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Volume 15 Issue 6, 2018

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CEO of Hong Kong's Competition Commission

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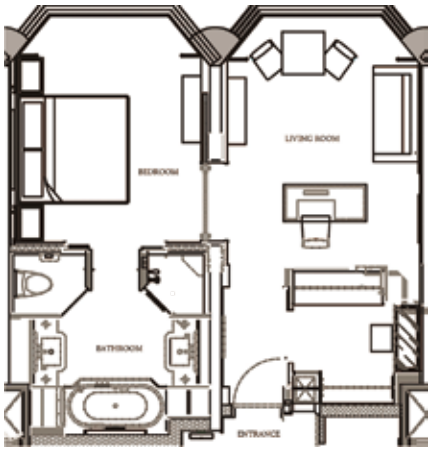

THE PENINSULA
BEIJING

8 GOLDFISH LANE, WANGFUJING, BEIJING 100006, THE PEOPLE'S REPUBLIC OF CHINA TEL: +86 (10) 8516 2888 E-MAIL: PBJ@PENINSULA.COM

asian-mena Counsel

Nick Ferguson – Managing Editor
nick.ferguson@inhousecommunity.com

Leo Yeung – Design Manager
leo.yeung@inhousecommunity.com

Wendy Chan – Global Head of Events
wendy.chan@inhousecommunity.com

Jessica Ng – Events Executive
jessica.ng@inhousecommunity.com

Rahul Prakash – Publisher
rahul.prakash@inhousecommunity.com

Yvette Tan – Head of Research and Development Manager
yvette.tan@inhousecommunity.com

Yannie Cheung – Office Administrator
yannie.cheung@inhousecommunity.com

Tim Gilkison – Managing Director
tim.gilkison@inhousecommunity.com

Patrick Dransfield – Publishing Director
patrick.dransfield@inhousecommunity.com

Arun Mistry – Director

Editorial Enquiries
Tel:..... (852) 2542 4279
editorial@inhousecommunity.com

Advertising & Subscriptions
Tel: ..... (852) 2542 1225
rahul.prakash@inhousecommunity.com

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Feature contributors

Hui Xu is a partner in the Shanghai office of *Latham & Watkins* and a member of the litigation and trial department. His practice focuses on advising clients in multi-jurisdictional white collar investigations and litigations, in the areas of FCPA and Chinese bribery laws, export controls and financial sanctions, data privacy and network security, anti-money laundering and antitrust. Xu also assists clients in presenting findings to and negotiating settlements with the regulators in the US and China as well as international public organisations such as the World Bank.

Catherine Palmer, a former US DoJ prosecutor, is a partner in the Hong Kong office of *Latham & Watkins* and chair of the Asia litigation practice. She leads the Asia corporate risk and government investigations team, which focuses on FCPA/anti-bribery and criminal antitrust/cartel risks confronting multinational companies and financial institutions in Asia and throughout the world. Palmer focuses her practice on the representation of multinational companies involved in criminal or regulatory investigations throughout the world, with an emphasis on global corruption/bribery investigations, global antitrust cartel investigations and investigations related to US trade and economic sanction issues.

Tina Wang is an associate in the Hong Kong office of *Latham & Watkins* and her practice focuses on FCPA / anti-bribery and international arbitration matters. Ms. Wang represented multinational clients in corruption / bribery investigations, and advised clients on matters relating to compliance with FCPA and anti-bribery laws.

Sean Wu is an associate in the Shanghai office of *Latham & Watkins* and a member of the litigation and trial department. His practice focuses on advising clients on FCPA, anti-corruption and anti-bribery matters in China. Wu has represented and conducted internal and FCPA corruption / bribery investigations for multinational clients across various industries.

Bui Ngoc Hong is a partner of *LNT & Partners* and co-leads the corporate and M&A practice. He focuses on corporate and commercial matters. He advises on corporate organisation and management, and has helped to conclude many cross-border transactions in Vietnam and the Asia-Pacific region. He is sought for advice in relation to foreign investment, especially on deal structuring, market opening, regulatory compliance, anti-bribery and corruption, and corporate governance.

Bill Novomisle is a co-founder of *In-Gear Legalytics*, where he works on improving the operational side of law. During his career, he has worked for both law firms and corporations on legal operations projects around the world. He is a strong believer in data-based decision making and the potential for lawyers to do much more than merely manage a company's risk. He started his legal career as a litigator in New York at Shearman & Sterling and then Paul Hastings, before serving as the global director of legal management and operations at PepsiCo, and was the director of pricing and client value at Stikeman Elliott.

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AFRICA

By Pieter Steyn

LEXAfrica
Lawyers for Africa • Advogados para África
• Avocats/Conseils pour l'Afrique

Werksmans Attorneys
The Central, 96 Rivonia Road, Sandton, Johannesburg, 2196
Private Bag 10015, Sandton, 2146, South Africa
Tel: (27) 11 535 8000 / Fax: (27) 11 535 8600
Tel: (27) 11 535 8296 / Fax: (27) 11 535 8696
E: psteyn@werksmans.com
W: www.werksmans.com

Increasing importance of African regulatory issues for M&A, trade and investment

It is important to remember that Africa is not a country but consists of 54 sovereign states and a huge diversity of cultures, customs, languages, ethnic groups and religions. The socio-economic, political and business environment as well as the range of business and investment opportunities varies from country to country. A country such as Tanzania or South Africa cannot be compared to failed states like Somalia or Libya.

