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REPORT

Dear Readers,

This edition of Setterwalls' Financial Markets Report spans a broad range of subjects, illustrating the global reach of business and legal issues today.

We report on progress in getting the 2001 Cape Town Convention on International Interests in Mobile Equipment approved in Sweden. Once accepted, the Convention will have a bearing on and be of great importance to asset-based financing of certain movable property. This will enable the creation of international security interests in helicopters, airframes and aircraft engines, as well as railway rolling stock and space assets.

A great deal of the international legal work within the EU is based on EU legislation that is drafted in each of the 24 official languages, all of which have the same legal status. However, languages express concepts differently and it can be difficult to achieve the same legal meaning in all respects. The article *Lost in Translation* deals with the topic of mismatched or even incorrect translations and also provides some examples of less successful efforts.

We also take a look at the forthcoming UCITS V Directive, which enhances UCITS funds' and investors' interests. The article examines the risks for UCITS funds investors and the question of who ensures that fund assets, and therefore investors' interests, are safe in an uncertain political environment such as Russia or Ukraine today. The UCITS V Directive clarifies that a UCITS fund manager must appoint a single depositary in order to have general oversight over a fund's assets. This ensures that fund management companies have a single point of reference in the event of problems relating to the safekeeping of UCITS assets. The article describes what to look for to ensure sufficient protection is in place.

We revisit the subject of Bitcoins and this time discuss whether the crypto-currency should be considered 'means of payment' for the purposes of notification requirements and for applying anti-money laundering standards to Swedish exchange providers.

We also address an interesting anti-competition aspect of syndicated lending and ask whether antitrust regulation should or could be applied to lending syndicates in local markets.

Finally, we consider the recent debacle in neighbouring Denmark, where OW Bunker – Denmark's second-largest initial public offering since 2010 – went bankrupt within a few months of being listed. This has also attracted widespread attention in Sweden, mainly because the IPO was handled by Swedish banks Carnegie and Nordea, and one of the company's shareholder is Altor, a respected Swedish private equity firm. Investors are likely to look for recourse, having seen their investments become worthless so soon after the initial offering. The incident, which is expected to be something of a poison pill for the Danish IPO market, is expected to raise the issue of the liability of various advisers and parties involved, including lawyers, investment bankers, brokers, accountants, risk capitalists and sponsors.

Christmas and the New Year will soon be upon us. Investors in 2015 will have to take account of this autumn's key interest rate cut to zero percent by Sweden's central bank, the Riksbank. The debate over whether the Riksbank is employing the right tactics, despite a relatively confident business climate in Sweden, is expected to continue into 2015.

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Fund Hotels

The increase in the number and complexity of the regulations applying to the European financial sector is resulting in a need to keep costs down while complying with all legal requirements.

This is important because of the need to maintain a minimum level of profitability and to secure investor access to reasonably priced European financial products.

Different operators have different ways of dealing with this issue. In the fund industry, developments in applicable regulation in recent years have resulted in the ability to use arrangements such as master and feeder funds. These types of construction enable administrative, legal and compliance costs to be kept down. Another way to keep these costs lower is to use what are known as 'fund hotels', which are becoming more common in Sweden.

This article uses the term 'hotel' to describe a fund management company that takes over the legal responsibility for fund administration. The term 'guest' is used for the 'old' fund management company, which after the transaction must – at the very least – be approved by the FSA to carry out discretionary portfolio management.[1]

In the figure at next page, the hotel is a Swedish fund management company approved and supervised by the FSA. The investment funds are managed in all respects by the hotel and they 'belong' to the hotel. For example, the hotel can permanently transfer the management of the investment funds to another fund management company or terminate the management of the fund altogether.

A fund management company is responsible for all functions relating to an investment fund. In addition to the management of the assets in the investment fund and the marketing of the fund (portfolio management/marketing), a fund management company is also responsible for such things as regulatory and compliance requirements, contact with the FSA, handling of payments to and from unit holders, issuance and redemption of fund units and risk management ('fund administration'). It is this latter function, fund administration, that typically is of interest to a fund management company wishing to transfer its funds to a hotel.

In the figure at next page, the original management company of Fund C has come to the conclusion that it would be best to focus on what was originally thought to be the distinguishing quality of its fund – portfolio management.

