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Business bulletins

SGX public consultation on listing rules amendments to align with changes to the Companies Act - Electronic transmission of notices and documents

By Kenneth Oh (Senior Partner, Singapore) and Hsu Li Chuan (Partner, Singapore)

After a series of public consultations by the Steering Committee for the Review of the Companies Act, key provisions in the Companies Act (Cap 50) of Singapore (Companies Act) were identified for reform and refinement. The resultant Companies (Amendment) Bill 2014 incorporating such proposed amendments was passed by the Parliament in October 2014, with the changes to the Companies Act effected in two phases, on 1 July 2015 and 3 January 2016 respectively.

Eight days after the second phase of changes, on 11 January 2016, the Singapore Exchange Securities Trading Limited (SGX) introduced a consultation paper proposing amendments to the SGX Listing Rules for both Mainboard and Catalist for alignment with the Companies Act amendments, as well as policy positions highlighted by other recent statutory amendments (Consultation Paper). These proposed amendments deal with, among others, insurance coverage and indemnities for directors, voting by certain shareholders, and treatment of shares held by a subsidiary in its holding company. The proposed amendment which was afforded the most extensive discussion and questions in the Consultation Paper was in relation to electronic transmission of notices and documents.

Companies Act

Under the revised Companies Act, with effect from 3 January 2016, companies are permitted, and given the freedom of deciding whether, to specify in their constitution that electronic methods of transmission of notices and documents to their shareholders will be used. If and where so permitted under the constitution, consent of the shareholders is to be obtained.

Such consent may either be express, implied or deemed:

- "Implied consent" is if the constitution provides for the use of electronic communications and specifies the manner of such use, and provides that the shareholder shall agree to such mode of communication without the right to elect to receive physical copies of notices and documents.

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- "Deemed consent" is similar to the foregoing, except that instead of shareholders not having the right to elect, the constitution specifies that shareholders will be given the opportunity to elect within a specified period of time whether to receive electronic or physical copies of notices and documents. To the extent that a shareholder fails to make an election within such time, consent will be deemed to have been granted.

In subsidiary legislation that also took effect on 3 January 2016, additional safeguards are provided for.

These safeguards include:

1. mandatory notification directly in writing by the company to shareholders, under the deemed consent regime of, among others:
   (a) the right of election whether to receive notices and documents by way of electronic communications or as a physical copy, and the consequences of failure to elect;
   (b) the manner in which electronic communications will be used is specified in the company's constitution;
   (c) the election is a standing election but the shareholder may make a fresh election at any time; and
   (d) until the shareholder makes a fresh election, the election that is conveyed to the company last in time prevails over all previous elections as the shareholder's valid and subsisting election in relation to all documents and notices to be given, sent or served;

2. where a company gives, sends or serves any notice or document to a shareholder by way of electronic communications by publishing the notice or document on the company's website, the company must give separate notice to the shareholder (using such means as may be specified in the company's constitution) of the publication and the manner in which the notice or document may be accessed; and

3. notices and documents relating to take-over offers or rights issues of the company are excluded from transmission by electronic means.

Consultation paper

Implied Regime

In the Consultation Paper, the SGX expressed its support of the move towards electronic transmission of notices and documents from the environmental, cost-savings and speed in accessibility perspective, but expressed its cognizance of concerns of shareholders who have yet to embrace technology. Additionally, the SGX recognised that once shareholders approve the implied consent regime as an amendment to the company's constitution, an implied consent regime forces the electronic option on shareholders who may not have approved of the amendment, and noted that some shareholders may have concerns with an implied consent regime as it does not allow shareholders to subsequently elect for physical copies of notices and documents.

Accordingly, the proposal by the SGX in the Consultation Paper was to amend the listing rules to allow electronic transmission of notices and documents only if express consent or deemed consent is obtained, which excludes implied consent as a permissible regime. In addition, the SGX posed a question to consult the public on potential concerns with an implied consent regime and whether it should be allowed for listed companies.

On this note, it bears highlighting that the express consent and deemed consent regimes may be administratively laborious as, in both cases, prior consent from its shareholders will have to be obtained (whether deemed or expressly) for notices or documents to be given, sent or served in electronic form. In addition, to the extent consent is not obtained from some shareholders (whether expressly so under the express consent regime, or from opting out under the deemed consent regime), the company may have to cater for both channels to be maintained through physical and electronic means.

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Document categorisation for electronic communication versus physical copies

While subsidiary legislation specifically excludes notices and documents relating to take-over offers or rights issues of the company from transmission by electronic means, the SGX goes beyond these two stated classes of corporate actions. In the Consultation paper, the SGX provides a list of corporate actions which ought to be sent by physical copy, on the basis that these actions may have a significant dilutive effect on a shareholder's shareholding interest or have a substantial impact on a shareholder's interest in the listed company, and which contain important procedural instructions and forms or acceptance letters shareholders may be required to complete. Apart from take-over offers or rights issue (which would fall squarely into such categories, and which is already precluded from electronic transmission), the SGX also set out a proposed extensive, non-exhaustive list of 12 matters falling within either of these categories. These matters include, among others, issuances of shares, company warrants and convertible securities (excluding those made pursuant to a general share issue mandate or share option or share scheme), preferential offerings, privatisation proposals, major transactions, very substantial acquisitions or reverse takeovers, merger, reorganisation or winding up proposals, interested person transactions (except for renewal of existing interested persons transaction mandate) and voluntary delistings. As proposed in the Consultation paper, only documents relating to routine matters would be sent by electronic means to reduce operational costs. Such routine matters include, among others, annual reports, share buyback mandates and share option schemes.

Accordingly, the SGX sought views on which documents ought to be included in each category.

Safeguards for electronic transmission

Apart from the safeguards prescribed by subsidiary legislation, the SGX proposes to adopt additional safeguards if website publication is chosen as the means of electronic transmission, to ensure shareholders are notified as and when documents are available on the website, such as via physical copies of notification letters, email or short message service. In addition, concerns on logistical issues on electronic transmission and the difficulty of ensuring the authenticity of return documents by shareholders to listed companies via electronic means, were raised. On this note, proposed solutions raised in the Consultation Paper include sending, by physical means, notices of meetings, notices that documents are available by electronic means, and procedural forms that shareholders may need to complete. Accordingly, the SGX sought feedback on proposed safeguards for the electronic transmission regime.