However, certain general trends can be identified, including better governance than 40 years ago and a rising consumer and middle class. The significant increase in Asia-Africa trade and investment during the past decade is a very important development. China remains a very important investor and business partner and is Africa's largest trading partner followed by the US and EU.

McKinsey & Co estimates that more than 10,000 Chinese-owned businesses are operating in Africa. China's focus has recently moved from commodities more to infrastructure projects, as indicated by the opening of the Ethiopia-Djibouti railway in 2017. Chinese manufacturers are also increasingly finding opportunities in Africa, including textile and shoe manufacturing plants in Ethiopia. A Chinese naval base was established in Djibouti in 2017.

Japan also has a significant presence (including a military base in Djibouti), with a focus on infrastructure such as the North-South Corridor and energy projects. About 450 Japanese companies operate in Africa with about 140 operating in South Africa. Southeast Asia via Singapore is also showing interest and Singaporean companies have become Asean's largest investor in Africa.

India is Africa's fourth-biggest trading partner and Indian companies are especially active in motor vehicles, pharmaceuticals, agriculture, energy and infrastructure.

A key factor is the growing activity of African regulators. In October 2015, South African telecommunications company MTN was fined US$5.2 billion (subsequently reduced to US$1.7 billion) by the Nigerian Communications Commission for failing to cut off 5.1 million unregistered SIM cards. In 2017, Canadian miner Barrick Gold settled an investment dispute with the Tanzanian government by transferring a 16 percent stake in three gold mines to the government and paying US$300 million. The South African competition commission is very active and has prosecuted numerous cartels. Cartel conduct is now a criminal offence in South Africa. Regional regulators are being established like the COMESA Competition Commission and the East African Community Competition Authority. Financial services, telecommunications, media and broadcasting and mining/resources are increasingly more actively regulated.

> "The general concept of the "public interest" is increasingly forming the basis of and rationale for policy interventions by African governments"

Local empowerment requirements are becoming more common and are being more strictly enforced by African governments. In Ghana, certain services to mining companies are reserved to Ghanaians, while in South Africa a firm's "broad based black economic empowerment" (BBBEE) rating is a key factor taken into account in procurement tenders by government and state-owned enterprises, and a "fronting practice" (or conduct which undermines or frustrates BBBEE) is a criminal offence.

The general concept of the "public interest" is increasingly forming the basis of and rationale for policy interventions by African governments. In South Africa it is a key factor taken into account by the competition authorities in the assessment and approval of mergers. In March 2017, China Petroleum and Chemical Corporation (Sinopec) made a US$900 million bid for a 75 percent shareholding in Chevron's southern African business which, if implemented, would be the single largest acquisition of a controlling interest in a South African company by a Chinese company to date. The South African Competition Commission has recommended the approval of the acquisition based on certain public interest undertakings by Sinopec, including a US$500 million upgrade of Chevron's refinery in Cape Town, a US$15 million development fund for small and black-owned businesses, increasing the black economic empowerment shareholding from 25 percent to 29 percent and agreeing that South Africa will be Sinopec's regional headquarters for Africa.

Asian investment and trade with Africa is set to continue its upward trajectory notwithstanding the recent economic downturn. It is however important to fully understand and comply with the local and regional regulatory framework in order to maximise the benefits of the opportunities offered by the African continent.

Lewis Sanders

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In-House

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DESIGN COMPANY — HONG KONG — 3-7 YEARS

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This is a small selection of our current vacancies. Please refer to our website for a more comprehensive list of openings.

Please contact Emily Lewis, elewis@lewissanders.com +852 2537 7408 , Camilla Worthington, cworthington@lewissanders.com +852 2537 7413 or Karishma Khemaney, kkhemaney@lewissanders.com +852 2537 0895 or email recruit@lewissanders.com

INDIA


By Neetika Ahuja and Vasudha Luniya

CLASIS LAW

14th Floor, Gopal Das Bhawan, 28, Barakhamba Road, New Delhi 110 001India
Tel: (91) 11 4213 0000 / Fax: (91) 11 4213 0099
E : neetika.ahuja@clasislaw.com • vasudha.luniya@clasislaw.com
W: www.clasislaw.com

Impact of the Companies (Amendment) Act, 2017

With the assent of the President on January 3, 2018, the much-awaited Companies (Amendment) Act, 2017 (Amendment Act), which provides for simpler provisions but stringent penalties, has finally seen the light of the day. The changes will facilitate ease of doing business, result in harmonisation with the Securities and Exchange Board of India (SEBI) and the Reserve Bank of India (RBI) and rectify certain omissions and inconsistencies in the Companies Act, 2013 (2013 Act). The new legislation is very vast, therefore this article focuses on certain changes brought by the Amendment Act.

Alteration in definitions

With a view to focus on control or participation in taking business decisions, as opposed to the share capital held by a person in the company, the definitions of "associate company" and "subsidiary company" determining the relationship between companies has been amended.

In the definition of "associate company", the term "significant influence" has been amended to mean control of at least 20 percent of the total voting power, or control of or participation in taking business decisions under an agreement. The definition of the "subsidiary company" has been revised and the criteria of determining the holding and subsidiary company relationship would now be based on the total voting power being by a shareholder as against the stake in the total share capital.

A new definition of "joint venture" has also been introduced meaning a joint arrangement, where parties have joint control of the arrangement and have rights to the net assets of the arrangement.

Related party transactions

In light of the amendment to the definition of related party, a body corporate (which includes a foreign company) that is a holding/subsidiary/associate/fellow subsidiary of an Indian company would come within the ambit of related party. Therefore, all offshore relationships will now be subject to related party compliances. This will provide additional protection to private equity and other investors in case related party transactions are carried out without their consent.