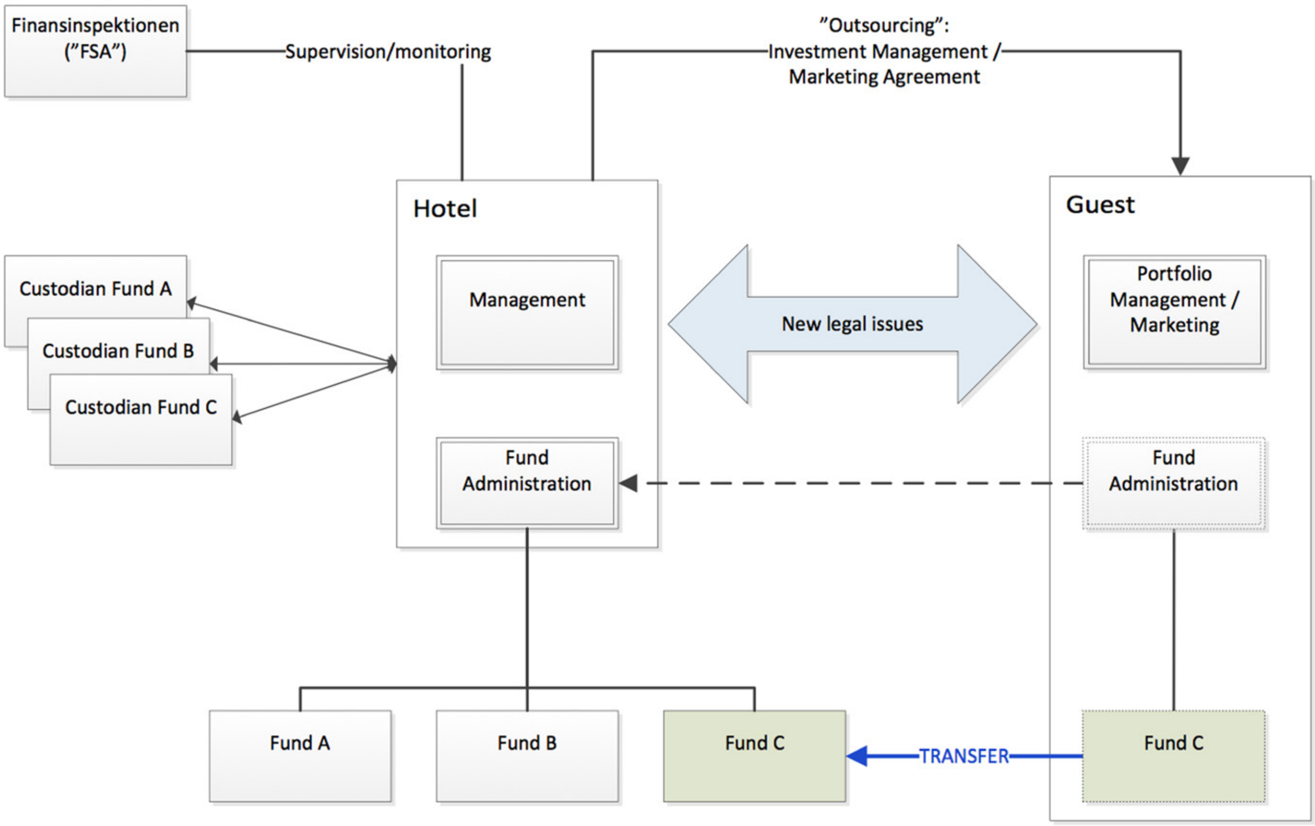
Using the hotel/guest construction, ('fund hotel outsourcing') this is achieved through the following steps:

- The guest transfers the management of Fund C to the hotel. This transfer requires a permit from the FSA.
- The hotel then outsources the portfolio management and the marketing of Fund C back to the former portfolio managers. Such outsourcing can only be made to a legal entity which has permission from the FSA either to act as a fund management company or to carry out discretionary portfolio management. The FSA must be notified of the outsourcing arrangement and the written outsourcing agreement must be submitted to the FSA.

Ordinary outsourcing vs fund hotel outsourcing

As pointed out above, step two of fund hotel outsourcing involves an outsourcing of the portfolio management 'back' to the fund's previous managers. Outsourcing the portfolio management of an investment fund through an investment management agreement is nothing new in the fund industry and has long been a way of securing access to specialised portfolio management expertise for 'real' fund management companies. In cases of *ordinary outsourcing* it is in reality (and not

[1] It should be pointed out that a fund hotel is nothing more than an ordinary fund management company. All legal requirements that apply to fund management companies also apply to fund hotels, and the management, owner and the fund administration staff of the 'hotel' cannot argue that the hotel/guest construction in any way affects the responsibility for 'its' funds and the unit holders that the hotel has, compared with what would be the case for an 'ordinary' fund management company.



just legally) the outsourcing fund management company that has all the interests relating to the investment fund and the unit holders. The portfolio manager that takes on the obligations to manage the portfolio 'only' has the interests of earning its fees and will typically have no rights in relation to neither the investment funds nor the unit holders. In a *fund hotel outsourcing* situation, it is the other way around: the legal fund management company – the hotel – has no interests (other than a legal interest) in the investment fund or the unit holders. Its only interests are in earning its fees and complying with its legal obligations so that it can continue to take on guests and earn fees. Instead, the 'real' interests relating to the investment fund/funds and the unit holders still lie with the guest.

However, looking at the structure from a strictly legal point of view provides another picture and it is this discrepancy between the *legal* and the *real* positions that needs to be regulated in agreements between the hotel and the guest.

The blue arrow between the hotel and the guest in the figure above represents the 'new' legal issues that arise in this situation. We deal with some of these issues below.

Employment-law related issues

The most important reason for a guest to engage in fund hotel outsourcing is to reduce the guest's fund administration costs. Depending on how the guest's previous operation is set up, it cannot be ruled out that the guest's administrative staff employed in the fund administration prior to the outsourcing will make a claim to the hotel to be taken over on the grounds that the transaction is in fact a transfer of undertakings ('verksamhetsövergång' in Swedish) under the Swedish Employment Protection Act. The claim will be made to the hotel (the transferee), which may consequently end up in legal disputes to defend itself from being forced to take over the guest's former administrative staff. Regardless of the risks of the hotel ending up with an obligation to take on the guest's previous personnel, the contractual arrangement between the hotel and the guest should contain comprehensive regulations to cover this issue and, in particular, the liability for the costs that may be involved in such legal discussions/disputes.

