Fund Finance

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Country chapters

Singapore

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Introduction

The use of Singapore-domiciled fund entities for fund-raising should be regarded as a relatively recent trend. While unheralded 10 years ago, a few key factors, namely, the introduction of a tax exemption scheme for Singapore tax-resident fund entities, a progressive regulatory regime for regulation of Singapore-based fund managers, and the availability of Singapore's wide network of tax treaties have made Singapore a more widely used jurisdiction to establish investment funds.

Anecdotally, although there are a score or more Singapore-domiciled fund companies that have been set up and are actively investing, the sponsors of the funds have not actively raised debt financing for the Singapore fund companies. Just as fund sponsors have taken a while to become comfortable with the concept of a Singapore-domiciled fund entity, institutional debt financiers probably are still in the early stages of coming to terms with the legal issues encountered where a borrower is governed by Singapore laws.

In light of the fact that the fund financing market is still not well developed in Singapore, this chapter will not address the market developments or future outlook. The following discussion will canvas the legal issues encountered under the Singapore Companies Act, where a Singapore company assumes the obligations of a borrower or security provider, which may be *de novo* to institutional players operating largely in London and New York funding markets.

Historically, the Singapore Companies Act is modelled after the UK Companies Act of 1948, but recent law reforms have seen Singapore adopting provisions inspired by the Australian Corporations Act and the New Zealand Companies Act, while monitoring developments in Hong Kong, Canada and other English common law-based jurisdictions. Thus, it could be said that the Singapore Companies Act is no longer a carbon copy of the UK Companies Act and there are *de novo* legal issues which may be practice pit-falls to the uninitiated, especially as regards company capitalisation and administration.

The capital call facility

The defining characteristic of fund financing is the security package, being comprised primarily of the unfunded commitments of investors to make capital contributions when called from time to time by the fund company. These obligations are typically set out in a subscription agreement between the fund entity and each investor. As such, financiers will seek an assignment of the fund entity's rights under the subscription agreement as part of the security package. In addition, financiers typically require the company to undertake to pay any proceeds of capital calls into a specified bank account, which is in turn charged in

favour of the financier as well. A facility secured on these unfunded capital commitments is also known as a "capital call facility".

As noted above, the capital call facility in the Singapore market is still not that well developed, but it does not differ greatly from facilities seen in London and New York funding markets. Consequently, the typical structures, documentation, covenants and their associated issues remain applicable when entering into a Singapore law governed capital call facility. However, slight differences in statutory law and market practice do give rise to practical concerns peculiar to the Singapore context, especially in the realm of assignments and the registration of security interests.

Assignment of subscription agreement – Notice of assignment

Under Singapore law, like most common law jurisdictions, it is possible for a contracting party to assign his contractual rights to a third party by way of legal or equitable assignment. An assignment is effective if: (1) it is an absolute assignment, (2) made in writing under the hand of the assignor, and (3) express notice in writing has been given to the counterparty.

The most pertinent issue in the context of an assignment is typically the giving of express notice in writing of the assignment to the investors, which is a perfection requirement under Singapore law. No particular form of notice is required; it is sufficient that the notice makes clear that the debt has been assigned. Strictly speaking, acknowledgment by the investor is not a security perfection requirement, but it is often requested by financiers for the following reasons. These acknowledgments commonly include undertakings by the investor directly in favour of the financier. Such provisions usually include: (1) undertaking to pay the financier instead of the fund company upon the financier's request; (2) representing that no prior notices of assignment were received by the investor; and (3) an undertaking that the investor will not assert any set-off or other rights that may exist between it and the fund company against the financier. In the context of a capital call facility, financiers may additionally require that the investors give certain information confirmations, such as the unfunded portion of the investor's capital commitment. However, it is noted that where there is a large number of investor entities, giving express notice in writing to each party and/or obtaining such acknowledgment may be difficult, especially if they prefer to keep their identities confidential. Some deals are structured on the basis that the amount available for borrowing is pegged to the unfunded capital commitments of investors who meet certain financial criteria and/or give such acknowledgment.

Assignment of subscription agreement – Registration of charge

Under section 131 of the Companies Act (Chapter 50 of Singapore), certain charges granted by a company over its assets are to be registered with the Accounting and Corporate Regulatory Authority ("ACRA") within 30 days of the date of creation of the charge. Such categories include charges over book debts, floating charges and charges over uncalled share capital. An unregistered registrable charge will be void against the liquidator and any creditor of the company, such that the creditor would effectively be an unsecured creditor in a liquidation. Moreover, a failure to register a registrable charge would mean that the chargor company and every officer of the chargor company is guilty of an offence and liable on conviction to a fine and default penalty.

