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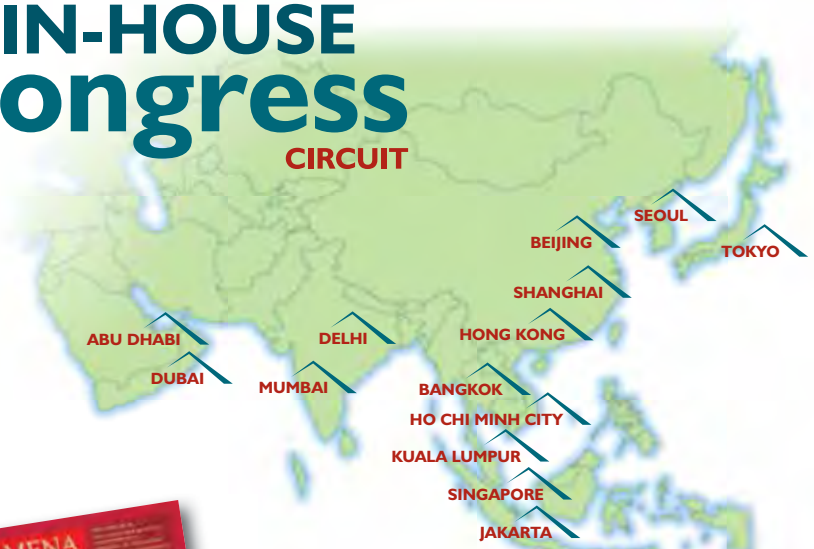

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Jack Yu is an associate in the Business Law section of *Fasken Martineau DuMoulin's* Toronto office. He is engaged in a broad corporate/commercial practice with a focus on anti-trust/competition and foreign investment review. He has worked on a variety of transactions including mergers and acquisitions, private placements, and initial public offerings.

Huy Do is the co-leader of *Fasken Martineau DuMoulin's* Anti-trust/Competition & Marketing Law Group and a partner of the firm. Huy has extensive experience dealing with the merger notification and review processes, as well as the civil and criminal provisions of the Competition Act and in advising clients, including state-owned enterprises, with respect to Canada's foreign investment law (Investment Canada Act).

Dr George Lin, managing partner of *Lin & Partners,* specialises in financial services, litigation and gaming law. Prior to establishing Lin & Partners, Lin was a senior attorney at Baker & McKenzie and Lee & Li. He has a PhD from National Cheng Chi University, LLM from Soochow University, and LLB from National Taiwan University, and is a Taiwan licensed lawyer.

Ross Darrell Feingold, of counsel to *Lin & Partners,* specialises in regulatory and policy issues. Previously, Feingold worked in-house for The Royal Bank of Scotland, Deutsche Bank, and JP Morgan. He has a JD from American University and a BA, cum laude, from Bucknell University, and is a New York and Washington DC licensed lawyer.

Ritika Ganju is a prinipal associate based in the Delhi office of *Phoenix Legal.* She advises foreign investors and multinational corporations on a wide array of legal issues relating to joint venture agreements, regulations governing external commercial borrowings, foreign direct investment policy, and company and employment law.

Puneet Upneja is a senior associate in the Delhi office of *Phoenix Legal*. He focusses primarily on foreign investments, M&A, joint ventures and general corporate matters including issues relating to real estate and exchange control laws.

Kripi Kathuria is an associate in the Delhi office of *Phoenix Legal.* She focuses primarily on corporate investments, M&A, legal and regulatory compliance and general corporate matters including issues relating to labour and employment law, real estate, food and beverage and exchange control laws.

Azman Jaafar is one of the founding members of *RHTLaw Taylor Wessing* and head of the firm's Corporate Practice. His practice focusses mainly on the energy and resources industries. He has advised and represented clients in numerous transactions involving M&As, corporate finance, mining and oil and gas in Singapore, the People's Republic of China and Indonesia. Fluent in Mandarin and Bahasa Indonesia, he also heads the firm's Indonesia Practice.

Chris Tang is a Managing Director of leading Hong Kong-based legal recruitment firm *Star Anise.* After 10 years' legal practice as a Corporate M&A lawyer with major UK law firms, where he managed and developed junior lawyers in his team, he quickly established himself in Hong Kong as a leading recruitment expert focusing on the legal, compliance and executive fields.

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Cover illustration: www.oweiss.com

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MOVES

The latest senior legal appointments around Asia and the Middle East

CHINA

Weil, Gotshal & Manges has added **Charles Ching** as a corporate partner in the firms China practice. Ching, who will be based in Shanghai, joins from Freshfields Bruckhaus Deringers Hong Kong office where he was partner. He has wide-ranging experience advising clients on complex private equity and M&A transactions and securities offerings. Ching regularly represents corporate clients and financial investors, including private equity firms, in cross-border M&A transactions as well as in pre-IPO, cornerstone and PIPE investments and debt offerings. He is fluent in Mandarin.

HONG KONG


Paul Greening

Akin Gump has expanded its Asia oil and gas practice with the addition of **Paul Greening** as a partner in Hong Kong, effective 20 July 2015. Joining from Vinson & Elkins, Greening focuses on international energy, utilities and infrastructure projects, as well as energy-focused cross-border M&As. With an expected move to Akin Gumps Singapore office later in the year, he will bolster the firms oil and gas capabilities across Asia. Greening has advised on matters involving energy-related cross-border M&A, divestitures, oil and gas contracts, project development and associated maritime law advice. He has worked on transactions involving clients, projects, companies and assets located across the Asia-Pacific, Russia, Australasia, the Americas, the Middle East, Africa and Europe. His clients have included state-owned enterprises and private oil and gas companies, project developers and private equity funds. Qualified in England and Wales, Australia (NSW) and Hong Kong, Greening received his LLB and BE, both with honors, from the University of Melbourne.


Shuang Zhao

Cleary Gottlieb Steen & Hamilton has added **Shuang Zhao** as a partner who will shortly join the firm in its Hong Kong office. Zhao joins from the Hong Kong office of Shearman & Sterling, where she has practiced for the last five years and was a partner focusing on capital markets transactions. She advises Chinese corporate clients and investment banks on capital markets transactions in the US and Hong Kong. She also assists Chinese corporate clients on a wide range of legal issues arising out of their operations in China and elsewhere. A PRC native, Zhao received her JD degree from Georgetown University Law Center in 1999. She is a New York and Hong Kong-qualified lawyer.

INDIA

J Sagar Associates has added **Varun Sriram** as a retained partner in the firms Chennai office. He specialises in private equity, venture capital and domestic and cross border M&As. He has been part of transactions across diverse sectors, including healthcare, security services, hospitality, ports, telecom VAS, food & beverage, manufacturing, technology, software services, transportation & logistics, pharmaceutical, non-banking finance companies and forex broking. Srirams practice also extends to general corporate commercial and advisory work, including legal opinions on a variety of corporate and commercial laws. He completed his law degree in 2006 and has been in practice since. Before joining the firm, he was a partner with HSB Partners Chennai and has also worked with Economic Laws Practice Mumbai and ALMT Legal Bangalore.


Varun Sriram

JAPAN

Baker & McKenzie has added **Joel Greer** as a new partner in its Tokyo office as of 1 July 2015. A registered foreign lawyer, Greer will be working as a key member of the Dispute Resolution practice group and will focus on international arbitration matters. He moved from Washington DC to join a major law firm in Tokyo in 2006 to handle international arbitration matters for Japanese multinationals and other major global corporations. He has advised clients in arbitrations around the world conducted under the rules of various arbitral institutions, including the International Chamber of Commerce, and his experience with matters conducted under the rules of the Japan Commercial Arbitration Association is unrivalled. He also assists clients with mediation and complex, multi-jurisdictional litigation. Greer graduated with a BA from Cornell University and received a JD from Yale Law School. He was admitted to the bars in Massachusetts and Washington DC in 2001 and 2002, respectively, and in Japan as a registered foreign lawyer in 2007.


Joel Greer

SINGAPORE

Baker & McKenzie.Wong & Leow, the member firm of Baker & McKenzie International in Singapore, has further enhanced its strengths in India-related financing work with the appointment of **Prashanth Venkatesh** as local principal. He joined the firm on 1 July 2015 from a top-tier law firm in India where he was a partner in the financing group. Prior to that, Venkatesh worked at a magic circle firm in London advising on banking and derivatives and

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MOVES

structured products in the European market. He has significant experience in India-related financing transactions, including assisting sponsors to negotiate leveraged exposure with Indian banks and financial institutions, as well as advising on the financing of road, port and renewable energy projects. He also has expertise in structuring debt instruments for non-resident clients investing in the real estate


Prashanth Venkatesh

debt sector through listed and privately placed debt instruments. Additionally, Venkatesh has advised lenders on corporate debt restructurings of infrastructure companies.

AMC

DEALS

Featured below are some recent headline deals from across Asia and the Middle East

AUSTRALIA

Allens has acted for **Healthscope Ltd,** one of Australia's leading private healthcare operators, in respect of the sale of its Australian pathology operations to Crescent Capital Partners for A$105 million (US$80.8m). Healthscope's Australian pathology operations consist of approximately 550 collection centres and 31 pathology laboratories in Victoria, South Australia, New South Wales and the Northern Territory. The sale will also see Healthscope transfer six skin clinics to Crescent. Partner **Emin Altiparmak,** supported by partner and co-head of private equity practice **Mark Malinas,** led the transaction which was announced on 23 June 2015 and is expected to be completed in July 2015.

Clayton Utz is advising **Skilled Group** in respect of its proposed A$650 million (US$500m) acquisition by Programmed Maintenance Services. Melbourne corporate M&A partner **John Brewster** and Sydney M&A director **Rod Halstead** are leading the transaction, supported by corporate national practice group head **Rory Moriarty** and Melbourne corporate partner **Andrew Walker.**

CHINA

Berwin Leighton Paisner has acted for **ICBC Leasing** in respect of its recent landmark deal involving leasing and financing of telecom equipment in Hungary. ICBC Leasing acquired optical fibre equipment from Huawei, the world-leading telecom equipment maker, and leased the equipment to Magyar Telecom, the leading telecom company in Hungary. This is a landmark telecom operating lease deal for ICBC Leasing, with financing provided by Bank of China Hungary Branch. This project is valued at over HUF10 billion (US$36m). Considered as one of the most significant deals signed recently, the transaction is part of China's One Belt One Road scheme which is aimed at improving connectivity and cooperation between the countries in Eurasia. Hong Kong partner Justin Sun led the transaction.

HONG KONG

Shearman & Sterling has advised **Harmonicare Medical Holdings Ltd**, a private obstetrics and gynecology hospital group, in respect of its primary listing on the Main Board of the HKSE and global offering of approximately HK$1.59 billion (US$205m). Harmonicare Medical is mainly engaged in obstetrics, gynecology and other healthcare services. As China's largest private obstetrics and gynecology specialty hospital group, it owns and operates 11 hospitals in Beijing, Shenzhen, Guangzhou, Chongqing and other cities. Capital markets partners **Colin Law** and **Peter Chen** led the transaction.

INDIA

AZB & Partners has advised **Pfizer Inc** in respect of its acquisition of 100 percent equity share capital of Hospira Inc for US$90 a share in cash for a total enterprise value of approximately US$17 billion. CCI approval for the acquisition was granted on 11 June 2015. NYSE-listed Hospira is the world's leading provider of injectable drugs and infusion technologies and a global leader in biosimilars. NYSE-listed Pfizer's global portfolio includes medicines and vaccines as well as many of the world's best-known consumer health care products. Partner **Samir Gandhi** led the transaction.

JAPAN

Baker & McKenzie Tokyo has advised **Kyocera TCL Solar LLC,** a Tokyo-headquartered joint venture of Kyocera Corp and Century Tokyo Leasing Corp, in respect of the development of floating mega solar business in Hyogo Prefecture. Two of the power stations are located in Kato City and in operation since March 2015, whilst the third plant, constructed in Sakasamaike, Kasai City and in operation since June 2015, is generating an estimated maximum of 2.3 MW per year in total and is considered the world's largest of its kind. Further expansion of floating solar power business is anticipated and this Hyogo Prefecture project is the forerunner of such future growth. **Naoaki Eguchi,** head of the Tokyo office Banking and Finance Practice Group, supported by partner **Masato Honma,** led the transaction.

MONGOLIA

Shearman & Sterling has represented the **Government of Mongolia** in respect of the update of its US$5 billion global medium term note program and its Regulation S offering of CNY1 billion (US$161m) 7.5 percent notes due 2018 under the program. The bonds will list in Singapore. This is the first dim sum bond from a non-Chinese Asian sovereign and the first high-yield dim sum bond from a sovereign globally. Hong Kong capital

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Construction Lawyer

Leading Conglomerate, 6+ Years PQE

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- Reporting to the Head of Legal, you will be part of a sizeable team
- In-house experience will be highly regarded
- Fluency in English and Cantonese is required (both spoken and written). Ref 501809

Funds/M&A Lawyer

Global Law Firm, 3-5 Years PQE

- Advising a broad range of institutional clients
- Be involved in regulatory issues over funds and M&A deals
- Candidates should be common law qualified
- Around 3+ years PQE in an investment funds team at major firm
- M&A lawyers with general funds experience may apply
- First rate English, strong Chinese is desirable. Ref: 501834

Property Lawyer

Leading Property Lawyer, 10+ Years PQE

- Handle a range of conveyancing and property development matters including construction litigation/arbitration
- Ideally have at least 10+ years PQE gained with a leading law firm and/or property developer handling commercial and residential property matters
- Fluency in English and Cantonese is required. Ref: 501663

Employment Associate

International Law Firm, 2-3 Years PQE

- Mixed contentious/non-contentious advisory role
- Additional involvement in employee incentives and pensions
- Ideally Hong Kong admitted, good employment exposure
- Advise on Hong Kong privacy laws
- PRC employment laws experience preferable, fluent Chinese
- Top tier law firm background required. Ref: 501812

Head of Legal

Multinational Services Provider, 12+ Years PQE

- Head up a small team
- Commercial contract drafting as well as advising on consumer laws and competition law matters
- Manage all litigation matters and take care of IP brand protection
- Risk management and in-house experience is required
- Ref: 501761

Corporate Associate

International Law Firm, 1-4 Years PQE

- Role gives a broad range of M&A and IPO deals exposure
- Advise on capital raising
- Candidate should be Hong Kong or common law qualified with excellent Chinese (Putonghua) and English written skills
- Talented applicants from local firms would be considered
- Ref: 501741

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DEALS

markets partner **Matthew Bersani** led the transaction.

SINGAPORE

Allen & Gledhill has advised **Singtel Group Treasury Pte Ltd** (SGT) and **Singapore Telecommunications Ltd** (SingTel) in respect of SGT's issue of US$500 million 3.25 percent notes due 2025 under its S$10 billion (US$7.37b) euro medium term note programme guaranteed by SingTel. Partners Yeo Wico, Bernie Lee and Sunit Chhabra led the transaction.

THAILAND

Weerawong, Chinnavat & Peangpanor has represented **Thanachart Bank Public Company Ltd** in respect of the β152 million (US$4.47m) facilities provided to Raffles Assets (Thailand) Ltd and Raffles Design International (Thailand) Ltd in connection with the financing of the construction and development of and working capital for the Raffles Design Institute Bangna Campus. Partner **Passawan Navanithikul** led the transaction.

AMC

NEWS

Mindfulness for legal industry professionals available now in Hong Kong

Over the last year or so, you may have noticed an explosion of interest in the practice of 'mindfulness', whether in the business section of the airport bookshop, the list of classes at your children's school, or in thousands of news stories on health and wellbeing.

The buzz could be dismissed as a fad were it not for the hard science backing it up. Studies suggest that mindfulness improves memory and attention skills, increases positive emotions, and reduces stress. Brain scans show increased density of gray matter in the areas of the brain related to learning, memory, emotion regulation, and empathy.

So what is this mindfulness thing all about? We caught up with Stuart Lennon, who, as well as being a senior marketing and communications manager at Norton Rose Fulbright, is also a qualified mindfulness teacher, offering courses and weekly drop-in sessions in Hong Kong.

"Mindfulness is a training for the mind. It provides tools to better deal with the pressures and challenges we face on a daily basis. Just as lifting weights builds muscle, mindfulness practice exercises the parts of the brain that deal with emotional management and empathy. We can learn to be calmer, more composed and less affected by life's difficulties." he commented.

Having practised mindfulness for nearly a decade, Stuart began teaching in 2014 following a year-long teacher training programme. He now offers a six week introduction course, that gives you all the information and tools you need to kickstart a mindfulness practice, as well as free weekly lunchtime sessions on Mondays in Central.

He continued: "The type of people coming on the course covers a wide range including lawyers, finance executives, teachers, and entrepreneurs. Some people are facing particular difficulties in their lives, whether at work, at home or related to family situations, and some are just curious about how mindfulness can help them become more productive at work, and relate better to others. People get different benefits depending on their motivation for taking up the practice."

Stuart's courses are detailed at http://mindfulnesscentral.com.hk along with a series of articles on how mindfulness can be applied in daily life situations.

IS YOUR SALARY COMPETITIVE?

Taylor Root Asia are pleased to release our annual salary guides for lawyers and compliance professionals working in-house in the Commerce & Industry and Banking & Financial Services sectors. These guides are derived from insight and information from our clients, ASIAN-MENA COUNSEL's Weekly Briefing online survey and global in-house tracking of recruitment trends, remunerations and bonuses. Over the last 12 months the in-house legal recruitment market in Asia has experienced improved market conditions, sentiment and job opportunities. Read the full reports.

To request a copy of the survey, please contact:

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EVENT REPORT

Bangkok In-House Congress

Our 2015 In-House Congress Bangkok, hosted at The Westin Grande Sukhumvit, Bangkok, was our thirteenth annual event for the In-House Community there. With 144 in attendence, the congress enlightened delegates on plenary topic 'What Do In-House Counsel Truly Want? How best can External Counsel Help Them?', after which practice workshops ensued.

Opening the sessions, Chandler Thong-ek Law Offices discussed 'Project Finance for In-House Counsel', while DFDL gave their thoughts on 'Outbound Investment: What the AEC Means for Thailand's ASEAN Trade and Investments'.

Subsequently, Latham & Watkins and Rajah & Tann presented workshops on 'Structuring and Financing M&A and JVs' and 'Employment Law – What Every In House Counsel Needs to Know', respectively. This was followed by a closing session on 'Understanding Company Ownership in Opaque Business Environments', from Kroll.

We would like to thank all speakers, pictured below, as well as all attendants for making this yet another successful year and event for Bangkok's In-House Community.

A special thanks on behalf of the *In-House Community*™ to all our speakers and panellists, which included:

2015 IN-HOUSE Congress BANGKOK

Suthirugs Berry
Director,
Group Legal
Counsel
Thoresen Group

Richard Dailly
Managing Director
Kroll

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Tim Gilkison
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Jude Ocampo
Cambodia Head
of Tax & Deputy
Head, Regional Tax
Practice Group
DFDL

Supawat Srirungruang
Partner
Rajah & Tann (Thailand)
Limited

The JLegal PQE

Personality Questionnaire Experience

Scott Weber

Associate General Counsel
and Senior Director
of Legal Affairs, APAC
at Juniper Networks

Every month, JLegal takes a light-hearted look at the PQE of a senior in-house counsel. This month, we meet Scott - who is also President of the American Club of Singapore - and discover his love for his family and travel.

- What is on your mind at the moment?
  The American Club's redevelopment proposal.
- Which talent would you most like to have?
  Financial acumen.
- What is your idea of misery?
  Watching family members or friends suffer through illnesses or unemployment.
- What do you most value in your friends?
  Time, time and loyalty.
- If you weren't a lawyer you would be a ...
  Concert promotor, skiing instructor or politician.
- What is your most precious possession?
  Relationships; with God, my family and friends.
- Where were you born?
  Chicago.
- Where is the best place you have ever been to?
  Vail Colorado.
- What is your greatest regret?
  Agreeing to consider that question.
- What is the strangest thing you have seen?
  Thaipusam.
- What is your motto?
  Ruthless efficiency.
- What do you consider your greatest achievement?
  Still working on it . . . but my family; 25 years of marriage is a great start!
- Top 3 favorite movies of all time?
  Fight Club, Monty Python and the Quest for the Holy Grail; To Kill a Mockingbird.
- What do you consider the most overrated virtue?
  Frugality.
- What is your greatest extravagance?
  Travel.
- If you could change one thing about yourself, what would it be?
  My eating habits.
- What irritates you?
  The absence of professionalism.
- What bores you?
  Routine and/or unfocused meetings.
- What would you like to be remembered for?
  Integrity.

EVENT REPORT

RISK & COMPLIANCE Symposium China 2015
A sister event to the In-House Congress

China Risk & Compliance Symposium

On July 2, 2015, the Renaissance Shanghai Pudong Hotel was the venue for the *In-House Community*'s second Risk & Compliance Symposium China. The event delved into topics such as how to respond to and cooperate with anti-corruption investigations in China; third party advisors in compliance – when to engage proactively and how to engage reactively; and corrption, cyber security and money laundering – your key risks in 2015.

As well as hearing from the speakers below on their chosen topics, delegates, of whom there were over 100, were invited by *Gilkron*'s Ron Yu to play the Game of Counter Party Risk (GCR). The game ran successfully in Shanghai to an overwhelmingly positive reception.