Regulatory risks for the hotel

The hotel will hope to be popular and be able to attract more than one guest. When carrying out the portfolio management

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for their respective (former) investment funds, each of the guests will be carrying out tasks that fall within the hotel's regulated activity in the hotel's capacity as a supervised fund management company for the funds. Failure by a guest managing the assets/portfolio of, for example, Fund A, to comply with the regulatory requirements that apply to the hotel in its capacity as legally appointed fund managing company in relation to Fund A will thus result in the hotel being exposed to risks of being sanctioned by the FSA.

Not only would such a situation result in a risk to the hotel in its capacity as a regulated entity of being sanctioned, fined, and, ultimately, of losing its license; it would also expose the hotel to claims from the other guests of not correctly monitoring and instructing the regulatory performance of the guest managing the assets of Fund A. Such failure by the hotel in supervising and instructing the guests could, if it were to lead to sanctions from the FSA, also result in consequences for all the other investment funds that have been checked in to the hotel and thereby also for its respective guest.

The agreements between the hotel and each guest must therefore contain rules regarding, for example, each guest's obligation to comply with the regulation that applies to the hotel in its capacity as a fund management company, and with the hotel's instructions; the obligation of each guest to keep the hotel sufficiently informed about circumstances that are or could be relevant for the hotel to know in its capacity as a fund management company; and regarding the right of the hotel to monitor the affairs of each guest, as well as a suitable and balanced regulation regarding limitation of liability for the hotel. Some of these clauses are not of relevance in an ordinary outsourcing agreement. Furthermore, the agreements between the hotel and the guest must also provide for the ultimate solution in the event that the guest cannot or does not want to comply with its legal/contractual obligations: the right of the hotel to terminate the relationship altogether. Such regulation must be worded within the limits set out by the protection given to the unit holders under applicable law and must also balance the hotel's and the guest's legitimate interests.

Securing guests' 'rights' in relation to 'their' investment fund and 'their' unit holders

In an *ordinary outsourcing* situation the investment manager, who has been commissioned to manage the fund's assets, has no real interest in the intangible/economic value of an investment fund or in the economic value that might be related to the fund's unit holders. Therefore, in such *ordinary outsourcing,* if the outsourcing entity (the 'real' fund management company) wishes to terminate the investment management agreement it is always free to do so without having to consider the interests relating to the investment manager in this respect.

In a *fund hotel outsourcing* situation, it is clear that it is the hotel that is the *legal* fund management company (and that therefore holds all *legal* rights and responsibilities relating to that capacity). However, compared with an *ordinary outsourcing* situation, it is also clear that it is the guest that has the real interests in the investment fund and the unit holders. Therefore, the agreements between the hotel and the guest must acknowledge and balance the distribution of these *real* interests versus the legal interests. Put differently, if the agreements do not protect the guests' *real* interests, the guests might not want to risk entering into the fund hotel outsourcing arrangement. On the other hand, and in addition, if the agreements do not protect the hotel's *legal* interests, the hotel cannot risk checking the guest in.

More than one custodian

A fund hotel that has to deal with a large number of custodians, each with its own custody agreement and custodian and sub-custodian set-up, technical platform and IT system, etc., will have to function in a far more complex reality than a fund hotel that has few, perhaps only one, custodian for all its investment funds. The relationship between a fund management company, the custodian and the investment fund can also be quite complex, even more so if the fund management company has to deal with more than one custodian. A hotel/guest structure in which the guest is allowed to require the hotel to accept a guest's existing custodian and custody agreement might severely affect the hotel's business and ability to function as planned.

Reversing the transaction – 'checking out'

If, in an *ordinary outsourcing* situation, the fund management company wants to end the outsourcing arrangement, it would only have to terminate the investment management agreement in accordance with the agreement's termination clauses. In such case, there would be no issue with how to deal with the value pertaining to the investment fund or the unit holders after termination. All of those 'belong' to the outsourcing company all the time and the investment manager has no rights in relation to them.