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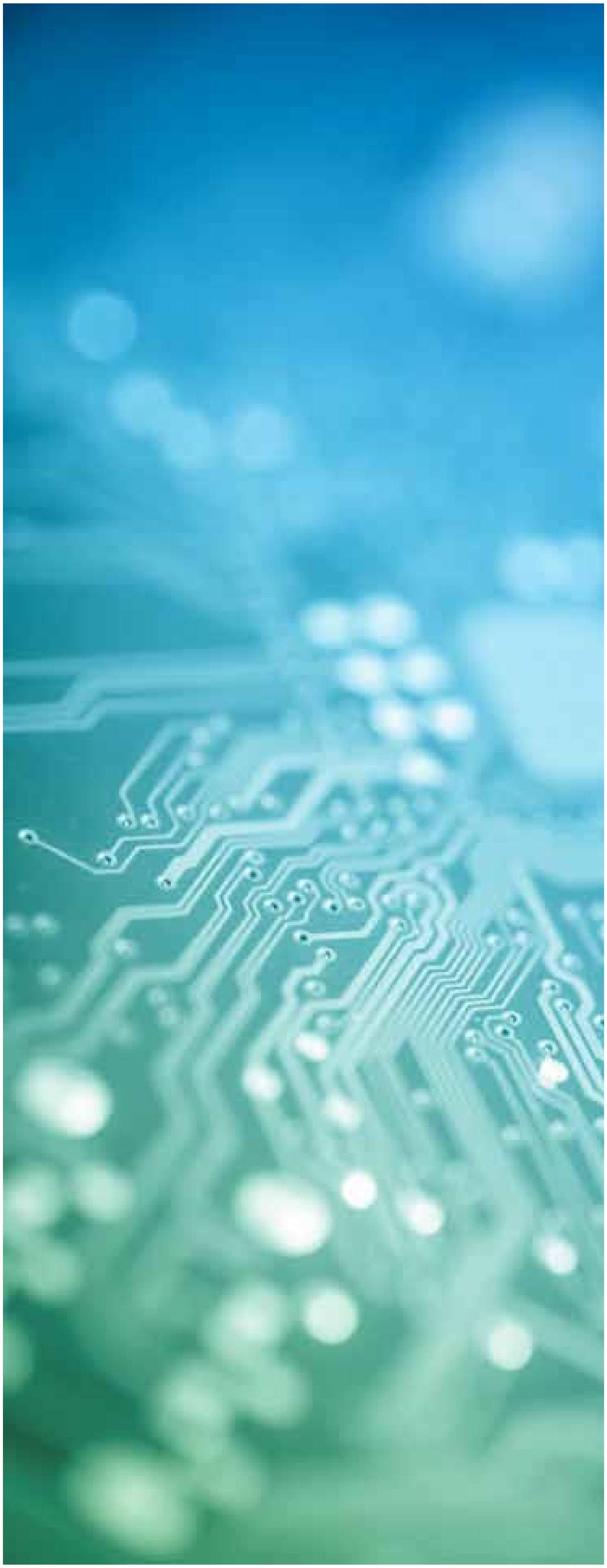

Conclusion

The electronic transmission regime was introduced into the Companies Act with the aim of enabling companies to reduce cost and increase efficiency, and accordingly the view taken by the Steering Committee for Review of the Companies Act was to ease the rules for electronic transmission and take a less prescriptive approach, with the aim of allowing companies to decide whether to adopt such a regime in its constitution, and how such electronic transmission should be effected. The Steering Committee for Review of the Companies Act, in an apparent recognition of the logistical difficulty for listed companies in introducing and administering such a regime with a large and fluid shareholder base without prejudicing any part of it, recommended that the SGX be at liberty to prescribe additional safeguards as may be appropriate for listed companies.

The multiple queries posed in the Consultation Paper thus reflect the cautious attitude that the SGX is taking in whether to allow electronic transmission for listed companies, and recognise the regulatory concerns of the SGX in introducing and administering such a regime, taking into account the interests of the shareholders of listed companies.

Consultation was closed on 21 February 2016, and the SGX is currently reviewing the responses received from market participants. It is unclear at this stage whether the SGX will permit electronic transmission, and if so permitted, the degree of safeguards to be introduced. However any consideration of safeguards ought not to limit or negate the potential advantages that electronic transmission seeks to offer. As it is, the stock exchanges in the United Kingdom, New Zealand and Hong Kong already allow for listed companies to communicate with its shareholders via electronic means, in varying extents, with the same underlying motivations behind the revisions to the Companies Act. It is therefore timely that the SGX has recognised the global market trend in this area, and introduced the Consultation Paper a mere eight days after the revisions to the Companies Act were effected. Various listed companies, in recognition of this likely trend, since January 2016, have introduced various forms of electronic transmissions through amendments to their constitution, though cautiously (and well-advisedly so) they have ensured that such amendments are only effective where the SGX's listing rules permit.

Competition law alerts

Competition law - Rights of private action

By Ajinderpal Singh (Senior Partner, Singapore)

Introduction

Singapore's competition law regime has been in place since 2006 but you may not be aware that Singapore's competition law regime provides for the Right of Private Action, under Section 86 of the Competition Act (Cap. 50B). The Right of Private Action offers remedies for victims of anti-competitive conduct to obtain compensation for loss and damage suffered. It is also intended to be a further deterrent to anti-competitive conduct, resulting in a fairer market for all. Apart from facing fines for anti-competitive conduct, entities may still be taken to task for loss and damage suffered by third parties as a result of such anti-competitive conduct.

The Right of Private Action

The Right of Private Action arises in limited, but clear, circumstances. Section 86(2)(a) provides that a claim for damages only arises upon a final determination that an entity has infringed:

1. Section 34 (by entering into agreements which have as their intended objective or result in the prevention, restriction or distortion of competition within Singapore);
2. Section 47 (by abusing the entity's dominant position in a market in Singapore); and/or
3. Section 54 (where a merger with another entity results or is expected to result in the substantial lessening of competition in a market in Singapore).

Such a determination may be made by the Competition Commission of Singapore (the CCS) but is subject to the entity's rights of appeal, from the decision of the CCS to the Competition Appeal Board, which in turn is appealable to the High Court of Singapore and from there to the Court of Appeal within prescribed time limits. In waiting for the final determination, third parties may therefore have to wait until an entity exhausts all of its rights of appeal.