> "The Amendment Act aims to provide for a regime of offences and penalties that is commensurate to the gravity of the offence"

Private placement of securities by a company

The section on private placement has been completely revamped. The concept of "identified persons" has been introduced. The revised section provides that a company cannot utilise the monies raised through private placement unless such return of allotment is filed. Further, under the Amendment Act, a company would be allowed to make offer of multiple security instruments in each class to the identified persons.

Loans to directors

To address the difficulties being faced in genuine transactions due to the complete embargo on providing loans to subsidiaries with common directors, the companies are permitted to give loans to entities in which directors are interested after passing a special resolution and adhering to the disclosure requirements.

Harmonisation with RBI and SEBI

Sections of the 2013 Act, which dealt with insider trading and forward dealing, have now been omitted since the SEBI regulations are wide enough to cover all instances of such frauds. Further, definition of "debenture" has also been amended to allow RBI to disqualify certain instruments as debentures.

Corporate social responsibility

With a view to address the practical difficulties arising in determining the applicability of corporate social responsibility (CSR) on a company, the Amendment Act replaces the words "during any financial year" with the words "during the immediately preceding financial year". Hence, based on the net worth/turnover/net profit of a company calculated during the immediately preceding financial year, the applicability of CSR on a company would be determined.

Rationalising penal provisions

The Amendment Act aims to provide for a regime of offences and penalties that is commensurate to the gravity of the offence. The size of the penalty shall now be levied taking into consideration, among other things, the size of a company, the nature of its business, injury to public interest, nature and gravity of default and repetition of default.

Conclusion

The Amendment Act while rationalising and streamlining certain provisions, also initiates strict actions and penalties against the defaulter companies as well as in cases of non-filing of balance sheet and annual return every year, which will act as deterrent to shell companies. Further, facilitation of ease of doing business and achieving better harmonisation with other regulations such as those made under RBI and SEBI is also envisaged.

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carmenmok@taylorroot.com

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MALAYSIA

By Karen Lyn Johnson

AZMI & ASSOCIATES
A member of TerraLex worldwide | advocates & solicitors

Tel: (603) 2118 5000 ext 5028
E: karen.lynn@azmilaw.com
W: www.azmilaw.com

Process and issues in dual listing or cross listing of Malaysian-incorporated listed companies

Dual listing is when a company's shares are listed on two or more different exchanges in addition to its domestic exchange for the purpose of adding liquidity to the shares and allowing investors greater choice in where they can trade their shares.

In Malaysia, a dual or secondary listing on another exchange such as Singapore is an option for listed companies that desire a better valuation, higher trading liquidity or more interest from foreign funds for their securities. Companies such as Malaysia Smelting Corp and IHH Healthcare have successfully had their stocks listed in Malaysia and Singapore. A dual listing is also sometimes known as a cross listing.

Why do companies seek multiple listings?

There are many potential benefits to having a listing on more than one stock exchange, among which are the following:

1. Increased access to capital

As capital markets are increasingly globalised, an issuer may gain increased access to capital outside the home market. A new listing may open up an investor base that is bigger and perhaps has greater familiarity with the issuer's business sector than in its home market.

2. Greater market liquidity

Being listed in dual/multiple exchanges will also allow the listed issuer to increase its total trading volume (combined home and new market) and decrease the cost of capital as their shares become more accessible to global investors.

3. Information disclosure

By obtaining a listing on an exchange whose rules on disclosure are stringent, a company can benefit from the stringent disclosure made previously to signal their quality to outside investors and to provide improved information to potential customers and suppliers.

4. Greater market visibility

Foreign listing can increase recognition and visibility of the issuer and its products/services with customers, partly through additional media coverage and financial research and analysis. This could, in some circumstances, result in increased commercial benefits in the form of export sales as well as to facilitate foreign acquisitions.

> "Seeking a secondary listing on a regional exchange such as Singapore and Hong Kong is one of the ways Malaysian companies are expanding their footprint"

Malaysian regulation on cross listings of Malaysian-incorporated listed companies on the foreign stock exchange

In 2006, the Malaysian Securities Commission (SC) introduced new measures to facilitate the listing in Malaysia of foreign-owned corporations having operations abroad as well as secondary listings on foreign stock exchanges of main board-listed Malaysian companies. In addition, the new measures also allow healthy Malaysian companies listed on the main board of Bursa Malaysia to seek secondary listings on foreign stock exchanges that are members of the World Federation of Exchanges with a view to attaining international recognition. The new measures had subsequently been encapsulated in Part C of Chapter 5, Equity Guidelines issued by the Securities Commission in 2009.

Pursuant to Part C of Chapter 5 of the Equity Guidelines, in approving any proposal from a Malaysian-incorporated listed company to seek cross listing on a foreign stock market, the SC will have to be satisfied that the listing will benefit the company.

Furthermore, the foreign stock market where the cross listing is sought must be a member of the World Federation of Exchanges and must be based in a jurisdiction that is subject to corporation laws and other laws and regulations that have standards at least equivalent to those in Malaysia, particularly with respect to:

(a) corporate governance;
(b) shareholders and minority interest protection;
(c) disclosure standards; and
(d) regulation of takeovers and mergers.

Disadvantages of dual or cross listing

Besides the obvious increase in listing costs, there are other disadvantages to dual or multiple listing, such as increased reporting and disclosure requirements as well as additional scrutiny by analysts and institutional investors in advanced economies and closer scrutiny by the public in the markets that the company is listed.