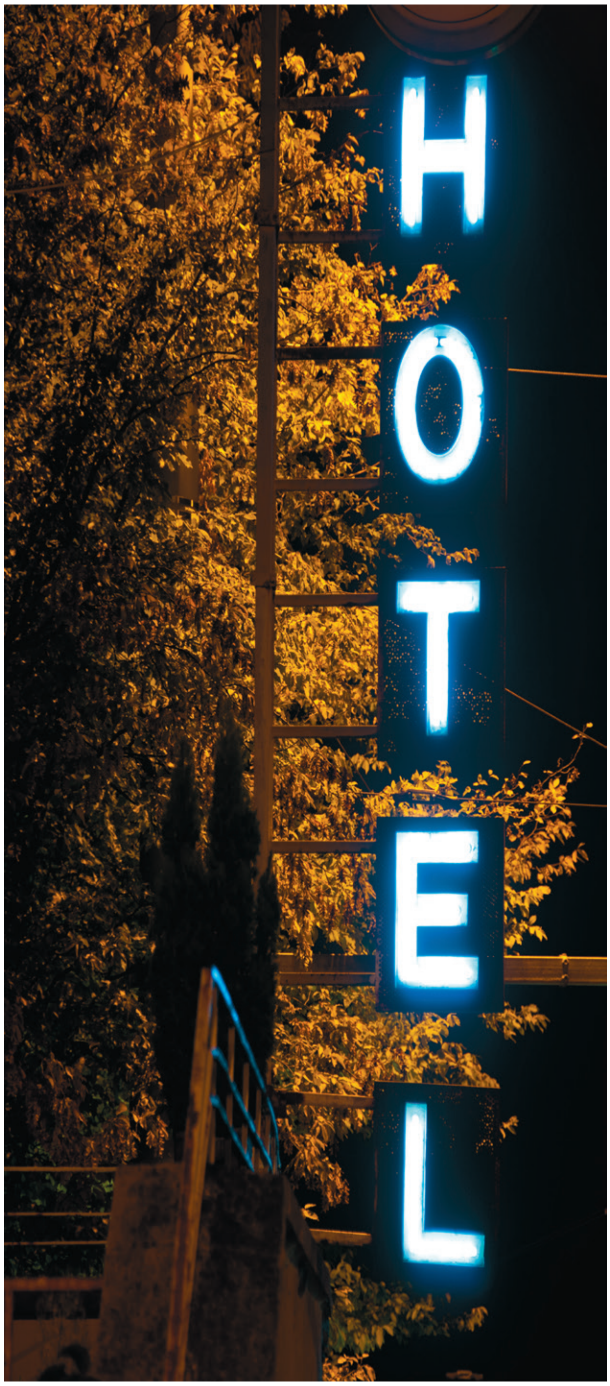
As mentioned above, this is different in a *fund hotel outsourcing* situation. The investment fund and the unit holders 'belong' to the guest and the agreement between the hotel and the guest must address this issue. In addition, it might also be the case that it is the guest that would like to 'take back' the legal responsibility for the investment fund, or check the fund out and check it in to another hotel.

Regardless of the situation, it is the 2004 Swedish Investment Funds Act that regulates how the management of an investment fund can be transferred to a third party and how to deal with a situation in which there is no transferee, i.e. when the operations of an investment fund are to cease. The ability of the parties to regulate this situation – thereby balancing the interests of the guest, the hotel and those of the hotel's other guests – must be exercised within this mandatory regulation.

In addition to the above, *fund hotel outsourcing* might entail issues relating to, for example, short selling regulation, infrastructure regulation under EMIR, anti-money laundering regulations and tax reporting obligations such as FATCA, calculation of the hotel's regulatory capital and a number of other legal issues.

All the issues mentioned in this article, and a number of other similar matters, arise when outsourcing portfolio management in a fund hotel outsourcing situation rather than *ordinary outsourcing*.

This article has referred to the 'agreements' to be concluded between the hotel and the guest. *Fund hotel outsourcing* should preferably be regulated by two agreements: firstly, the 'outsourcing agreement' between the hotel and the guest covering the details that must be regulated pursuant to mandatory regulation, with this agreement being submitted to the FSA; and secondly, another agreement (indicated by the blue arrow in the figure above) which deals with all the other issues touched upon in this article. The difference between the parties' interests in relation to the fund and the unit holders in an *ordinary outsourcing* compared with *fund hotel outsourcing* are such that an 'old school' investment management agreement will not suffice to deal with these new legal issues relating to outsourcing of portfolio management from a fund hotel.



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Syndicated loans: are more antitrust headaches expected?

As regulators continue to increase the requirements for the resilience of banks following the financial crisis, the number of syndicated loans has increased. Such cooperation can potentially eliminate competitive pressure between banks, which means that competition authorities may initiate cartel investigations.

When it comes to commercial cooperation with competitors, banks and financial institutions may often find antitrust legislation to be a rather theoretical and far-fetched legal risk. Following the recent LIBOR and EURIBOR decisions regarding the manipulation of interbank benchmarks, however, such perceptions may have to be reconsidered. In late 2013, the European Commission fined eight international financial institutions more than a total of € 1.7 billion for participating in illegal cartels in the financial derivatives market covering the European Economic Area. Four of these institutions

participated in a cartel relating to interest rate derivatives denominated in euros. Six of them participated in bilateral cartels relating to interest rate derivatives denominated in Japanese yen.

It is not only on interest rate derivatives that banks cooperate with each other in a manner that may be perceived by some as impeding competition and thereby having an adverse effect on the market and consumers. In other areas too, such as the provision of financial services for high-cost projects or high-risk lending through bank syndicates, competition concerns could be raised.

Over the past 30 years, syndicated loans have become an important source of financing for large firms, and, increasingly, even for mid-sized companies. A loan syndicate can be broadly defined as two or more financial institutions agreeing to jointly provide a credit facility to a borrower. Virtually any type of corporate and commercial loan or credit facility can be syndicated, including term loans, construction loans and export finance loans.

