.

Family offices are an approved industry under the GIP, but investors may be subject to slightly different eligibility criteria in terms of business or investment track record, family net worth and assets under management by the family office. If the application is successful, individuals would be even better placed to enjoy the tax incentives available for Singapore residents.

Below, we further discuss how foreigners may enjoy benefits under Singapore's tax regime through (1) trust structures; and (2) fund management structures.

Trust structures

Two main tax incentives are available for trusts administered by a local trustee, namely the Foreign Trust Exemption and the Locally Administered Trust Exemption. A local trustee could be a professional licensed trustee, or a PTC subject to the satisfaction of certain conditions. A PTC is a company incorporated specifically to act as trustee of a trust, and subject to certain conditions, may be exempt from obtaining a trust business licence. A PTC is preferable to appointing an independent trustee for families who wish to retain more control over the trust. Alternatively, if a licensed trustee is hesitant to take on a trust because of certain risks, a PTC may be established to function as trustee.

Foreign Trust (FT) Exemption

A Singapore FT and its underlying holding companies can enjoy tax exemption on specified income derived from designated investments under Section 13G of the Income Tax Act (Cap 134) (the ITA) and the relevant regulations. Any share of income received by a beneficiary is also exempt from tax. However, the FT must be administered by a trustee company in Singapore and neither the settlor nor any beneficiary can be a Singapore citizen or resident in Singapore. In the case of an entity, it must be neither incorporated nor resident in Singapore.

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Locally Administered Trust (LAT) Exemption

If a family member is resident in Singapore, the family can in an appropriately structured trust avail of the LAT Exemption Scheme under Section 13Q of the ITA. LATs and their underlying holding companies can thereby enjoy the existing tax exemption granted on Singapore-sourced investment income derived and foreign income received directly by individuals in Singapore. Exempted income received by a beneficiary is similarly tax exempt. The scope of exemption for LATs under the LAT Exemption is however not as wide as that enjoyed by FTs in the FT Exemption. The LAT must also be administered by a trustee company in Singapore and every beneficiary must be an individual or charitable institution, trust, or body of persons established for charitable purposes. The settlor must be an individual and cannot be the sole beneficiary of the LAT.

Fund management structures

It is not uncommon for a family office to be established alongside trust structures. High net worth families typically make use of family offices to assume the day-to-day management and administration of their assets and wealth, as described above.

There are various tax exemption schemes for funds managed by a Singapore fund manager or family office. Generally, funds are subject to tax in Singapore on their income sourced in Singapore and derived from the trading of investments. Gains on sale of investments are taxable if they are revenue in nature. For offshore funds, the presence of a fund manager who habitually exercises authority to conclude contracts may create a taxable presence (PE) in Singapore.

The relevant incentives are (1) Offshore Fund Exemption (Section 13CA of the ITA); (2) Onshore Fund Exemption (Section 13R of the ITA); and (3) Enhanced-Tier Fund Exemption (Section 13X of the ITA). These incentives provide a tax exemption on specified income derived by the fund vehicle from certain designated investments, including stocks, shares, bonds, notes and derivatives.

The fund manager or family office managing the funds could also possibly benefit from a tax incentive known as the Financial Sector Incentive – Fund Management Award (FSI-FM), which grants a concessionary tax rate of 10% on qualifying income, subject to the satisfaction of certain criteria and approval by the authorities.

In general, the appropriate structure (whether a trust, fund and/or any structure) and relevant applicable tax incentives would depend on the specific needs and circumstances of the particular individual investor and/or family.

Corporate Perspective

Introduction

Singapore is a leading offshore hub not only for high net worth individuals, but also for multi-national corporations to set up holding companies. In this section, we wish to highlight examples of such policies including, among other things, various tax incentive schemes headed by the Singapore Economic Development Board (EDB) and Monetary Authority of Singapore (MAS) that are aimed at encouraging the development of high-value and substantive economic activities in Singapore, as well as the various options for corporate structuring in Singapore.

Corporate Tax Incentive Schemes

Several tax incentive schemes under the EDB and MAS are available to companies that grow capabilities and conduct new or expanded activities in Singapore. These include (1) the Pioneer Certificate Incentive and Development and Expansion Incentive (Parts II, III and IIIB of the Economic Expansion Incentives (Relief from Income Tax) Act); (2) the Finance & Treasury Centre Incentive (Section 43G of the ITA); and (3) the Financial Sector Incentive scheme (Section 43Q of the ITA).