The GCR is a unique, interactive session where teams work with embedded experts to solve problems posed in fictional scenarios. Teams present their solutions to expert judges who award points based on the numbers of issues identified and dealt with, the comprehensiveness of the solution and measures proposed to prevent future recurrence of the problem.

Participants universally praised the GCR as an excellent means of preparation for dealing with the multi dimensional and multi disciplinary aspects of a contemporary complainance/ corruption-related crisis.

A special thanks on behalf of the *In-House Community*™ to all our speakers and panellists, which included:

Neal Beatty
Director
Control Risks

Harry Liu
Partner
King & Wood Mallesons

Meg Utterback
Partner
King & Wood Mallesons

Ron Yu
General Counsel
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Patrick Dransfield
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Andrew Macintosh
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Control Risks

Kyle Wombolt
Global Head of Corporate Crime & Investigations, Partner, Hong Kong
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A multinational corporation seeks a senior legal counsel qualified in Hong Kong with at least 12PQE. Experience in M&A, corporate finance, general commercial, and employment is required. Familiar with legal and compliance especially SFC regulations, Listing Rules and Compliances Ordinance. Strong business acumen and with Chinese language skills. (IHC 11464)

REGIONAL LEGAL COUNSEL (HEALTHCARE) — Singapore — 8-12 PQE

Global healthcare corporation is looking for a legal counsel to manage and oversee all legal matters across Asia Pacific. The potential candidate should have extensive range of corporate commercial experience, ideally already in-house in the healthcare or biotech industry with a regional coverage. Due to the nature of their business, proficiency in Mandarin is required. (IHC 12253)

LEGAL COUNSEL (BANKING) — Singapore — 6-10 PQE

Regional private bank is looking for a derivatives lawyer to advise the business regionally on a broad range of structured products. The ideal candidate should have relevant familiarity in structured products and ISDA legal documentation work. (IHC 11846)

EMPLOYMENT — Hong Kong — 6-10 PQE

Top-tier investment bank seeks an Employment lawyer to join their growing regional Employment Relations team. Great opportunity to work directly with HR and business and provide strategic and pragmatic operational advice on all aspects of employment matters. Excellent collegiate team culture. Chinese language is not required. (IHC 12259)

GENERAL COUNSEL — HK/Singapore — 6-8 PQE

Well-established investment group is seeking a corporate finance lawyer with strong entrepreneurial skills to support their upcoming IPO and handle a range of other legal matters. This is a unique opportunity to be part of a rapidly growing investment firm and a chance to work closely with a high-profile management team. You can be based in Hong Kong or Singapore. (IHC 12310)

LEGAL COUNSEL — Hong Kong — 3-8 PQE

Leading Wealth Management Company seeks a legal counsel to handle a wide variety of legal related business/ commercial agreements and funds related documents. Sound knowledge of financial service regulatory and fund setup is important. Fluency in both written and spoken English and Chinese required. (IHC 11794)

COMPLIANCE (LAW FIRM) — Hong Kong — 3-8 PQE

Unusual opportunity for a lawyer to take on an in-house compliance role in a law firm. The role will involve managing a team of conflict and AML analysts and advising on risk related projects. Will suit lawyers with AML or general compliance/regulatory experience. No language skills. (IHC 12295)

COMMERCIAL/CORPORATE — Hong Kong — 3-7 PQE

Leading commercial enterprise seeks a commercial/corporate lawyer to handle a mix of transactional work as well as advising on operational issues. Ideal candidate will have excellent training from a leading international law firm. Fluency in Chinese language is preferred. (IHC 12048)

AP LEGAL & IP DIRECTOR — Shanghai — 7+ PQE

The European manufacturing MNC is seeking a Senior IP Lawyer to cover Asia Pacific. This position will support the Asian Management Boards on Legal and IP issues. The ideal candidate should have minimum 7 years' experience in a law firm or MNC. (IHC 12275)

LEGAL COUNSEL — Shanghai — 6+ PQE

A Fortune 500 Pharma company is looking for a legal counsel to be based in Shanghai. Over 6 years of China commerical experience is required. Oversea studying will be a plus. Strong communication skills in both English and Mandarin are essential. (IHC 12135)

IP COUNSEL — Hong Kong — 3-6 PQE

Leading conglomerate has a vacancy for an IP Counsel to provide legal support to business on all IP and technology related legal issues globally. This includes, but is not limited to, advising on patent and trade mark portfolio management, drafting and negotiating IP licenses and IT outsourcing agreements. Chinese language is required. (IHC 12231)

FUNDS COUNSEL — Hong Kong — 3-6 PQE

Award winning asset management firm is seeking a funds lawyer to provide full legal support to their regional business. Solid understanding of MPF and ORSO-related funds is required for success in this role. Fluency in English and Cantonese is required, with conversational Mandarin being preferred. (IHC 12272)

CORPORATE TMT LAWYER — Singapore — 3-5 PQE

Global financial institution seeks a junior to mid-level lawyer with experience in corporate TMT work to join their established legal team. The ideal candidate should be familiar with a range of IT outsourcing, data protection/privacy and intellectual property work. (IHC 12150)

LEGAL COUNSEL (PRIVATE BANKING) — Singapore — 2-4 PQE

An established European private wealth management company is looking for a junior lawyer to join their lean legal team in Singapore. The ideal candidate should have relevant experience in private wealth, regulatory funds and/or banking and finance work. (IHC 11976)

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Singapore: Jason Lee (j.lee@alsrecruit.com), **China:** Kevin Gao (k.gao@alsrecruit.com)

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EVENT REPORT

Manila In-House Congress

This year the *In-House Community* hosted a Congress for its members in Manila for the first time since 2005. We were welcomed by over 100 delegates at the Makati Shangri-la Manila, each keen learn how they could manage tasks more effectively.

After welcome remarks from In-House Community Managing Director Tim Gilkison, attendees enjoyed the panel discussion 'What Do In-House Counsel Truly Want? How Best can External Counsel Help Them?', featuring Christopher Stephens, Leandro Remigio S. Amante, Michael David I. Abundo III, Simeon Ken R. Ferrer, Kyle Wombolt and moderator Patrick Dransfield.

The subsequent workshops – 'Where do I Arbitrate? Pros and Cons of Various Arbitration Institutions' and 'Corruption, Cyber Security and Money Laundering' gave delegates an opportunity to learn more about these fields, with the former including contributions from the Hong Kong International Arbitration Centre, the Kuala Lumpur Regional Centre for Arbitration, the Philippine Dispute Resolution Center Inc., the Singapore International Arbitration Centre and the International Chamber of Commerce International Court of Arbitration.

Finally, there was an afternoon plenary entitled 'Reasonable Expectations: Developments in Workplace Privacy; Walking the Regularisation Tightrope: Trends in Job Contracting, Outsourcing and Other Types of Engagement'. We would like to thank sponsors and speakers, listed below.

2015 IN-HOUSE Congress MANILA

A special thanks on behalf of the *In-House Community*™ to all our speakers and panellists, which included:

Michael David I. Abundo III
Head – Legal and Admin. Services, Corporate Resources Division
OCLP Holdings, Inc.

Simeon Ken R. Ferrer
Partner and Head of Corporate Services
SyCip Salazar Hernandez & Gatmaitan

Ricardo Ma. P.G. Ongkiko
Partner and Head of Litigation
SyCip Salazar Hernandez & Gatmaitan

Jay Santiago
Counsel
Hong Kong International Arbitration Centre

Leandro Remigio S. Amante
Vice President – Legal and Human Resources
Team Energy Corporation

Tim Gilkison
Managing Director
In-House Community

Cheryl Ann L. Peña
Partner
Siguion Reyna Montecillo & Ongsiako

Christopher Stephens
General Counsel
Asian Development Bank

Robert N. Dio
Commercial Arbitrator
Philippine Dispute Resolution Center, Inc.

Rafael H.E. Khan
Partner
Siguion Reyna Montecillo & Ongsiako

Antonio C. Pido
Senior Partner
Siguion Reyna Montecillo & Ongsiako

Sylvia Tee
Director, Arbitration & ADR, Asia
International Chamber of Commerce (ICC) International Court of Arbitration

Patrick Dransfield
Publishing Director
Asian-mena Counsel and Co-Director
In-House Community

Seok Hui Lim
Chief Executive Officer
Singapore International Arbitration Centre

Smrithi Ramesh
International Case Counsel
Kuala Lumpur Regional Centre for Arbitration

Kyle Wombolt
Global Head of Corporate Crime & Investigations, Partner, Hong Kong
Herbert Smith Freehills

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In-house

Legal Director | 10-15 yrs pqe | Hong Kong REF: 12990/AC

An international healthcare group is seeking a Hong Kong-qualified corporate/commercial lawyer to provide leadership in all legal matters. Based in Hong Kong, you will be responsible for covering a wide range of company and commercial issues including employment, property, contract, litigation, and IP matters. You will have 10-15 years' solid corporate and commercial experience gained in MNCs. Candidates with leadership qualities and experience in the healthcare/medical industry are preferred for the role. Fluency in English and Chinese is mandatory.

Head of Legal & Compliance | 10+ yrs pqe | Shanghai REF: 13042/AC

An MNC in the healthcare (non-pharma) industry seeks a senior corporate/commercial lawyer to lead its China legal team. Based in Shanghai, you will be responsible for leading a small team of professionals to provide advice and support on a range of legal and compliance matters in China. You must have at least 10 years' PQE in M&A, corporate, commercial and regulatory compliance matters in China; healthcare industry experience is a bonus but not essential. Overseas education and work experience or with an international law firm or an MNC is required, as are excellent leadership skills and fluency in English and Mandarin.

Compliance & Privacy Director-China | 7+yrs exp | Shanghai REF:13043/AC

This renowned medical corporation is seeking an experienced compliance professional with excellent technical skills to cover its operations in China. Based in Shanghai, you will lead the compliance and privacy team to provide strategic and tactical support on healthcare compliance, anti-corruption and privacy issues in China. You must have solid compliance experience in a highly regulated environment. Candidates with business acumen, strategic capabilities and the ability to advise senior business leaders are welcome to apply. Fluent written and spoken English and Mandarin skills are mandatory.

Investigations Counsel | 6-10 yrs exp | Beijing REF: 13041/AC

This Fortune 500 IT corporation is seeking a lawyer with solid investigation experience to be based in Beijing, covering its operations in the Asia Pacific region. You will be responsible for managing external and internal investigations with a focus on the Chinese market. You ideally have a law degree with 6-10 years' investigation experience at a top law firm or at an MNC. Experience in practicing anti-corruption law is highly desirable. Fluency in English and Mandarin, written and spoken, is mandatory.

Legal Counsel | 5-10 yrs pqe | Singapore REF: 13012/AC

A global market leader in its field is looking for a senior dispute resolution lawyer. You will be responsible for providing legal advice and support to the key business partners and its engineering and project-management teams on contract and dispute matters. You ideally are Singapore qualified with 5-10 years' PQE in general litigation or dispute resolution matters at leading law firms in Singapore. Experience in handling disputes or litigation related to construction is highly desirable. A good understanding of construction contracts, project tendering process, documentation and project management is essential.

Private Practice

Managing Associates | 5-7 yrs pqe | London REF: 13037/AC

Looking for a move to London? Exciting opportunities exist for senior-level corporate associates to join this prestigious UK firm. You must have a general corporate law background with good transactional experience gained on international deals. The firm is open to UK, AUS, NZ, SG or HK-qualified associates. Ideal for expats looking to return to the UK or enthusiastic lawyers seeking exposure to the complex London market.

Securities & Enforcement Associate | 4+yrs pqe | Shanghai REF:13050/AC

Wall Street firm seeks a US-qualified lawyer to join its securities and enforcement practices in Shanghai. You must have experience in private securities litigation, US enforcement matters and internal investigations at a leading law firm. You should be capable of managing complex case and have experience of leading teams of junior associates. Lawyers with a US LLM/JD are preferred. Fluency in English & Mandarin is a must.

Dispute Resolution Associate | 4+ yrs pqe | HK REF: 13048/AC

Top international law firm is seeking US-qualified dispute resolution lawyers to join its stellar team in HK. You must have solid experience in general litigation, including one or all of corporate crime, sanctions, or cybercrime cases, with top law firms. US-educated attorneys with 4-5 years' dispute resolution experience and excellent academic record are sought for a genuinely interesting role. Native Mandarin & fluent English are mandatory.

IP Lawyer | 4+ yrs pqe | Beijing REF: 13044/AC

Top global law firm with significant clients seeks an IP lawyer with 4-6 years' PQE to join its Beijing office. You will work closely with leading partners advising MNCs and Fortune 500 companies on a range of IP issues in the PRC. You ideally are PRC qualified with over 4 years' PQE in general IP issues including consulting, commercial, and trademark work. Fluency in English and Mandarin, written and spoken, is required for the role.

Project Finance Associate | 2-5 yrs pqe | Singapore REF: 13016/AC

Leading US law firm seeks a US/UK qualified lawyer to join its project finance practice in Singapore. You will cover all aspects of project finance and have a regional focus. You ideally have solid experience in some or all of the oil & gas, petrochemicals, energy or infrastructure industries. Candidates with excellent academics and a working experience at a Magic Circle or White Shoe firm are highly desirable.

US Securities Associate | 2-3 yrs pqe | Singapore REF: 13017/AC

This White Shoe law firm is seeking a US qualified lawyer with strong technical skills and experience to join its securities practice in Singapore. You will have the opportunity to work under the guidance of leading partners on a wide range of US securities-related work. You must be US qualified with at least 2-3 years' relevant experience gained from top-tier law firms.

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Be it a case of wanting to spice things up or break the pattern, every now and then, it's nice to know there's something else. Whether you do so casually or stringently, take a look below to see what the legal sector can offer you.

Head of Legal
PQE: 8+ yrs, Hong Kong

A reputable Asia-based asset manager is looking for a senior funds lawyer to head up its legal team. The company deals in a mix of retail, ETF, and PE funds work, so prior experience in these areas would be ideal. Additionally, experience in regulatory-related matters would also be useful. This is an excellent opportunity for candidates with funds experience in-house or in private practice to work closely with the business in a senior position. Mandarin is essential. [Ref.: AC5433]

Contact: Chris Chu
Tel: (852) 2537 7415
Email: cchu@lewissanders.com

Senior Legal Counsel
PQE: 16+ yrs, Hong Kong

A leading news media group in Asia is seeking an astute lawyer with strong business acumen to join its legal team based in Hong Kong. In this role you will be responsible for providing legal advice and support to the leadership team on corporate and commercial matters and M&A and JV projects. The ideal candidate will be a qualified lawyer with at least 16 years' PQE in M&A, corporate finance, land development, employment law and e-commerce. You must have good knowledge of SFC regulations and Listing Rules and the Companies Ordinance. Excellent drafting and communication skills are required as well as fluent English and Chinese. [Ref.: 12975/AC]

Contact: Dora Cheung
Tel: (852) 2520 1168
Email: hughes@hughes-castell.com.hk

Funds Counsel
PQE: 3-6 yrs, Hong Kong

An award winning asset management firm is seeking a funds lawyer to provide full legal support to their regional business. Solid understanding of MPF and ORSO-related funds and the regulatory arena is required for success in this role. Fluency in English and Cantonese is required, with conversational Mandarin being preferred. [Ref.: IHC 12272]

Contact: Claire Park
Tel: (852) 2920 9134
Email: c.park@alsrecruit.com

Construction Lawyer, Leading Conglomerate
PQE: 6+ yrs, Hong Kong

- Handle both contentious and non-contentious matters relating to Hong Kong and PRC
- Report to the Head of Legal, you will be part of a sizeable team
- In-house experience will be highly regarded
- Fluency in English and Cantonese is required (both spoken and written). [Ref.: 501809]

Contact: Annie Tang
Tel: (852) 2810 9077
Email: annie.tang@staranise.com.hk

Corporate Counsel
PQE: 6-8 yrs, Singapore

The legal counsel sought will provide legal support to the APAC region. The scope involves negotiating and drafting a variety of agreements such as IT outsourcing and procurement contracts. Candidates with RFP experience will be viewed favourably. [Ref.: JGB – IS 1565]/ JLegal Pte Ltd Employment Agency Licence No: 08C4187/ Benedict Joseph, EA Registration [No: R1324716]

Contact: Benedict Joseph
Tel: (65) 6818 9707
Email: benedict@jlegal.com

Head of Legal China (International Bank)
PQE: 10+ yrs, Shanghai

A renowned international financial institution is seeking to recruit a Head of Legal to manage the legal department and legal infrastructure within its China businesses, covering corporate and investment banking, commercial and personal banking, and private banking businesses. The responsibilities of the Head of Legal include management of a team of banking lawyers across Shanghai and Beijing and managerial responsibilities such as budget and recruitment for the legal team. The role includes strategic involvement in the management and operation of the employer's China businesses ensuring both interaction with the business on a daily basis and a close working relationship with senior management.

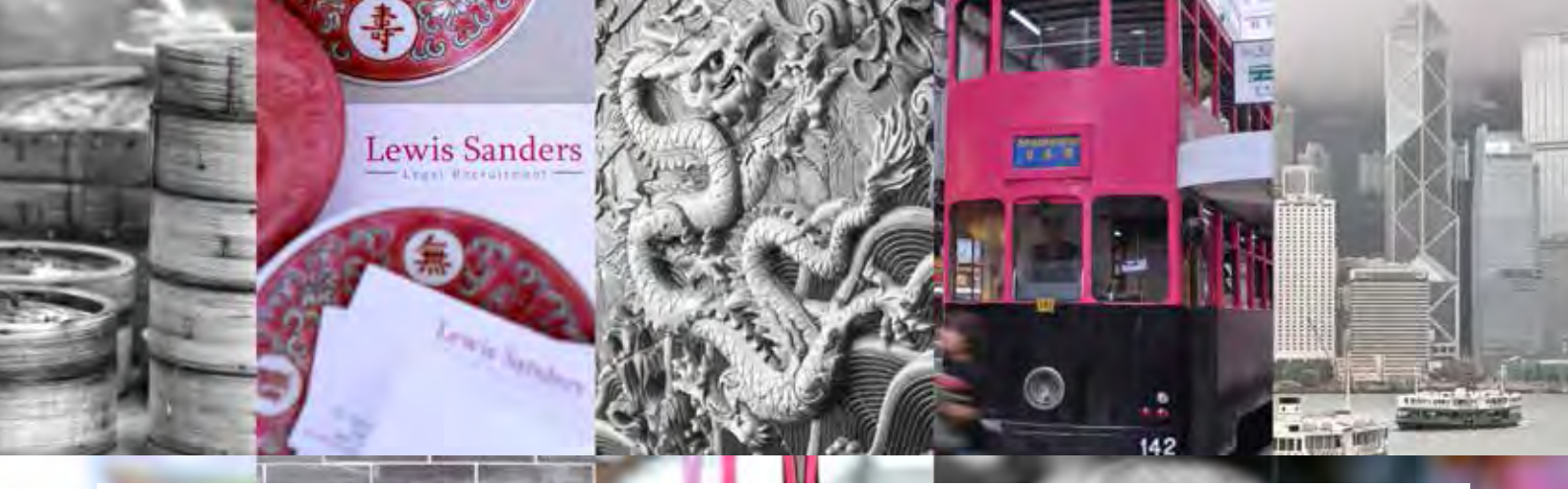
Ideally you have solid technical banking and finance skills and an understanding of the regulation of financial institutions. International applicants with experience dealing with PRC and APAC legal banking matters are encouraged to apply. Mandarin language skills essential. [Ref.: 202560]

Contact: Hayden Gordine
Tel: (852) 2973 6333
Email: haydengordine@taylorroot.com.