The increased use of syndicated loans could lead to heightened interest from competition authorities. It is therefore essential that banks and other financial institutions are prepared for such action, for example by amending their compliance programmes and taking competition law advice before entering into any syndicates or other cooperation on credits.

In assessing the competition law risks involved for a specific loan syndicate, the rationale behind the syndicate is essential. In short, the central issue that should initially be investigated in a given case is whether or not each individual member of a syndicate has the capability to provide the borrower with the entire credit by itself. If a member of a syndicate does not have such capability, for example if the amount is so vast that it jeopardises the bank's future, it cannot be regarded as competing with other members of the syndicate in the same situation for the specific tender and no problems relating to competition law would be expected. There are two principal situations where such justification should be sought.

Firstly, there are situations in which banks are simply unable to provide large loans, for example to major construction projects, and therefore must cooperate in order to be able to provide an offer. In such cases, the cooperation between the syndicate members results in increased competitive pressure for the provision of the specific credit since the members would otherwise have been unable to compete for the financing services demanded. Under such circumstances, syndicated loans therefore enhance the competitive pressure and are therefore accepted.

Second, there are situations where there is a high risk of credit loss due, for example, to lending to financially vulnerable companies. For example, banks may hesitate to provide loans to companies with an unstable financial record due to the high risk exposure. From a competition law perspective, this may justify bank cooperation through syndicates if the risks involved in providing the loan were objectively too high for a single bank to assume. However, in these kinds of situations an individual bank will often find it difficult to establish that it could not commercially justify the provision of the loan by itself and that cooperation with one or several competitors through a bank syndicate would change the commercial expectations in that regard. In these situations, it may be even more advisable not only to consult competition law expertise but also to conduct a thorough analysis of the effects that the credit would have on the bank.

In conclusion, the use of syndicated loans may only be justified if the credit in question cannot, from a commercial perspective, be arranged in a more straightforward form such as a bilateral credit facility. When a company is in need of very large amounts of liquidity and/or lacks a stable financial record, smaller financial institutions or banks may simply not have the capacity on their own to satisfy the demand, resulting in fewer possible alternatives for the borrower and therefore less competition. In order for more lenders to compete for credit demand, this type of cooperation through syndicates may be the only viable option. It therefore follows that a further increase in the use of loan syndicates could potentially contribute to an intensification of competition in the market.

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The Putin factor: are securities safe with depositories at times of international crisis?

Russian President Vladimir Putin has repeatedly shown that economic considerations are not the driving force in the Kremlin's decision-making. The economic sanctions against Russia imposed by Western states appear to have had little effect on Russia's destabilisation of Ukraine. Many investment funds have already withdrawn, or are planning to withdraw, large parts of their investments in Russia and neighbouring states. But who is responsible for a safe transfer of the assets in times of economic sanctions and geopolitical turmoil?

A nervous market

Unit holders in funds investing in Russia have had a bumpy 2014. The crisis in Ukraine has led to many investors seeing their investments in Russia and the other post-Soviet states fall in value. Moreover, many of them could experience even worse problems than a fluctuating market. Who is guaranteeing that the fund's assets are safe in an unsecure political environment? The fund's asset manager? Or the global financial institution acting as the fund's depositary? Or perhaps the local bank to which the depositary has sub-delegated the depositary functions for the Russian assets?

There is some doubt about the actual effect of the international sanctions aimed at checking Putin's geographical. They have, however, 'successfully' created an unsecure situation for many Western financial institutions with investments in Russia. In this unstable political environment, many asset managers are realising that their depositary agreements grant depositaries significant possibilities to avoid liability for events such as international political and economic sanctions that are deemed to be out of the depositary's control. However, since the risk – but not the precise nature or scope – of economic sanctions is often known well in advance, this notion might be debatable.

The growing risk of further sanctions shines a light on an issue that is often ignored: who bears the burden of proof in the event of the loss of a financial instrument, the UCITS manager or the depositary? And in what situations may a depositary rightfully be discharged of liability for the loss of assets held in its custody?

UCITS V and the regulation of depositaries

UCITS, or "undertakings for the collective investment in transferable securities", are investment funds regulated at European Union level. They account for around 75 % of all collective investments by small investors in Europe. The legislative instrument covering these funds is Directive 2014/91/EU. The new UCITS V directive (as well as the existing Alternative Investment Fund Managers directive, AIFMD) regulates depositaries. The Directive establishes an exhaustive list of entities that are eligible to act as depositaries for UCITS' assets: (i) central banks, (ii) credit institutions under Directive 2013/36/EU and (iii) legal entities authorised by the competent authority under the laws of the member states to carry out depositary activities.

The UCITS must appoint a single depositary to have general oversight over the UCITS' assets.

The requirement for a single depositary is supposed to ensure that the depositary has an overview of all the assets of the UCITS, and that both fund managers and investors have a single point of reference in the event that problems occur in relation to the safekeeping of assets.