Conclusion

In recent times, Malaysian companies are increasingly going regional. Seeking a secondary listing on a regional exchange such as Singapore and Hong Kong is one of the ways of expanding their footprint.

With the increased globalisation of markets around the world, Bursa Malaysia and the SC has been constantly working to improve the governance foundations of our financial market and more relaxed rules by SC. In light of this, we should see more companies joining the bandwagon to undertake dual or cross listings in the future.

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Liam Richardson | In House FS Legal
+ 852 2499 9794 | liamrichardson@puresearch.com

Tina Lu | In House FS Legal
+ 852 2520 5877 | tinalu@puresearch.com

Michelle Koh I In House C&I Legal
+ 65 6407 1202 | michellekoh@puresearch.com
MOM Reg. No: R1102371

Alex Tao | In House C&I Legal
+ 852 2499 9293 | alextao@puresearch.com

puresearch.com

Hong Kong + 852 2499 1611

Singapore + 65 6407 1200
Singapore Registration No: 201209597C
EA License No: 1255954

PHILIPPINES

By Leia Clarissa Veronica R Veracruz

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Proposed rules and regulations on crowdfunding

Crowdfunding (CF) platforms have proven to be a popular way to solicit charitable donations and to raise funds for projects or business ventures. With CF platforms, access to funds has expanded for start-up companies and for micro, small and medium enterprises.

In line with this developing financial innovation, the SEC proposes to regulate CF activities in the Philippines and released its proposed rules and regulations governing CF (Rules) for public feedback. The proposal to regulate CF activities in the Philippines is consistent with the direction taken by other countries, such as the US, Canada and Singapore, which have already established regulations on CF transactions.

The Rules attempt to strike a balance between the dual responsibilities of the SEC to encourage capital formation and to protect investor interests.

To encourage capital formation and in view of the limited character of the public offering through CF, the Rules grant exemption for securities sold or offered through CF from the registration requirement under Section 12 of the Securities Regulation Code (SRC).

On the other hand, to protect investor interests, the SEC incorporated disclosure requirements, registration requirements for intermediaries and funding portals, regulatory framework for intermediaries and post-registration requirements for issuers and intermediaries in the Rules, among others.

Disclosure requirements

Those looking to raise funds (Issuer) will be required to disclose, among others, the nature of their business, financial condition, historical reports of operations, the business plan with respect to the CF offering, the risk factors of investing in its projects, the procedure on how to return funds if the target offering is not met and the procedure to complete or cancel investment commitments.

Registration requirements

Entities that facilitate transactions involving the offer or sale of CF securities through online electronic platforms will be required to register as a Funding Portal.

An applicant Funding Portal, which should be registered with the SEC as a corporation and must have at least Ps50,000 equity, must submit: (i) Registration Statement with information on the principal place of business, legal status and disciplinary history, business activities and types of compensation received by the funding portal, and website address/es; (ii) account opening and disclosure rules; and (iii) business conduct rules.

Entities that mediate in the offer or sale of CF securities will be required to file an application with the SEC and to register as Intermediary.

Only securities brokers registered in accordance with Section 28 of the SRC, investment houses as defined under the Investment Houses Law, and funding portals registered in accordance with Section 30 of the Rules, are eligible to file an application with the SEC and engage as Intermediary in CF transactions.

To register as Intermediary, eligible entities must signify their intention to conduct activities of CF Intermediary and must be able satisfy the criteria set under the Rules.

Regulatory framework for intermediaries

Under the Rules, Intermediaries will be required to: (i) provide investors educational materials; (ii) take measures to reduce the risk of fraud; (iii) provide communication channels to permit discussions about offerings on the platform; (iv) comply with maintenance and transmission of funds requirements; and (v) comply with completion, cancellation and reconfirmation of offerings requirements.

Continuing reporting requirements

Issuers will be required to periodically file with the Commission an annual report on all its CF transactions, the relevant CF Forms within five business days: (i) after the Issuer reaches 50 percent and 100 percent of the target offering amount; (ii) after the Issuer accepts proceeds in excess of the target offering amount; and (iii) after the offering deadline, a disclosure on the total amount of securities sold in the offering.

Intermediaries will be required to keep and maintain records related to CF transactions, which include information related to investors and issuers, records of all communications that occur on or through its platforms, and all daily, monthly and quarterly summaries of transactions effected through the funding portal.

Burdensome and high-cost of compliance

As opposed to traditional, exempt, private placement transactions, which require one-time submission of Form 10.1 (Notice/Confirmation of Exemption) with the SEC, Issuers in CF offerings would have to continuously comply with the Continuing Reporting Requirement and incur costs for the same.

Considering the heavier regulatory burdens and higher compliance costs, in conjunction with the Ps10 million cap on the amount that can be raised through CF, the Rules may create an unintended consequence of disincentivising companies from using CF.

Understandably, the SEC has placed the foregoing requirements to protect the interest of ordinary investors. However, the Rules may have to be revisited to achieve the original intention of providing simple and alternative financing access to start-up companies, without sacrificing the interest of the investing public.