Once a final determination is made, third parties will have only two years to commence civil proceedings against the entity.

Given the complexity of the area of law, parties dealing with entities under investigation by the CCS would be advised to consult their lawyers and other experts to consider their likely losses resulting from the alleged anti-competitive conduct under investigation as soon as it is apparent that investigations are underway to ascertain if they are in fact victims of the anti-competitive conduct.

Victims must have suffered loss directly

Singapore's competition law regime limits the Right of Private Action to persons who have suffered losses directly as a result of such anti-competitive conduct. For example, in the case of commodities or consumables, aggregators may form a cartel to inflate wholesale prices, only for wholesalers and retailers to pass on the inflated prices to final consumers. Based on this requirement of direct losses, consumers may not be able to commence civil proceedings against the anti-competitive entity. Although the courts in Singapore have not yet authoritatively ruled on this issue, wholesalers not involved in the cartel activity would be able to recover damages for losses suffered instead.

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Damages recoverable by victims of anti-competitive conduct

As the anti-competitive nature of the entity's conduct may not be challenged, an anti-competitive entity is likely to focus its efforts in contesting a third party's quantification of its damages. Damages are generally intended to compensate the third party's for its losses.

Such losses may include:

1. lost profits on actual and potential sales;
2. lost sales (due to consumers turning to available substitute goods); and
3. lost market share.

Quantifying such losses is usually a matter for expert evidence on complex microeconomic and econometric analysis. Such detailed expert analysis will also have to be interpreted and directly linked to the entity's anti-competitive conduct before third parties will be awarded damages. While the assessment of damages and analysis of microeconomic and econometric analysis are generally complex matters, it is likely that the direct victims of anti-competitive conduct will be able to establish their losses with greater ease and clarity than indirect victims.

As with other claims, it is unlikely that the Singapore courts will award exemplary or punitive damages, or require entities to disgorge their profits as it is more likely that the direct victims of anti-competitive behaviour in Singapore will be able to quantify their losses more readily. In this case, it is much more important for victims of anti-competitive behaviour to be certain of their losses. This, of course, is easier said than done.

Conclusion

Since January 2016, the CCS has issued two negative determinations in the life insurance industry and the fresh poultry industry; has issued statements in response to queries in two further industries; and, is currently considering a variety of complaints in separate industries.

To date, no third party has exercised their Rights of Private Action pursuant to Section 86 of the Competition Act. This however is a development which may take place in the near future.

The author acknowledges and thanks Ganesh Bharath Ratnam for his contribution in the writing of this article.

Litigation briefs

A new breakthrough - Working towards globalising the enforceability of Singapore court judgments

By Philip Jeyaretnam, SC (Singapore Chief Executive Officer and Global Vice-Chair, Singapore) and Koh Kia Jeng (Partner, Singapore)

What is the Singapore Choice of Court Agreements Act (CCAA)?

The CCAA was enacted on 14 April 2016. It gives effect to Singapore's treaty obligations under 2005 Hague Convention on Choice of Court Agreements (2005 Hague Convention) thereby allowing Singapore to ratify it.

What is the 2005 Hague Convention?

The 2005 Hague Convention obliges contracting states (such obligations of which will need to be passed into municipal law and Singapore has done so with the enactment of the CCAA) to:

i. uphold exclusive choice of court agreements designating the courts of contracting states in international civil or commercial cases; and

ii. recognise and enforce judgments of the courts of other contracting states designated in exclusive choice of court agreements without reviewing the underlying merits of the substantive claims,

subject to the exceptions in the convention and/or any reservations which a contracting state may have.

Currently, 28 countries are parties to the 2005 Hague Convention, i.e. Mexico and the European Union member states (except Denmark). The United States and Ukraine have signed the 2005 Hague Convention but have not yet ratified it.

What is the effect of the CCAA?

Where a Singapore court is the chosen court under an exclusive choice of court agreement, courts of other contracting states are obliged to suspend or dismiss parallel proceedings brought in their jurisdiction in favour of the Singapore court unless certain exceptions apply (e.g. where the agreement is null and void). Further, Singapore court judgments obtained in proceedings pursuant to such an exclusive choice of court agreement must be recognised and enforced by all the other contracting states unless certain exceptions apply (e.g. where the agreement is null and void).

Conversely, Singapore has reciprocal obligations to similarly deal with proceedings brought in Singapore where the parties have an exclusive choice of court agreement designating a foreign court of a contracting state to the 2005 Hague Convention to determine their disputes, unless certain exceptions apply (e.g. where the agreement is null and void under the law of the State of the chosen court, or the chosen court has decided not to hear the case).

Specifically on enforcement, the CCAA distinguishes between mandatory grounds and discretionary grounds when considering the issue of refusing recognition or enforceability of the foreign judgment issued from the court of a contracting state.

Mandatory grounds include the situations where the judgment was obtained by fraud in connection with a matter of procedure, and where recognition would be manifestly incompatible with Singapore public policy.

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Discretionary grounds include situations where one of the parties lacked capacity to enter into the exclusive choice of court agreement, and where the foreign judgment is inconsistent with a Singapore court judgment in a dispute between the same parties.

Lastly, the CCAA provides that any Singapore judgment, even that issued by a lower court, e.g. the State Courts, can be enforced in a contracting state so long as the Singapore courts are chosen by the parties to be the exclusive choice of court.

What type of cases can the CCAA apply to?

The CCAA applies to international civil or commercial disputes but does not apply to exclusive choice of court agreements in personal, family or consumer matters, e.g. matrimonial matters, bankruptcy, insolvency, consumer claims, status and legal capacity of natural persons, wills and succession, anti-trust (competition law) matters, and claims for personal injuries.

What has the CCAA achieved for Singapore?

It enhances Singapore's position as an international dispute resolution hub.

To some, the 2005 Hague Convention can be described as the court-cousin of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention) and the CCAA does substantially reflect most of the principles that one would find when seeking to enforce an international arbitral award issued by a contracting state to the 1958 New York Convention in another contracting state.

Together with the Singapore International Commercial Court, it paves the way for commercial undertakings, particularly multinational and cross border ones, to resolve disputes in Singapore and have judgements enforced in a contracting state to the 2005 Hague Convention if Singapore is chosen by the parties to be the exclusive choice of court.

In effect, the CCAA, in line with the objectives of the 2005 Hague Convention, has given more teeth to the successful enforcement of judgment debts in this increasingly globalised world.