Any delegation or sub-delegation of depositary functions by the depositary should be objectively justified and subject to strict requirements in relation to the suitability of the third party entrusted with the delegated function, and in relation to the due skill, care and diligence that the depositary should employ to select, appoint and review such a third party. The new rules shift the balance of power in favour of the funds and their managers. The UCITS V directive clarifies the depositary's liability in the event of the loss of a financial

instrument that is held in its custody. In such cases, the depositary must return a financial instrument of an identical type or the corresponding amount to the UCITS. No discharge of liability in the case of loss of assets should be envisaged, except where the depositary is able to prove that the loss is due to an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary. In that context, a depositary should not be able to rely on internal situations, such as a fraudulent act by an employee, to discharge itself of liability.

Unlike the depositary regime under the AIFMD, there will be no possibility to contractually discharge from liability. It is, however, our experience from negotiating depositary agreements that all too often the depositary is unwilling to accept a definition of loss that includes any 'temporary' loss whereby the fund manager is unable to directly or indirectly dispose of a financial instrument for an unknown and unspecified time period (such as might be the case during economic sanctions). The new rules might give investment managers a false sense of security should the depositary's definition of 'loss' be very narrow, excluding all loss during times of political and economic turmoil, such as during Russia's aggression towards Ukraine and the subsequent sanctions towards Russia. It is thus important when drafting the depositary agreement that fund managers imagine a number of situations in which assets might be indefinitely lost.

We believe that the liability of depositaries for loss (both temporary and permanent) of assets could also be upheld in situations such as the ongoing crisis in Ukraine. But to avoid any doubt, investment managers must still be careful when negotiating and signing depositary agreements.

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The Cape Town convention and the Aircraft Protocol

1. The framework

It is most likely that Sweden will soon ratify the Cape Town Convention and the Air-craft Protocol. The Cape Town Convention addresses the difficulties stemming from different jurisdictions having different approaches to rules on secured finance.

The Cape Town Convention provides uniform rules for asset-based financing. The regime comprises two instruments: the Convention, which is not equipment-specific, and a separate controlling Protocol for each category of equipment covered by the Convention. The categories are helicopters, airframes and aircraft engines, railway rolling stock and space assets.

In essence, the Convention, with its Protocols, is designed to overcome the problem of obtaining secure and readily enforceable rights in aircraft objects, railway rolling stock and space assets, which by their nature have no fixed location and, in the case of space assets, are not on earth at all. At this time, only the Aircraft Protocol is in force.

2. Objectives

The Convention and its supporting Protocols have five basic objectives:

a) to provide for the creation of an international interest, recognised in all Contracting States;

b) to provide the creditor with a range of default remedies and, where there is evidence of default, means of obtaining speedy interim relief pending final determination of the claim on the merits;

c) to establish an electronic international register for the registration of international interests which will enable the creditor to preserve its priority against subsequently registered interests and unregistered interests and the debtor's insolvency administrator;

d) to ensure, through the relevant Protocol, that the particular needs of the industry sector at hand are met;

e) to provide intending creditors with greater confidence in the decision to grant credit, enhance the credit rating of equipment receivables and reduce borrowing costs to the advantage of all interested parties.

3. Key provisions

The Convention provides for the protection of five different categories of interest:

International interests, that is, interests granted by the pledgor under a security agreement, or vested in a person who is the conditional seller under a title reservation agreement or a lessor under a leasing agreement. The international interest is the primary category of interest with which the Convention and the Aircraft Protocol are concerned.

Prospective international interests, that is, interests intended to be taken over existing, identifiable equipment as international interests in the future, but which have not yet become international interests. For example, in the case of a security agreement in which the terms of the agreement are still being negotiated or the prospective debtor has not yet acquired an interest in the equipment to be charged. A prospective inter-national interest may be registered as such in the International Registry but does not take effect until it becomes an international interest, in which case it ranks for priority purposes as from the time of its registration as a prospective international interest.

National interests, that is, interests registered under a national registration system which would be registered as international interests but for the fact that they are created by internal transactions in respect of which a Contracting State has made a declaration resulting in that the Convention cannot be applied.

Non-consensual rights or interests arising under national law, with priority without registration. A Contracting State may make a declaration specifying non-consensual rights or interests which under national law would be given priority over interests equivalent to an international interest and which, to the extent specified in the declaration, are to have priority over a registered international interest even though such non-consensual interests are not registered.

Registrable non-consensual rights or interests arising under national law. A Contracting State may make a declaration that non-consensual rights or interests arising under its law may be registered in the International Registry, and any such right or interest that is so registered is then treated for the purposes of the Convention as a registered international interest. Possible examples are a judgment or order affecting equipment of a category to which the Convention applies and a legal lien in favour of a repairer.

4. Status: which countries have ratified the Convention, and what is the driving force?

The Convention was signed in 2001 but has come into focus in a number of countries only in the last few years. It came into force in 2006. The Convention has been ratified by a number of states, such as the US, Russia, Ireland, Malta, Norway and New Zealand. Within the EU, only Ireland, Luxembourg and Malta have ratified the Convention so far, but a number of states, such as Sweden and the UK, are moving towards ratification.

One of the reasons for the interest is, of course, the unification of the rules regulating a global business sector like aviation.

Another reason, with a strong driving force, is the officially supported export credit, and the minimum interest rate, in connection with the financing of new aircraft. When official financing support is provided, the minimum interest rate is allowed to be lowered by a certain percentage, if the state in which the buyer is located has ratified the Convention.