(This article first appeared in Business World, a newspaper of general circulation in the Philippines)

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A global tech player seeks a trademark lawyer to support the group's international IP matters relating to trademark, domain name and copyright. You should be a HK qualified lawyer with a good command of both English and Mandarin. Attractive compensation package is on offer. (IHC 16299)

Senior Legal Manager — Hong Kong — 5PQE+

A well-known Real Estate development group seeks a mid-senior level lawyer with corporate experience. Work will involve providing legal advice on general corporate, M&A, joint venture, finance, commercial and fund transaction. Experience from international law firms or real estate industry is an advantage. Chinese language required. (IHC 16008)

Legal Counsel — Hong Kong — 4–6PQE

A leading multinational corporation seeks a mid-level lawyer to support their business units in North Asia. You will advise on a wide range of commercial contracts and agreements and handle legal disputes, employment and company secretarial matters. Fluency in English, Cantonese and Mandarin required. (IHC 16255)

Legal Counsel — Hong Kong — 1–5 PQE

A global legal team of an innovative US company seeks a junior commercial lawyer to provide legal support to the regional business. Experience gained at a multinational corporate or an international law firm is required. Fluency in both Mandarin and English required. (IHC 16266)

Regional Legal Director — Hong Kong — 10–15PQE

Fortune 500 company seeks a senior in-house commercial lawyer with good China and regional experience. Work will involve managing a small legal team and advising senior management on an interesting mix of contract, general commercial, employment and some compliance matters. Fluency in Mandarin is required. (IHC 15097)

Senior Finance Counsel — Singapore — 12–18 PQE

Well established regional bank seeks a senior finance lawyer to join their legal team. Reporting to the Head of Legal, the lawyer will provide legal and compliance support to the bank's corporate banking business across the region. You should have at least 10 years of experience in banking finance law gained at in-house with a financial institution or a top tier law firm. (IHC16230)

Senior Commercial Counsel — Singapore — 7–12 PQE

Major US listed company in the IT space seeks a legal counsel. You will be part of a dynamic team supporting the business across the Global region and advising, negotiating and drafting a broad range of complex customer service related contracts. Singapore qualified lawyer with at least 7-12 years PQE with good corporate commercial experience highly preferred. Open to consider good commercial litigators and lawyers from in-house or private practice. (IHC16161)

Regulatory Counsel — Singapore — 3–6 PQE

Major investment company seeks a corporate or regulatory lawyer to join their legal regulatory team. You will work closely with the business and transactional team to provide regulatory advice on a broad range of regulatory matters including anti-bribery, anti-trust, takeover code, and financial regulations relating to the company's global investments. Singapore qualified with at least 3-6 years PQE in corporate finance or regulatory work gained from a top tier law firm preferred. (IHC15831)

Legal Counsel (Commodities) — Singapore — 3–6 PQE

Global commodities house with offices across America, Europe and Asia seeks a mid-level legal counsel. Reporting to the Head of Legal for Asia, you will support corporate commercial matters relating to its commodities marketing, trading & logistics and trade finance business. 3-6 PQE with experience in commodities work preferred. Strong corporate or disputes background gained from a top tier firm is a plus. (IHC16314)

General Corporate – IT — Beijing — 10+ PQE

A leading IT company is looking for a senior legal counsel to lead a business unit's in-house legal team. The ideal candidate should have good corporate experience gained from both in-house and in private practice. IT experience would be a plus. (IHC 16078)

General Corporate – Energy — Shanghai — 7+ PQE

This leading MNC seeks an in-house counsel with general commercial experience. The position will support the company's most profitable business unit in China. This is a great opportunity to join a MNC that offers a stable and supportive working environment. (IHC 16087)

Project Finance – Internet — Beijing — 6+ PQE

A well-known private company in China is looking for an experienced finance lawyer to join their fast growing team. Candidates with experience in loans/ trade finance/project finance/consumer finance or banking are encouraged to apply. (IHC 16145)

To apply, please send your updated resume to **als@alsrecruit.com**, or contact one of our Legal Consultants:

www.alsrecruit.com

Hong Kong
Claire Park
+852 2920 9100
c.park@alsrecruit.com

Singapore
Jason Lee
+65 6557 4163
j.lee@alsrecruit.com

China
Kevin Gao
+8610 6567 8728
k.gao@alsrecruit.com

SOUTH KOREA




By Kurt Gerstner, Kyoung-Joo Park, Hyun-Ah Kim and Ah-won Choi

Lee International
IP & LAW GROUP

Poongsan Bldg. 23 Chungjeongro, Seodaemun-gu, Seoul 03737, Korea
Tel: 82 2 2262 6288 / Fax: 82 2 2279 5020
kgerstner@leeinternational.com • kjpark@leeinternational.com • hkim@leeinternational.com • awchoi@leeinternational.com
W: www.leeinternational.com

Ordinary wages in Korea

Calculation of ordinary wages in Korea can have a profound impact on an employer's labour costs, as ordinary wages are used to calculate other benefits and compensation, including overtime, compensation for unused annual paid leave and severance pay.

However, interpreting what items of compensation should be included in ordinary wages has been controversial, due to the absence of clear guidance. Whether items of compensation should be included in ordinary wages must be determined based on whether payments have been regular, consistent and fixed as compensation for labour.

For payments to be regular and consistent, they must be paid continuously at regular intervals and consistently with respect to employees having the same working conditions or meeting the same work standards. For payments to be fixed, they must be paid to employees, regardless of the employees fulfilling any additional requirements or conditions, such as accomplishing certain performance goals or requirements. Therefore, payments depending on performance evaluations such as performance-based bonuses generally fail to qualify as ordinary wages.