An absolute assignment of a chose in action (such as the right to make capital calls and to receive the proceeds of a capital call) by way of security is typically registered as a charge over book debts under section 131(3)(f) of the Companies Act. The test of whether

something is a book debt is a rather factual enquiry, being whether the practice in well-kept books is to enter the debt in question in the ordinary course of business. Given that the fund company is essentially a holding company, it is arguable that the obligation to pay monies owed by the investors to the fund company constitutes the fund company's book debts, and consequently an assignment by way of security is registrable as a charge over book debts.

Even if not strictly a book debt, there is an argument that an assignment of the right to make a capital call pursuant to a subscription agreement falls within section 131(3)(b) of the Companies Act as a charge over uncalled share capital. One counter-argument rests on the basis that the requirement to register such charges was meant for charges over the unpaid portion of the par value of shares, and therefore does not extend to a charge over an obligation to contribute capital to the company in connection with an allotment of fresh, fully paid shares. However, this was never tested in a Singapore Court. Nevertheless, if the uncalled commitments were structured as the unpaid portion of the fund company's share capital (such that the investor holds unpaid shares, as opposed to a contingent contractual obligation separate from the allotment of new fully-paid shares in the investor's favour), then arguably there is a strong case that the assignment is registrable under section 131(3)(b) of the Companies Act.

Given the consequences of non-registration, and the fact that it is often not immediately clear whether or not a particular charge would fall within section 131(3) of the Companies Act, it is common practice for Singapore financiers to routinely require registration of each charge created in their favour even if they may not fall strictly within a section 131(3) category.

The Courts do have the power, on the application of the company or any person interested, to grant an extension of time for registration on the grounds that the failure to register was (1) accidental, (2) due to inadvertence, (3) not of a nature to prejudice the position of creditors or shareholders, or (4) where it is just and equitable to grant relief. However, this will involve costs, the time taken for the hearing date and the wide discretion of the court in hearing such an application, and this means that such a procedure should not be routinely relied upon.

It must be noted that the charge registration regime essentially serves a public notice function. As such, the very fact of registration means that the nature of the security, and hence the fact of the fund company having obtained financing, would become public knowledge. In addition, a copy of the charge document must be kept available at the company's place of business for its creditors' inspection without fee, and any person may, upon application to the company and payment of a nominal fee, be furnished with a copy of such instrument.

Note that the registration requirements only apply to companies incorporated under the Companies Act and non-Singapore companies registered as foreign companies in Singapore under the Companies Act. The position may differ if the fund was organised as a limited partnership under the Limited Partnerships Act (Chapter 163B of Singapore). However, where the general partner who acts for the fund is a company incorporated or registered under the Companies Act, charges made on behalf of the fund may be registered as against that general partner.

Charge over shares in subsidiaries

While it is recognised that any downstream security taken over the fund company's portfolio entities would likely rank behind the respective portfolio entity's senior creditors, financiers may nevertheless seek to take security over all of the fund company's assets and

undertaking under an all-assets debenture (a security allowed under Singapore law and not uncommon). A typical Singapore law debenture will seek to take a fixed charge over as many present assets as the nature of the property allows (e.g. existing real property, tangible moveable property, insurances, contractual rights and shares), and a floating charge over the whole of the fund company's undertaking and other assets, present and future. Financiers may also require a specific charge over the equity in specific subsidiaries of the fund company. Such charges will be registrable under section 131(3)(g) of the Companies Act as a floating charge, and possibly, for charges over equity in specific subsidiaries, under section 131(3)(c).

Where the shares charged are not that of a subsidiary within the definition given in section 5 of the Companies Act, the charge may still be registrable as a charge over book debts. A typical form of share charge would also include a charge over all rights and dividends received, receivable, attaching to, deriving from or exercisable by virtue of the ownership of such shares. As above, it is commonly accepted practice to treat these rights as book debts and registrable as such. For listed shares which are held as scripless securities (shares within the meaning of "book-entry securities" as defined in section 81SF of the Securities and Futures Act (Chapter 289 of Singapore); typically including shares traded on the SGX) and deposited in The Central Depository, a statutory interest must be created in favour of the financier in the manner prescribed by the Securities and Futures Act and the Companies (Central Depository System) Regulations 1993.

A share charge or pledge given by a fund company would typically be governed by the law of the place of incorporation of the portfolio entity, and it attracts Singapore stamp duty of S$500. The liabilities for stamp duty and its registrability are not affected by the governing law of the charge instrument.

Conclusion

Although very much a developing phenomenon, capital call facilities are becoming more widespread in the Singapore private equity landscape. While foreign investors may feel very much familiar with the usual forms of documentation adopted by domestic financiers in such facilities, there are nevertheless important domestic law issues to bear in mind, especially in relation to the perfection of security. Given the impact these concerns may have on both the fund and its financier, it is important that they be given due consideration.

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Information in this chapter accurate as of 12th Jan 2017

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