The OECD, which is in charge of regulating officially supported export credits, maintains a list, 'the Cape Town list', of countries that have ratified the Convention. If Sweden ratifies the Convention, it may be on the Cape Town List shortly after year-end 2015.

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Bitcoins, the regulatory perspective

1. Introduction

In our Financial Markets Report of November 2013, we reported that Bitcoins were not e-money, as defined under the relevant EU legislation. This is partly because a limited number of Bitcoins are created and then traded; there is no real issuer of Bitcoins in the sense of a company issuing Bitcoins in exchange for money or other funds.

However, we also reported that Bitcoins (and other crypto-currencies such as Litcoin), have increasingly attracted the attention of legislators and regulatory authorities. One reason for this is that crypto-currencies are allegedly involved in illegal transactions.

Bitcoins can, of course, be traded or bartered in exchange for goods or services. However, in order to function in the economy, Bitcoins also need to be exchangeable for other currencies such as legal-tender currencies in various jurisdictions. These kinds of services are provided through online exchange platforms. These enable Bitcoins to be bought in exchange for funds denominated in regulated currencies.

Since November 2013, Bitcoin has also had to cope with the reported closure of well-known exchange platform provider MtGox, entailing the possible loss of funds invested in Bitcoins. Other providers of exchange platforms have been set up following the difficulties of MtGox.

2. The Reporting Duty Act

Under Swedish law, providers of certain financial services would be obliged to notify the Swedish Financial Supervisory Authority (SFSA) of their activities in accordance with the Swedish Certain Financial Operations (Reporting Duty) Act (lagen (1996:1006) om anmälningsplikt avseende viss finansiell verksamhet), (the 'Reporting Duty Act') and be registered as a financial institution by the SFSA. A registered financial institution is obliged to comply with Swedish Anti-Money Laundering (AML) law and thus adopt proper procedures for AML compliance.

The question arises as to whether providers of exchange platforms are obliged to notify the SFSA under the above-mentioned act.

According to Section 2 of the Reporting Duty Act, a natural or legal person intending to engage in currency exchange on a significant scale or other financial operations must notify the SFSA of such operations. Furthermore, according to Section 1 of the Reporting Duty Act, "currency exchange" is defined as "professional trade in foreign currency and coins, as well as travellers' cheques denominated in foreign currency" and "other financial operations" as "means of professional activities that primarily consist of conducting one or more of the operations set out in Chapter 7, section 1, second paragraph, subsections 2, 3 and 5-12 of the Swedish Banking and Financing Business Act (SFS 2004:297)."

The reference to "professional trade in foreign currency and coins, as well as travellers' cheques denominated in foreign currency" is primarily to be understood as a reference to trade in foreign legal tender currency (i.e. the traditional currencies recognised as legal tender in other countries). It may be assessed that the exchange of or professional trade in Bitcoins for other currencies would not fall within this definition of currency exchange.

It remains to be tested whether such trade in Bitcoins could fall within the scope of "other financial operations". The reference to Chapter 7, section 1, second paragraph, subsections 2, 3 and 5-12 of the Banking and Financing Business Act is of interest here as subsection 5 of that section makes a reference to the provision of "means of payment".

Subsequently, the question arises as to whether "means of payment" should be understood as a reference to any means of payment generally accepted in trade or as a reference merely to means of payment denominated in a legal tender currency.

It has been held in a decision by the Swedish Council for Advance Tax Rulings that Bitcoins constitute "means of payment" for the purpose of the Banking and Financing Business Act and the Reporting Duty Act and thus entail such services being exempt from VAT[1]. This decision was based on the finding that the SFSA had held the aforementioned Acts to be applicable since Bitcoins constitute "means of payment".

On the other hand, for income tax purposes the Swedish Tax Authority[2] has held that Bitcoins cannot be considered a currency but rather an asset comparable to "goods". The reasoning behind this is that Bitcoins are not legal tender.

3. Conclusion

In my opinion, the standpoint that Bitcoins are to be considered "means of payment" for the purposes of the Notification Act is well founded. In fact, Bitcoins are accepted as a means of payment by a limited but growing number of companies. This is also the case in Sweden. "Means of payment" is not necessarily to be understood as including only legal tender currencies. The decisive element behind such a standpoint is that Bitcoins are in fact accepted as "means of payment". The standpoint that Bitcoins are "means of payment" thus focuses on the function of the currency being traded as currency rather than any endorsement by a state. This is also to say that a de-facto currency should be regarded as currency irrespective of its status as legal tender.

This view is in line with the ruling of the European Court of Justice (ECJ) in the Thompson Case, in which the court held that "Although doubts may be entertained on the question whether Krugerrands are to be regarded as means of legal payment it can nevertheless be noted that on the money markets of those Member States which permit dealings in these coins they are treated as being equivalent to currency"[3]. The court thus concluded that Krugerrands fell within the definition of "means of payment" rather than that of "goods".

The view that Bitcoins constitute "means of payment" entails, as mentioned above, AML standards applying to Swedish exchange providers (and other requirements on the board members of the companies providing such services). This would contribute to building confidence in crypto-currencies, counteracting the use of crypto-currencies for illegal purposes and enhancing the use of crypto-currencies, such as Bitcoins, in day-to-day business.