Does hedging play an integral part in mitigating the loss of falling oil prices?

By Iain Sharp (Partner, Singapore)

Mitigation following a breach of contract – how far does the duty extend?

The rout in commodity prices continues to impact nations and stocks across the globe. Already this year the price of oil has dipped below US$30 a barrel, with a seemingly unrelenting oversupply of crude and markets preparing for the return of Iran post-sanctions. Sadly, falling prices often result in contract re-negotiations or default, leading to claims and innocent parties with goods on their hands and a difficult search for a willing buyer prepared to pay a reasonable price.

Following a breach of contract, the innocent party has a duty to mitigate the loss it has suffered. However, failure to mitigate loss may prevent that party from recovering damages for avoidable loss. A standard defence which the defaulting party often invokes to reduce the damages payable is that the innocent party has failed to act reasonably to mitigate its loss. The burden of proving a failure to mitigate falls, however, on the defaulting party.

As one might imagine, the courts are generally sympathetic to efforts made by an innocent party seeking to deal with a breach of contract. The requirement to take 'reasonable steps' to mitigate loss is not a particularly high standard. This so-called 'duty' requires reasonable steps to be taken to limit the losses that are incurred (and also to avoid incurring unnecessary expenditure in seeking to remedy the breach). An innocent party need not, however, take unusual steps that would be outside the normal course of its business, or even incur undue costs. Reasonable costs of mitigation incurred by the innocent party will generally be recoverable from the defaulting party.

For example, in contracts for the sale of goods, the claimant seller will usually have to give credit for the market value of the goods at the time of termination. This requires the defendant buyer to establish two things:

- that there is a market for the goods; and
- the market value of the goods.

The courts are likely to penalise a claimant in damages where it has demonstrably and unreasonably failed to take any steps to mitigate its loss, or where the steps that it has taken are plainly inadequate. For example, where a claimant could potentially mitigate its loss by selling goods in the market, the courts will usually expect to see evidence of meaningful attempts to do so.

In a falling market, 'reasonable' offers may be hard to come by. How long should the innocent party wait to sell the goods in the hope that market conditions might improve? Should the innocent party continue to store goods (and incur charges) whilst it waits for a better offer?

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Although it might seem unpalatable, it could be reasonable for the innocent party to accept a lower offer to purchase goods from the defaulter. In such circumstances, the innocent party would be wise not to waive its right to claim the losses suffered as a result of the defaulter's conduct.

In the context of oil trading, recent English authorities have shown that hedging can be seen as an integral part of mitigation.

In *Glencore Energy UK Ltd v Transworld Ltd* [2010] EWHC 141 (Comm), the buyer Glencore claimed against the seller Transworld for repudiatory breach of an FOB contract for Ukpokiti crude oil. The parties agreed that there was no available market for Ukpokiti crude within the remit of section 51(3) of the Sale of Goods Act 1979.

Glencore claimed for the difference between the contract price and the value of the Ukpokiti crude on the date it should have been delivered. Transworld argued that Glencore had closed out its position early and therefore mitigated its losses. Glencore was required to close out its position in order to reduce exposure to the accrual of greater hedging losses against which there was no physical cargo to offset. To ignore the hedging position would effectively give Glencore a windfall.

The court held that account was to be taken of Glencore's reduced hedging loss. Having accepted Transworld's breach as bringing the contract to an end, Glencore "not only did but was required to mitigate its loss by closing out its hedges. To have allowed them to run on would have been to speculate in the movement of the price of oil, which Glencore has asserted is no part of its business for present purposes."

By closing out its hedges, Glencore established its loss. On its own evidence, hedging was an integral part of the business by which Glencore entered into the contract. Closing out positions is something that a claimant may be required to do, as part of its duty to mitigate its loss once its counterparty's breach is clear.

The article was first published on the Global Law and Business blog.

Iain Sharp is a contributing author to the Oil and Gas Trading: A Practical Guide, recently published by Globe Law and Business (http://www.globelawandbusiness.com/OGT). This new guide to oil and gas trading examines the way in which the oil and gas market operates in practice, taking note of real-life situations that can arise.

Vicarious liability of employers

A case note on *Mr A M Mohamud (in substitution for Mr A Mohamud (deceased)) v WM Morrison Supermarkets plc* [2016] UKSC 11 (Mohamud v Morrison)

By Rodney Keong (Senior Partner, Singapore)

Decision by the UK Supreme Court given on 2 March 2016 on an employer's vicarious liability in tort for an assault carried out by an employee.

Executive summary

The UK Supreme Court (UKSC) has confirmed that the close connection test remains the applicable test when determining vicarious liability in tort. Applying the close connection test, the court found a supermarket operator vicariously liable for the assault committed by an employee on a customer, despite the fact that the employee in carrying out the assault had disregarded the supervisor's instructions to stop. Given that the Singapore Court of Appeal has previously held that the imposition of vicarious liability may not be justified where the employee's conduct was uncontrollable and the employer had done all that was reasonable to deter the tort, it remains to be seen whether the Singapore courts would follow the UKSC's decision in a similar fact situation.

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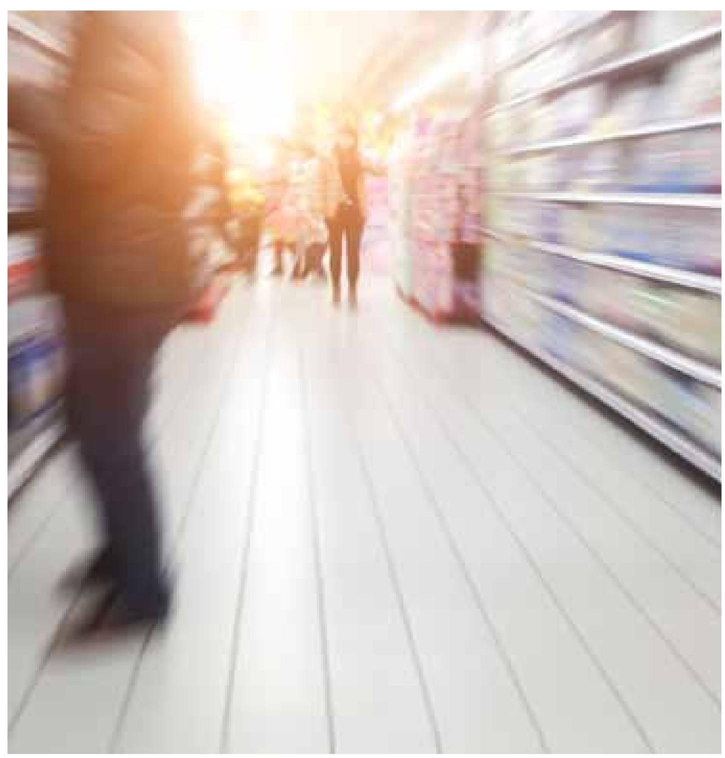

