

unique

The newsletter of aQUIVER

editorial



Winston Churchill once famously quipped: “Never let a good crisis go to waste”, working to form the United Nations during the 1940’s, at the time when World War II was nearing its end. I am still not entirely convinced that the transformation of the toothless League of Nations into the powerless United Nations have promulgated a substantial improvement in the evolution of mankind. However, and keeping politics outside, Churchill’s adage is as cynic as it is true.

So far, the covid-19 pandemic has claimed over 4,500,000 deaths. The direct economic impact is around \$4,000,000,000,000 (that’s 4 trillion US dollars). And this does not take into account all the indirect consequences; psychological effects such as depression, incidents of domestic violence, loss of the most valuable commodity of all (time). All in all, the toll is huge. And, as a result, the entire way of living over the globe has been, to say the least, disrupted. This precipitated an appreciation of the basics, an adoption of a new way of life with social distancing, a simplification of anything that was complex and sophisticated. Looking at it from a financial perspective, it gave us the unparalleled opportunity to take a step back and look at first principles. That is, to make our economies more resilient to such future crises, to minimise wastage, to generate economies of scale and of scope. When talking of world crises, the covid pandemic is nothing short of a disaster of biblical proportions. In the eyes of Churchill, it would have been a massive opportunity.

Still. Some things never changed. And they never will. Rules, procedures and red tape which have plagued our lives and our businesses have managed, like bad pennies, to survive unscathed from this mayhem. In an obscure European little island, you still need to turn up in person in order to transfer the registered name of a telephone line. You still need to physically show your face in order to carry out a menial task such as upgrading your internet connection from 20Mbps to 100Mbps. At the very top of this list sits the request of (who else?) a bank. A bank professing social distancing and promoting digitalisation, has requested an individual to present herself in person to the local branch in order for her to sign in front of an officer, so that the officer could verify that her signature has not changed in the past six months. They called it “signature update”; I call it ingenuity at its best. Force someone (who incidentally has been banking with the said bank for over 15 years) to get out of her office, queue outside a retail branch in an FFP2 mask during a summer heatwave and in general expose herself to covid-19, in order to prove in person that her signature has not changed. This, in an environment, when the task could have been done over a short video call and the safety of the internet. And, without commenting on the hilarious pointlessness of the “signature update”. What a totally, utterly and disappointingly wasted crisis...

Have a pleasant reading

Pericles

ISSUE 10 SEP 2021

what's on this edition?

PAGE 2

Cyprus’ upgraded classification under the Securities and Exchange Board of India (SEBI)

PAGE 3

FATF prepares tightening of beneficial ownership rules

PAGE 4

A Geneva banker, slavery and the “Perpetuity Rule” in trust law

Cyprus' upgraded classification under the Securities and Exchange Board of India (SEBI)

Background

Indian regulations currently allow global investors to invest in India via a number of different routes namely Foreign Direct Investment (FDI), Foreign Portfolio Investment (FPI), Foreign Venture Capital Investment and Alternative Investment Fund. Depending upon the modalities of investment and other factors, one of the most preferred routes is the FPI route.

What is foreign portfolio investment (FPI)?

FPI is an investment route by non-residents in Indian securities including shares, government bonds, corporate bonds, non-convertible debentures, units of business trusts and so on. The class of investors who make an investment in these securities is known as Foreign Portfolio Investors (FPIs) and are classified into different categories.

What are Category I FPIs?

In accordance with SEBI FPI Regulations 2019, Category I FPI includes entities from Financial Action Task Force (FATF) member countries or from any country specified by the Central Government by an order or by way of an agreement or treaty with other sovereign Governments which are:

- Appropriately regulated funds.
- Unregulated funds whose investment manager is appropriately regulated and registered as a Category I FPI.
- University related endowments of such universities that have been in existence for more than five years.

Funds originating from non-FATF compliant countries can also obtain Category I FPI registration subject to a separate Central Government approval.

Cyprus becomes an eligible country as Category I FPI

The Government of India has notified Republic of Cyprus that is has become an eligible country for obtaining Category I FPI registration under the SEBI FPI Regulations 2019.



What does this mean?

