DE-RISKING TO A FAULT: AFTER OBLIVION THEN WHAT?

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THE OLINT AFFAIR

“The word is love” – Michael Manley

- Olint Corp Limited (Olint) banked with the National Commercial Bank (Jamaica) Limited (NCB)
- NCB was unhappy with the business activities of Olint and gave notice to terminate
- Olint went to court; Supreme Court and Court of Appeal found in favour of NCB
- The Judicial Committee of the Privy Council (JCPC) on further appeal upheld decision of lower courts
NCB’S POSITION

“If yuh live inna glass house don’t throw stones” - Peter Tosh

- Bank or customer is able to with notice terminate the banker-customer relationship without need for either to have or articulate specific reasons
- Capacity of bank to terminate applies even where account is being lawfully operated
- Olint was considered to be operating a Ponzi scheme
  - Should this continue, correspondent banking relationships of NCB would be compromised
  - General harm to economy would result from inaction
- Was it necessary to claim a pound of flesh and not an ounce short?
“Is there a balm in Gilead?” – Jeremiah 8:22

- NCB operated under licence, granted by the government acting on behalf of the Jamaican people
- NCB had an implied incident of licence duty to serve the best interests of customers, and the economy more generally
- If not prepared to do so, NCB should have surrendered their licence
- What is the scope and function of a bank?
GAP IN JCPC DECISION

“The system is a grave yard” – Mutabaruka

- JCPC did not provide any or any real guidance on the nature of banking licences
- It did not determine what the ‘incidents of a banking licence’ require, including service obligations to the jurisdiction as a whole
- It also did not include any real consideration of de-risking, which was in fact central to the Olint case
- Justice by reference to what?
"Look into my eyes. Tell me what you see" – Bounti Killa

- It is proper to consider Caribbean jurisdictions as "offshore"
  - Offshore from where? By reference to what?
  - Is “offshore” instead of “international financial centre” any less offensive than “migrant” instead of “expat”?

- Banking services are core to the financial services offerings across the Caribbean region
  - Really?
  - Does the BVI, for example, provide banking services?

- Deeper regulation is the answer
  - Where is it ever?
CHAOS – THE NEW NORMAL I

“Finance, so to speak, is at the heart of the economy from which other organs take their tone” – W.B. Gladstone

- Gladstone is even more correct now than then
  - Financial system is now super connected and invasive at several levels

- Ongoing concerns include:
  - Money laundering
  - Terrorism financing
  - Cross-border risk of contagion
  - Possibility of international system failure
CHAOS – THE NEW NORMAL II

- Guidance provided by FATF and other organisations is insensitive, inadequate and uneven in application.
- Consequential and fast-paced ongoing change has caused chaos at one level or another.
  - Change oftentimes required through developed country ‘edicts’
  - Small states suffer exogenous shocks and have little capacity to influence change.
- Gap in JCPC decision also reason for chaos at another but related level.
- Are there intellectual and other silos to be collapsed?
PAROCHIALISM AT THE INTERNATIONAL I

‘Selfishness is natural. Altruism is learnt, and more often than not self-interested, behaviour.’

- Correspondent Banking Relationships (CBRs) critical to global financial system
- However, correspondent banks are domestic in one jurisdiction or another and driven by profit motive
- Caribbean region is facing high level of de-risking by CBRs
PAROCHIALISM AT THE INTERNATIONAL II

- Regional governments, banks and other stakeholders are very concerned
  - Negative implications of de-risking are real

- De-risking within region could also have adverse implications for the global system, including:
  - Undermining of long term growth and financial prospects [IMF, April 2017]
  - Deepening risk of unregulated shadow banking [IMF, FATF, CDB, CAB, CCMF]

- Where will the selfish find interest in altruism? / What is the value proposition?
“Captain your ship is sinking. Captain the seas are rough” – Gypsy

A October 2016 Caribbean Association of Banks (CAB) survey reported that 55% of its members have lost at least one CBR

- Sample included 39 banks, with response rate of 97%
- Impact was considered as at 25 August 2016

Surprisingly, CAB found that European, not US, banks were the major de-risking institutions

- The IMF, CDB, CCMF have suggested otherwise; hence surprise
European leaning may be partially explained by US policy and regulation