Brief facts

- The claimant was a customer at the respondent company's premises which included a petrol station and a kiosk where customers paid for their purchases.
- On the day of the incident, the respondent's employee was behind the kiosk counter and his job was to ensure that the petrol pumps and the kiosk were kept in good running order and to serve customers.
- After parking his car at the petrol station, the claimant entered the kiosk and inquired whether it would be possible to print some documents from a USB stick which he was carrying.
- The respondent's employee responded rudely. When the claimant protested at the manner in which the employee had spoken to him, the employee used foul, racist and threatening language to order the claimant to leave.
- Even after the claimant walked out of the kiosk and returned to his car, the respondent's employee followed him. When the claimant got into his car, the employee opened the front passenger door and told him in threatening words never to come back. As the claimant told the employee to get out of the car and close the passenger door, the employee punched the claimant. When the claimant got out of the car to close the passenger door, the employee again punched him in the head, knocked him to the floor and subjected him to a serious assault involving punches and kicks while the claimant lay curled up on the floor trying to protect his head from the blows.
- While carrying out the assault, the employee ignored instructions from his supervisor who had tried to stop him.

Decisions

- The trial judge concluded that the respondent company was not vicariously liable for the employee's unprovoked assault as the close connection test was not satisfied. While the employee's job entailed some interaction with customers, it involved nothing more than serving and helping them. The trial judge also singled out the fact that the employee had made a positive decision to exit from behind the counter and follow the claimant out of the kiosk in contravention of instructions given to him.
- The Court of Appeal upheld the trial judge's decision that the close connection test was not satisfied. The Court of Appeal was similarly of the view that the fact that the employee's job involved interaction with customers did not provide the degree of connection between his employment and the assault which was necessary for the test to be satisfied and for the respondent company to the held vicariously liable. This is because such a scope of duties did not involve a clear possibility of confrontation nor did it place the employee in a situation where an assault was likely.

UKSC's decision

Before the UKSC, the claimant argued that the time had come for a new test of vicarious liability. Instead of the close connection test, the courts should apply a broader test of "representative capacity". Under this test, an employer would be vicariously liable for the tort of an employee if a reasonable observer would consider the employee to be acting in the capacity of a representative of the employer at the time of committing the tort.

In its decision which traced the origins and development of the doctrine of vicarious liability, the court noted that the close connection test was imprecise, but the imprecision was inevitable given the infinite range of circumstances where the issue of vicarious liability arose. The close connection test was firmly rooted in justice and it was difficult to see how it could be further refined. On the other hand, the "representative capacity" test was "hopelessly vague" and "far from being demonstrably better" than the close connection test. Therefore, the close connection test remained the applicable test until a better test could be devised.

Under the close connection test, the court considered the following two issues:

1. What functions or field of activities had been entrusted by the employer to the employee – in other words, what was the nature of his job; and

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2. Whether there was a sufficient connection between the position in which the employee was employed and his wrongful conduct to make it right for the employer to be held liable under principles of social justice.

Applying that test and overturning the decision below, the UKSC held that since it was the employee's job to attend to customers and to respond to their inquiries, the rude manner in which he responded to the claimant, though inexcusable, was "within the 'field of activities' assigned to him". Delivering the lead judgment, Lord Toulson noted that the cases in which the necessary connection had been found were cases in which the employee had used or misused the position entrusted to him in a way which injured the third party.

Describing what happened as "an unbroken sequence of events", Lord Toulson disagreed that any significant connection ceased when the employee exited from behind the counter for the following two reasons:

1. It was not right to regard the employee as having metaphorically taken off his uniform the moment he stepped from behind the counter since it was a seamless episode of him following up on what he had said to the claimant.

2. By threatening the claimant never to come back to the petrol station, the employee was ordering the claimant to keep away from his employer's premises. In doing so, he was purporting to act about his employer's business, which though a gross abuse of his position, was in connection with the business in which he was employed to serve customers.

Commentary

As demonstrated by the opposing decisions reached by the UKSC and the courts below, whether there is a sufficient connection between the employee's field of activities and his wrongful conduct to satisfy the close connection test can be very subjective. Indeed, the test has been criticised for resulting in inconsistent or irreconcilable decisions, with observers commenting that many decisions are in reality based on the court's perception of what justice requires.

In Singapore, the Court of Appeal has confirmed the applicability of the close connection test in its seminal decision of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] SGCA 22 (Skandinaviska). However, in Skandinaviska, the Court of Appeal made clear that apart from close connection, there was also a need to consider the policy considerations of victim compensation and deterrence.

With regard to deterrence, (then) Chief Justice Chan Sek Keong explained that the policy consideration "rests on the fundamental premise that the employer is best placed, relative to everybody else, to manage the risks of his business enterprise and prevent wrongdoing from occurring." Hence, where an employee's tort is "uncontrollable and, therefore, not amenable to deterrence", CJ Chan opined: "In such situation, it may well be possible to find that the employer has done all that is reasonable to deter the tort and yet has failed to prevent the commission of the tort. In such situations, deterrence as a justification for imposing vicarious liability loses much of its force."

In addition, the Court of Appeal introduced a new factor of foreseeability on the part of the employer in respect of the employee's tort. In Skandinaviska, one of the reasons why the court held that the employer was not vicariously liable for the employee's conduct in obtaining credit facilities from several banks through false pretences and forged board resolutions was that the employer could not have reasonably contemplated that the employee might defraud a third party which he had no authority to deal with as finance manager; in other words, the employee's fraud was "entirely unforeseeable".

In Mohamud v Morrison, the employee had ignored instructions from his supervisor who had attempted to stop him from continuing the assault. Accordingly, it would appear that a Singapore Court may well have taken the view that "the employer has done all that is reasonable to deter the tort and yet has failed to prevent the commission of the tort" which was "entirely unforeseeable". This, coupled with the pro-employer stance often adopted by the Singapore Courts, suggests that in the event of a spur-of-the-moment assault by an employee on an innocent customer in Singapore despite being instructed not to do so by a supervisor, an employer may not be held vicariously liable. Whether this will indeed be the case in light of the UKSC's latest decision in Mohamud v Morrison remains to be seen.