Pioneer Certificate Incentive (PC) and Development and Expansion Incentive (DEI)

An approved company under the PC or DEI is eligible for a corporate tax exemption or a concessionary tax rate of 5% or 10% respectively on income derived from qualifying activities.

The qualifying criteria for the PC or DEI include:

a) employment created (including skills, expertise and seniority);

b) total business expenditure which generates spin-off to the economy; and

c) commitment to growing the capabilities (e.g. technology, skillsets, knowhow) in Singapore.

The company must also carry out new, pioneering activities that have not been undertaken by other companies at a scale that is substantive in economic contribution.

Finance & Treasury Centre (FTC) Incentive

The FTC Incentive is aimed at encouraging companies to grow treasury management capabilities and use Singapore as a base for conducting treasury management activities for the region. An approved FTC company is eligible for a concessionary tax rate of 8% on income derived from:

a) qualifying FTC services to approved network companies (ANCs); and

b) qualifying FTC activities carried out on its account with funds obtained from qualifying sources.

To qualify for the FTC incentive, companies must establish substantive activities in Singapore which may include control over the management of cash and liquidity position, provision of corporate finance advisory services, and management of interest rates and foreign exchange.

Additionally, the qualifying criteria include:

a) employment created (including skills, expertise and seniority in the FTC team);

b) total business expenditure which generates spin-off to the economy; and

c) scale of the FTC operations in the depth and breadth of the services and activities.

Financial Sector Incentive (FSI) Scheme

The FSI Scheme (Section 43Q of the ITA) is administered by the MAS and applies to licensed financial institutions including large universal banks, fund managers and capital market players. It is aimed at promoting and encouraging the development of high-growth and high value-added financial activities in Singapore.

Concessionary tax rates of 5%, 10% and 13.5% are awarded under the FSI-Standard Tier, which covers a broad range of qualifying activities including lending, debt and equity capital markets, fund management, trust administration and FSI-Headquarters Services. Award periods range from 5 to 10 years depending on headcount and the scope of activities undertaken.

Multitude of Options for Corporate Vehicle Structure

The Singapore-incorporated company

Incorporating a company in Singapore is straightforward and the process can be completed in a short span of time. The Doing Business 2019 report published by the World Bank Group ranked Singapore third in the world for ease of starting a business. In fact, the report noted that in 2017/18, Singapore had simplified certain post registration procedures making it easier to start a business here.

The regulatory requirements for incorporating a business in Singapore are easy to satisfy. A Singapore incorporated company is only required to have at least one (1) shareholder and a minimum issued capital of at least $1. While a Singapore incorporated company must have a registered office in Singapore, the company does not necessarily need to lease (or buy) premises, as the registered office can be that of the corporate secretarial agent, for instance. Finally, every Singapore incorporated company must have at least one (1) director who is ordinarily resident in Singapore, and must appoint a company secretary who must be a natural person ordinarily resident in Singapore.

Foreign companies and foreign individuals looking to set up companies in Singapore would welcome the fact that there are generally no restrictions on foreign shareholding in Singapore incorporated companies which can be 100% foreign owned.

In addition to being easy to set up, Singapore incorporated companies are easy to maintain, as their ongoing annual compliance requirements are relatively simple and straightforward. Further, there are certain exemptions from the audit requirements, for example, companies that qualify as “small companies” do not need to have their accounts audited. Additionally, Singapore private limited companies may be exempted from holding annual general meetings if certain requirements are met.

➢ **Read more on page 26**

Singapore's Inward Re-domiciliation Regime

The movement of assets into Singapore is further facilitated by the ease of corporate actions including not only incorporation as mentioned above, and internal acquisitions and reconstructions, but also more recently, its inward re-domiciliation regime introduced in October 2017 under which foreign corporate entities may transfer registration to Singapore as a Singapore company limited by shares. This is especially useful for individuals or families who make use of companies to hold their assets, generally as long as re-domiciliation is permitted under the laws of the original jurisdiction of the company, the company is solvent, and satisfies any 2 of the following requirements:

a) value of its total assets exceeds $10 million;

b) annual revenue exceeds S$10 million;

c) has more than 50 employees.

In this way, foreign entities in jurisdictions facing risks and uncertainties due to changing political climates and/or regulatory regimes may be migrated to Singapore whilst retaining their assets, employees, corporate history and branding.