With this order from the Government of India, Cyprus-based funds are now eligible for obtaining a Category I FPI License. This will avail them to a number of benefits such as:

1. Exemption from indirect transfer provisions. Investors in Category I FPIs are exempted from the applicability of "Indirect Transfer" provisions under the Indian Income Tax Act, which are otherwise applicable to an overseas investor upon transfer of shares / interest in an overseas entity with assets in India.
2. Regulatory advantages:
 - a. Eligibility to issue (or invest in) offshore derivative instruments, after compliance with the KYC requirements of SEBI.
 - b. Reduced KYC documentation requirements by SEBI as compared to Category II FPIs.
 - c. Higher position limits for investing in complex financial instruments.

FATF prepares tightening of beneficial ownership rules. Call for a consultation

Who is the FATF?

The Financial Action Task Force (FATF) is the global anti money laundering and terrorist financing watchdog. It is what keeps an eye on the bad guys on behalf of the good guys. Over the years, the FATF has developed a number of recommendations in order to keep the system in place. Money laundering, terrorist financing and the financing of the proliferation of weapons of mass destruction are serious threats to the security and the integrity of the financial system; and the FATF, is fighting them vigorously.

What are 40 + 9 recommendations of FATF?

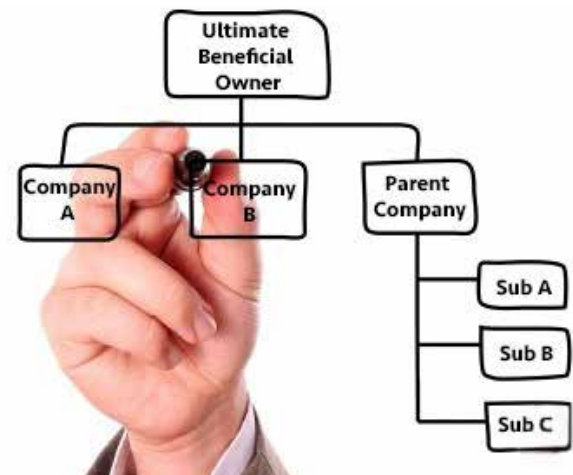
The FATF has issued 40 + 9 recommendations, providing a complete set of suggestions on counter-measures against money laundering. They have been recognised, endorsed, or adopted by many international bodies.

Beneficial ownership recommendation

One of these recommendations, number 24, addresses the transparency and beneficial ownership of companies and other legal persons. The FATF is now considering amendments that would require all countries to assess and mitigate the anti-money laundering risks of certain legal persons created in foreign countries, as well as the current requirement of all legal persons created within the country. The FATF considers this extension to be necessary because of the use of cross-border ownership structures to conceal beneficial ownership. The practical issues, however, regarding the identification and risk assessment of foreign-created legal persons are acknowledged. The FATF is therefore seeking a risk-based approach that would limit the measure's scope to foreign-registered legal persons who have 'sufficient links' with the countries. The question that naturally arises is the quantification of 'sufficiency'.

The 'multi-pronged' approach

Another one of the FATF's proposed amendments relates to 'multi-pronged' approaches to the collection of beneficial ownership information. The FATF is considering what elements should be included in a multi-pronged approach and what supplementary measures should be considered for inclusion, based on the experiences of countries that have beneficial ownership registries. The FATF has opened up a consultation which, as a starting point,



accepts that centralised registries are not the only solution and is requesting feedback on the merits and drawbacks of alternative approaches. Such alternatives could, for example, place the responsibility of holding the beneficial ownership information to the companies themselves.

Does the consultation have other elements?

Yes, other aspects of the consultation include:

- Improving the adequacy, accuracy, and timeliness of the information.
- Ensuring that competent authorities have easy access to the information while protecting confidentiality of the data subjects.
- Implementing stronger controls on the use of professional directors, nominee shareholders and bearer shares (does anybody use them these days?)

The FATF is particularly interested in the views of organised groups of professionals, as well as those of companies themselves, in order to address this potential gap. The text of the recommendation will be reviewed and discussed at the FATF meetings which are to be held in October later this year.

A Geneva banker, slavery and the “Perpetuity Rule” in trust law

What does a Geneva banker do in London?