Property notes

Are long-term leases that are not in registrable form in breach of the Planning Act (cap 232)?

A case study of *Golden Village Multiplex Pte Ltd v Marina Centre Holdings Pte Ltd* [2001] 2 Sing. L.R. (R.) 450

By Norman Ho (Senior Partner, Singapore), Gazalle Mok (Partner, Singapore) and Jeannette Lim (Partner, Singapore)

Under the Planning Act (Cap 232), leases of certain tenure (taking into consideration their renewal terms, if any) may constitute a subdivision for which subdivision permission is required.

This issue was considered and analysed in detail in the seminal case of *Golden Village Multiplex Pte Ltd v Marina Centre Holdings Pte Ltd* [2001] 2 Sing. L.R. (R.) 450 (Golden Village).

In the Golden Village case, Golden Village Multiplex Pte Ltd entered into a non-registrable lease for a term of 15 years (Golden Village Lease) with Marina Centre Holdings Pte Ltd. One of the key issues before the High Court was whether, by virtue of its tenure being more than seven years, the lease was in breach of the Planning Act (Cap. 232, 1990 Rev. Ed. Sing.) (the 1990 Planning Act)[1] as it constituted a subdivision of the premises from the rest of the building without complying with the requirement for subdivision under the 1990 Planning Act, which was then prevailing.

The relevant provisions under the 1990 Planning Act are Section 2(2) and Section 10(3)(a).

An extract of both provisions are as follows:

"Interpretation
2.—(2) For the purposes of this Act, a person is said to subdivide land if, by any deed or instrument, he conveys, assigns, demises or otherwise disposes of any part of the land in such a manner that the part so disposed of becomes capable of being registered under the Registration of Deeds Act or in the case of registered land being included in a separate folio of the land-register under the Land Titles Act, and "subdivide" and "subdivision" shall be construed accordingly:

Provided that a lease for a period not exceeding 7 years without the option of renewal or purchase shall not be deemed to be a disposal with the meaning of this definition."

"Restriction upon development or subdivision of land
10.—(3) No person shall subdivide any land unless —
(a) he has obtained the written permission of the competent authority, and a copy of his written permission has been forwarded by the competent authority to the Collector together with a plan of the permitted subdivision on which dimensions of all lots, widths of streets and backlanes and such other particulars as the competent authority may consider necessary are shown; ..."

In determining whether the Golden Village Lease was in breach of Section 10(3)(a) of the 1990 Planning Act, the High Court considered Sections 51(1), 51(2) and 165(1)(a) of the Land Titles Act (Cap. 157, 1994 Rev. Ed. Sing.) ("the 1994 LTA"), which was then prevailing.

An extract of the provisions are as follows:

"Approved forms
51.—(1) The forms from time to time approved by the Registrar shall be used for all instruments intended to affect registered land.

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(2) The Registrar may register any instrument containing departures from an approved form and the instrument shall be deemed to be in a form approved by the Registrar."

"Subdivision of registered land
165.—(1) Except as provided in this section, the Registrar shall not register any instrument affecting part of the land in a folio until he is satisfied that —
(a) the authority for the time being charged with the duty of controlling or supervising the subdivision of the land has certified that the lawful requirements of that authority relating to subdivision have been complied with; ..."

It was undisputed by the parties in the case that there was no written subdivision permission from the authorities. Nevertheless, the High Court held that there was no breach of Section 10(3)(a) of the 1990 Planning Act because the instrument in question was not capable of being included in a separate folio of the land register under the LTA.

The High Court considered at [114] that since Section 165(1)(a) of the 1994 LTA prohibits the Registrar of Titles from registering the instrument, the instrument was not capable of being included in a separate folio of the land register. Judicial Commissioner Woo Bih Li (as he then was) observed that this was the same interpretation taken in a previous High Court decision of *Chin Hwa Trading Pte Ltd v. United Overseas Bank Ltd* [1985-1986] Sing. L.R. (R.) 63 at [25]. However, he was of the view that this was not the correct interpretation, because the very failure to obtain the subdivision permission would itself save the lessor from being in breach of the 1990 Planning Act.

Woo JC preferred to base his holding on the fact that the instrument was not in the registrable form. He was of the view that the correct interpretation of Section 2(2) of the 1990 Planning Act is that the same only applies to instruments in a registrable form. Woo JC explained at [122] that an instrument which is not in a registrable form is not one that is "capable of" being included in a separate folio unless and until the registrar exercises his discretion under Section 51(2) of the 1994 LTA to register it, but not before.

Nevertheless, Woo JC explicitly stated that even if this interpretation is incorrect, he would then have adopted the interpretation premised upon Section 165(1)(a) of the 1994 LTA and likewise held that there would be no breach of the 1990 Planning Act.

On appeal, the Court of Appeal in *Golden Village Multiplex Pte Ltd v. Marina Centre Holdings Pte Ltd* [2002] 1 Sing. L.R. (R.) 169 reached the same conclusion that there was no breach of the 1990 Planning Act. It similarly considered both interpretations, but clearly preferred the interpretation premised upon Section 165(1)(a) of the 1994 LTA.

This is because Section 51(2) of the LTA gives the Registrar of Titles discretion to register an instrument containing departures from the registrable forms, whereas Section 165(1)(a) of the 1994 LTA does not leave the Registrar of Titles with any discretion to register an instrument affecting part of the land in a folio unless subdivision permission has been obtained.

The holding of the Court of Appeal in the Golden Village case was restated as obiter dicta in a more recent High Court case of P*ontiac Land Pte Ltd v. P-Zone Services Pte Ltd* [2010] 4 Sing. L.R. 111 at [16] and [17]. It therefore remains good law at the time of publication of this article.

Legislative changes to the Planning Act and the Land Titles Act

The prohibition against subdivision of land without written subdivision permission is now contained in Section 12(3) of the Planning Act (Cap. 232, 1998 Rev. Ed. Sing.) (the 1998 Planning Act), which is the version of the statute currently in force.