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[1] Advance ruling 14 Oct. 2013 (doc. No. 32/12/I). The decision has been appealed.
[2] Swedish Tax Authority's position at 23 April 2014 (doc. No. 131 212709-14/111).
[3] See also ECJ case no. 7/78 Regina vs. Thompson

Lost in translation: how poorly translated financial legislation makes compliance difficult

Ever tried to figure out when to start complying with the European Securities and Markets Authority's (ESMA) Guidelines 2012/832 on ETFs and other UCITS issues? According to the English-language text, the rules do not come into effect until the earlier of a) the first revision of the fund prospectus or b) 18 February 2014. The Swedish text, however, advises readers not to comply until both a) and b) have occurred. In another provision, English speakers must take action to reduce counterparty risk exposure, whereas Swedish speakers must reduce the counterparty's risk exposure.

These are some examples of the confusion caused by the translation of EU documents for anyone trying to get their head round the ever-increasing wave of financial regulations (sometimes referred to as the 'regulatory tsunami'). The translations are often incorrect, vague and use the wrong technical terms.

The European Union now consists of 28 member states. In addition, through their membership of the EEA, Norway and Iceland are also part of the European legislative project. The EU comprises 24 official languages: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Irish, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, and Swedish. Important documents, such as legislation, are translated into every official language. In our daily practice we have found numerous examples of translation blunders. The EU Short Selling Regulation (236/2012) establishes rules regarding "fund management activities relating to separate funds". "Funds" in this respect refers to investment funds. In the Danish translation, however, "funds" has been translated into "midler", which is the other meaning of "funds" – "money".

In the Swedish translation of the ESMA guidelines mentioned above, "instruments of incorporation" are translated as "instrumenten för införlivande," whereas the correct Swedish term is "bolagsordning". In the Commission Delegated Regulation (EU) No 1002/2013 of 12 July 2013 amending the EMIR regulation, Japanese and US central banks and certain "public bodies" are exempted from the EMIR. In the Swedish translation, however, only central banks and certain "[European] Union public bodies" in the United States and Japan are exempted.

In the Commission Delegated Regulation (EU) No 231/2013 that supplements the AIFM Directive, a financial instrument held in custody is considered lost if "a stated right of ownership of the AIF is demonstrated not to be valid because it either ceased to exist or never existed". In the Swedish version, the same condition is translated as "AIF-fonden har uppgett äganderätt som bevisligen inte är giltig", which instead literally means "The AIF has stated a right of ownership that is demonstrably not valid". This translation clearly changes the conditions of the rule.

One might object that, although confusing, most translation errors are harmless; diligent readers will understand the correct meaning and can easily check other language versions to confirm their comprehension. We believe that such an approach to inadequate translations will, in the long run, result in an impaired legal system.

The reader of a legal document from the European Union should be able to gain an understanding of the text, irrespective of the language version. Furthermore, in the

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case of regulations, the Swedish language version has the status of a binding Swedish act, and discrepancies must be taken seriously. Language errors in directives are not as significant, since directives are transposed by Member States into their internal law and language errors can thus be corrected in the process.

The European Supervisory Authorities (ESAs) were created to promote a harmonised approach to EU legal acts regulating the financial markets. One way that the ESAs try to fulfil that purpose is by issuing guidelines on how to implement and comply with European financial legislation.

The guidelines issued by the ESAs normally enter into force two months after their publication on the authority's website. According to the ESAs, competent authorities (i.e. the national supervisory authorities) and financial market participants must make every effort to comply with the guidelines. The competent authorities do this by incorporating the guidelines into their supervisory practices. Hence, although the guidelines are not necessarily legally binding in the same way as a regulation from the European Commission, an institution must have very good reason not to comply. For a financial firm, keeping up to date with the ever-increasing amount of guidelines it is burdensome and requires a fair amount of resources. Having to read the guidelines in two language versions is unreasonable.

Significant responsibility lies with the national supervisory authorities, to which the proposed translations are always referred for consideration. The competent authorities often have a better understanding of the technical terms that make up significant parts of the guidelines than translators do, regardless of their linguistic talent.

In the long run, there is an important decision to be made: either to drastically increase time and resources for translations within the EU, ESAs and the national authorities, or to abandon the idea of translating these legal documents. If the translations cannot be trusted, are we perhaps better off without them?

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Facts and figures

Established in 1878, Setterwalls is the oldest law firm in Sweden. Today it is also one of the largest law firms in Sweden, employing more than 190 lawyers at offices in Stockholm, Göteborg and Malmö. Setterwalls has undergone substantial expansion over the past 10 years, both in terms of the number of lawyers and practice areas. Setterwalls' dynamic growth and the firm's participation in several high-profile cases and transactions have pushed the firm to its prominent position in the Swedish legal services market.

Setterwalls is organized into practice groups and trade and industry oriented teams.

Setterwalls' Financial Markets Group consists of highly skilled and specialised lawyers who are able to provide custom-made solutions and advice to clients. Through long-standing relation with domestic and foreign banks, investment firms, insurance companies and a wide range of other financial institutions, Setterwalls has gained a reputation for its high-quality work in a practice area that often involves complex processes. The firm is also well known for its expertise in ship and aircraft finance and marine insurance.

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