The Variable Capital Company

As part of a general movement towards making Singapore more attractive to investment funds, and to encourage more fund managers to domicile their funds in Singapore, Singapore intends to launch a new corporate structure in 2019.

This new structure would add to Singapore's full service offerings for any type of fund to be based in this jurisdiction. The new corporate entity would be known as the Variable Capital Company (VCC) and it would be tailored for collective schemes. It would be open to both open-end and closed-end funds, traditional and alternative funds, and can be a stand-alone entity or an umbrella entity with multiple sub-funds.

We set out below, certain benefits of the new VCC entity:

a) The VCC will be a single legal entity, with its sub-funds operating as separate cells (each without legal personality);

b) Directors of a VCC can dispense with need to hold an annual general meeting (AGM) with at least 60 days' written notice to the members prior to the last date to hold AGM;

c) There is no need for shareholders' approval for a VCC to redeem shares, thereby providing flexibility in the distribution and return of capital; and

d) A VCC's shareholder register is not required to be made public (but open to inspection by a public authority), thus offering privacy to investors.

Employment

Singapore's employment law framework is generally balanced and fair. Singapore adopts a "tripartite" model of partnership between employers, trade unions and the government, which come together to promote fair and responsible employment practices.

It should be highlighted that in Singapore, the activities of trade unions are heavily regulated and industrial actions are rare. The Singapore government takes a strict stance against illegal industrial action, with Prime Minister Lee Hsien Loong stating in his 2013 May Day speech that the government will not tolerate any "*illegal action, or any party undermining [Singapore's] industrial harmony*". Additionally, trade unions may not negotiate on behalf of their members in respect of certain matters specified in Singapore's Industrial Relations Act. For example, trade unions may not negotiate on behalf of their members in relation to promotions, transfers within the employing organisation that are not detrimental to the employee's terms of employment, or termination for redundancy or reorganisation.

Conclusion

As a country that has historically focussed on drawing in foreign investments to build local economic activity, Singapore has rolled out a significant number of incentives to attract investors to its shores. We believe that such incentives will be maintained for the foreseeable future. Singapore should therefore be considered by investors who wish to safeguard their assets and investments in the midst of global political shifting sands and changing tides in regulatory frameworks.

Dentons Rodyk is well positioned to advise any foreign investor considering Singapore as a destination on the benefits, requirements, customized structuring and process for implementation. If you wish to speak to us on any of the above, or require our assistance on the same, please do not hesitate to contact the key persons listed in this article.

Dentons Rodyk thanks and acknowledges associate Randall Lee, legal executive Sean Gallagher, practice trainee Gabriel Fang and intern Cherie Tan for their contributions to this article.

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Coming to terms with COMI

Lessons from Re: Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener) [2019] SGHC 53

The Model Law on Cross-Border Insolvency was issued by the UNCITRAL Secretariat in 1997. The purpose of this Model Law was to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote various objectives, and as part of this process, the Model Law focuses on identifying the main insolvency proceeding. The way to do this? By identifying the "COMI" (i.e. the centre of main interests).

20 years later in 2017, Singapore passed the Model Law on Cross-Border Insolvency into national legislation with some modifications (the Singapore Model Law), confirming that COMI was very much a part of Singapore insolvency law. (Note: The Singapore Model Law is presently set out in the Tenth Schedule of the Singapore Companies Act (Cap. 50). However, once the omnibus Insolvency, Restructuring and Dissolution Act comes into force, it will contain all insolvency-related provisions, including the Singapore Model Law.)

Prior to the Singapore Model Law, the Singapore Court had been grappling with cross-border insolvencies, hamstrung by traditional insolvency laws which were largely territorial in focus. Since the enactment of the Singapore Model Law, the Singapore Courts have had the opportunity to expand on the Singapore Model Law COMI test in the case of *Re: Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53.

Following a contentious proceeding spanning more than a year, the Singapore High Court granted full recognition of the US Chapter 7 proceedings and the US Court-appointed Trustee of Zetta Jet Pte Ltd and Zetta Jet USA Inc. in March 2019. The Singapore High Court's decision very helpfully set out the approach and considerations relevant to recognition applications under the Singapore Model Law.

This commentary should be of interest to anyone active in cross-border insolvency and restructuring, and of particular relevance to those involved in foreign insolvency proceedings requiring recognition by the Singapore Courts.