- US ‘defensive’ policies have included implementation of the Foreign Tax Compliance Act (FATCA)

US regulators have tended to impose higher fines on non-US banks for regulatory breaches

- Referenced in Caribbean Centre for Money and Finance (CCMF) 2016 Paper

What’s the message in a bottle?
CARING FOR THE INDIVIDUAL

“Same knife stick sheep stick goat” – Jamaican proverb

- CAB, CDB, CCMF, IMF, etc. de-risking analysis include no or no real attempt to examine de-risking by local banks

- Their narrative does not factor a moral autonomy nexus between de-risking by domestic banks and that by correspondent banks

- Banking that does not serve the individual or underserves her undermines economic imperatives

- Chaos for the individual ultimately translates to chaos for the nation

- Is every other person my neighbour, to be treated as Lord Atkin would have treated his? [Donoghue v Stevenson]
WHERE NOW?

“Every weh yuh tun macka juk yuh” – Jamaican proverb

- Sugar? Yes, then no. Banana? Yes, then no. Reparations? No. Financial services? Yes, becoming no

- Community banks are relics in the Commonwealth Caribbean
  - Effective management of majors from without
  - Profit is king

- De-risking of international business corporations (IBCs) is ongoing
  - Even if not admitted

- Respondent banks claim that de-risking at local level preserves correspondent relationships
  - See Olint v NCB

- Unhealthy unipolar domination of global system for netting and settling

- What is the way forward?
“If baby want food and can’t do without it. Big 45 will go scout it.” – Damion ‘Jr Gong’ Marley

- A wounded buffalo is considered to be the most dangerous animal in all of Africa

- Banks in the Commonwealth Caribbean do not have the size or capacity to respond destructively by economic threats or state action
  - Antigua and Barbuda did win its WTO case against the US
  - How has this played out since?
RISK IN DE-RISKING II

- Unchecked de-risking by correspondent banks could result in unholy alliances and encourage destructive shadow banking
- De-risked individual also likely to enter unholy alliances and shadow banking arena
- De-risking will ultimately undermine accepted status quo and built in systemic security
  - National security risk and instability
  - Regulatory standards and controls to what end?
- There is a compliance conundrum
  - How, when, and to what end should compliance intervene?
"Nature Abhors a vacuum" – Aristotle

- Re-examining global system for netting and settling
  - Uni-polarity under review
  - US$ pure fiat currency since 15 August 1971 – value based on perception
  - Petrodollar arrangement with Saudi Arabia under 1972-1974 agreements limping
  - In December 2015, China’s renminbi joined dollar, euro, yen and pound in IMF basket of reserve currencies
  - In April 2016, China introduced new renminbi-denominated gold

- Harmonisation at regional level, including for netting and settling
  - Special SWIFT or other arrangements for regional transactions

- Legislative and regulatory response to de-risking at local level
  - Conduct of business over prudential regulation
WHERE FROM HERE II

- Progressive judicial policy construction
  - Central point/fatal flaw
  - *Bhasin v Hrynew* good faith to the rescue?
- Financial Innovation – FinTech Regtech
- New age community banking to the world
- From theory/observations to sustainable action/implementation
  - Where is the viable path?
  - Is there political will?
  - Will silos be collapsed?
The withdrawal of correspondent banking is but one aspect of de-risking

- It directly affects banks, with indirect implications for the individual

De-risking by domestic affects the individually directly, with more general implications

- It appears, however, that individual plight has not been considered seriously

Underlying arguments against de-risking apply equally to the individual against domestic bank as they do to respondent against correspondent bank

- There is a critical moral autonomy nexus that is not be overlooked
- Arguments by respondents against de-risking mirror those of individual against de-risking
CONCLUSION II

- De-risking is necessary in appropriate cases, but unchecked application cannot be supported
- There is urgent need to re-examine how banks function, and their obligations to the jurisdictions where they operate
  - Private Members Bill is being debated in the Jamaican House of Representatives to curb ‘improper’ charges and other abusive conduct
  - Appetite for development project risk low
  - Regulators have had blinkered focus on prudential over conduct of business
- There are real gaps in the international financial system
  - These induce negative economic and other implications for the Commonwealth Caribbean
  - Implementation of well considered financial innovation and other measures required
- Aluta continua