However, where a certain amount is paid despite poor performance, that amount may be deemed to be fixed payments. Fixed payments also mean the minimum amount of wages employees are entitled to receive if they provided labour on a given day, even if they are terminated the next day. Accordingly, payments are deemed fixed if they are conditioned on factors or events that already occurred as of the date the labour is performed, such as a condition that the employee have a certain amount of experience, or a condition that the employee has been working for the employer for a certain period of time, eg two years. In contrast, compensation that is to be paid only for the employees who are working on a designated date, would not qualify because employees cannot be paid for their labour on certain dates if they quit before such dates arrive.

> "Payments depending on performance evaluations such as performance-based bonuses generally fail to qualify as ordinary wages"

Given the existing law as clarified by the Supreme Court in December 2013, employers reasonably may be able to predict and control their wage payments by reducing the amount of payment that is fixed. The Supreme Court of Korea also identified a mechanism to protect employers from having to pay back wages to employees retroactively for time periods before December 2013, when the Supreme Court clarified what compensation should be included in ordinary wages. The Court held that no additional wages may be demanded by employees in the event that employers and employees have agreed to exclude regular bonuses from ordinary wages.

However, this will apply only where there has been an understanding and agreement that (i) such bonuses should not be included in the employees' ordinary wages, and (ii) the financial condition and survival of the employer's business could be threatened if such agreement is found to be void and the employer is required to pay additional wages to the employees. Thus, employers must make a good faith representation and potentially prove that they have reached such an agreement with their employees based on the employers' financial condition and the potential business crippling impact of having to pay back wages based on a re-calculation of ordinary wages.

Stand Out With Hughes-Castell

In-house

Regional Chief Compliance Officer | 12+ yrs exp | Hong Kong REF: 14346/AC

This leading investment management firm in Asia is seeking an experienced compliance professional, ideally with a legal background, to cover its regional operations from a Hong Kong base. You will be responsible for ensuring best practice of their compliance policies and procedures, advising partners and private fund clients on investments and handling the regulators' examinations. Significant experience in advising private equity firms on compliance-related policies and regulations is required, in addition to fluent English and excellent communication skills.

AVP/VP, Regulatory | 8-12 yrs pqe | Hong Kong REF: 14344/AC

A supervisory position is now open at a world-renowned financial institution in Hong Kong. You will be responsible for providing legal and compliance support on IPO listing rules and policy development projects. You must have at least 8 years' experience, 2 of which are at the management level, in accounting, corporate finance or investment banking companies. You must have a thorough knowledge of HK listing rules and the securities industry and its practices. Fluent English, Cantonese, and Mandarin are essential.

Assistant General Counsel | 8+ yrs pqe | Beijing REF: 14341/AC

This NASDAQ-listed software provider is seeking a key member of their in-house legal group and China management team in Beijing. You will be responsible for overseeing complex software licensing agreements, business transactions, risk management, employment issues, corporate governance work and real estate property leases. You ideally have over 8 years' PQE in negotiating sophisticated software licenses and consulting services agreements at both top-tier international law firms and a US technology company. Experience in business transactions and employee relations and familiarity with the Chinese legal environment are highly desirable. Fluent English and Mandarin skills are essential.

Senior Legal Counsel | 8+ yrs pqe | Malaysia REF: 14359/AC

This global market leader in its specialist field is urgently seeking a Malaysian-qualified corporate lawyer with at least 8 PQE to provide support for their operations in Malaysia. You will be responsible for assisting the General Counsel on a wide range of issues including the M&A, joint ventures, corporate/commercial agreements, corporate governance and legal risk management matters. Proven corporate transactional experience gained in a major international law firm or in a public company is required. You must be able to work in multi-disciplinary teams in a global work environment and have strong interpersonal and communication skills.

Legal Counsel | 5+ yrs pqe | Shanghai REF: 14355/AC

The China legal team of this global industrial supplier is seeking their first locally based in-house counsel in Shanghai. You will cover their business operations in PRC and be responsible for providing legal support on all corporate/commercial and compliance matters. PRC-qualified lawyers with solid experience in the automotive industry plus over 5 years' PQE in complex negotiations and contract management in China are preferred. Knowledge of corporate law, joint ventures, technology licensing and contract management is highly desirable. You must have strong drafting and negotiating skills together with fluent English and Mandarin for the role.

Private Practice

PRC Regulatory Expert| 7+ yrs pqe | HK/BJ REF: 14349/AC

This US international law firm is seeking a counsel or partner-level PRC regulatory expert to join their Hong Kong or Beijing office. You will be proactive in providing regulatory advice and transactional support to corporations and financial services institutions. You will ideally have a minimum of 7 years' PQE in handling a variety of regulatory matters in China at a leading PRC or international firm. Fluency in written and spoken Mandarin Chinese is essential for this role.

Trademark Attorney | 3+ yrs pqe | Beijing REF: 14357AC

This international law firm, renowned for its Intellectual Property work, is seeking a qualified Trademark Attorney to join their expanding IP team in Beijing. You will be working under the guidance of the leading partner to advise US and European clients on both contentious and non-contentious trademark matters. Ideally, you are PRC qualified with over 3 years' PQE in handling trademark issues at leading PRC or international law firms. Qualified trademark attorneys without PRC qualification are welcome to apply. You must have fluent written and oral English and Mandarin for the role.

Litigation Associate | 2-3 yrs pqe | Hong Kong REF: 14348/AC

This top-tier multinational law firm is seeking a litigator to join their busy dispute resolution practice in Hong Kong. You will work closely with the leading partner on corporate/commercial litigation. Candidates need at least 2 years' court litigation experience within a leading international law firm. Fluent written and spoken English and Mandarin skills are required.