Head of Employment – Investment Bank
PQE: 10-15 yrs, Singapore

A blue-chip investment bank with a sizeable legal team in Singapore is currently looking for a senior employment lawyer to head up their Asia-Pacific employment legal team. On a day-to-day basis, you will be driving global and regional initiatives, as well as working closely with internal stakeholders to manage HR-related legal risk. The ideal candidate will have 10-15 years of experience within a top tier law firm and/or financial institution. An excellent career track and competitive pay package are on offer. [Ref.: R/040775]

Contact: Shulin Lee
Tel: (65) 6407 1053
Email: shulinlee@puresearch.com



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Legal Recruitment

In-House

HEAD OF LEGAL — HONG KONG — 8+ years

Reputable Asia-based asset manager needs a senior funds lawyer to head up its legal team. Our client deals in a mix of retail, ETF & PE funds work & so prior experience in these areas would be ideal. Excellent opportunity to work closely with the business. Mandarin is essential. AC5433

STRUCTURED PRODUCTS — SINGAPORE/HK — 6-10 years

Global i-bank requires a VP level lawyer to join its legal team. You will have significant experience in financial products such as structured products & OTC derivatives, from an international firm or a financial institution. Singapore or HK office. Excellent exposure on offer. AC5337

CORPORATE COUNSEL — SHANGHAI/BEIJING — 5-7 years

Prestigious US-based research firm is looking to hire a legal counsel in China as part of its continued expansion in the region. The ideal candidate will have strong M&A/regulatory/general commercial experience. PRC qualification, native Mandarin & fluent English are essential. AC5386

PRIVATE BANKING - AVP/VP — HONG KONG — 3-9 years

Bulge-bracket bank is seeking a mid-level lawyer with strong products knowledge to join its private banking legal team. The role involves advisory & transactional matters in relation to structured products, derivatives & alternative investments. Chinese language skills advantageous. AC5361

ISDA VP - IWM — HONG KONG — 4-7 years

Global i-bank is looking for someone with strong ISDA experience to join its transaction management team in HK. You will have at least 4 years' experience preparing & negotiating ISDA agreements. Exposure with OTC derivatives advantageous. Fluent Cantonese is essential. AC5424

TRANSACTION COUNSEL — HONG KONG — 3-8 years

Investment advisory firm is looking for a corporate lawyer with 3-8 PQE to join its legal team in HK. The candidate will advise on M&A, PE, finance & VC transactions as well as risk/compliance matters. Strong transactional experience, fluent English & Cantonese are required. AC5427

LEGAL COUNSEL - GAMING — SHANGHAI — 4-10 years

An international gaming company seeks a dynamic & confident lawyer to join its team in Shanghai. You will have commercial & transactional experience as well as fluent Mandarin. Exposure to the gaming or technology sector will be an advantage. Competitive package on offer. AC5436

Private Practice

REGULATORY COUNSEL/ASSOCIATE — HONG KONG — 8-12 years

A leading non-contentious regulatory practice with a top tier UK law firm is looking for a senior lawyer to join its team as a counsel or senior associate. You will have at least 8 years' experience in dealing with non-contentious FSR matters. HK experience is essential. AC5391

US CAPITAL MARKETS — HONG KONG — 4-6 years

A mid to senior level US capital markets associate is needed for a UK firm where a wide range of ECM & DCM work is on offer. The ideal candidate will have 4-6 years' experience at an international firm. US qualification & ability to draft in Mandarin & English required. AC5358

CORPORATE/PE/FUNDS — HONG KONG — 4-7 years

Offshore firm seeks to add a corporate M&A/PE or funds lawyer to the team. The role will offer top quality PE & funds work, significant BD exposure & good prospects. Offshore lawyers based in London or offshore jurisdictions welcome to apply. Commonwealth qualification preferred. AC3579

M&A — HONG KONG — 3-5 years

Global international firm is looking for an experienced corporate lawyer with HK M&A experience. Working with well-established partners & a team of quality fee-earners, you will have 3+ years' relevant experience from a reputable firm. Cantonese & Mandarin language skills essential. AC5431

EMPLOYMENT — HONG KONG — 2-4 years

Leading UK firm is seeking a junior lawyer with strong HK employment experience to join the team. You will be familiar with HK privacy law & solid knowledge of HK occupational retirement fund & MPF schemes. Fluent Chinese skills are essential. AC5416

RESTRUCTURING — HONG KONG — 1-3 years

Excellent opportunity at a top tier UK firm for a junior restructuring lawyer. The ideal candidate will have non-contentious restructuring & insolvency experience from a reputable international law firm. Lawyers with HK, UK or Australia qualification are welcome to apply. AC5389

FINANCE — HONG KONG — 1-3 years

International firm is looking to add a junior finance lawyer to its expanding practice in HK. Applicants should have at least a year of experience in syndicated loans, project or acquisition finance. HK qualification is preferred but Australia or UK qualified lawyers will be considered. AC5367

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Karishma Khemaney, kkhemaney@lewissanders.com +852 2537 0895 or email recruit@lewissanders.com

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Kate Chan
Regional Managing Director

Dawn raids: survival tips and pre-emptive action

Last year's government raid on Mercedes-Benz in China was a stark reminder of the risks that companies face as regulatory regimes continue to multiply across numerous jurisdictions. Unfortunately, the first time many organisations become aware they are under investigation is when the authorities arrive on their doorstep. Known as corporate dawn raids, these unannounced visits from regulatory or enforcement authorities get their name from the government investigators' habit of turning up at the beginning of the business day, when companies are likely to be least prepared for the unexpected.

Armed with warrants, they can and do arrest company officials and take away information not only in the form of paper files, but also electronic evidence stored on computers, servers and other digital devices. Given the impact on business, severe penalties and reputational damage associated with corporate wrongdoing, companies need to be prepared for a raid. They should also take proactive steps to detect unlawful behaviour ahead of a knock on the door from the authorities.

How to handle a raid

Alert management and legal to the arrival of authorities

It is always advisable to ask the investigators to wait for the company's lawyers to arrive, as they will check on the lawfulness and scope of the warrant/search order. Also, call in an IT or forensic technology consultant who can shadow the investigators.

Ensure internal communications promote compliance with investigators

The obstruction and failure to comply with properly authorised investigators carries the risk of hefty fines and imprisonment. Employees should stay calm, not answer questions beyond scope or comment outside of company-related questions.

Do NOT delete data

This leaves a trace and can lead to uncomfortable inquiries, expansion on the scope of electronic data collections or repeated collections. It is vital to ensure all employees are aware of their legal obligations. For example, computers should not be turned off because investigators may require access to recently used RAM to check on data copied to clipboards or downloaded.

Monitor investigators

Organisations should ensure investigators are sticking to the scope of investigation and following proper procedures to preserve the integrity of evidence. The powers of the authorities to enter premises and how they copy relevant information vary. Companies should always seek local legal advice on how to respond in each case.

Note what investigators are searching for and on which devices. With the help of a computer forensic expert, it is possible to replicate what the investigators copy either during or immediately after the raid. Business continuity is important — negotiate with investigators and ask whether they need to seize whole computers and take servers offline. Areas of potential relevance can be discussed and targeted, as can procedures for handling known privileged documents.

The aftermath

The sooner a company is able to start reviewing what the authorities have collected, the sooner it can consider its legal exposure and strategy for handling the investigation. A legal technology provider can set up a document review tool that allows the company to rapidly analyse documents seized by regulators. The millions of emails now available will need to be automatically filtered and prioritised using the latest technology so that the company can quickly assess potential liability and prepare a response.

Proactive compliance monitoring

Electronically stored information (ESI) such as email is a source of evidence often targeted by regulators. In line with guidance from authorities, it is becoming increasingly advisable for companies to review their electronic communications and information as part of their internal compliance monitoring and audit process. Companies that carry out such internal reviews of their ESI to detect unlawful activity will be better placed to defend themselves.

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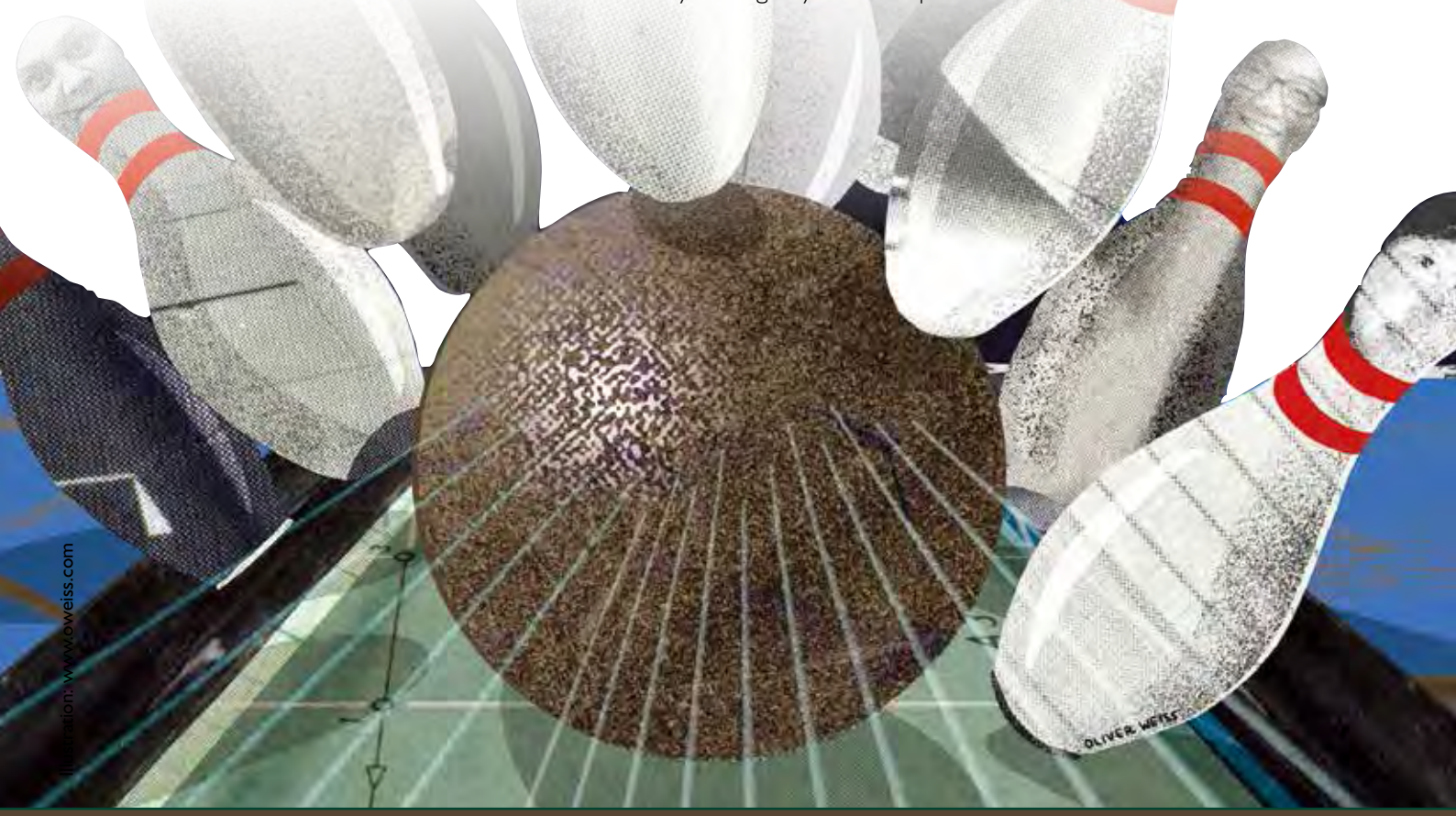

What in-house counsel should know about China's anti-monopoly law in the intellectual property sector

He Jing of *Anjie Law Firm* gives history and case studies of China's anti-trust laws in relation to IP and asks what he feels is the 'big question'.

Introduction

Intellectual property (IP) related anti-trust enforcement in China has been a focal point among the industries and the international anti-trust legal community for last couple of years. The Qualcomm investigation by the National Development and Reform Commission (NDRC) is symbolic of what a large licensing company may encounter in China.

This brief will highlight the key events and the most relevant legal basis in the IP-related anti-trust fields in China. Some of our readers may be surprised to discover the breadth and depth of the legal and business issues that have been addressed by the Chinese courts. Standards-related IP policies, FRAND royalty rates, refusal to license, patent pools, injunction relief for standard essential patents, etc. have been heatedly debated among policy makers, judges, practitioners and industries. Some Chinese court cases are arguably among the very early decisions worldwide. The future enforcement activities and outcome of private anti-trust lawsuits in China may likely continue impacting the trends.

Early history

China did not have its Anti-monopoly Law (AML) until 2008. Prior to that, courts and government authorities relied on the Anti-unfair Competition Law, which includes rules dealing with bundling, to address anti-competitive activities.

Back in 2004, a Chinese generic battery company TSUM sued SONY Corp. for illegal bundling of its infoLITHIUM batteries. This case was widely held as the first IP anti-competitive court case as the plaintiff argued that Sony misused its encryption technology to bundle the batteries. The court dismissed the plaintiff's claim and ruled there were no tie-ins.

IP-related anti-trust issues were given much deeper thought when China started experimenting patent pooling efforts for homegrown standards in 2004. The widely known video codecs group AVS took an unusual move in setting out an IPR policy for standardisation setting activities. Issues such as FRAND and Standard Essential Patents were seriously considered and eventually addressed in the carefully drafted IPR policy. Multinational companies' standard experts and IP counsel contribute significantly to this effort, although the commercialisation of the AVS standards was not that successful.

Between 2004 and 2014, lots of IP-related anti-trust discussions focussed on IP policy for standard-setting activities. The draft measures on national standards related to patent rules, which were driven by the Standard Administration Commission, consistently attracted the interest of the industries until the rules were finally issued in 2014.

Anti-monopoly Law

What shifted the legal landscape is the PRC Anti-monopoly Law, which went into effect as of August 1, 2008. Its Article 55 directly addresses intellectual property rights. Although Art. 55 seems to acknowledge that IPR owners are entitled to exercise IP rights, it essentially subjects any alleged IP misuse to the jurisdictions of the anti-monopoly law. The very provision lays out the statutory basis for subsequent legislative efforts in IP misuse fields. Another signficiance is that the PRC AML provides the legal basis for private anti-trust lawsuits for civil remedies. Everyone has been watching how the courts and the anti-trust regulators in China are going to handle the IP misuse cases.

After the passage of the AML, legislative efforts in an IP-related field mostly relate to the IP Misuse Guidelines that were being drafted by the State Administration for Industry and Commerce (SAIC). The guidelines were eventually converted into the IP Misuse Measures, which we will described in more detail in the briefing.

Notably, the Supreme People's Court (SPC) issued advisory opinions on determination of royalty rates for those standard essential patents in the same period of time. While the opinions

By He Jing, ***AnJie Law Firm***

were not binding, it is clear that SPC has deep interest in setting out clear precedents in this area. A more active SPC is expected to have a much bigger impact in this field in the years to come.

MOFCOM's 2012 merger review of Google and Motorola

The first China case where PRC anti-monopoly law authorities made clear their position and analysis on standard essential patents is probably the MOFCOM merger review in Google's acquisition of Motorola. In May 2012, MOFCOM announced its conditional approval of Google Inc.'s proposed US$12.5 billion acquisition of Motorola Mobility Holdings Inc. Contrary to the unconditional approval granted by the EU and US anti-trust authorities, MOFCOM imposed the conditions on Google out of anti-trust concerns. Such conditions include: Google shall treat all OEMs in a non-discriminatory manner with regard to the Android platform; and Google shall honour Motorola's pre-existing commitment to license its SEPs on FRAND terms.

Huawei Technologies v. InterDigital Corporation

The Huawei cases are probably among the most controversial decisions. The decisions related to the determination of relevant market and FRAND royalty rates have generated countless debates, which may even hurt Huawei's own licensing activities in the future.

In April 2014, the Guangdong High Court of China published its October 2013 judgments in two *Huawei Technologies v. InterDigital Corporation* cases. Huawei, the world's largest telecommunications manufacturer, prevailed in its two claims that US-based InterDigital Corporation (IDC) abused its dominant market position and failed to license its SEPs on FRAND terms.

Regarding the first claim, the court supported Huawei's claim that IDC had abused its dominant market position by mandating a tying arrangement in the licence agreements, requiring grant-backs, and requesting a discriminatory and unreasonably high royalty rate for its Chinese SEPs and non-SEPs. In particular, the court found that each of the SEP licensing markets constitutes a relevant market.

Regarding the second claim, the Guangdong High Court affirmed the Shenzhen Intermediate Court's ruling that IDC imposed excessively high royalty rates for its SEPs related to 2G, 3G, and 4G wireless communications standards. Specifically, the court found that IDC's royalty rates were noticeably higher when compared to IDC's licensing agreements with Apple and Samsung. However, many people believe that the royalty rate lacks sufficient grounds, as the alleged royalty rate IDC charged Apple is not really comparable. The case is currently pending at the Supreme People's Court for a final review.

The NDRC's 2013 investigation of Qualcomm

In February 2015, the NDRC concluded its investigation of Qualcomm Corporation and imposed a RMB6.088 billion fine on Qualcomm, the largest penalty to date under China's Anti-Monopoly Law. The NDRC identified three types of anti-competitive conduct that Qualcomm engaged in during its licensing arrangements with Chinese licensees:

(1) Charging excessive licensing rates;
(2) Bundling the licensing of SEPs with non-SEPs without justification; and
(3) Imposing unreasonable terms and conditions in licensing agreements without justification.

Notably, in this decision, the NDRC seems to have followed some of the legal analysis under the Huawei cases when it comes to the abuse of dominant market position in licensing activities. The most significant outcome of this case, from anti-trust perspectives, is that Qualcomm has escaped the worst nightmare – in this case, application of smallest salable items doctrine. In other words, the PRC anti-trust authority does not object to Qualcomm continuing to charge royalty based on the handset price.

"The competition between anti-trust authorities such as the NDRC and the SAIC might cause significant challenges for companies to figure out what to follow. Another big factor is the attitude of the courts"

He Jing

MOFCOM's 2014 merger review of Microsoft and Nokia

This merger review decision deserves a lot more attention than it has received as the decision deals with some of the most challenging issues related to de facto essential patents.

In April 2014, just two years after its conditional approval of the Google merger discussed above, MOFCOM approved Microsoft's acquisition of Nokia's mobile handset business on the condition that both Microsoft and Nokia continued their business dealings with licensees on FRAND terms. MOFCOM expressed concerns that Microsoft—after obtaining control of the sizable mobile devices manufacturer—might take advantage of its "important patents", e.g. those covering Android operating system, in order to gain a competitive advantage over other competitors in the mobile handset market—particularly other Android phones. This raises a very interesting issue about whether PRC authority believes that FRAND should apply to de facto essential patents.

SAIC IP abuse rules

The SAIC released the long-awaited Rules on the Prohibition of Abuse of Intellectual Property Rights for the Purpose of Eliminating or Restricting Competition (SAIC IPR Abuse Rules) on April 7, 2015, which will be effective as of August 1, 2015. The SIAC IPR Abuse Rules deal with manifold issues such as the determination of a patent holder's market dominance, compulsory licensing, standard essential patents (SEP), safe harbour in horizontal and vertical agreements settings, etc.

The SAIC IPR Abuse Rules were initially drafted as guidelines to deal with IP-related anti-competitive practices, a project which was commenced as early as 2009. The earlier drafts of the guidelines were commented on multiple times by local and foreign legal professionals, regulatory agencies, courts and other stake-holders. At the end of 2012, the SAIC made a dramatic move to convert the draft guidelines into the SAIC IPR Abuse Rules, which can act as the legal basis for the SAIC imposing penalties on violators.

However, the fate of the SAIC IPR Abuse Rules was cast into doubts when the State Council Anti-monopoly Commission announced in early June 2015 that NDRC has been delegated to draft IP misuse guidelines. It is perplexing how the two sets of IP misuse rules will be applied in practice. While the industries and practitioners are now waiting to see the first draft of the new IPR misuse guideline, it may be useful to review some of the key provisions in the SAIC IPR Abuse Rules, as these rules arguably presented the most comprehensive legal framework to handle IP-related anti-trust issues.

(1) A Rule of reason approach

The wording of the SAIC IPR Abuse Rules seems to suggest that the authority has endorsed a rule of reason approach, which provides much greater flexibility as opposed to a per se approach.

(2) Relevant (technology) market

In addition to defining the anti-trust concept of the "relevant market" as both the "product market" and "geographic market", Article 3 of the IP Abuse Rules stipulates that the relevant market may also refer to a "technology market"—or a product market involving certain IPRs. Specifically, the "relevant technology market" refers to the market that is developed out of competition between the technology involved in exercising IPRs and any available substitutable technology of similar capacity to produce similar goods.

(3) Exceptions to anti-trust liability regarding certain agreements

Article 5 of the IPR Abuse Rules stipulates legal exceptions to anti-trust liability in the context of IP with regards to certain vertical and horizontal agreements. Specifically, the provision states that the SAIC shall not find anti-trust liability in the following circumstances:

(i) Horizontal agreements: either the combined market share of the competing business operators in the relevant market does not exceed 20 percent; or there exist at least four independently controlled substitutable technologies that are available at reasonable cost in the relevant market.

(ii) Vertical agreements: either the respective market share of each of the business operators and their transaction counterparties in the relevant market does not exceed 30 percent; or there exist at least two independently controlled substitutable technologies that are available at a reasonable cost in the relevant market.

(4) Presuming a dominant market position as a result of holding IPRs

In-house counsel should take solace in the fact that Article 6 of the IP Abuse Rules clearly stipulates that the SAIC shall not presume that IP holders have a dominant market position by merely holding IPRs. This provision also carries over into the discussion of standard essential patents (SEPs). In effect, it should provide a layer of protection for IP holders and make it harder for the SAIC to prove that the holder has a dominant market position.

(5) The essential facilities doctrine

The SAIC adopts the controversial essential facilities doctrine, despite repeated suggestions from the United States' American Bar Association and other foreign legal entities to exclude the doctrine. In essence, Article 7—the essential facilities provision—stipulates that a business operator in a dominant market position must license its patent to other competitors when the patent at issue is deemed an "essential facility", regardless of an IPR of unilateral exclusion. In determining whether a patent is an essential facility, there is a three-prong test:

(1) The IP at issue cannot be reasonably substituted in the relevant market, and it is essential for other business operators to compete in the relevant market;

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(2) A refusal to license will adversely affect competition or innovation in the relevant market, thereby harming consumers or the public interest; and
(3) Compulsory licensing of the IP at issue will not cause unreasonable harm to the IP holder.

The SAIC clearly realises the controversies here. One of its senior officials has repeatedly assured the industries that the authority will be very much cautious in using this provision.

(6) SEPs and FRAND

Article 13 expressly prohibits holders of essential patents from taking advantage of standard-setting organisations (SSOs) and failing to disclose their IPRs to SSOs when they choose to adopt a standard involving their IPR. Furthermore, the provision states that SEP holders must license the SEP on FRAND grounds.