Setting the scene – the coming of COMI

The recognition of foreign insolvency proceedings in Singapore was discussed in passing by the Court of Appeal in its decision of *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815, but no express mention was made of COMI. However the subsequent decision of the Singapore Court in *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] 4 SLR 312, recognised the COMI test as the basis for the recognition of foreign insolvency proceedings at common law. The Singapore Court considered English law developments and held that COMI would likely be the place where the bulk of the business is carried out i.e. where most dealings occur, most money paid in and out, and where most decisions are made. The registered office would be the presumed COMI in the absence of evidence to the contrary. This was followed in another case, *Re Gulf Pacific Shipping Ltd (in creditors' voluntary liquidation) and others* [2016] SGHC 287.

In short, the COMI test is now part of Singapore law.

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Zetta Jet Pte Ltd – A brief history

Zetta Jet Pte Ltd is a Singapore incorporated private jet company operating flights predominantly in US and Europe. On 15 September 2017, Zetta Jet Pte Ltd attempted to restructure under the Chapter 11 proceedings in the US. While the Chapter 11 proceedings was ongoing, two shareholders of Zetta Jet Pte Ltd obtained a Singapore injunction against the company and two other shareholders, restraining them from carrying out any further steps in and relating to the US Chapter 11 proceedings. However, the Singapore injunction was ignored by the US parties and the US Court which overreached to declare the Singapore Court Order invalid. The Chapter 11 proceedings were converted to liquidation proceedings under Chapter 7.

On 13 December 2017, the US Trustee of Zetta Jet Pte Ltd applied (on his own behalf and on behalf of Zetta Jet Pte. Ltd. and Zetta Jet USA, Inc) but did not succeed in his application for full recognition of the US proceedings. The Singapore High Court found that the US Trustee had been appointed in breach of a Singapore injunction. However, recognizing that there may be a need to balance the equities, the Court exercised its discretion to grant limited recognition to the US Trustee for the purposes of setting aside or appealing the Singapore injunction. (A summary and our insights on *Re: Zetta Jet Pte Ltd and others* [2018] SGHC 16 can be found **here**.)

In July 2018, the Singapore injunction was set aside by consent of the parties.

The most recent *Zetta Jet* case is the US Trustee's second attempt for full recognition of the US Chapter 7 proceedings and the US Trustee as the foreign representative in Singapore.