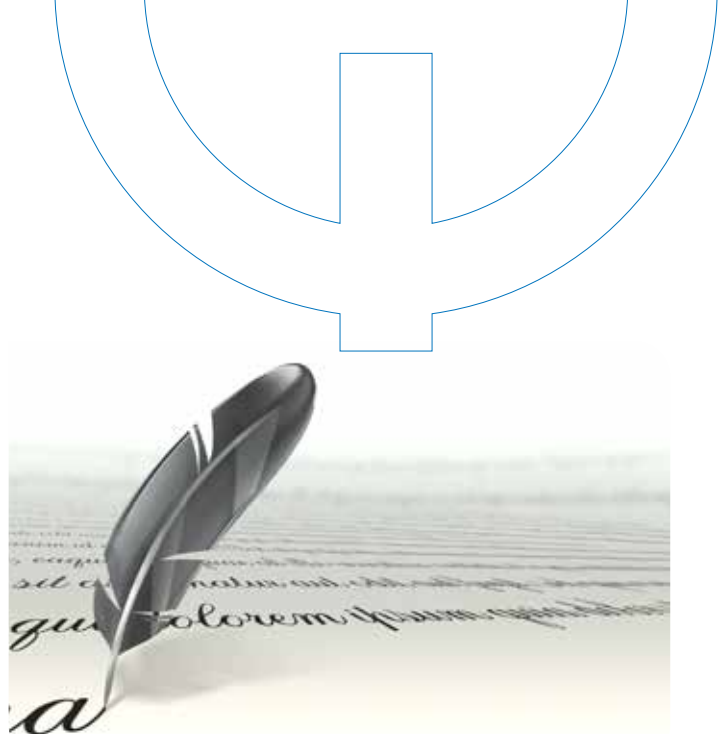
During the short sixty-two years of his life, Peter Thellusson (1735 – 1797) managed what others will most certainly fail to accomplish in five lifetimes. He emigrated from (what is today known as) Switzerland to England, operated and expanded a successful banking business, accumulated nearly 5,000 acres of land, invested in sugar refineries, imported tobacco from the West Indies and so on and so forth. Interestingly, and in a self-contradicting way, his greatest achievement culminated not with the accomplishments of his adult life but with the cataclysmic events occasioned with his demise.

The Thellusson estate

Mr Thellusson bequeathed his vast fortune (around £600,000) into a trust fund for the benefit of future generations at the expense of his living relatives and offspring. It should be noted that the wealth he sought to leave for the future generations was separate to the £140,000 that he left for his wife, children, grandchildren and even his brother who lived abroad at the time. It should be also noted that the will excluded all future female offspring, a provision not entirely alien to the customs of the time; one should bear in mind that slavery was still lawful back then (Mr Thellusson may have owned slaves of his own through his investments in Caribbean plantations), so seeking political correctness and gender equality in Mr Thellusson’s succession planning arrangements is a bit of a stretch. All in all, it was not a revengeful will as one might be inclined to view it but rather a capricious one. The will was contested in court by the wife, the three sons and the husbands of the two daughters but it was upheld. After protracted legal fighting, the two ultimate beneficiaries decided by the courts were the grandchildren of his sons Peter Isaac and Charles.

The Thellusson Act

It is quite commonplace, if not befitting, for statutes to bear the name of the person who brought the Bill to Parliament but quite rare for statutes to be named after the person whose actions resulted in them. In this instance, an act was passed (in the interval between the ruling of the Court of



Chancery and the hearing in the House of Lords) in order to prevent such disputes from arising in the future; and it was named after Mr Thellusson. The (also known as) Accumulations Act 1800 stipulated that no property should be accumulated for any longer term than, inter alia, either the life of the settlor or twenty-one years from his or her demise.

Relevance to trusts

Trust practitioners are well aware that private trusts may not be created for unlimited lengths of time. The law permits the establishment of private trusts for only reasonable lengths of time, so as not permanently withdraw from commerce the assets vested in them. The rule does not apply to charitable or benevolent trusts, as such trusts may continue in perpetuity.

Recent developments

For instruments taking effect before 6 April 2010 the Perpetuities and Accumulations Act 1964 allowed the trust instrument to specify a flat period of up to 80 years before the interest vests or, alternatively, the trust instrument can specify 'lives in being plus 21 years' which was the duration envisaged in the Thellusson Act. The Perpetuities and Accumulations Act of 2009 has now increased the perpetuity period to 125 years.

Oxymoron

Mr Thellusson had sought to perpetuate the control he exercised over his family by bequeathing 75% of his considerable fortune to descendants “on whom his eyes had ever rested”. He may have eventually failed to do so but he most certainly perpetuated his name in a way that he could have never fathomed.

¹Virginia Law Review, Vol. 22, No. 4 (Feb., 1936), p. 421