Conclusion

It is clear that China is rapidly developing rules on IP-related anti-trust issues. The competition between anti-trust authorities such as the NDRC and the SAIC might cause significant challenges for companies to figure out what to follow. Another big factor is the attitude of the courts. As more private anti-trust lawsuits are being filed, the Supreme People's Court may be willing to use its powers to issue specific rules or otherwise use leading precedents to set the tone. The Supreme Court published a draft for public comments of the judicial interpretation on patent lawsuits. Several provisions directly address injunctions related to SEP. Will the PRC courts follow something close to competition-neutrality or show more interest in protecting local firms? This is a big question.

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Merger control and foreign investment review in Canada

Fasken Martineau DuMoulin's Huy Do and Jack Yu[1] write that acquisitions of, or investments in, Canadian businesses can give rise to merger control and foreign investment reviews. The following provides a general overview of the merger control regime under the Competition Act (Canada) (CA) and the foreign investment review regime under the Investment Canada Act (ICA).

A. Merger control – Competition Act

Substantive merger provisions

The CA sets out a regime for the civil review of "mergers" (broadly defined) which the Commissioner of Competition (Commissioner) considers are likely to prevent or lessen competition substantially. All mergers may be subject to review under the CA, regardless of whether they are subject to mandatory pre-merger notification, and can be challenged pre or post-closing.

Pre-merger notification

Under the CA, parties to certain types of transactions must notify the Commissioner and provide specified information to permit the review of such mergers. Mergers that are subject to mandatory pre-merger notification may not be completed before the expiry of certain time periods.

Subject to specific exceptions, pre-merger notification in respect of certain types of transactions (e.g. acquisition of voting shares, assets or interests in combinations, as well as amalgamations and combinations) is required where the merger involves, directly or indirectly, an operating business in Canada and, where applicable, size-of-parties and size-of-transaction thresholds are exceeded.

(i) Size-of-parties threshold

There is no requirement to provide pre-merger notification in respect of a proposed transaction unless the parties to the transaction, including their affiliates, have:

(A) assets in Canada that exceed C$400 million in aggregate book value; or

(B) annual gross revenues from sales in, from or into Canada that exceed C$400 million in aggregate value.

In the case of an acquisition of voting shares, the parties to the transaction are the acquiror and the corporation, the shares of which are being acquired, i.e. target corporation.

(ii) Size-of-transaction threshold

The size-of-transaction threshold is specific to the type of transaction being undertaken. The CA contains thresholds that are specific for: (a) acquisitions of shares; (b) acquisitions of assets; (c) amalgamations; (d) combinations; and (e) acquisitions of interests in combinations.

(a) Acquisition of shares

In respect of an acquisition of voting shares, pre-merger notification is required where the target corporation and any corporations controlled by that corporation have aggregate assets in Canada, or annual gross revenues from sales in or from Canada generated from such assets, exceeding C$86 million[2], and where:

– in the case of a publicly-traded target corporation, the acquiror, including its affiliates, would own, post-transaction, more than 20 percent of the voting shares (or more than 50 percent of the voting shares, if the acquiror already owned more than 20 percent prior to the acquisition); and

– in the case of a private target corporation, the acquiror, including its affiliates, would own, post-transaction, more than 35 percent of the voting shares (or more than 50 percent of the voting shares, if the acquiror already owned more than 35 percent prior to the acquisition.

(b) Acquisition of assets

Pre-merger notification is required in respect of a proposed acquisition of assets of an operating business where the aggregate value of those assets in Canada, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds C$86 million.

(c) Amalgamations

Pre-merger notification is required in respect of a proposed amalgamation of two or more corporations where

By Huy Do and Jack Yu, ***Fasken Martineau DuMoulin***

one or more of those corporations carries on (either directly or indirectly) an operating business where the aggregate value of the assets in Canada that would be owned by the continuing corporation that would result from the amalgamation or the annual gross revenues from sales in or from Canada generated from such assets, exceeds C$86 million, and each of at least two of the amalgamating corporations, together with its affiliates, has assets in Canada or gross revenues from sales in, from or into Canada, that exceed C$86 million.

(d) Combinations

Pre-merger notification is required in respect of a proposed combination of two or more persons to carry on business otherwise than through a corporation (e.g. partnerships) where one or more of those persons proposes to contribute to the combination assets that form all or part of an operating business carried on by those persons and where the aggregate value of the assets in Canada that are the subject matter of the combination, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds C$86 million.

(e) Acquisitions of interests in combinations

Pre-merger notification is required in respect of a proposed acquisition of an interest in a combination that carries on an operating business other than through a corporation where: the aggregate value of the assets in Canada that are the subject matter of the combination, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds C$86 million; and as a result of the proposed acquisition, the person(s) acquiring the interest, together with their affiliates, would hold an aggregate interest in the combination that entitles the person(s) to receive more than 35 percent of the profits of the combination or assets on dissolution (or more than 50 percent where the person(s) acquiring the interest are already to receive more than 35 percent of such profits or assets).

(3) Notification and review process

Where notification is required, the parties to the proposed transaction are required to wait for a 30-day period to elapse before completing their proposed transaction. During this 30-day period, if the Commissioner requires more information to evaluate the proposed transaction, he may, during the 30-day waiting period, issue a supplementary information request (SIR) and a second 30-day waiting period will commence once all of the information requested is received. Each party to a notifiable transaction must submit its own notification, which is commonly accompanied by a competitive impact submission.

Alternatively, where a proposed transaction does not raise significant substantive competition issues, the parties can apply for an advance ruling certificate (ARC). Where an ARC is issued prior to the expiration of the 30-day waiting period, it effectively terminates the 30-day waiting period and has the effect of preventing the Commissioner from challenging the proposed transaction to which it applies. If an ARC is not issued, the Commissioner may nonetheless issue a no-action letter (where he states that he does not plan to challenge the proposed transaction, but retains the right to do so within one year of closing) together with a waiver of the 30-day waiting period (if the waiting period has not yet expired).

The time required for the Competition Bureau (Bureau) to complete its assessment of the merger does not necessarily correspond with the 30-day statutory waiting periods. In its Fee and Service Standards Handbook, the Bureau identifies "service standard" periods, which are non-binding maximum turnaround times within which the Bureau expects to complete its review. These service standard periods vary according to the "complexity" of the transaction under review. Following its receipt of a filing, the Bureau will typically classify the transaction as either "complex" or "non-complex", in terms of the competition issues raised by the proposed transaction. The service standard for "complex" transactions is 45 calendar days, commencing the day on which a complete notification or ARC request is received by the Commissioner. For non-complex mergers, the service standard is

"All mergers may be subject to review under the (Competition Act) CA, regardless of whether they are subject to mandatory pre-merger notification, and can be challenged pre or post-closing"

Huy Do

"Where notification is required, the parties to the proposed transaction are required to wait for a 30-day period to elapse before completing their proposed transaction"

Jack Yu

14 calendar days, commencing the day a complete notification or ARC request is received by the Commissioner.

Irrespective of whether an applicable waiting period or service standard period has elapsed, or if a no-action letter is issued, the Commissioner can bring an application before the tribunal for a remedy in respect of a merger within one year following the substantial completion of the merger, but not thereafter. However, this ability to challenge a merger one year after completion is not available where the Commissioner has issued an ARC in respect of that merger.

B) Foreign investment review

– Investment Canada Act

All acquisitions of control of Canadian businesses by non-Canadians, whether direct or indirect, are subject to either notification or review under the ICA, subject to certain exceptions. Under the ICA, direct and indirect acquisitions of control by non-Canadians of Canadian businesses which exceed specified monetary thresholds, subject to certain specified exceptions, are reviewable (i.e. require the approval of the federal Minister of Industry and/or the federal Minister of Canadian Heritage (collectively, the Minister) based on a "net benefit to Canada" test). Any acquisition of control of a Canadian business by a non-Canadian which does not exceed the applicable review threshold is merely notifiable. A notification can be filed either prior to or within 30 days following implementation of the investment (e.g. closing).

In the case of corporations, an "acquisition of control" is considered to have occurred for purposes of the ICA when in excess of 50 percent of the voting shares of a corporation have been acquired by a person, or will be rebuttably presumed to have occurred when one third or more of the voting shares of a corporation have been acquired. (The presumption can be rebutted by establishing that, upon the acquisition, the corporation is not controlled in fact by the acquiror through the ownership of voting shares.) Please note, however, that notwithstanding the above acquisition of control rules the Minister has the discretion to determine that an acquisition of control in fact has occurred in relation to: an investment by a state-owned enterprise; an investment in the cultural sector by a non-Canadian; or an investment that is subject to the national security provisions of the ICA.

(1) Transactions for net benefit to Canada

In general, where the acquiror is a WTO investor, or where the target corporation is immediately prior to the transaction controlled by a WTO investor:

(i) direct acquisitions of a Canadian business require review and approval only if the enterprise value of the entity carrying on the Canadian business and all other entities in Canada control of which is being directly or indirectly acquired in the transaction is equal to or greater than C$600 million;[3] and

(ii) indirect acquisitions (e.g. acquisitions of a foreign corporation that controls[4] a Canadian corporation carrying on the Canadian business) are not subject to review (unless the Canadian business involves a cultural business, in which case the thresholds discussed below apply).

For purposes of the ICA, the relevant "enterprise value" will be determined by:

(a) for a publicly-traded Canadian business, calculated as its market capitalisation, plus its total liabilities excluding its operating liabilities, minus its cash and cash equivalents. Market capitalisation will be determined at the point the investor makes an ICA filing.

(b) for a private Canadian business, calculated as its total acquisition value, plus its total liabilities excluding its operating liabilities, minus its cash and cash equivalents; and

(c) for a Canadian business acquired through an asset acquisition, calculated as its total acquisition value (i.e. total consideration payable for the acquisition), plus the liabilities that are assumed by the investor, minus the cash and cash equivalents that are transferred to the investor, all as determined in accordance with the transaction documents that are used to implement the investment.

However, the above C$600 million enterprise value threshold does not apply to acquisitions made by State-Owned-Enterprises (SOE's), which will remain subject to the former threshold

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The NSR process prescribes lengthier review periods once triggered. The review periods are as follows:

Stage of NSR process	Length of period
Initial notice to Non-Canadian party that national security review may be ordered	Minister has 45 days from the time of the receipt of the application for review.
Minster recommends to cabinet to order an NSR	45 days from the time of receipt of application if no initial notice given OR an additional 45 days if notice was given.
Minster deems no further review required or reports findings to cabinet	45 days from the time the order of review was made. If minister is unable to complete the review, the period maybe extend by a further 45 days or a period agreed upon with the non-Canadian party.

(C$369 million in "asset value"). In addition, if the Canadian business being acquired is engaged in a cultural business, or if the investor is not a WTO investor and the target is not controlled by a WTO investor, the review thresholds for direct and indirect acquisitions of Canadian businesses by non-Canadians are generally C$5 million for direct acquisitions and C$50 million for indirect acquisitions.

'WTO investor' is a defined term in the ICA. The rules as to whether a person is a WTO investor for purposes of the ICA are complex. Very generally, WTO investors are nationals, permanent residents and governments of WTO Members, and entities ultimately controlled by them. 'WTO Members' are the member countries of the World Trade Organization. Therefore, in direct WTO investments and instances where thresholds are not met, parties are only subject to notification and not review. Nonetheless, such transactions may still be reviewable under National Security grounds.

Where an investment is reviewable by the Minister, after receiving the application for review, the Minister has 45 days to review it and decide whether to approve the investment on the basis that it is likely to be of "net benefit to Canada". If no notice is sent by the Minister to the applicant within the above 45-day period, the investment will be deemed to have been approved. The Minister may extend the 45-day review period by 30 days or such longer period as the applicant and the Minister may agree. If the applicant does not receive notice of the Minister's decision within such further 30-day-or-longer period, the investment will be deemed to have been approved. If the Minister within such 45-day period, or such further period, informs the applicant that he will not allow the acquisition because it will not be of net benefit to Canada, the Minister must inform the applicant of its right to make further representations and to submit undertakings within a further 30-day period, or such longer period as the applicant and the Minister agree.

(2) National Security Review (NSR)

As a result of amendments to the ICA in 2009, the Governor in Council (i.e. federal cabinet) may review an investment by a non-Canadian in a business (including minority investments) where the Minister has reasonable grounds to believe that such an investment could be injurious to national security. The review of an investment on the grounds of national security may occur whether or not an investment is subject to review on the basis of net benefit to Canada or notification under the ICA.

The ICA gives the cabinet the ability to take any measures necessary with respect of the investment to protect National Security. The cabinet is thus given a further 20 days to achieve this after recommendations are made by the minster at the last stage noted above.

Endnote

1. Huy Do is a partner and Co-Leader of the Antitrust/Competition & Marketing Law Group of Fasken Martineau DuMoulin LLP and Jack Yu is an associate within that group.
2. The size-of-transaction threshold amounts are adjusted annually based on Canada's annual Gross Domestic Product.
3. This threshold will increase to C$800 million in 2017 then to C$1 billion in 2019.
4. For this purpose, an entity controls a corporation either by owning a majority voting interests, or by control in fact (e.g. if one shareholder or a group of shareholders holds 10% or more of the voting interests, this may be control in fact). As well, the Minister may determine whether an entity engaged in a "cultural" business is or is not controlled in fact by another entity.

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CCI rulings in the e-commerce sector: paving the pathway for a virtual marketplace

In this article, *Phoenix Legal* representatives discuss the anti-trust aspects of online portals, noting how easily dominance can be achieved due to pros such as price comparison and doorstep delivery. Has the innovation of the online marketplace increased competition by generating more businesses or made it so that only the big boys can compete?

The Indian e-commerce market has seen an unprecedented growth in the past few years. The sector has grown by 34 percent since 2009, generating revenues which touched US$16.4 billion in 2014 and is expected to be in the range of US$22 billion in 2015.

E-retailing, more popularly known as e-tailing, which comprises online retail and online marketplaces, has become the fastest-growing segment having risen at a whopping rate over the last five years. Products including books, apparel, accessories and electronics are the largest selling products, and account for around 80 percent of product distribution. The increasing use of smartphones, tablets, internet broadband and 3G technology has led to development of a strong consumer base which is likely to increase further. Admist the growing market, the e-commerce sector has come under close scrutiny of the Competition Commission of India (CCI) as various complaints have been filed against online portals such as Amazon, Flipkart etc. with the CCI for being engaged in anti-competitive activities and thus doing business in violation of the provisions of the Competition Act, 2002 (Competition Act).

The CCI has recently passed positive orders in the favour of online portals Flipkart, Amazon, Snapdeal etc. (Online Portals) by not accepting the allegations that these Online Portals establish exclusive arrangements for gaining full control over the sale of selected products. In another on-going proceeding, upon a complaint being made by Snapdeal, the CCI ordered investigation into the practices regarding minimum resale price followed by a manufacturer, and addressed some important concerns for e-commerce companies. The CCI has analysed the aforementioned issues relating to operation of e-portals, while dealing with the proceedings in the cases mentioned above.

Exclusivity arrangements

One of the major complaints that was filed against the Online Portals was the existence of exclusive agreements between sellers/distributors and the Online Portals. The complaint filed against Flipkart, Amazon and various other Online Portals, specifically stated that these e-commerce websites have exclusive distribution agreements with their distributors for certain products, due to which such products are only available on that specific Online Portal. It was alleged that the presence of such exclusive arrangements leads to the concerned products being available only on the specific portal, which allows the portal operator to decide terms of resale, sale price, terms of payments, delivery period, quality and service standards etc.

"A relevant product market is to be described on the basis of products considered to be substitutable or interchangeable"

Kripi Kathuria

By Kripi Kathuria, Ritika Ganju and Puneet Upneja, ***Phoenix Legal***

The CCI was of the view, that exclusive distribution agreements or vertical agreements will not be interpreted as anti-competitive unless such an agreement/arrangement causes an appreciable adverse effect on competition under the terms of Section 3 (4) of the Competition Act. The aforementioned section cites types of agreements which, should they cause an appreciable adverse effect on competition, will be in interpreted as anti-competitive.

Therefore, existence of exclusive arrangements between distributors and Online Portals will not be treated as anti-competitive at the first instance, and the CCI will have to assess such agreements in accordance with the various factors specified under the provisions of the Competition Act[1] such as creation of barriers for new entrants in the market, driving existing competitors out of the market, foreclosure of competition by hindering entry into market, accrual of benefits to consumers, improvements in production or distribution of goods or provisions of services and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

The CCI also observed that the existence of exclusive agreements did not seem to affect the existing players in the retail markets and with new e-portals entering the market, the competition was only expanding. It recognised that the Online Portals provide the opportunity to consumers to compare prices, judge the pros and cons of a product before purchasing it and receive packages at their doorstep.

Market dominance and relevant market

Another issue raised against the Online Portals is that due to presence of exclusive arrangements for products, the Online Portals enjoy exclusive dealing of specific products and 100 percent of the market share which leads to dominance and confining the relevant market of a product to itself.

The Online Portals defended themselves, stating that a particular product cannot be defined as a relevant product market in itself. A relevant product market is to be described on the basis of products considered to be substitutable or interchangeable. By way of example, the relevant market for books will be delineated on the basis of the nature of the sale i.e. on the basis of category/genre, language etc.

The CCI agreed with the contentions made by the representatives of the Online Portals and observed that every product cannot be taken as a relevant market in itself. It was also observed that no one Online Portal seems to be individually dominant as there are considerable number of Online Portals in the online retail market that offer similar facilities to consumers.

Usually the products offered on Online Portals and in the physical markets are the same and can be considered as two different channels of the same relevant market and not as independent relevant markets, making them substitutable for one another.

Resale price maintenance

With the products being sold by the Online Portals at heavy discounts, the manufacturers have started displaying notices on their websites distancing themselves from such products being sold under their brand name and refusing to honour the warranties of the products purchased from Online Portals. The manufacturers treat the Online Portals as not being part of the authorised distribution channel.

Recently, Kaff Appliances Private Ltd (an appliances manufacturer) displayed such a caution notice on its website and also served a legal notice to Snapdeal wherein it stated that the products manufactured by Kaff are sold at its exclusive chain of authorised retail outlets and at the listed prices and any discounted schemes introduced and launched in the market by distributors will require prior sanction of Kaff and specifically required Snapdeal to comply with resale price maintenance practice, or what is more popularly now known as 'Market Operating Price' (MOP). Snapdeal served a notice on Kaff for violating the provisions of the Competition Act.

The CCI opined that the requirement to comply with MOP was in violation of Section 3(4)(e) read with section 3(1) of the Competition Act, which provides that agreement for resale price maintenance, which causes appreciable adverse effect on competition, will be treated as anti-competitive. The CCI also observed that the manufacturers cannot force the dealers/distributors to sell the products at the prices determined by the manufacturers.

Section 3(4) of the Competition Act provides that agreements among enterprises or persons at different stages or levels of production chain in different markets, in relation to production, supply, distribution, storage, sale or price of, or trade of goods or services, including agreements such as tie-in arrangements, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance would be in contravention of Section 3(1) if such agreements cause or are likely to cause an

"with the advent of an online marketplace, manufacturers of products are capable of fostering exclusive partnerships with e-commerce players, allowing them to sell their products directly to the end consumers thereby eliminating middlemen and offering consumers a hassle-free shopping experience"

Puneet Upneja

appreciable effect on competition in India. Resale price maintenance has been classified as a restraint under Section 3(4) that does not automatically raise competition concerns unless the agreement causes or will likely cause an adverse appreciable effect.

It is interesting to note here that Section 19(3) of the Competition Act specifies the factors based on which CCI has to determine an existence of appreciable adverse effect. The factors include creation of barriers to new entrants, foreclosure of competition by hindering entry into the market, improvements in production or distribution of goods or provision of services, accrual of benefits to consumer and driving existing competitors out of the market. However, while determining the prima facie existence of adverse appreciable effect, the CCI identified that Kaff's market share of 28 percent is enough to have an adverse appreciable effect and ignored the factors specified in Section 19(3) of the Competition Act.

E-commerce under scrutiny in Europe

Online Portals continue to face heat from anti-trust authorities in foreign jurisdictions as well. Recently, the European Commission launched an inquiry into the e-commerce sector in the European Union. The European Commission, which targets to identify the potential barriers created by the companies to cross-border online sale of products, is expected to give its final report in the first quarter of 2017.

As a part of the inquiry, more than 2000 e-commerce firms have been asked to submit the sensitive commercial information and the copies of contracts to the anti-trust authorities. The scrutiny of the information provided may result in formal anti-trust cases being initiated against Online Portals violating the European Union law by abusing their dominant market position. It would be interesting to see whether the European Commission will take a view similar to the CCI that the online distribution channels provide opportunities to the consumers to compare the prices as well as the pros and cons of the product, or on the contrary, restrict arrangements between the marketplaces and the distributors as being anti-competitive.

Conclusion

The introduction of Online Portals in the retail marketplace has changed the functioning and dynamics of the distribution and sales in the country. The physical marketplace propagated the presence of various parties such as wholesalers, distributors, retailers and other middlemen in the chain connecting manufacturers and consumers. However, with the advent of an online marketplace, manufacturers of products are capable of fostering exclusive partnerships with e-commerce players, allowing them to sell their products directly to the end consumers thereby eliminating middlemen and offering consumers a hassle-free shopping experience.