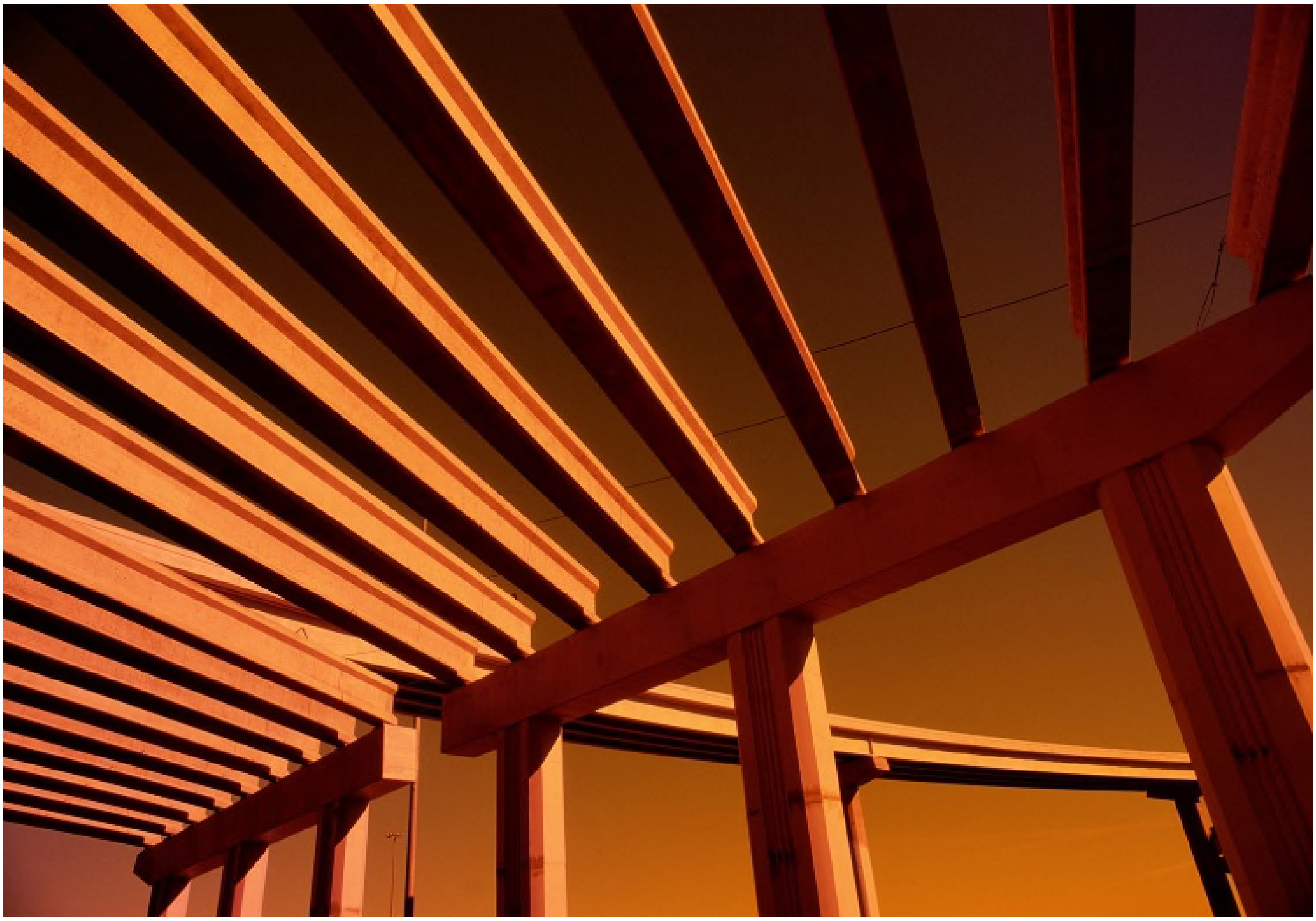
Summary of the Court's decision

Article 17(2) of the Singapore Model Law provides that the foreign proceeding must be recognised as a foreign main proceeding if it is taking place in the State where the debtor has its COMI. Hence, the Singapore Court had to determine Zetta Jet Pte Ltd's COMI in order to determine whether the US proceedings should be recognised as the foreign main proceeding.

The Singapore High Court (acting in accordance with judicial comity) decided in favour of the US Trustee and found Zetta Jet Pte Ltd's COMI to be the US. The Singapore Court granted full recognition to the US Chapter 7 proceedings as the foreign main proceeding, and to the US Trustee as the foreign representative.

The key takeaways from the judgment are summarised below.

- COMI will be determined as at the date of the filing of the recognition application (i.e. following the approach under US law, which approach may differ from that in other jurisdictions).
- The factors considered by the Singapore Court when determining the COMI are:
  - the presumption under Article 16(3) of the Singapore Model Law that the place of the debtor company's registered office is its COMI ("**the Article 16(3) Presumption**"). However, the Article 16(3) Presumption is only a starting point and can be displaced by the presence of other factors pointing towards some other location.
  - objectively ascertainable by third parties generally, with a focus on creditors and potential creditors. The Court's focus is on the actual facts on the ground rather than on legal structures. The enquiry would be dependent on the circumstances of each case and no general rule can be laid down.
- The following factors were considered by the Court, with particular weight given to the factors marked with an asterisk (*).
  - Location from which control and direction was administered*
  - Location of clients
  - Location of creditors*
  - Location of employees
  - Location of operations
  - Location of assets
  - Dealings with third parties*
  - Governing Law (Note: The Court had noted this factor to be of less relevance in most situations given the (ostensible) demise of the *Gibbs* rule outside England – more on this below.)



- The three key factors (i.e. location from which control and direction was administered, location of creditors, and corporate representations to third parties) pointed to US as the COMI. These outweighed the factors in favour of Singapore (i.e. that Zetta Jet Pte Ltd's administration and operations were partly carried out in Singapore, and the location of employees in Singapore).
- On the facts, the Singapore Court considered the most important factor to be the location of Zetta Jet Pte Ltd's primary decision makers i.e. its management.
- The location where the foreign representative was acting from (in this case the US Trustee) is not relevant to the analysis when determining COMI. (Note: This is a departure from the approach by the US courts.)

Public policy issues arising from the previous breach of the Singapore injunction order

- The US Trustee's previous breach of the Singapore injunction did not bar the Singapore Court from recognising the US Chapter 7 proceedings and the US Trustee. Because the injunction order was discharged by consent, recognition no longer undermined the administration of justice in Singapore.
- Consensual discharge of the injunction order created special circumstances which helped paved the way for full recognition of the US Chapter 7 proceedings and US Trustee in Singapore. However, the Singapore Court warned that outside of such special circumstances, parties who disobey Singapore orders will have to answer for their actions should they ever need to look for assets or information in Singapore.