The definition of "subdivide" under Section 4 of the 1998 Planning Act largely follows that of Section 2(2) the 1990 Planning Act, and although the scope of its proviso has expanded with the passing of the Planning (Amendment) Act 2003, the definition has remained intact up till now.

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An extract of the said provisions in the 1998 Planning Act are as follows:

"Meaning of "subdivide"

4.—(1) Subject to this section, a person shall, for the purposes of this Act, be said to subdivide land if, by any deed or instrument, he conveys, assigns, demises or otherwise disposes of any part of the land in such a manner that the part so disposed of becomes capable of being registered under the Registration of Deeds Act (Cap. 269) or, in the case of registered land, being included in a separate folio of the land-register under the Land Titles Act (Cap. 157), and "subdivide" and "subdivision" shall be construed accordingly.

(2) Notwithstanding subsection (1), the following leases granted on or after 1st April 1998 shall not be regarded as a disposal of the land or part thereof:

(a) in the case of any development described in Part I of the Third Schedule, the grant of any lease for any unit in the development for a term not exceeding an aggregate of 14 years;

(b) in the case of any development described in Part II of the Third Schedule, the grant of any lease for a building or any part of a building comprised in the development for a term not exceeding an aggregate of 14 years; or

(c) in the case of any other land, the grant of any lease of the whole or part of the land for a term not exceeding an aggregate of 7 years.
..."

"Unauthorised subdivision, development and other works
12.—(3) No person shall without subdivision permission subdivide any land."

As for the Land Titles Act, consequential amendments were made to the legislation in 2004, and Section 165(1)(a) of the 1994 LTA was effectively deleted. However, the Parliamentary Debates did not shed any light on the rationale behind the deletion, and specifically, whether it was triggered by the Golden Village case.

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Section 165(1) of the Land Titles Act now reads as follows:

"Subdivision of registered land

165.—(1) Except as provided in this section, the Registrar shall not register any instrument affecting part of the land in a folio until he is satisfied that the boundaries and dimensions of part of the land in a folio described in an instrument are in accordance with the final boundaries and dimensions shown in the plan lodged with and approved by the Chief Surveyor under the Boundaries and Survey Maps Act (Cap. 25)."

On the other hand, Section 51(1) and 51(2) of the Land Titles Act have remained unchanged till this day.

Conclusion

The unexplained removal of Section 165(1)(a) of the 1994 LTA has therefore cast doubt on the Court of Appeal judgment in the Golden Village case.

For long-term leases (i.e. which tenure is greater than the period stipulated under Section 4(2) of the 1998 Planning Act) of part of a land where there are no surveyed boundaries, it appears that the Court of Appeal judgment in the Golden Village case can still be relied on, because the existing Section 165(1) of the Land Titles Act still prevents the Registrar of Titles from effecting registration of such lease instruments. Such leases are therefore not capable of being included in a separate folio of the land-register under the Land Titles Act, and would not constitute "subdivision" for the purposes of the Planning Act. There would thus be no breach of Section 12(3) of the Planning Act.

However, in respect of long-term leases of whole pieces of land (wherein the boundaries and dimensions of such land have been lodged with and approved by the Chief Surveyor as set out in Section 165(1) of the Land Titles Act), it is submitted that legal practitioners can now only fall back on the interpretation put forth by the High Court in the Golden Village case – i.e. an instrument which is not in a registrable form is not "capable of" being included in a separate folio of the land-register under the Land Titles Act until such time when the Registrar of Titles decides to exercise its authority under Section 51(2) of the LTA and registers the long-term leases that deviates from the registrable form.

1. Although the case was decided in 2001, which was after the implementation of the 1998 Edition of the Planning Act, it should be noted that the agreement to lease in question was dated 28 February 1995, and the applicable legislation was therefore the 1990 Edition of the Planning Act.

The authors acknowledge and thank Marco Low for his contribution in the writing of this article.

Right of first refusal in relation to real estate

By Lee Liat Yeang (Senior Partner, Singapore) and Ho Soo Lih (Partner, Singapore)

Introduction

This article aims to provide an overview of what constitutes a right of first refusal ("ROFR") in relation to real estate (referred to herein as "property") and the salient considerations to be borne in mind by parties considering a ROFR agreement.

Overview of ROFR

A ROFR in relation to real estate essentially arises where the owner of the land (Grantor) contracts that, if and when he decides to sell the property, he will *first* offer it to the other contracting party (Grantee) ahead of any other purchaser. The ROFR, unlike an option to purchase, is not an offer to sell, and does not give the Grantee the right to buy.

An instance where a party may wish to obtain a ROFR is when a tenant desires to extend its continued occupation at the property. In such a case, the tenant may, other than or in addition to an option to renew the tenancy, negotiate for a ROFR to be included in the tenancy agreement, with the tenant effectively being placed in the position of a preferential purchaser.

In Singapore, the ROFR features in industrial property leases issued by the Housing Development Board (HDB) and the Jurong Town Corporation (JTC). With effect from 15 April 2010 for JTC industrial land leases and 1 January 2015 for HDB industrial land leases respectively, ROFR clauses have been imposed on all new allocations of leases, as well as for lease renewal and lease assignment cases. In such instances, where a lessee desires to assign or sell the industrial property leased from JTC or HDB, the lessee is required to give JTC or HDB (as the case may be) the first right to buy the property.

Key considerations

While a ROFR may take various forms, some key considerations when negotiating for a ROFR include the following:

(a) Nature of the right granted –
Whether the Grantor is contractually obliged to make an offer to sell to the Grantee on certain terms, or is merely obliged to notify the Grantee of his desire to sell, leaving the Grantee to make an offer to buy which the Grantor may accept or decline;

(b) Duration of the right –
Is the ROFR intended to be exercisable, for example, only during the first two years of the tenancy, or for the entire term of the tenancy?

(c) The triggering event –
Whether the exercise of the ROFR should be limited to circumstances when the Grantor desires to sell the property, or if other dispositions of the property (by way of gift or otherwise) are intended to fall within the ambit of the ROFR;

(d) Timeline for the exercise of the right –
Whether the Grantee is given a specific duration to exercise the ROFR upon the Grantee being notified of a third party's offer or of the Grantor's desire to dispose of the property;

(e) Non-exercise of the right –
If the Grantee chooses not to exercise the ROFR on the first occasion when it becomes exercisable, does the Grantor remain bound by the ROFR on a rolling basis such that the Grantee remains in the position of a preferred purchaser each time the Grantor desires to sell? Further, if the Grantor's sale to a third party is unsuccessful, is the Grantor obliged to go through the process of notifying or making a further offer to the Grantee in the event of another potential sale?