In the emerging economies like India, the e-commerce sector is expected to grow exponentially. While e-commerce has its own risks, it cannot be denied that it has given consumers various diverse options to choose from.

From the recent orders passed by the CCI in cases involving Online Portals, it appears that the CCI has taken a conscious approach to understanding the nitty gritty of the upcoming e-commerce sector and rationally decided upon the issues and challenges faced by Online Portals. The sector and competition analysts are confident that the decisions of the CCI in respect of unconventional businesses such as Online Portals will iron out many issues and challenges that these corporate houses face in and out.

Endnote

1. Section 19(3) of the Competition Act, 2002

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Photo: Patrick Dransfield

'Stuck in the middle with you.' Value, leadership and legal services strategy

by Patrick Dransfield, Publishing Director of Asian-MENA Counsel

Economist and business guru Michael Porter wrote that business strategy should target either cost leadership or superior quality. He urged companies not to be 'stuck in the middle'. A company must either gain a cost advantage or effectively market product differentiation. Business failure resulted from falling between the stools of cost leadership (or 'value') and superior quality.

Many, including John Kay of the *Financial Times,* consider the idea that one must choose between cost leadership and superior quality to be nonsense. And I agree with them. Michael Porter's 'either' competitive price 'or' superior quality scenario fits squarely into the logical tautology of the two-horse race: of course, there should be (and often is) the third option of superior quality *AND* cost effectiveness.

However, unconsciously, Porter's tautological position is dominating the discussion regarding quality in the legal services sector. The much-touted argument goes that you are either in the game of delivering 'bespoke' legal services, for which companies pay a premium, or providing a commoditised service at a discounted price.

The blind leading the blind?

I have lost count of the times that I have heard senior partners argue that their service provision is indeed unique, unlike their rivals just across the lift lobby. Few, it seems, are claiming to be comfortable in the 'squeezed middle' – the delivery of superior commoditised legal services at a cost-effective price. This is odd because the vast majority of legal work is in this middle area. Therefore, I have decided to go on a quest and garner opinions regarding this conundrum from senior practitioners from the whole gamut of legal service providers, including Kirtee Kapoor of US-originated international law firm Davis Polk & Wardwell; Dr Mohamed Idwan Ganie of Indonesia's law firm Lubis Ganie Surowidjojo; Nick Seddon, Partner at consultancy Beaton Capital; Kirsty Dougal of 'new law' provider of tech-enabled legal services Axiom; and Paul Smith, Chairman of United Kingdom-originated international law firm Eversheds.

Kirsty Dougan, Head of Asia, Axiom

The choice between cost and quality is a fool's choice, because it simply needn't be made. In fact, there is a term for offerings that lay at the cross-section between the two: value.

When the objective is value (better quality at a reduced cost) it requires not only great legal talent, but also change management, best practices, process re-engineering, technology and the ability to harmonise all of these things in a (new) legal service delivery model that stands up to intense scrutiny.

Let us explain further: most general counsel have historically seen two components of their job – managing risk versus managing cost – at odds with one another. That way of thinking finds its roots in the industry's obsession with pedigree, associating quality control with the resume of the lawyer doing the work. Pedigreed lawyers are expensive and so, says this logic, if you have less money, you're going to get less pedigree and more risk. If a GC feels that they are being asked to make a zero-sum trade-off between cost mitigation and risk mitigation, they will always choose risk mitigation.

But the well-kept secret of the legal industry is that the trade-off isn't necessary to make at all. Axiom's Managed Services offering breaks the paradigm for the way traditional legal work is delivered, applying process innovation (tools that drive standardisation and consistency of risk positions) and sophisticated technology in support of experienced legal practitioners. As such, Axiom delivers superior economics through a combination of improved productivity, including reduction in rework and errors, better alignment of work with seniority of the team members and a utilisation of lower cost locations. Importantly, this balance is achieved without forcing clients to make the cost/risk trade-off; the methodologies and tools that we use simultaneously improve both risk and cost.

As a result, neither our firm, nor our clients are 'stuck in the middle'. Instead, we're at the intersection of a new path forward.

Kirtee Kapoor, Partner, Davis Polk & Wardwell

I believe no service provider can sustain their client relationships unless clients get 'value' for what they are paying. Neither premium nor commodity pricing is the answer in my mind – value pricing is. The art and science of value pricing is where much of attention should be focussed.

Nick Seddon, Partner, Beaton Capital

We at Beaton are more in the Porter camp. When I was in private practice, the issue of differentiation was the elephant in the corner of the room. The challenge of how to differentiate would occasionally appear in the front of my mind but I would quickly

banish it back in to its corner as being far too difficult to deal with. Now I can look at the law from outside I can see why I did not want to deal with the 'd' issue.

First I need to take issue with the assumption that differentiation equates to quality. Most clients will tell you that for international law firms, quality is a given, so isn't a point of differentiation at all. Factors of differentiation might be size (the biggest), focus (the boutiques), geography (the pioneers), business model (the innovators) or reputation (the brand leaders). The common factor with all of these is that, unless you are extremely close to achieving your chosen factor of differentiation, getting there from where you start is likely to be extremely difficult. If you are mid-sized and want to be the biggest, you have to grow. If you are full service and want to focus, you have to shrink. If you are not in the geographies you need to be in, you need to expand. If you are a traditional big law firm and you want to become a new law firm, you have to break the old model. And if you have an average reputation and want to be a brand leader, you have major sacrifices to make.

So if you cannot differentiate, then you are "stuck in the middle" and, as Michael Porter said, you will have to compete on price.

Paul Smith, Chairman, Eversheds

The traditional law firm model is based on a number of partners combining as a firm to work for their clients with junior lawyers and supporting staff, sharing the profits at the end of each financial year.

The traditional model is increasingly under threat, especially from large buyers of legal services such as multi-national companies who regard law firms as 'suppliers' just like any other suppliers of services. New structures are set up as companies rather than partnerships, employing a mix of lawyers and other professionals. Some law firms have embraced these changes and are approaching the market in new ways, whereas other firms resist the changes and hold that common sense will prevail and the old model will continue to prosper.

A useful case study is that of US company Tyco which operates globally and the relationships it has with its primary legal provider which is international law firm Eversheds. Tyco used to use hundreds of law firms throughout the world working on hourly rates. There was no control on cost, no overview of the services being provided and no way of assessing whether the legal work was being done in a cost effective manner. In Europe, the Middle East and Africa, Tyco was using 280 different law firms in 35 countries. In a joint exercise involving the legal department and the procurement department, they invited 12 firms to tender for their legal work, with the aim of appointing one firm to handle most of the work, with the flexibility to appoint other firms if the

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single firm did not have the capability to handle a particular matter. The firms were asked to propose a fixed fee to handle all the work which was defined in the contract. The firm also had to commit to reduce that fixed fee by 20 percent in the first year and by 30 percent in the second year of the contract. Work done outside of the scope of the contract on more complex matters was to be done on the basis of discounted hourly rates.

The contract with Eversheds has been renewed four times and the cost of the 'in-scope' work has been reduced by over 50 percent. As Eversheds has gained the trust of Tyco, now over 75 percent of the work is carried out on the more profitable 'out-of-scope' work. Tyco has saved many millions of dollars in external legal spend and the project is very cost effective.

Following the establishment of the relationship with Tyco, Eversheds has set up many similar models with international companies following the Tyco model. Some of these models have bonus arrangements to ensure that quality standards are met. One arrangement provides that Eversheds can receive between 80 percent and 120 percent of its invoice value depending upon client feedback. This reflects a high quality legal service being recognised whilst at the same time being done in a cost-effective way. Such arrangements has given Eversheds a substantial competitive advantage compared to more traditional law firms.

Dr Mohamed Idwan Ganie, Managing Partner, Lubis Ganie Surowidjojo

All services and work products must meet the required quality standard and must be offered at the right price. This applies equally to commoditised and bespoke services. Quality means to us 'fit for the purpose' at the right cost/price, and ultimately must lead to client satisfaction.

However, there cannot be any consistent quality and client satisfaction if quality is not properly managed. The economic reality is that a firm can only provide external quality services to clients if its internal processes also fulfill required quality standards. Quality drives productivity and productivity in turn is able to lower the cost of production, without compromising on quality. As part of 'total client experience' leading either to client satisfaction or dissatisfaction, we must provide the right service or product. But we must also live up to the standards of superior service. Not only does what we deliver matter, but how it is delivered, too.

The 'value for money' principle must also apply in the legal industry, although many firms simply don't know how to reduce fees but increase profitability. This applies equally to commoditised and bespoke services. Bespoke services can't be the justification for unpredictable or excessive fees actually caused by inefficient service delivery. Especially highly leveraged, large firms with a high cost base must figure out how to turn their big size into economies of scale for the benefit of the client and also for their firm's own profitability.

In conclusion, yes, I agree, it is the right quality and it is the right price. And it is ultimately the resulting client satisfaction, based on the total client experience with a firm, that makes clients want to come back next time or makes them recommend that firm to others through word-of-mouth, if that is a firm's ultimate business objective. For us, it is.

Business development for lawyers – should you be scared?

by Chris Tang, Managing Director, Star Anise legal recruitment (Hong Kong)

Business Development (BD): it's a term that sends shivers down the spine of even the most hardened and experienced lawyer. In some cases it has even deterred people from continuing a career in private practice, with many citing the desire to no longer do BD as a major factor for making the jump in-house. But is this line of reasoning rational?

Within many law firms, for example, the path to partnership is usually preceded by the question, "how much business can you generate?" It's a question which often sends senior associates taking off over the hill, never to be seen again!

Common responses as to why lawyers leave law firms for the perceived utopia of in-house life include:

- "I don't like doing business development"
- "I don't know where to start"
- "I don't like networking"
- "Most of my clients are institutional clients"
- "It takes up too much time"
- "I'm not naturally good at meeting new people"

Ironically, BD skills are a key asset for any aspiring or existing in-house lawyer; not in the sense of generating and fostering business, but rather *developing and enhancing relationships* – developing those relationships between you and your board, the employees, key suppliers and customers, as well as other stakeholders in the business.

In fact, when people refer to wanting to "go in-house" to be involved in the decision making process of the business, it's not that much different from how a law firm needs their associates and partners to think and operate. It all boils down to relationship building.

Chris Tang

"BD skills are a key asset for any aspiring or existing in-house lawyer; not in the sense of generating and fostering business, but rather developing and enhancing relationships"

And that gets to the heart of BD in any organisation.

The reasons why you must build relationships (whether in-house or in law firms) are multiple:

- to resolve issues and achieve results fast and effectively
- to ensure the smoother running of the business
- to add value to your firm's or company's business
- to generate business (for companies, see second bullet point above)
- to make your colleagues' jobs smoother and easier, and to make your job smoother, easier and more fulfilling
- to help with your future promotion or job prospects.

Indeed, top of the list of questions (industry and law firm) employers will ask themselves as to why they should hire a lawyer is, "what is the value proposition in hiring this person?" In other words, "what's in it for us?"

In addition to your technical skills, knowledge and experience, employers need people who will interact and pro-actively provide solutions to their daily challenges. Just having the specialist knowledge and the ability to burn the midnight oil to churn out documents in your pod or office is not enough to fulfil a value proposition.

You have to actively demonstrate that your presence and contribution adds value to the business, the clients and other stakeholders, as well as the well-being of your future colleagues. In order to enhance your bonus, pay review and promotion prospects, you must demonstrate that you are the 'go-to' person for any issues.

That doesn't mean that you have to resolve each and every issue. Far from it. You may know someone who can help, or you can delegate the matter to someone in your team, or refer the query to another colleague in the firm (cross-selling services). But being a success in any legal job requires you to achieve the ultimate accolade of 'trusted advisor', which encompasses more skillsets than a mere competent professional.

Whether you are in private practice or in-house, BD (in one form or another) is a tool for your own success. It's not just essential, it's critical. It's there to be embraced, not shied away from. And regardless of your seniority, there's no better time to start than today.

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Asia-Australia – counseling for success

by Tim Gilkison, Managing Director of the In-House Community

Sitting in a coffee shop in downtown Sydney on a recent trip to Australia, a look around at the diversity of faces discussing business, the price of coffee (and last weekend's 'footie'), it was clear that Australians of Asian descent are very much part of the fabric of the country. But whilst Asia has come to Australia, is Australia investing in Asia, and are Australian businesses taking full advantage of their geographical proximity to either the region's mature or fast-emerging markets?

Whilst Asia is well established as Australia's biggest trading partner, mostly in the areas of bulk commodities, the level of direct investment by corporate Australia into Asian companies and markets is surprisingly low. According to a market survey report published by PWC in 2014[1], less than 10 percent of Australian businesses were operating in Asia at that time, and of Australia's largest companies, less than 25 percent had staff on the ground anywhere in Asia.

Recent research by the Center for International Development at Harvard University showed that countries that display the greatest potential for "growth of GDP to 2023 are those that 'accumulate productive knowledge by developing their respective capacity to make both more products, and products of increasing complexity'". So India and Indonesia top the list for Asian countries – while Australia, having been dependent on commodities export, is in the bottom 10.

On a recent visit to Australia, I sat down with Chong Ming Goh, a Melbourne based partner with Australian law firm Maddocks. With more than 20 years' experience in corporate and commercial law across the region, including over 10 years working as an in-house lawyer at a major listed Malaysian financial services group, Chong Ming has advised clients on both sides of the Asia-Australia dynamic.

Asian-MENA Counsel: **How much of your work is helping Australian clients investing into Asia and vise-versa?**

Chong Ming Goh: "Most of our Asia-Australia work is helping Asian clients making inbound investments into Australia. Over the last two or three years particularly, this has been into the property sector, with clients from Singapore and Malaysia investing in new developments. This is a trend we're seeing increase. In Singapore for example, after many years of growth they've put in place various measures to cool the property market, so developers there have needed to look elsewhere to make their property investments. At the same time, we're also seeing an increase of Chinese

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Chong Ming Goh, Maddocks

investors in the market. Apart from the Chinese property market having also slowed down, many Chinese investors just want to find a suitable way of moving some of their money out of the country, and the Australian property market provides a safe option for them."

AMC: **Why are Australian companies not taking advantage of their geographical closeness to Asia and investing more in the emerging markets. Are there legal and regulatory issues behind that?**

CMG: "I don't think it's really so much to do with legal issues. It's more to do with a reluctance to come out of their comfort zone. Partly, Australian companies are just not aware what is out there in terms of opportunities, and perhaps a fear of the unknown also plays a part. Where Australian companies have invested, things often have gone very well, for example an Australian manufacturing company we advised recently opened operations in Malaysia, and that investment has gone from strength to strength."

AMC: **Is corruption an issue that puts Australian companies off of investing in certain Asian jurisdictions?**

CMG: "In some jurisdictions, yes. Australian entities may feel they will be put into a position where they will be expected to do things, or asked to make payments they would not at home to get the deal through, and obviously they don't want that.

"But often, it's more a matter of getting comfortable with how you might reasonably be able to proceed with business in a particular jurisdiction. Malaysia and Singapore are actually pretty straightforward places to do business these days, China, relatively less so. Apart from issues of transparency, you need to allow time to build relationships in China … you often have to meet with the other party many times before you actually start talking business, and this is a different experience than Australians are used to. It should be remembered though, that even for Asians doing business in Asia, there are differences for them from one country to another, so time has to be invested to learn these things."

AMC: **Going in the other direction, what are the areas that Asian companies need to be aware of when investing in Australia that may not be a consideration in their own jurisdictions?**

CMG: "The first is the Foreign Investment Review Board (FIRB), which depending on various criteria their investment activities may have to go through. There are regulations governing not only the purchasing of a property itself, but also acquiring shares in a company that owns land, or unit trusts. This has to be kept in mind as in a number of Asian jurisdictions these restrictions do not exist.

"Again, for investors from countries such as Singapore and Malaysia there are perhaps less differences than for those from other jurisdictions, but even then, there are still important variations. For example, even if a retail lease in Australia is only set for a couple of years, unless you obtain a waiver, the tenant has a right to occupy the property for up to five years. If you're a property developer who buys in this market unaware of such conditions, you may find yourself disappointed. Another restriction Asian investors into the Australian property market should be aware of is that foreigners can only buy new builds. Recently a Chinese investor bought an existing property in Sydney through a subsidiary business, and was later forced to divest (though not without making a reasonable profit on the transaction in the interim!)

"For inbound Chinese investors, there is the challenge of adapting to the differences in how business is done in Australia from how it is carried out in China, as it is vise-versa. Even simple issues such as how a company gets incorporated in Australia, how you make resolutions and go about share transfers, filings etc must be carefully explained. It's even more complicated when you have two Chinese parties involved, as they are very comfortable with how such things are done in China, but that doesn't exactly translate into how things are done here.

"Chinese clients also have a different approach to negotiation, and are concerned as to whether they, or the other party should be taking the lead, etc, whereas, Australians tend to be more open in their approach to such discussions and often simply say what they think.

"In addition, whereas in Australia, there is a clear differential between 'the company' and the 'individual' behind the company, sometimes Chinese management struggle to distinguish their company from themselves. This is a cultural difference, where for Chinese people, if it is your company, it is felt you should honour you company's liability.

"All this being said, business still gets done, but it does require more explaining and handholding than with domestic clients. Even though I myself am ethnically Chinese, having grown up in Malaysia – where for example, company incorporation regulations are based on those here – and now living in Australia, working through these differences is a learning experience for me as well."

Exporting Australian legal services

Whilst the export of services in general from Australia to Asia lags behind those to Europe and the US, the export of 'legal services' is a different matter. According to a report prepared by the Law Council of Australia[2], as of 2010-11, exports of Australian legal and related services were valued at over A$900 million, with Asia standing as the largest regional market for these, accounting for more than 34 percent of total legal service exports from the country.

The top four areas of work cited in the report were corporate law; intellectual property, information technology and telecommunication work; litigation; and banking and finance, with the most significant growth for Australian legal and related services being in Indonesia and Singapore. Recent free trade agreements (FTAs) executed with China, Japan and South Korea ought to provide Australian legal service providers further opportunities in the region also.

By Tim Gilkison

Debra Woodman, Director of Business Development, Asia Pacific at global law firm K&L Gates, says that the firm she works for has also seen an increasing number of transactions involving collaboration between lawyers in Australia and lawyers in Asia in recent months: "With a lower Australian dollar, investment into Australia is attractive, and we've assisted a number of clients to enter the market or expand their operations in Australia. We continue to see opportunities in areas such as agribusiness and real estate investment, and retail is also very strong. A return in activity in Asia's capital markets, the liberalisation of emerging economies across South East Asia and a burgeoning middle class have meant that many Australian companies have been busy assessing how they can best capitalise on opportunities in the Asian century."

Woodman, who lived and worked in Japan for 10 years, and is currently taking part in a nine-month Asialink Leader's Program run by Asialink Business, which seeks to assist leaders in Australia to build Asia capabilities, commented that she has definitely seen more of a commitment to increasing Asia-Australia collaboration in recent years: "The 'Australia in the Asian Century' White Paper[3] released by the Gillard Government in 2012 accelerated this and the FTAs with countries in Asia will also lead to greater connections between Australia and Asia."

Counseling for successful collaborations

In the afore mentioned White Paper, the authors state that Australia's commercial success in the region will require Australian entities to develop collaborative relationships across the region, and that "Australian firms need new business models and new mindsets to operate and connect with Asian markets".

"With a lower Australian dollar, investment into Australia is attractive, and we've assisted a number of clients to enter the market or expand their operations in Australia"

Debra Woodman, K&L Gates

To that end, Australia's legal counsel, both in-house and external, will need to play their part in helping corporate Australia shape these new business models and make the cross-region collaborations work.

ENDNOTES:

1. www.pwc.com.au/passingusby
2. Analysing data collected by FMRC Pty Ltd from the Fourth Legal and Related Services Export Survey, jointly funded by the Law Council of Australia, the Commonwealth Attorney-General's Department and the Large Law Firm Group.
3. http://www.murdoch.edu.au/ALTC-Fellowship/_document/Resources/australia-in-the-asian-century-white-paper.pdf

The thing about ...

ASIAN-MENA COUNSEL'S Publishing Director, Patrick Dransfield, photographed and talked to Mr Chew Seng Kok on his recent visit to Hong Kong and put to him a series of questions on behalf of the *In-House Community*.

ASIAN-MENA COUNSEL: **ZICO Holdings is described as "an integrated provider of multi-disciplinary services". What does that mean for a General Counsel when considering engaging ZICO Holdings' services?**

Chew Seng Kok: Unlike a traditional law firm which provides only legal services, ZICO Holdings (ZICO) is able to offer a combination of services together with legal, including but not limited to Shariah, trust, corporate services, consulting and share registry. These services can be provided in an integrated manner because ZICO is structured as a multi-disciplinary practice (MDP). This allows GCs to have the option of engaging ZICO to provide this range of services without having to engage several service providers in transacting a deal.

AMC: Please explain the relationship between ZICO Holdings, ZICOlaw and Zaid Ibrahim & Co. Please also describe the ZICOlaw Network. Are the individual offices structured on a traditional partnership structure?