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Thoughts and insights

1. Different packaging, familiar taste

The COMI tests in *Re Opti-Medix* under common law and in *Re: Zetta Jet* under statute, focus on locating the debtor's principal place of business. There appears to be alignment between the common law and statutory test and it seems that there is practically no advantage in drawing that distinction for the future.

2. All factors are equal, but some factors are more equal than others

From the Singapore High Court's analysis of the factors, certain factors are given more weight – those relating to the location where control and direction of the debtor company is administered (what the US courts term as the "nerve centre"), and the perception of third parties. In *Re: Zetta Jet*, what was particularly pertinent was that the Zetta Jet entities had marketed themselves to be operating out of Burbank, California. Further, the Zetta Jet points of contact which the company had communicated to customers and creditors were persons based in US.

As for the other factors, much depends on the nature of the company's business. In *Re: Zetta Jet*, minimal weight was given to the location of the company's assets given that the company's main assets were planes which were naturally expected to be located in multiple jurisdictions. However, the Court may give more weight to the location of more permanent assets, for instance, property owned by a real estate development company.

3. Relevance of the governing law of the debtor's contracts and Gibbs rule

The Singapore Court in *Re: Zetta Jet* dedicated only three lines to the relevance of the governing law of the debtor's contracts, and in doing so, demonstrated the reduced importance of this factor. The Court referred to the demise of the *Gibbs* rule in most jurisdictions other than England. (The *Gibbs* rule does not apply in Singapore. See: *Re Pacific Andes Resources Development Ltd and other matters* [2018] 5 SLR 125.)

The *Gibbs* rule states that the discharge of a debt can only take place under the law governing the debt. Therefore if the debt is governed under English law, it must be discharged under English law meaning an English law scheme presumably by the English Courts. In practical terms, this usually means that any cross-border restructuring involving assets located in England will have to consider the need to commence parallel restructuring proceedings in the country of the law governing the debt (i.e. not merely recognition proceedings). The *Gibbs* rule was recently affirmed in the case of *Gunel Bakhshiyeva v Sberbank of Russia & Ors* [2018] EWCA Civ 2802. (We note that leave is being sought from the UK Supreme Court to challenge the outcome in *Sberbank* and along with it, the rule in *Gibbs*. Until then, it is said that the *Gibbs* rule remains good under English law.)

4. Time, and time again

Time of the debtor's COMI is a contentious issue. In *Re: Zetta Jet* the Singapore Court agreed with the US approach and determined COMI as at the date of filing of the application for foreign recognition.

Given the different approaches taken in the various jurisdictions, the discerning debtor will need to identify at an early stage, where its COMI should be, and will need to be mindful of where recognition proceedings will need to be filed. Steps should be taken to ensure that evidence is consistently gathered in anticipation of recognition proceedings bearing in mind the timing of when COMI is determined in the relevant jurisdiction.

The various positions on timing are summarised below:

- The US approach: COMI is determined as at the date of filing of the recognition application (Singapore's position). Unlike Singapore, the US Court will consider the place of existing insolvency / restructuring activities.

- The UK approach: COMI is determined as at the date of the filing of the foreign proceedings – this is due to the EU regulations and the use of COMI in the Recast European Insolvency Regulation (the Recast EIR).

  (Note: The outcome of Brexit is expected to have a bearing on whether the Recast EIR continues to apply to the UK, which may in turn have a bearing on the timing of when COMI is decided under UK law. Indeed, in the very recent (as yet) unreported UK decision of *Re Toisa Limited*, the Court has held that the appropriate date on which to determine the COMI of the debtor should be the date of the recognition petition, following the US approach.)

- The Australian approach: COMI is determined as at the date of the hearing of the recognition application.

Concluding remarks

COMI shifting may well be useful where genuine attempts at restructuring require access to tools that facilitate restructuring e.g where rescue financing is available and super-priority accorded for much needed insolvency funding. At the same time, creditors need to be alive to illegitimate attempts at COMI shifting to make it difficult for creditors to exercise their legitimate rights. Creditors need to understand the tools at their disposal to thwart such attempts in insolvency and restructurings which more often than not, transcend borders nowadays.

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Dentons Rodyk would like to thank and acknowledge Senior Associate Geraldine Yeong for her contributions to this article.

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