(f) Terms of the sale –
Among other things, the terms could include the price to be paid for the property (and the basis for arriving at such price, where applicable), the encumbrances subject to which the property will be sold (if any), and whether the Grantee is to pay a deposit upon exercise of the ROFR; and

(g) Transferability of the ROFR –
Do parties intend for the Grantor's successors in title to be bound by the ROFR? In addition, parties may also wish to consider if the ROFR is intended to be personal to the Grantee only.

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Enforceability of a ROFR which terms are vague

A review of the Singapore and UK cases suggests that a court would hesitate to find that a ROFR is unenforceable even where the terms of the ROFR are vague. In the absence of a comprehensive ROFR which clearly delineates the parties' respective rights and obligations, a court will, so far as possible, strive to give some sensible meaning to the terms of the ROFR. This is particularly so where commercial parties have taken the trouble of negotiating, preparing and concluding an agreement granting or otherwise incorporating the ROFR.

For example, where the terms of the ROFR do not stipulate a clear timeframe for the exercise of the ROFR by the Grantee upon occurrence of the triggering event, there are at least two avenues by which a court may seek to give effect to operation of the ROFR. The court may find that:

1. The Grantor is entitled to revoke the offer to sell at any time before the Grantee exercises the ROFR; or

2. The Grantor is obliged to give the Grantee a reasonable timeframe to exercise the ROFR, having regard to the circumstances of the particular case. While case authorities are lacking on what would constitute a reasonable and sufficient timeframe for the Grantee to exercise the right, this could be any time between one week and three months from the date on which a third party's offer (or the Grantor's offer to sell, as the case may be) is communicated to the Grantee.

By way of another example, it may be that a ROFR has been granted as part of or pursuant to a tenancy agreement but is silent on the duration of the ROFR. A court may, in these circumstances, find that the rights and obligations conferred by the ROFR were intended to have effect for the full duration of the tenancy agreement, unless any other term of the tenancy agreement suggests that the ROFR was intended to survive the agreement (for example, renewal term of the tenancy) or to cease before the expiry of the tenancy.

Threatened breach / actual breach of the ROFR

A ROFR is a *caveatable* interest under Singapore law. Accordingly, a Grantee's caveat registered claiming an interest under a ROFR may stand in the way of a Grantor who purports to sell his property to another party in breach of the ROFR. Such a caveat may be removed by the Grantor only if the Grantor has properly discharged his obligations under the ROFR, or if the ROFR has lapsed or been revoked whether by effluxion of time or by agreement of the Grantor and Grantee. Alternatively, a Grantee may obtain an injunction to restrain the Grantor's sale of the property to a third party until the Grantor has first complied with the ROFR.

Where a Grantee realises only too late that the Grantor has transferred the property to another party in breach of the ROFR, his recourse would lie in an action for breach of contract by the Grantor. In such a scenario, the Grantee's remedy will likely lie in damages.

Conclusion

Given the intricacies of any grant of a ROFR and the likelihood that a court would uphold a validly granted ROFR, contracting parties should seriously consider the above issues and obtain legal advice on the rights and obligations which they may assume pursuant to a ROFR, prior to entering into any agreement for the grant of a ROFR.

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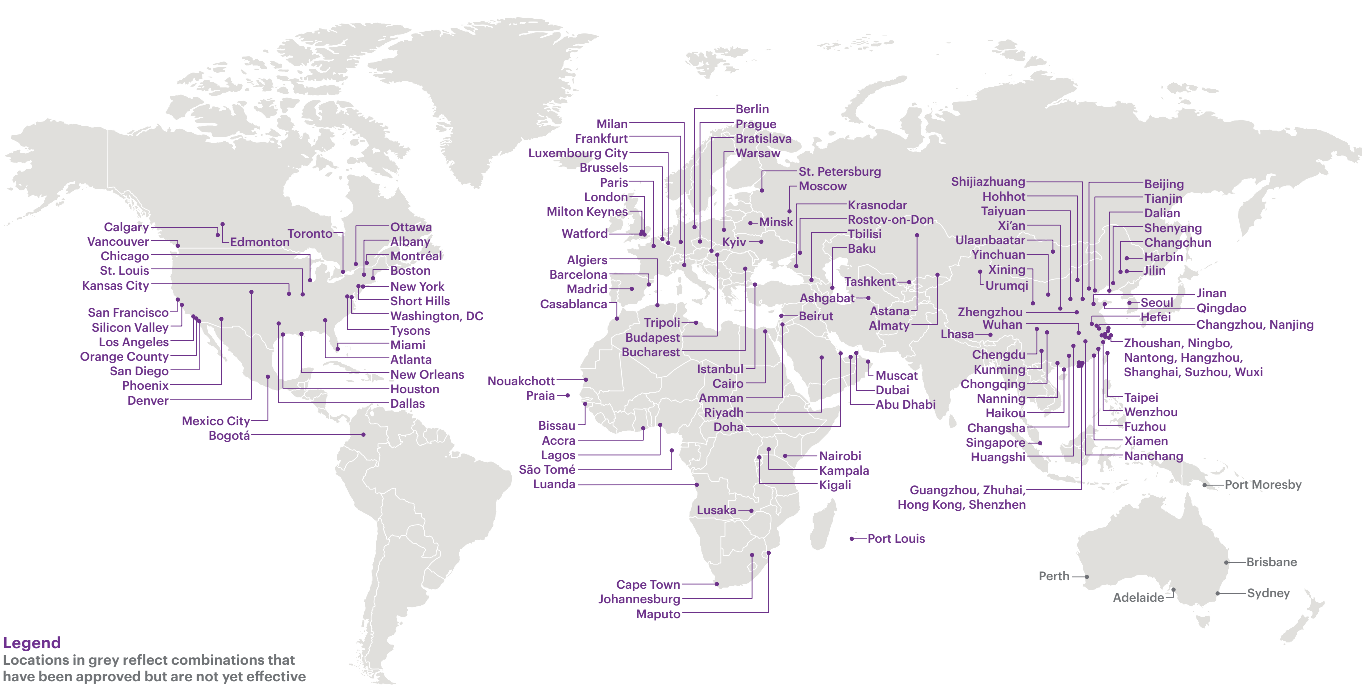

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