CSK: Zaid Ibrahim & Co. (ZI) started in Malaysia in 1987 and rapidly became the largest Malaysian law firm in 1998. Between 2003 and 2014, ZI expanded into Singapore, Indonesia, Thailand, Vietnam, Cambodia, Myanmar and Laos. In the process of doing so, the network adopted the 'ZICO', 'ZICOlaw' and 'ZICOlaw Trusted Business Advisor' trademarks to provide a common corporate identity for the various offices and entities, which were using different names until then. In July 2011, Singapore was announced as the regional hub for the ZICOlaw Network and is now present in 15 cities, and eight of the 10 ASEAN countries.

ZICO Holdings (ZICO) is a listed company on the Catalist Board of the Singapore Exchange Securities Trading Limited. The group is an integrated provider of multidisciplinary professional services focussed on the ASEAN region, and provides advisory and transactional services, management and support services and licensing services. ZICO augments its existing regional presence with the ZICOlaw Network to reach eight out of 10 ASEAN countries. ZICO works closely with ZICOlaw Network, but do note that the members of the ZICOlaw Network are legally separate from ZICO (save for members in Myanmar and the Lao PDR).

AMC: ZICO Holdings recently listed in Singapore. Could you share with the In-House Community what you and your colleagues learned through the experience? What advantages did it bring to the group? Was your personal experience at Andersen Legal a contributing factor in considering how to structure both ZICO Holdings and ZICOlaw?

CSK: One of the key lessons we learned from the listing is the need for compliance with the standard of legal and financial regulation under a transparent legal framework. Another key lesson is the importance of timely and accurate communication to a wider group of stakeholders. From the listing, we have benefited from the ability to raise capital which was a serious structural constraint on the traditional partnership model. External capital allows management to fund growth, expand into other services through acquisitions and invest in capital expenditure, especially IT solutions. Another benefit is that we now have the ability to implement employee share options and share grant schemes to attract and retain valuable talent within the organisation. Being a member of the Andersen Legal Network, I was given the opportunity to learn world class management skills and standards. Andersen Legal provided me with the forward thinking environment required for developing processes and initiatives that drive efficiency. It brought into clear focus the importance of people and IT as key drivers for transformation in any profession.

AMC: Where do you hope ZICO Holdings will be in 10 years' time?

CSK: My vision for ZICO Holdings and the ZICOlaw Network is that collectively, we will be the 'go-to' organisation for all corporations, entrepreneurs and talents doing business in ASEAN. In 10 years' time, I would like to see the ZICO brand acknowledged by all stakeholders as the premier ASEAN firm for professional services.

AMC: What kind of clients are attracted to the 'one-stop-shop' that ZICO Holdings represents? Who do you see as your main competition?

CSK: Clients who are in need of a range of legal and related services appreciate the value of going to a one-stop-shop like ZICO, which operates as a single entity. They can have access to companies and businesses which harness the collective skills and experience of different entities in different countries who share a vision to provide an enhanced level of service across the ASEAN region. With regards to competition, we see the expansion of the Big Four into legal services as our major competitor.

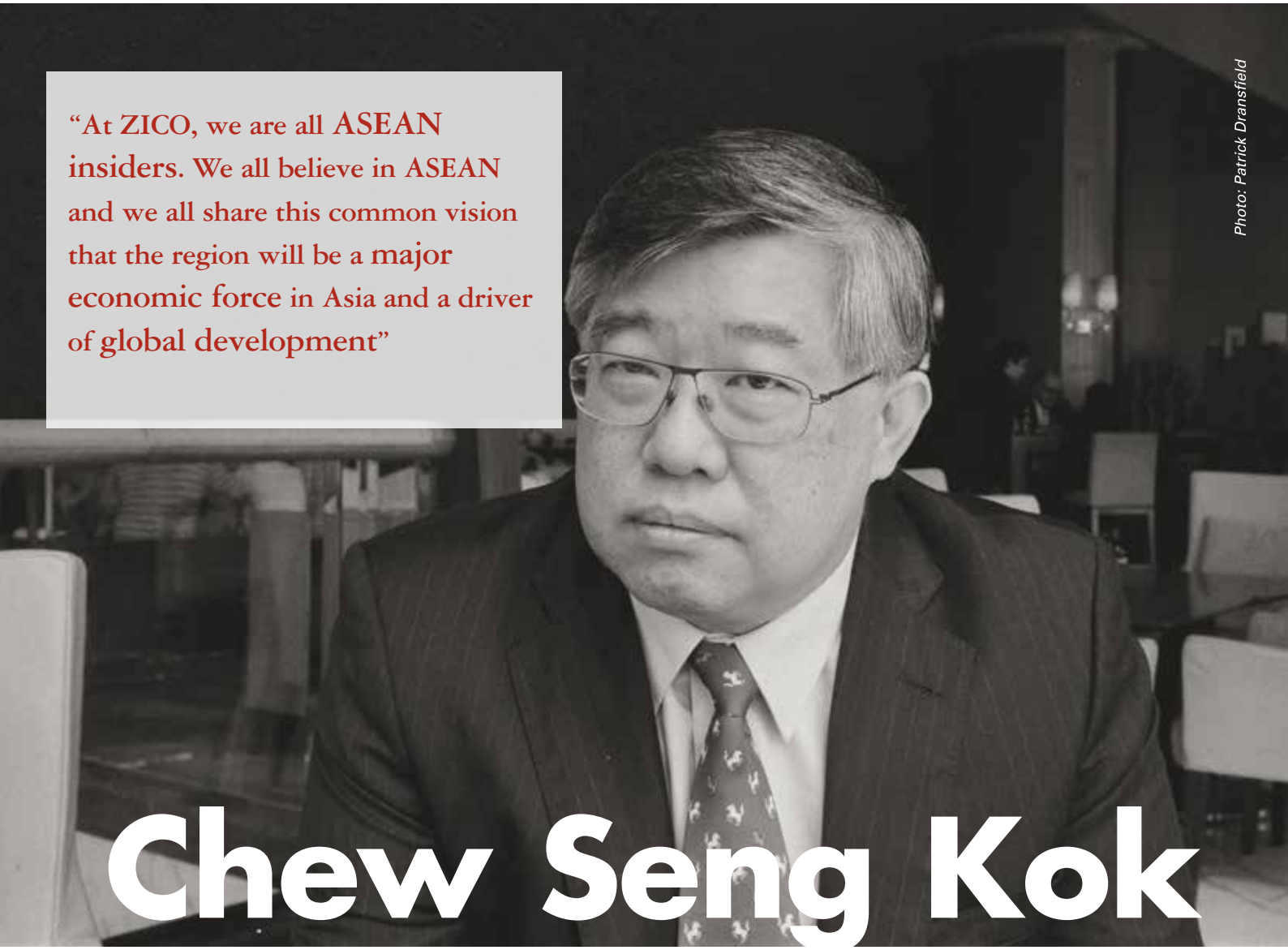

Photo: Patrick Dransfield

"At ZICO, we are all ASEAN insiders. We all believe in ASEAN and we all share this common vision that the region will be a major economic force in Asia and a driver of global development"

Chew Seng Kok

AMC: What are the ties that bind the whole together? How does ZICOlaw maintain high standards of practice across a wide spectrum, from the developed market of Singapore to the emerging market of Vietnam? For example, how do you incentivise partners in the different offices?

CSK: At ZICO, we are all ASEAN insiders. We all believe in ASEAN and we all share this common vision that the region will be a major economic force in Asia and a driver of global development.

We have a collaborative arrangement amongst the offices, and the partners are encouraged to share their skills and experiences with each other. This is enhanced by the secondment arrangement of lawyers within the offices in the ZICOlaw Network. As chairman of the ZICOlaw Network I make it a point to consult closely with the partners of the law firms across the network. The partners of ZICOlaw are incentivised through their shared vision and as shareholders in ZICO Holdings, which benefits from their collective contributions.

AMC: What should a legal department know about ASEAN integration? Do you foresee legal services as being one of the areas that will liberalise under the proposed Regional Economic Integration process starting in January 2016?

CSK: Legal departments should realise that with the AEC scheduled to happen on December 31, 2015, closer integration of the ASEAN economies will create a market of 625 million people with a single market and production base. There will be an increase of FDIs, transfer of specialised expertise and technology into the service sectors regionally and opportunities for local companies to expand out of the domestic markets and enter into regional markets.

As has been reported, the Regional Comprehensive Ecominic Partnership (RCEP) intends to bring together existing Free Trade Agreements in ASEAN and has the objective of broadening, deepening and improving significantly all elements of those agreements, including tariffs and chapters relating to market liberalisation for services and investment, intellectual property,

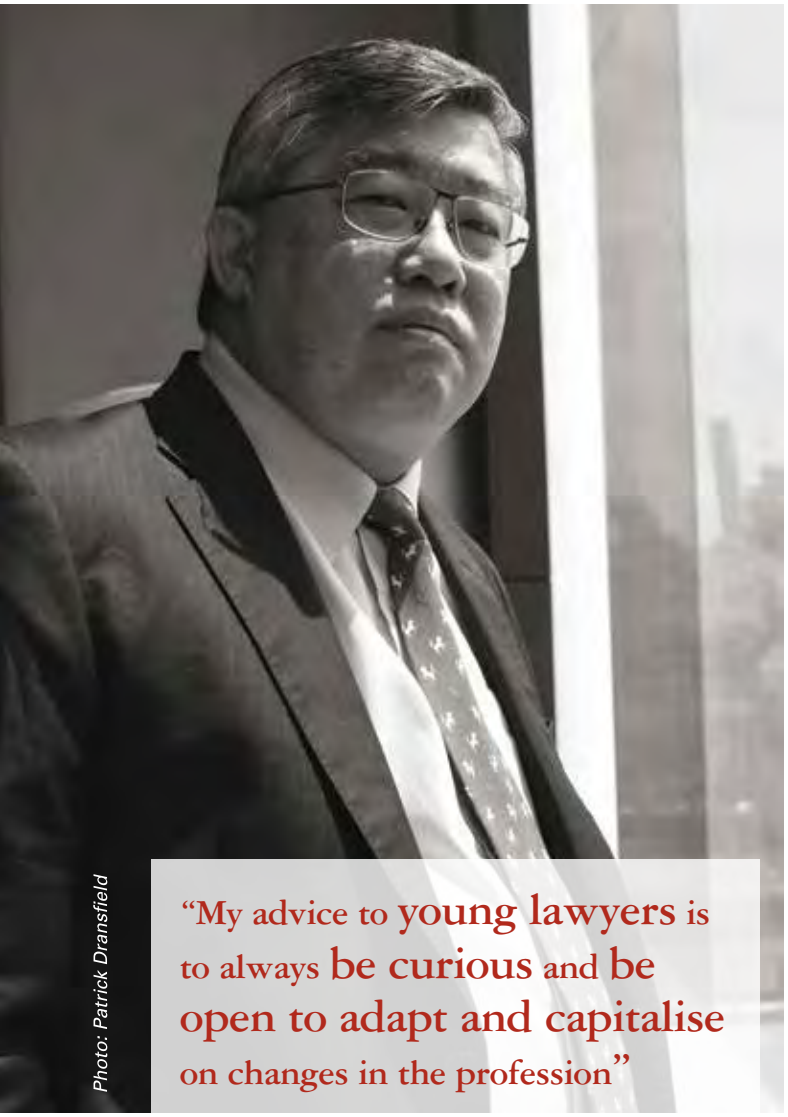

Photo: Patrick Dransfield

"My advice to young lawyers is to always be curious and be open to adapt and capitalise on changes in the profession"

competition and legal matters such as dispute resolution. As with the AEC, the RCEP has a target completion date of end-2015. However, there have been doubts on this as progress has been slow and it has not yet been possible to agree on the actual extent of tariff reductions during the ongoing negotiations.

AMC: What are the common mistakes you see when international law firms attempt to enter into the Southeast Asian market?

CSK: ASEAN is a region with diverse cultures with countries at different levels of political, economic and social development. In terms of legal system, the laws amongst the countries in Southeast Asia are not harmonised. Malaysia, Myanmar and Singapore are governed by common law principles; Cambodia, Laos, Vietnam and Indonesia follow the French civil code and the Roman-Dutch civil system. Therefore, due to the disparities and differences, it is a mistake to try and attempt to deal with these countries with a uniform or one-size-fits-all approach.

Another common mistake is to try to manage the local offices remotely and not have any representatives on the ground. I find it very important to have people on the ground as they are more familiar with the local policies, environment and working culture in doing business, which are important to guide foreign investors.

AMC: Following the financial crisis, Islamic finance has grown exponentially. Malaysia, Zaid Ibrahim & Co.'s home, pioneered the use of Sharia-compliant Sukuk bonds and remains the global leader in Islamic finance. Dubai has recently announced its ambition to be the global capital of the Islamic economy. With Hong Kong, Singapore and London joining the fray, what do you see regarding the opportunities and challenges for Islamic finance?

CSK: Malaysia will still be at the forefront of Islamic finance. The emergence of the Islamic financial model has been accelerated in recent years, largely thanks to its deep and widespread incorporation as a key part of the Malaysian economy. It sets the trend in blending Islamic and non-Islamic finance, and the Islamic financial world takes its cues from Malaysia's pioneering efforts in bringing structure and regulation to a rapidly expanding industry.

The increasing interest in Islamic finance in Hong Kong, London and Singapore will create a wider pool of stakeholders, which can only benefit the industry. ZI has a very strong Islamic finance practice. ZICO Shariah Advisory Services is a leading provider of Shariah services in the ASEAN region. The combination of ZI and ZICO Shariah Advisory Services working together differentiates and puts ZICO in a good position to capitalise on the growing demand for Shariah related counsel in Islamic banking and finance, wealth management and Islamic law in general.

AMC: Professor Richard Susskind maintains that we are "on the brink of fundamental change in the world of law". Would you agree that this is true across Southeast Asia? What are the key drivers of this change?

CSK: I am a fan of Richard Susskind and George Beaton, who were the pioneers in alerting us about the fundamental changes likely to affect the legal profession. I believe deeply that the convergence of client demands for 'more for less' and the acceleration in the scope, scale and economic impact of technology are powerful forces that are transforming the delivery of legal services. We now live in a world which is much more connected through trade and movements in capital, people and information, so I believe it is inevitable that the disruptive forces affecting the legal profession in the US and Europe will reach the shores of Southeast Asia sooner rather than later. The question that arises is 'what should the leaders of law firms like ours do?' In our case, we have anticipated and embraced these developments in recasting and restructuring our business model to capitalise on these changes. We have set out our views on these threats in the Offering Circular for our listing. I am glad to report that since then, we have benefitted from expanding and seizing the opportunities from an increasingly disaggregated legal services market.

AMC: On training: our belief is that the aim of training is to produce lawyers who can be at the top of their game, where knowledge of the law and a profound grasp of professional

ethics and integrity, as well as the necessary commercial acumen to be your own boss, are embedded in the DNA. Do you subscribe to the above and how does ZICOlaw attempt to accomplish the above? Is operating in the challenging business environment of across Southeast Asia a particular challenge?

CSK: I agree, which is why we have a knowledge management team (KM) within ZICO. KM is a critical component in a ZICO team's competency development. The KM team would analyse what is required in the current business landscape and run extensive in-house legal and soft skills in order for us to stay ahead in the challenging business environment across Southeast Asia.

The KM team is led by a full time former legal partner, Paul Subramaniam, who has been in practice for more than 30 years. Paul has extensive years of legal knowledge and commercial acumen. He is supported by a team of lawyers and managers with experience in research and training.

AMC: What keeps you awake at night?

CSK: I am very passionate about what I do and the restless spirit in me is always looking for 'white spaces' or 'blue oceans' to deliver new and better quality services to clients. Having just embarked on a new phase in my career and life as the managing director of a listed company, I find myself embracing a new set of challenges and presented with so many opportunities to grow our businesses. As a result, I am driven to seek new ideas and innovative ways to manage ZICO. In that sense, I am usually awake at night, although I do sleep well.

AMC: On fees and service: what are the various ways that ZICOlaw engages with clients regarding compensation for services rendered? Have you seen a shift in preferred billing arrangements in recent years? Can you provide a real example of where the network has gone 'the extra mile' for a client?

CSK: We exercise a combination of hourly rates and fixed fees, where the services to be provided can be defined with some certainty in terms of scope and time frame. We have definitely seen a shift towards fixed fees in recent times as clients have to buy and manage their budget. We have worked closely with clients to structure our fees to align with the risks in their transactions, so the higher proportion of the fee is paid upon the successful completion of a transaction.

AMC: What advice would you give an ambitious and intelligent young person interested in pursuing a career in the law today?

CSK: It is most definitely an exciting and challenging time to be in practice. Lawyers may not have realised the drastic changes that have occurred over the past few years. The profession is no longer as protected as it once was. As mentioned, liberalisation of law firm ownership and the existence of disruptive innovations in the legal industry mean that lawyers must either embrace change or be changed. My advice to young lawyers is to always be curious and be open to adapt and capitalise on changes in the profession.

AMC: What is your hinterland (i.e. what are your interests outside of the firm)? How do you control your time so that you can pursue them?

CSK: My colleagues and friends will tell you I am a workaholic. I have not, as yet, struck the work life balance that is supposed to be ideal for me. Indeed, I find I am even more busy than I was in my previous role in managing the law firms. Part of this is due to my extensive and constant travels around to meet with the people in our offices and presenting a wider range of services to clients. The other part is because of the difficulty in adjusting to the challenges in my new role in managing a wider group of stakeholders. I hope this current hectic phase will be transitional so that I get more time to spend with my family. I hope to also pursue my interests in travel, reading and following my favourite sports: football and rugby union.

Mr Chew Seng Kok is the Managing Director of ZICO Holdings Inc (ZICO). He is primarily responsible for the business development and overall strategy and management of ZICO.

ZICO is a listed company on the Catalist Board of the Singapore Exchange Securities Trading Limited. It is an integrated provider of multidisciplinary professional services focused on the ASEAN region and provides advisory and transactional services, management and support services and licensing services. Chew graduated with a LLB (Hons) in 1984 and obtained a LLM (1st Class) from Victoria University of Wellington, NZ in 1989. He started practice in Malaysia in 1985, was with Chapman Tripp Sheffield Young in Wellington (1987 - 1989) and Baker & McKenzie, Singapore (1989 – early 1991). In 1991, he joined Zaid Ibrahim & Co. where he rose up the ranks to become its managing partner in 2004. He assumed the role of regional managing partner of the ZICOlaw Network in 2011.

In November 2014, Chew left his managing role in Zaid Ibrahim & Co. to take up a full time role as the Managing Director of ZICO and as the Chairman of the ZICOlaw Network.

Chew has been recognised and acknowledged as one of Asia's leading business lawyers in legal industries publications. He was shortlisted for the Most Innovative Lawyer award at the Financial Times (FT) Asia-Pacific Innovative Lawyer Awards 2014. ZICOlaw won the FT "Innovation in Corporate Strategy Award" in 2014 and this year ZICOlaw is recognised for its Innovative Transformation of Legal Services under the "Innovation in the Business Law" (Asia-Pacific headquartered law firms).

Chew is also a member of the ASEAN Business Club and a member of the Executive Council of the International Centre for Law & Legal Studies, which is a body under the Attorney General's Chambers of Malaysia.

Offshore mutual fund regulation in Taiwan – An overview

In their overview of offshore mutual fund regulation in Taiwan, Dr George Lin and Ross Darrell Feingold of *Lin & Partners* discuss recent developments in the market, divulge how to obtain registration approval and explain the measures they feel will enhance the attractiveness of Taiwan as a market for offshore fund products.

Taiwan continues to have an active mutual funds industry, based on its high GDP per capita (US$20,900 in 2014), investor appetite for a range of wealth management products and a large number of industry participants that ensures innovation and competition in the market.

According to the main industry trade group, the Securities Investment Trust & Consulting Association (SITCA) at end-2014, investors in Taiwan held US$107bn in offshore mutual funds, and US$105bn in onshore local funds.

Taiwan's past reputation was that the market had significant regulatory hurdles to entry, including its own library of abbreviations such the Financial Supervisory Commission (FSC), securities investment trust enterprises (SITEs), and securities investment consulting companies (SICEs).

However, with appropriate collaboration from external counsel and distribution partners, offshore mutual funds can enter the market with no greater difficulty than neighbouring jurisdictions. Regulations are transparent even if the regulatory decision-making process may sometimes be slowed due to market conditions. This article discusses the offering of offshore funds to retail investors in Taiwan. Private placement of offshore mutual funds to high net worth individuals and institutional investors are governed by additional regulations outside the scope of this article.

Legal & regulatory overview

The primary applicable regulation is the Regulations Governing Offshore Funds (Regulations) (as last amended on 29 May 2014). Banks, securities brokers, insurance firms, SICEs and SITEs are subject to laws and regulations that govern their respective businesses, which range in scope from customers facing procedures such as know your client (KYC) to back office functions. Regulatory circulars issued by the FSC and its predecessor agencies also apply to the industry. Self-regulatory organisations also play a significant role as the initial application window for offshore fund approval registration, and have issued numerous voluntary guidelines for best practices in business conduct.

The master agent

Under the Regulations, the offshore fund manager must appoint a master agent. As of December 31, 2014, 45 firms are registered as master agents for 1025 offshore funds managed by 81 offshore managers.

The master agent's legal obligations include submission of regulatory approval applications, serving as onshore recipient of investor and regulatory correspondence, and operational processing of sales and redemptions. The master agent requirement did not initially exist when the market was opened to offshore funds, and was implemented in 2006 to provide comfort that an offshore fund manager has an onshore point of contact for investors and regulators.