Real Estate Associate | 1-3 yrs pqe | HK/SH REF: 14352/AC

This US international law firm is seeking a junior lawyer with transactional experience to join their expanding real estate team. You will be based either in Hong Kong or Shanghai and will work closely with leading partners on real estate transaction work. Ideally, you will have experience in M&A/PE investment and real estate financing work at a leading law firm. Hong Kong-qualified candidates are preferred but US or Common Law qualified lawyers are welcome to apply. You must have fluent Mandarin skills, both speaking and drafting, for the role.

Litigation Associate | 1-3 yrs pqe | Shanghai REF: 14351/AC

This global law firm is hiring a Litigation Associate for their FCPA team based in Shanghai. You will provide legal support on all FCPA-related litigation cases. Ideally, you have 1-3 years' PQE in general litigation with an international law firm. Previous FCPA or investigation experience is highly desirable. Candidates should have great attention to detail and excellent communication and interpersonal skills. You must have native-level Mandarin and fluent English for the role.

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Indochine Counsel
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Ho Chi Minh City Office – Unit 305, 3rd Floor, CentecTower
72 -74 Nguyen Thi Minh Khai, District 3, Ho Chi Minh City, Vietnam
Tel: (84) 28 3823 9640 / Fax: (84) 28 3823 9641
E: tien.pham@indochinecounsel.com
Hanoi Office – Unit 705, 7th Floor, CMC Tower, Duy Tan Street, Cau Giay District, Hanoi, Vietnam
Tel: (84) 24 3795 5261 / Fax: (84) 24 3795 2562
E: hanoi@indochinecounsel.com
W: indochinecounsel.com

New law supports start-ups and SMEs

On June 12, 2017 the National Assembly of Vietnam issued Law No. 04/2017/QH14 on supporting small and medium-sized enterprises (the SME Support Law), which took effect on January 1, 2018.

Criteria for identification of an SME

According to the SME Support Law, the SME includes micro-enterprises, small enterprises and medium-sized enterprises with an annual average number of employees participating in social insurance not exceeding 200, and which satisfy one of the following criteria:

(i) Total capital is not greater than Vnd100 billion; or
(ii) Total turnover of the immediately preceding year does not exceed Vnd300 billion.

General supports for SMEs

In each period, the government will decide the policies on supporting financial institutions to increase the outstanding loan balance to SMEs. In addition, SMEs shall be granted credit guarantee from the Credit Guarantee Fund, which is a non-budget state financial fund and is established by provincial People's Committees. This guarantee for SMEs shall be based on the security assets or the feasible business plan or credit ratings of the SME.

Furthermore, SMEs shall be granted a preferential tax rate for a definite duration, which is lower than the normal tax rate applicable to enterprises. With respect to legal assistance, the ministries shall establish the network supplying SME consultancy services and the fee shall be exempted or reduced for SMEs.

Beside the general support discussed above, the SME Support Law also provides for other support to SMEs on accounting regimes; ground spaces for production; technology, incubators, technical facilities and co-working spaces; information access; etc.

> "While there is a long way to go before Vietnam can challenge Silicon Valley, this is an early step in the right direction"

Support for the SMEs in conversion from household businesses

An SME that converts from a household business shall be supported for free consultancy and direction for establishment of enterprises. SMEs shall further be exempted from enterprise registration fees and other fees. For the purpose of receiving such support, SMEs that have converted from a household business must satisfy the following conditions:

(i) the household business is legally registered and operated before the conversion; and
(ii) the household business has been operating continuously for at least one year by the day on which the first Enterprise Registration Certificate (ERC) is issued.

Support for the start-up SMEs

A start-up SME that has operated for less than five years from the date of issuance of its first ERC and has not made any public offer in the case of joint stock companies shall be supported by the government in terms of technology (ie, technology application and transfer, use of equipment at a technical facility, co-working space participation support, etc), training (ie, in-depth practical training on product construction and development, investment attraction, etc) and other forms of support.

The SME Support Law provides the legal framework for investment in start-up SMEs. The investor in a start-up SME includes venture capital funds and domestic and foreign organisations and individuals. Such investors shall be exempted from corporate income tax for a limited period of time. However, the investment in a start-up SME is limited to not more than 50 percent of charter capital.

Supporting SMEs in participating in industry clusters and value chains

Under the SME Support Law, the contents of support for SMEs in industry clusters and value chains shall comprise in-depth training in production technology and techniques; information on the need for connection, production and business of the SME; support for brand development and for expansion; etc. SMEs shall be entitled to support on satisfaction of either the following conditions:

(i) creating products with competitive advantages in terms of quality and prime cost; and
(ii) creative innovation in technological processes, materials, components, machinery and equipment.

As SMEs have long been a factor in regions with good records of investment, we are hopeful that this new supports for SMEs will offer the chance to open Vietnam to further investment. While there is a long way to go before Vietnam can challenge Silicon Valley, this is an early step in the right direction.

The JLegal PQE

Personality Questionnaire Experience

Every month, JLegal examines the PQE of a senior in-house counsel. This month we speak with the creative Gupinder Assi, whose tolerance for slow walkers is entirely location-dependent.