SITEs, SICEs and securities brokers may act as master agents. Master agents are subject to capital, clean regulatory record, performance bond, staffing and other operational requirements, which entities associated with Taiwan's largest financial groups are easily able to satisfy. The master agent will mandate the sub-distributors such as banks, SITEs, SICEs, mutual funds and insurance companies.

A master agent is not restricted to acting on behalf of a single offshore fund manager, although the parties may agree to this by contract. The amount of the master agent's compensation is subject to commercial negotiation between the fund manager and master agent, though the amounts, types (sales-linked, marketing budget, etc.) and basis (e.g. AUM) must be disclosed to investors per guidelines issued by SITCA. The master agent agreement is based on a format common in the market with little

By Dr George Lin & Ross Darrell Feingold, ***Lin & Partners***

possibility to negotiate bespoke clauses. Some offshore managers have elected to establish their own master agent in Taiwan rather than work with third parties.

Distribution channels

Offshore mutual funds may be distributed via banks, SITEs, SICEs securities companies, insurance companies and other financial advisers. Banks with their large branch networks are often the favoured distributor for offshore funds, as banks offer significant resources scale. However, banks in turn have the leverage to limit the number of funds that they distribute and extract greater commissions. Insurance companies are also an increasingly important distribution channel.

A distributor is not restricted to acting on behalf of a single offshore fund manager, although the parties may agree to this by contract. The amount of the distributor's compensation is subject to commercial negotiation between the fund manager and distributors and master agent, though the amounts, types (sales-linked, marketing budget, etc.) and basis (e.g. AUM) must be disclosed to investors per guidelines issued by SITCA. The distributor agreement is based on a format common in the market with little possibility to negotiate bespoke clauses.

Fund types & investor preferences

Taiwan's retail fund investors' preference for equity or fixed income funds varies with global market conditions. The FSC will generally approve offshore equity or fixed income funds, subject to the restrictions below. Funds established as Undertakings for Collective Investment in Transferable Securities (UCITS) in Dublin or Luxembourg may be registered, and are favoured by fund managers for operational efficiencies, as well as for the FSC's history of approving UCITS funds.

Key regulatory restrictions are:
Derivatives: The non-offset 'long' position may not exceed 40 percent of the offshore fund's NAV, and the non-offset short position may not exceed the fund's holding of the asset.
China: For equities, the securities must be listed on either the Shanghai or Shenzhen exchange and may not exceed 10 percent of the fund's NAV. For fixed income issued in China, equities issued in Hong Kong by Chinese companies (e.g. red chips), and fixed income issued in Hong Kong by Chinese companies, there is no NAV-linked limit.
Physical Commodities and Real Estate: No holdings are permitted.
Denomination: Major currencies are permitted; renminbi and Taiwan dollar are not permitted.
History: Prior to the regulatory application in Taiwan, the fund must have existed for one year, and be publicly offered in its home market.
Custodian: The offshore fund's custodian bank must be rated BBB- or above.
Hedge Funds: Offshore hedge funds may not be registered for sale to retail investors.

Registration approval

The master agent, rather than the offshore fund manager, files applications with SITCA. Subsequent to SITCA's review, the application is forwarded to the Financial Supervisory Commission, Securities and Futures Bureau, Securities Investment Trust and Consulting Division, for approval. In reality, the offshore fund manager will, together with its external counsel, prepare the applications on behalf of the master agent.

Especially for new entrants to the market, preparation of applications, legal documentation and investor fact sheets takes one to two months. Experienced fund managers are able to condense this period.

The SITCA review typically takes one month, and the FSC review six months.

Registration withdrawal

The offshore fund may apply to withdraw its registration and cease sales in Taiwan. In such cases, the master agent must con-

"With appropriate collaboration from external counsel and distribution partners, offshore mutual funds can enter the market with no greater difficulty than neighbouring jurisdictions"

Dr George Lin

Ross Darrell Feingold

"The Financial Supervisory Commission is receptive to industry suggestions especially those that expand onshore product availability and the knowledge base of the financial services workforce"

tinue to ensure that investors in Taiwan are able to redeem their holdings and continue to receive statements and other information in a timely manner. Failure to maintain sufficient support onshore following a registration withdrawal may result in regulatory actions by the FSC and substantially impact the offshore manager's ability to register funds in the future.

Cross listing Exchange Traded Funds (ETF)

Taiwan and Hong Kong allow ETFs to be cross-listed, which offers hope for future cross-listing agreements between Taiwan and exchanges in other jurisdictions. Currently, only Taiwan financial institutions have cross-listed ETFs in Taiwan and Hong Kong. Thus, it remains to be seen whether fund managers from outside Taiwan will seek to cross-list an ETF.

White labelling

The regulatory structure for an offshore fund manager to act as a sub-advisor to a local fund established by an onshore fund manager is well developed. The use of a white label product may be of interest to fund managers who are new entrants to the Taiwan market.

Taxes

Offshore funds continue to be an attractive option for retail investors, as income earned from an offshore investment product is not taxed unless the investor's total offshore income (from all income sources) exceeds a minimum threshold of NT$1 million. The income will be added to the investors total taxable income and taxed at applicable income tax rates.

Recent developments

On February 6, 2013, the FSC announced a series of long term measures to encourage the offshore funds industry to conduct more business from onshore and to otherwise improve service quality. In addition to a relaxation in staffing rules for the master agents, the FSC committed to speedier reviews for new fund registrations and waivers to derivatives limits, and increase to three the number of new registrations a master agent may concurrently submit. We believe successful implementation of these measures will enhance the attractiveness of Taiwan as a market for offshore fund products.

Scheduled to be implemented on January 1, 2016 is a reduction in the amount of Taiwan securities that may be held in a registered offshore fund to 50 percent, from the current 70 percent, of NAV, and a reduction in the percentage of NAV of an offshore fund that may be held by Taiwan investors, to 50 percent from the current 70 percent. Although these may be viewed as additional restrictions, the FSC takes the view that they will encourage offshore fund managers to bring more diverse products to the market.

Conclusion

The FSC is receptive to industry suggestions, especially those that expand onshore product availability and the knowledge base of the financial services workforce. Recent initiatives outside the funds space include the expansion of offshore banking and securities unit services, the liberalisation of renminbi product offerings and raising the daily stock trading fluctuation limit to 10 percent from seven percent. For offshore funds and global fund managers, Taiwan offers a market with a large, wealthy and knowledgeable customer base. The participants in the distribution channels, such as master agents, SICEs, and SITEs, have over two decades in the registration and marketing of offshore fund products. Although the regulatory infrastructure is unique and may differ significantly from other markets in Asia, it is not a barrier to entry, and the many fund managers who have successfully registered their funds in Taiwan attest to this.

The authors would like to thank associate Tsai-Ling Wu for her assistance in the preparation of this article.

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Diversity and connectivity within the ASEAN Economic Community

As well as laying out the ASEAN Economic Community's goals, Azman Jaafar of *RHTLaw Taylor Wessing* notes why he expects to see major improvements to the entire ASEAN region, not just to the richer jurisdictions, but to all 10 involved. He points out ASEAN's strengths, such as its diversity, and notes the many factors that could make the AEC dominant. As he states, "The myriad of opportunities that will present themselves in the region is endless".

In the Bali Summit of October 2003, the ASEAN leadership declared the ASEAN Economic Community (AEC) as the "realisation of the end-goal of economic integration". This simple declaration has led many to believe that the AEC's single objective is to amalgamate the ASEAN economies into one homogenous union. Too often, the AEC has been the subject of unfair comparison to the European Union. We know that our motives are different and at the time of the AEC's inception, the leadership certainly appreciated the diversity and inequality that already existed within ASEAN. The AEC is a journey that has only just begun.

ASEAN is situated in an economically vibrant part of Asia. The establishment of the AEC reflects the importance placed on ASEAN's continued relevance in the global economy. ASEAN is not homogenous in terms of its people and economies, but the AEC's diversity is its strength. Economic integration is the end-game, but this is not a hop and a skip away in the near future. With 600 million people and a growing middle class, the AEC is not only intended to develop into a serious regional trading hub that can rival the larger global economies, but it also has a burgeoning growth market from within. The four pillars that define the AEC play a very important role in accelerating economic integration and alleviating the inequality between member states.

There are new opportunities which arise from the creation of the AEC:

(a) the attraction of external investors into the AEC;

(b) the ease of regionalisation within the AEC and the growth of intra-ASEAN trade; and

(c) the need for increased connectivity within ASEAN to facilitate trade activities within AEC.

Increased connectivity arising from the creation of the AEC will propel ASEAN to attain higher competitive growth by bringing about economies of amalgamation and synergised production chains and networks. We can expect major improvements in physical infrastructure such as transportation routes that will ease shipping costs, enhanced communications networks that will help businesses and consumers communicate more freely and new power plants that will narrow the gap between energy demand and supply. There will be extensive institutional changes across ASEAN to open up trade and investment opportunities to one another. These are the steps being taken for the AEC to build ASEAN countries into a synergised entity whereby we will operate as a single market and production base as set out in the AEC Blueprint. Not only will each country benefit economically, but also the distribution of growth and rapid increase in infrastructure will reduce the development divide amongst the ASEAN countries.

"Not only will each country benefit economically, but also the distribution of growth and rapid increase in infrastructure will reduce the development divide amongst the ASEAN countries"

"As we become more interdependent with each other within the AEC, we can also expect an increase in projects that facilitate and promote intra-AEC connectivity"

In the wake of the 2008-2009 global economic crisis, the investments that will spur infrastructural growth within ASEAN will become a kick-starter for economic recovery and future sustained growth in the region. This is especially so as the AEC will nurture and grow the middle class consumer market in the region, which will increase domestic consumption and intra-ASEAN trade, becoming a vital engine for trade and investments in the region. The middle class is expected to grow to more than double what it is now in the next 10 years, along with their income per capita. This means a surge of demand for a broad spectrum of consumer goods and services from vehicles to financial services. The myriad of opportunities that will present themselves in the region is endless.

With increased connectivity, there will be a growth of intra-ASEAN trade. Increased trade will mean an increase in freight in the region. According to the ASEAN Logistics Study in 2008, as we achieve the objectives of infrastructural development in the region, it is estimated that logistical costs will be reduced by four percent and time spent on logistics by nine percent. That translates to millions of dollars in substantial savings.

Increased connectivity will also impact ASEAN trade with countries outside the region. Investors will want to increase their presence in our production networks and supply chains. This will increase foreign direct investment into the region. We are already witnessing the growing interest of non-ASEAN countries in our region. Spain will look to better its trade relations with Philippines as it views the Philippines as an investment hub for Spanish entities to take up investment projects in the AEC. Japan has already announced that it would extend 750 billion yen in bilateral development aid to the Mekong region. The Chinese are also preparing to place their stake on some Indochinese industries such as mining and hydroelectric power. As the tariffs and non-tariff barriers rapidly diminish, not only are ASEAN companies gaining a stronger foothold in the global economy, multinational companies from all over the world are looking into building production bases in the AEC in order to proliferate trade in the Asia-Pacific region. The non-discrimination principle that the AEC advocates facilitates cross border investments and encourages cross border transactions. The AEC increases the attractiveness of ASEAN as a single investment destination.

According to a recent survey, less than one-fifth of ASEAN businesses are actually prepared to meet the challenges and opportunities presented by the AEC. With closer economic integration, we can expect greater competition from our ASEAN neighbours.

With the AEC, ASEAN will become a more important marketplace for Singaporean SMEs. The integration will bring about new threats and increased competitiveness. This would be a good time for Singaporean SMEs to review their capabilities and evaluate their competitive advantage. To stay competitive in the larger global economy, Singaporean SMEs must move their businesses up the value chain. With the AEC, there is the promise of increased intra-ASEAN trade in the midst of a growing consumer market. This will, without a doubt, attract new foreign investments into the AEC and there will also be new opportunities for Singaporean SMEs to plug themselves into a more integrated global marketplace. New investments can help them move up the value chain. Organic growth can be a slow and painful process

Azman Jaafar

"While the diversity of the AEC as a single market and production base is probably its greatest advantage to investors, the key to its success lies in its ability to enhance connectivity within ASEAN"

By Azman Jaafar, ***RHTLaw Taylor Wessing***

"With the rising cost of doing business in Singapore, it would be timely for Singaporean SMEs to look into relocating parts of their operations to lower cost jurisdictions"

and in today's world, this may not be an option for many domestic businesses. Overcoming these challenges will ensure the long-term survival and sustainability of their businesses.

The lowering of trade barriers will facilitate the regionalisation of Singaporean SMEs. In the long run, with smoother customs processes and freer movement of human capital, services and finances within ASEAN, Singaporean SMEs can expect greater predictability and transparency when exporting goods and services within the AEC. With the rising cost of doing business in Singapore, it would be timely for Singaporean SMEs to look into relocating parts of their operations to lower cost jurisdictions. Singaporean SMEs also need to be increasingly wary of the rapidly improving competition from the region which will only improve faster as the AEC comes to fruition, hence the goods and services of Singaporean SMEs need to improve as well to retain their unique competitive advantage. They can improve by trying to attain globally competitive supply chain qualities by imputting knowledge from best practices in their industries. Otherwise, they will have to move their businesses up the value chain to ensure future sustainability of their endeavours. The increased connectivity between member states also makes regional expansion an easier task. Singaporean SMEs must gear up to meet these challenges, as regional expansion requires resources and thoughtful planning.

There are sceptics who doubt that the AEC will ever get off the ground. Advocates of the AEC say that diversity is its strength. In a typical scenario, a Singaporean SME can choose a country like Vietnam as its manufacturing and production base due to the lower operating cost. It can then take full advantage of the AEC by importing components manufactured in Thailand and Indonesia; and employing its engineers and skilled technicians from the Philippines. It can outsource certain services to a company in Malaysia and borrow working capital in Singapore. A regional play will require a Singaporean SME to examine its internal processes to ensure that it is sufficiently robust to meet the demands of its regional operations. The naysayers will then bring up the differing administrative and regulatory standards across the countries. In response, the ASEAN nations have already put in place a trade facilitation framework to reduce such irregularities across the board.

The expected increased connectivity within the AEC also contemplates increased investments in infrastructure beyond just transport and logistical services. Connectivity within the AEC is all encompassing and refers to the underlying connectivity in infrastructure and people. This level of connectivity will also encompass technology and communications, as well as energy. As we become more interdependent with each other within the AEC, we can also expect an increase in projects that facilitate and promote intra-AEC connectivity.

More efficient cross-border transport is a challenge given ASEAN's geography. It has been reported that the capital cost for transportation connectivity can be expected to exceed US$500 billion. Whether it is the ASEAN Single Window project, Jakarta Monorail project, the Singapore-Malaysia High-Speed Rail Link project or the hydroelectric power projects in Laos, all such projects will contribute towards increased connectivity within the AEC.

The AEC is a diverse ecosystem which is in the process of being integrated into a single market. While the diversity of the AEC as a single market and production base is probably its greatest advantage to investors, the key to its success lies in its ability to enhance connectivity within ASEAN. The AEC ecosystem will not only bring out the best companies in our region, but also the best companies around the world. Singaporean SMEs should embrace the diversity in the AEC and play a more pivotal role in intra-ASEAN trade under the AEC.

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Vertical agreement: *illegal per se* or the rule of reason? (Part II)

By Blake Yang
杨奕

In the previous issue, we compared *illegal per se* and the rule of reason, and pointed out that cases where *illegal per se* applies turn out to be favourable to the enforcement agencies and the plaintiff in an anti-trust litigation. Judged from the regulations on the burden of evidence in applicable judicial interpretation, it seems that the rule of reason will apply when determining the legality of a vertical agreement (mainly resale price maintenance under the AML), because the draft provisions of the Supreme Court once provided that the victim of vertical and horizontal agreements need not prove that such agreement restricts or eliminates competition. But such content of vertical agreement was eventually deleted. The change indicates that the Supreme Court sees vertical agreement different from horizontal agreement in that the former's existence is not self-incriminating.

We should notice that one clause directly related to the above judicial interpretation is the definition of monopolistic agreement in the AML. Article 13 and Article 14 of the AML prohibit companies from reaching "the following monopolistic agreement" rather than reaching "the following agreement" with other competing companies (horizontal agreement) or trading parties (vertical agreement). Huge difference lies in the wording. Paragraph 2 of Article 13 of the AML defines "monopolistic agreement" as "agreement, decision or other concerted activities that eliminate or restrict competition". In the famous Rainbow Medical v. Johnson & Johnson case, Shanghai High Court required the plaintiff Rainbow Medical (distributor of Johnson & Johnson) to prove that the distribution agreement which restricted resale price signed with Johnson & Johnson had eliminated or restricted competition in the relevant market pursuant to the definition and judicial interpretation discussed above, and then reviewed the agreement in question from four perspectives, i.e., whether the competition in the relevant market is sufficient, whether the implementing company possesses powerful market position in the relevant market, whether the implementing company possessed the intent to restrict competition, and the impact of the monopolistic conduct on the competition. This is an obvious application of the rule of reason.

"Article 13 and Article 14 of the AML prohibit companies from reaching "the following monopolistic agreement" rather than reaching "the following agreement" with other competing companies (horizontal agreement) or trading parties (vertical agreement). Huge difference lies in the wording"

Following the above logic, horizontal agreement should certainly be reviewed from the above four perspectives as well. Apparently this is inconsistent with the theories and practice of the antitrust law. Horizontal agreements (mainly refers to price control, output restriction, market division, and bid rigging here), also called hard core cartels, are always the target of strict scrutiny in any major antirust jurisdiction, and are almost without exception judged by *illegal per se* (in some countries where *illegal per se* does not exist, there would be a similar concept). It is so difficult to even imagine that a typical monopolistic agreement like price cartel between competitors cannot be confirmed as an antitrust violation until being analyzed from different perspectives such as whether the competition in the relevant market is sufficient. Furthermore, it is totally unnecessary to provide a safe harbor clause when the plaintiff has to first assume the burden of evidence and the corresponding risk of failure to produce evidence. When the court analyzes the plaintiff's evidence by applying the rule of reason, it will review those legitimate causes, whether described in the safe harbor clause or not. There is relatively little difference between listing such causes as safe harbor and not listing them. Only when a defendant is put in an unfavorable position of being assumed to have implemented monopolistic conduct, a remedy to defeat such assumption is necessary. Therefore, the legislators have provided horizontal and vertical agreements with the same remedy, and set the same conditions to apply such remedy, which implicates that the legislators treat the two with equal importance. Taking all these contradictory clues into consideration, the discussion of vertical agreement and the rule of reason will continue to drag on.

纵向协议：本身违法，还是合理原则？（下）

在上一期，我们对本身违法原则和合理原则进行了比较，指出适用本身违法原则的案件对执法机关以及反垄断诉讼中的原告更为有利。从有关司法解释对举证责任的规定看，判断纵向协议（在《反垄断法》下主要指转售价格限制）的合法性似乎应当适用合理原则，因为最高法院在《关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定》的草案中曾经规定纵向协议和横向协议的受害人均无需对协议具有排除、限制竞争的效果举证证明。但最终，上述纵向协议的部分被删除。这一变化表明最高法院认为纵向协议与横向协议不同，其存在本身不足以自证其违法性。

“《反垄断法》第十三条、第十四条分别禁止经营者与其他具有竞争关系的经营者（即横向协议）或交易相对人（即纵向协议）达成“下列垄断协议”，而没有禁止它们达成“下列协议”。这其中差别巨大。”

必须注意到，与上述司法解释直接相关的一条规定是《反垄断法》对“垄断协议”的定义。《反垄断法》第十三条、第十四条分别禁止经营者与其他具有竞争关系的经营者（即横向协议）或交易相对人（即纵向协议）达成“下列垄断协议”，而没有禁止它们达成“下列协议”。这其中差别巨大。《反垄断法》第十三条第二款规定将“垄断协议”定义为“排除、限制竞争的协议、决定或者其他协同行为”。在著名的锐邦涌和诉强生一案中，上海高院即根据该定义与司法解释要求原告锐邦涌和（强生的经销商）证明强生与其签署的限制转售价格的经销合同在相关市场中具有排除、限制竞争的效果，并且从相关市场竞争是否充分、实施企业在相关市场是否具有很强的市场地位、实施企业是否具有限制竞争的行为动机、垄断行为的竞争效果等四个方面对涉案协议进行考察。这显然是合理原则的应用，尽管听上去并不合理——上海高院要求原告从四个方面举证证明限制转售价格的纵向协议具有“排除、限制竞争”的效果，而这四个方面并非《反垄断法》的明文规定，也不属于避风港规则下的情形。因此，上海高院实质上超越其法定权限，对《反垄断法》第十四条的适用条件进行了限缩解释。

根据上述逻辑，既然《反垄断法》第十三条同样禁止竞争者之间达成横向“垄断协议”（而非简单的横向“协议”），那么对于横向协议是否构成“垄断协议”并违反《反垄断法》，自然也应当从上述四个方面进行考察。这显然与反垄断法的理论与实践不符。横向协议（这里主要指价格控制、产量限制、市场划分、串通投标）在任何主要反垄断法域都属于严格规制的对象，又称为核心卡特尔，几乎无一例外地适用本身违法原则进行判断（部分国家没有本身违法原则，但一般也存在与之相类似的概念）。很难想象对于竞争者之间达成价格同盟这样的典型横向垄断协议，居然还要从相关市场竞争是否充分、实施企业的市场地位是否强大等方面再考察一番才能确定该行为是否违反《反垄断法》。假设一个本地行业协会下的企业为了操纵产品价格而达成了价格联盟（例如上海黄金横向协议案），难道要因为这些企业市场地位不强大或者相关市场竞争很充分而认定它们之间的横向协议不违反《反垄断法》吗？

此外，若原告必须首先承担举证责任及相应的举证不利风险，则完全没有必要规定避风港条款。因为当法院适用合理原则分析原告的证据时，必然会考察避风港条款所述或未述的正当理由，这些理由是否专门列为避风港区别不大。除非被告面临被推定为实施垄断行为的不利地位，此时能够打破此等推定的救济方为必要。因此，从《反垄断法》行文看，立法者为横向协议与纵向协议提供了相同的救济途径，且适用的条件完全相同，表明立法者将二者置于同等重要的地位。而且事实上，执法机构在对垄断协议进行查处时并不遵循上海高院的思路。考虑到这些互相矛盾的线索，对纵向垄断与合理原则的讨论仍将长期存在。

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INDIA

CLASIS LAW

Urban reforms – three urban rejuvenation schemes launched


By Vineet Aneja and Parul Kashyap

There is a compelling need to develop sustainable and technology-driven urban centres, partly as the burgeoning urban population is creating pressure on existing cities and partly to address the growing aspirations of a large neo-middle class that is emerging in the tier-I and tier-II towns in India. As per the Concept Note for Smart Cities, the urban population being around 31 percent of the total population contributes over 60 percent to India's GDP. It is projected that urban India will contribute nearly 75 percent of the national GDP in the next 15 years. Therefore, with an urban population of 31 percent, India is at a point of transition where the pace of urbanisation is expected to speed up. It is in this context that it becomes critical to plan the urban landscape in a way that is efficient, smart and fosters economic growth.

Missions for urban renewal launched

Kick-starting the urban reforms, the government of India on June 25, 2015 launched the below schemes for improving the urban landscape:

- 'Smart Cities Mission' for 100 cities with an outlay of INR480 billion
- 'Atal Mission for Rejuvenation and Urban Transformation' (AMRUT) for 500 cities with outlays of INR500 billion
- 'Housing for All by 2022'

Below are the highlights of newly launched missions.

Smart Cities Mission

Under the Smart Cities Mission, a smart city aspirant will be selected through a city challenge competition intended to link financing with the ability of the cities to perform to achieve the mission objectives. Under the smart cities initiative, focus will be on core infrastructure services such as adequate and clean water supply, sanitation and solid waste management, efficient urban mobility and public transportation, affordable housing for the poor, power supply, robust IT connectivity and e-governance. The smart cities would be developed by an SPV to be created for each city, and state governments will ensure steady stream of resources for such SPVs.

Atal Mission for Rejuvenation and Urban Transformation (AMRUT)

This mission will be implemented in cities and towns each with a population of one hundred thousand and above and will also include some cities situated on stems of main rivers, a few capital cities and important cities located in hilly areas, islands and tourist areas. It adopts a project approach to ensure basic infrastructure services relating to water supply, sewerage, storm water drains, transport and development of green spaces. Implementation of this mission will be linked to promotion of urban reforms such as e-governance, constitution of professional municipal cadre, devolving funds and functions to urban local bodies, review of building bye-laws, improvement in assessment and collection of municipal taxes, credit rating of urban local bodies, energy and water audit and citizen-centric urban planning.

The central assistance towards AMRUT will be to the extent of 50 percent of project cost for cities and towns with population of up to 1 million and one-third of the project cost for those above 1 million. This amount will be released in three instalments in the ratio of 20:40:40, based on achievement of milestones indicated in state annual action plans.

Housing for all by 2022

This project will disburse about INR3000 billion in the next seven years for construction of 20 million affordable houses in urban areas for slum dwellers, low income groups and economically-weaker sections. An interest subsidy of 6.5 percent on housing loans with 15 years tenure will be provided under this scheme.

Funding options

The nodal agency for the smart city project is the Ministry of Urban Development, Govt. of India, besides the state government and the Urban Local Bodies being other key participants. The government continues to look for other sources of funding besides the budgetary allocation and it is already in advanced talks with the governments of United States, Spain, France, Germany and Sweden for the development of smart cities.

Conclusion

With various countries and large corporations evincing interest in India's smart cities, these are exciting times for all the stakeholders. India being what it is with its myriad complex political, social and environmental realities, it is advisable that the foreign investors assess the regulatory, tax and other risks involved in such projects before making a foray into India.

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Indonesian Rules on E-Signatures


By Bezaliel B. Erlan and Soefiendra Soedarman

E-signatures in Indonesia are regulated by Law No. 11 of 2008 regarding electronic information and transactions (Law No. 11/2008) and Government Regulation No. 82 of 2012 regarding the implementation of electronic systems and transactions (GR No. 82/2012).

Under the relevant regulations, an e-signature is defined as containing electronic information that is attached to, associated with or linked to other electronic information that is used as a verification and authentication tool.

E-signatures in Indonesian law have lawful legal force and legal effect as long as they meet the following requirements: (i) e-signature creation data is associated only with the signer; (ii) e-signature creation data at the time of the electronic signing process shall be only in the authorisation of the signer; (iii) any alteration to e-signatures that occurs after the time of the signing is traceable; (iv) any alteration to electronic information associated with the e-signature after the time of the signing is traceable; (v) certain methods are adopted to identify the signer; (vi) and certain methods are adopted to demonstrate that the signer has given his or her consent to the associated electronic information.

The regulations do not stipulate the qualifications of 'certain methods' as mentioned in points v and vi. However, we believe that these methods are those that have the ability to secure originality and may be traced back to signers for authentication purposes.

Function and types of e-signature

E-signatures function as an authentication and verification tool for (i) the identity of the signer, and (ii) the intactness and authenticity of the attached, associated or linked electronic information.

In Indonesia, there are two types of e-signature: certified e-signature and uncertified e-signature. Certification is provided by an independent certification company, as regulated in Law No. 11/2008 and GR No. 82/2012.

Applicability in practice

To discuss the applicability of e-signatures we must also discuss electronic documents that must contain an e-signature for the purpose of authenticating and verifying the originality of such e-document.

E-documents are admissible as evidence in disputes settled through either the courts or arbitration. Please note, however, that for e-documents to be admissible in courts or arbitration bodies, they must be at least generated or transmitted through an electronic system that in general satisfies the following requirements: (i) able to retain the electronic information and/or e-documents in their entirety in accordance with the relevant laws and regulations; (ii) able to protect the availability, intactness, authenticity, confidentiality and accessibility of electronic information in the implementation of such electronic system; (iii) can be operated pursuant to the procedures or instructions for the implementation of such electronic system; (iv) equipped with procedures or instructions announced in a language, information, or symbol that can be understood by the party related to the implementation of such electronic system; and (v) has a continual mechanism for maintaining the novelty, clarity and accountability of the procedures or instructions.

Note that even if an e-signature is on an e-document being transmitted and generated by a system that complies with Law No. 11/2008 and GR No. 82/2012, if it does not satisfy the validity and principles of a contract then such e-signature and e-document may be voidable under the law or automatically void by law, as far as Indonesian civil law is concerned.

Exceptions

While Indonesian law recognises e-signatures and e-documents, there are certain situations in which e–signatures and e-documents are not recognised. These are as follows: (i) documents that pursuant to the relevant laws and regulations must be made in written form; and (ii) documents together with their supporting papers that pursuant to the relevant laws and regulations must be made in notarial deed form or deed form by a land deed official.

Deeds of Sale and Purchase of Land and Buildings and Articles of Association in view of the establishment of a limited liability company are examples of where e-signatures and e-documents are not recognised under Indonesian law.

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MALAYSIA

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The net effect


By Mariette Peters-Goh and Amylia Soraya Aminuddin

Introduction Netting arrangements refer to the settlement of obligations between two parties that processes the combined value of transactions. It is designed to lower the number of transactions required. In simple terms, this means if A owes B MYR100,000 and B owes A MYR40,000, the value after netting would be MYR60,000.

Netting arrangements were previously prohibited in Malaysia. However, the Netting of Financial Agreements Act 2015 currently provides legal certainty to the enforceability of a close-out netting mechanism under the Malaysian law.

Close-out netting is an important risk management tool used by financial institutions and financial market participants to reduce risk exposure should there be a counterparty default for bilateral financial transactions entered into.

The netting provision The close-out netting mechanism is now embedded in financial contracts, in what is known as a 'netting provision'.

A netting provision, as defined by the Act, is a provision in a qualified financial agreement[1] which provides that, upon the occurrence of the events specified by the parties in the agreement (eg, by default or insolvency of a counterparty), all obligations owed by one party to another party under a qualified transaction are reduced to, or replaced with, a single net amount in accordance with the qualified financial agreement.

The close-out netting mechanism essentially allows all transactions, upon the trigger of events specified by the parties in the agreement, to terminate the transactions, determine the value for each transaction and the sum value to be aggregated to come to a single net amount payable by one party to another, instead of the gross amount for each individual transaction under the financial contract.

Period of stay Although close-out netting is a good risk management mechanism, exercising the close-out netting against a troubled financial institution may result in challenges, thus a brief deferral on the close-out netting mechanism is needed in order to afford time to the relevant authorities to decide whether and how to resolve such institution. In such cases, the Act gives power to the Minister of Finance to impose a period of stay on the rights of the close-out netting under the Act for the purposes of the provisions specified in Part II of the Schedule, namely, subsections 115(3) and 180(1) of the Malaysia Deposit Insurance Corporation Act 2011; subsection 209(2) of the Financial Services Act 2013; subsection 220(2) of the Islamic Financial Services Act 2013; and section 41 of the Pengurusan Danaharta Nasional Berhad Act 1998.

Importance and benefits Close-out netting allows parties in the financial market to perform financial transactions with reduced exposure to credit and market risks as well as confining counterparty credit risk to a single net amount payable, instead of on a gross basis upon termination of transactions.

It also reduces the cost of conducting business and effecting transactions in Malaysia, since lower capital may now be set aside to meet regulatory requirements which will then lower the cost of transactions, effectively enabling financial institutions to undertake more transactions, trade in financial instruments more efficiently, and develop the capacity to provide new and innovative financial products to consumers. This will also enable banks to deal more competitively with foreign counter parties worldwide, consequently improving the efficiency of financial markets.

Legal impediments Despite all efforts to ensure legal certainty on the enforceability of the Act, there are several impediments to close-out netting, and these are found in section 29A[2] and section 41[3] of the Pengurusan Danaharta Nasional Berhad Act 1998, and section 346C[4] of the Capital Markets and Services Act 2007.

Conclusion It is hoped that the recognition of Malaysia as a netting-friendly jurisdiction would give confidence to international financial institutions to deal with Malaysian financial institutions, thus facilitating further development and competition in the local financial markets.

Endnotes

1. A qualified financial agreement is defined under section 2 of the Act, and must have certain features as prescribed by section 5 of the Act.
2. According to section 29A of the Pengurusan Danaharta Nasional Berhad Act 1998, 'the appointment of a Special Administrator under the Danaharta Act shall not be regarded as giving rise to a right for a person to terminate an agreement or accelerate the performance of an obligation.'
3. According to section 41 of the Pengurusan Danaharta Nasional Berhad Act 1998, 'on the appointment of the Special Administrator, a moratorium for a period of 12 months shall take effect during which no steps may be taken by any parties to set off any debt owing to the affected person in respect of any claim against the affected person except with the prior written consent of the Corporation.'
4. According to section 346C of the Capital Markets and Services Act 2007, 'the Securities Commission may issue a directive requiring any person to take any measure as the Commission may consider necessary in the interest of monitoring, mitigating or managing "systematic risk in the capital market".'

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Review of the amendments to the Commercial Building Lease Protection Act

By Kea-Sung Noh

1. Reasons for amending the Commercial Building Lease Protection Act (Amended on May 13, 2015)

Under the previous version of the Commercial Building Lease Protection Act (the Act), a commercial tenant could lose the value of its 'leasehold premium' (kwon-ri-gum in Korean), which is the monetary value of goodwill, etc. that resulted from the tenant's investment and business activities at the property, if its landlord terminated it or refused to renew its lease. The existing tenant might bear a business loss for a substantial period of time to reinvest in facilities and establish goodwill. Then their landlord could receive the benefit of the existing tenant's goodwill by terminating that tenant and executing a lease with a new tenant who would enjoy the business value created by the prior tenant, for which the new tenant pays the landlord.

To resolve the foregoing problem, an amendment to the Act was enacted to protect existing tenants by enabling them to recover their leasehold premium when leaving the premises. It also imposes an obligation on landlords not to unreasonably interfere with the existing tenant in that tenant's efforts to sell its leasehold premium to a new tenant found by the existing tenant (not by the landlord). The amendment to the Act also is intended to strengthen protection for existing commercial tenants by allowing new potential tenants to obtain necessary lease information to facilitate such sales and recommending the use of a standard commercial lease agreement and a standard leasehold premium agreement.

2. Major amendments

The amendment to the Act expands a tenant's ability to assert a priority right in the leased premises over rights of third parties, such as mortgage holders, in all commercial lease agreements (Article 2, Paragraph 3).

The superintendent of the applicable tax office is required to draft a certificate of a fixed date that sets forth the location of the commercial building concerned, the fixed date of the tenancy, the amount of rent and the security deposit. This enables a tenant to prove its lease interest in the property to new potential tenants. The superintendent is prohibited from unreasonably refusing to provide that information to new potential tenants who request it (Article 4).

The concept of a 'leasehold premium' is now recognised under the law in the amendment to the Act. It is identified as a price paid by a person who is doing or contemplating doing business at a leased commercial building, to a landlord or a tenant (other than a security deposit and a rent), to compensate for obtaining or using the goodwill in the property - tangible or intangible value including business facilities, equipment, customers, credit, business know-how, operational advantages resulting from the location of the building, etc. (Article 10-3)

From three months prior to the end of the lease term to the termination of the lease, a landlord cannot prevent the existing tenant from receiving a leasehold premium payment from a new tenant identified by the existing tenant. The landlord is required to compensate the existing tenant for any loss or damage suffered in case of a breach. The existing tenant is required to provide information about the new tenant to the landlord. (Article 10-4)

If a commercial building subject to a lease is part of a 'superstore' or 'quasi-superstore', as defined in Article 2 of the Distribution Industry Development Act, a "State Property", as defined under the State Property Act, or a "common property", as defined under the Common Property and Goods Management Act, then it is excluded from being subject to these leasehold premium protections. (Article 10-5)

Any sublease, where an existing tenant sublets the leased property to a third-party sub-lessee, also is not subject to these new protections.

3. Implications for future legal disputes

Under Article 10-4, Paragraph 1 of the amendment to the Act, the owner of a commercial building (a landlord) shall not prevent an existing tenant from receiving payment for its leasehold premium from a new tenant found by the existing tenant. Accordingly, an existing tenant may argue that the owner/landlord is required to execute, against its will, a new lease agreement with a new tenant that is willing to purchase the leasehold premium from the existing tenant.

While such an argument appears to be a strained interpretation of the law, there is a potential remedy to protect against such a claim. The amendment to the Act requires the Minister of Land, Infrastructure and Transport to announce standard procedures and methods of appraisal of leasehold premiums and he may designate a standard leasehold premium agreement and recommend use of that standard agreement. Accordingly, while it is not required to draft a leasehold premium agreement, drafting and confirming the terms of such an agreement and thereby clarifying the rights and obligations related to such an agreement in advance may help parties avoid future disputes.

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UNITED ARAB EMIRATES

كليدانكو
CLYDE&CO

A lesson in trademark protection


By Harriet Balloch and Nicole Giblin

Educational establishments work hard to build reputations as trusted and leading education providers within local communities and globally. Investing in trademark protection can ensure that exclusive rights are secured in the name and logo of the educational establishment at a country level and internationally, by filing for protection on a country-by-country or regional basis.

Globalisation of education providers

As a result of an increased demand for top performing schools internationally, there has been a recent trend towards the globalisation of the educational sector. For example, a number of outstanding British and US schools and universities have set up campuses in new markets, particularly in China and the Middle East.

As part of these arrangements, establishments usually enter into licensing agreements with local partners, authorising the use of the school's intellectual property rights, including the name and logo of the school, together with the curriculum, teaching materials and the school uniform. Some of these assets can be protected through IP rights, such as trademarks, copyright and registered design rights.

Given that the right to use the name and logo of a school will be core to any licensing deal, it is key to ensure that adequate trademark protection is secured in advance of entering into licensing agreements. As part of this protection strategy, it is important to consider whether local language variations, such as Arabic or Mandarin versions of the trademark, need to be protected.

Why secure trademark protection?

Registering a trademark gives the owner the exclusive right to that trademark, in relation to the goods and services listed on the certificate, in the country of registration.

Accordingly, a trademark registration can prevent competing schools, nurseries or universities from using the same or a similar trademark.

By way of example, if a nursery has established an outstanding reputation, a third party setting up a new nursery may seek to use a trademark which is the same or very similar to the first nursery's brand, in an attempt to confuse prospective parents and students into thinking that the new campus is associated with the first nursery. Trademark registrations can be used to prevent third parties from seeking to trade off the reputation of successful educational brands, without permission.

Trademark protection also enables establishments to develop their brands, by attracting investors or generating alternative revenue streams, through licensing arrangements in new markets.

Trademark searches

Before applying for and/or using a trademark, it is important to ensure that there are no conflicting prior brands being used or registered in the countries of interest.

Trademark clearance searches should be undertaken prior to the launch of a new brand and before expanding that brand into other markets. Conducting searches can quickly reveal whether the relevant trademark is free to use or whether use of the mark will infringe the prior rights of a third party.

Given that significant time and money is invested in branding exercises, undertaking clearance searches early can avoid unnecessary costs being incurred in connection with a forced re-brand.

The application process

Assuming the results of searches are clear, applications can be filed to protect the trademark in the countries of interest. Before filing the applications, it is necessary to decide which goods and services should be protected in relation to the trademark.

All goods and services are categorised into 45 'classes'. Educational establishments usually look to secure protection in the following core classes:

- Class 41 which covers education and training services; and
- Class 16 which covers teaching materials and books.

Universities and other higher educational establishments may also wish to protect their trademarks in relation to Class 42, which covers research and development services.

Any establishments which are considering opening campuses in new markets should secure protection for their trademarks before entering into discussions with potential local partners. Adopting this approach will ensure that they are in a position to license the use of the school's trademark in that country.

If you have any questions about securing trademark protection, please contact our IP team at IP@clydeco.ae.

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New investment law – new provisions on licensing procedures for foreign investors

By Pham Thi Thanh Lan

On November 26, 2014 the National Assembly of Vietnam adopted a new law on investment (2014 Investment Law) which will take effect on July 1, 2015 and replace the current 2005 Investment Law. Under this new law, there are many changes designed to open opportunities for foreign investors through new provisions on licensing procedures applicable to certain common investment forms, including investment along with setup of enterprise and investment under the way of capital contribution or shares purchase in enterprises in Vietnam.

Investment along with setup of enterprise

For such investment form, the foreign investor must proceed with the procedure for issuance of an investment registration certificate (IRC) for their investment project. For mega investment projects which require government control, the foreign investor must obtain an investment policy from the competent state authority before applying for an IRC. Upon receipt of an IRC, the foreign investor can establish a foreign invested enterprise by going through the procedure of enterprise registration to obtain an enterprise registration certificate (ERC) under the new 2014 Enterprise Law.

Compared with the procedure for issuance of an investment certificate (IC) under the current 2005 Investment Law, the licensing procedure for an IRC is much simpler and has been slashed from 30-45 days down to 15 days. The required application documents are stipulated transparently under the law. In case of refusal, a written notification to the foreign investor must be returned and must cite specific reasons. Notably, the competent IRC-issuing authority for investment projects outside of industrial zones, export-processing zones, high-tech and economy parks will be the provincial Department of Planning and Investment (DPI), instead of the People's Committees as required under the current law.

> "The 2014 Investment Law confirms plainly that the foreign investor is no longer required for any investment certificate when conducting M&A transactions (capital contribution or shares purchase in Vietnamese enterprises in Vietnam)"

The foreign investor to contribute capital or purchase of shares or portion of capital contribution (M&A transaction) to enterprises in Vietnam

The 2014 Investment Law confirms plainly that the foreign investor is no longer required for any IC when conducting M&A transactions (capital contribution or shares purchase in Vietnamese enterprises in Vietnam). Such M&A activity is only required to be registered with the competent DPI in case such M&A activity is made into conditional investment sectors applicable to foreign investors, or as a result of such M&A, the foreign investors and/or deemed foreign investors with 51 percent foreign ownership may hold more than 51 percent equity of the target. In these cases, the DPI will have only 15 days, compared with 30 days or more in practice under the current law, to consider the compliance with the regulations on investment conditions, ratio of foreign ownership in the target company, and must notify the investor of such results, including the reasons in case a negative notice is given.

In summary, the above major change is identified as a new step to open up and simplify administrative procedures for foreign investment activities in Vietnam. It is expected to save precious time and cost for foreign investors when joining the local business market.

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