- **What is on your mind at the moment?**
  This questionnaire.
- **What secret talent do you have?**
  I design posters and t-shirts for my children's school.
- **If you weren't a lawyer you would be ...**
  an architect. I have always liked the idea of designing my own house to my family's specifications.
- **Where is the best place you have ever been to?**
  I love the Caribbean, because I find it so relaxing. Beautiful beaches, sunshine, Caribbean rum and one of the slowest paces of life I have come across.
- **Top 3 favourite movies of all time?**
  Very tricky as I like so many movies - I would have to say the original Star Wars Trilogy (I know that's already 3); Jerry Maguire; and Rocky.
- **If you could have one superpower it would be ...?**
  Ultimate knowledge; or the ability to fly.
- **What is the strangest thing you have seen?**
  A snake having its head cut off with a pair of rusty scissors on the Mekong Delta so that they could drain its blood for tourists (not me) as well as cut out its heart. It was such a barbaric way to kill the snake.
- **What do you consider the most overrated virtue?**
  Prudence - sometimes to experience life you have to jump in with both feet!
- **What irritates you?**
  Slow walkers (except in the Caribbean!); nepotism; arrogance; hypocrisy.
- **What was your last Google search?**
  Is the iPhone 8 waterproof?
- **If you could time travel, where would you go?**
  Into the future to see if the paperless office will ever exist and if lawyers will still bill on an hourly basis!
- **Which of the Seven Dwarfs is most like you?**
  I'm not that short!

JLegal
YOUR RECRUITMENT PARTNER

Gupinder Assi

Vice President and Senior Counsel (Asia)
First Data Asia Pte Ltd

SINGAPORE
16 COLLYER QUAY, #18-00, SINGAPORE, 049318
T +65 6818 9701 | E singapore@jlegal.com

MOVES

The latest senior legal appointments around Asia and the Middle East

AUSTRALIA

Corrs Chambers Westgarth has added highly regarded litigation and insolvency specialist **Felicity Healy** as partner, based in the firm's Sydney office. She joins from Henry Davis York, rejoining former colleagues Patrick O'Grady, Ben Emblin, Cameron Cheetham, Craig Ensor and Michael Catchpoole who recently joined the firm. In her 17-year legal career, Healy has worked in three jurisdictions — UK, New Zealand and Australia — with the common thread being her interest in advising some of the world's leading financial institutions on their legal risks and issues. She is known for her ability to provide commercially astute advice in large and complex matters, such as the high profile Octaviar liquidation and a large scale mortgage fraud matter on behalf of a leading financial institution.


Archie Smith


Elliot Raleigh

Gadens has added **Archie Smith** and **Elliot Raleigh** from Kemp Strang. Based in the Sydney office, Smith joins after 12 years as a partner in Kemp Strang's property practice. He is highly experienced in the acquisition, disposal and structuring of commercial and industrial transactions, mixed-use and multi-stage developments, landholder projects, complex leasing and licensing, portfolio sales, subdivisions, and strata titling. He also advises clients on property finance. **Raleigh** joins as a partner in the banking and finance group. He has also worked with Clayton Utz and Allen & Overy in London.

Hogan Lovells will add I**an Gordon** in the firm's corporate practice as a partner in the Perth office. Gordon is an energy and resources lawyer with broad corporate transactional and regulatory capabilities. He joins from King & Wood Mallesons, where he advised clients on their investments into Australia. He has worked on a large number of the most significant offshore and onshore LNG/oil and gas projects in Australia, as well as in Southeast and Central Asia and Europe. He advises on all aspects of Australian offshore and onshore petroleum laws and regulations, and is a member of the Association of International Petroleum Negotiators. In the resources space, Gordon advised on a large number of cross-border mining project interest acquisitions in Australia, Europe, Asia and Africa, as well as on mining and procurement activities for Australian operators. He advises on all aspects of Australia mining laws and regulations.

CAMBODIA

Tilleke & Gibbins has added **Jay Cohen** as partner and director of the firm's Cambodia operations. A 14-year veteran of Asian investment markets with a decade in Cambodia, Myanmar and Singapore, he brings a wealth of experience in inbound and outbound investments. He joins from Singapore's Kelvin Chia Partnership, where he was a partner and country manager of Cambodia operations for the past eight years. His practice covers every stage of the investment process, from providing exploratory advice and preliminary due diligence, to implementing appropriate corporate and investment structures, advising on continuing operations, and negotiating and drafting commercial contracts. Cohen has particular expertise in the energy industry, frequently assisting clients with acquisition of energy resources and infrastructure, handling upstream licensing and transactional work, and advising on regulatory compliance in emerging Southeast Asian markets. He has also previously worked in private practice in Myanmar and Singapore, and as in-house counsel at the SK group in Korea.


Jay Cohen

CHINA

Duane Morris & Selvam has added **Kening Li** as partner and head of intellectual property in China. He joins after working at Miller Canfield Paddock and Stone, where he was chief of IP, China, based in its Shanghai office. He concentrates on formulating IP strategy and is highly experienced in worldwide IP procurement and enforcement, including patent litigation in both China and the US, and patent and trademark prosecution. He has worked as a patent attorney, as in-house counsel and in private practice. Li has also served as general counsel for the Chinese Biopharmaceutical Association US for 12 years.

HONG KONG

Ashurst has added three partners from magic circle rivals — banking and finance partners **Eric Tan** and **Daniel Lau**, and corporate partner **Frank Bi**. Tan has more than 15 years of experience acting for major banks in the region on complex financing deals. He specialises in acquisition finance, cross-border lending, structured finance and other banking matters. He worked at Linklaters before joining Fangda Partners in 2016. On the other hand, Lau joins from Allen & Overy's Beijing office, where he advised on a wide range of debt-related transactions, such as structured and acquisition finance, real estate finance, project finance and syndicated loans. Bi joins from Slaughter and May, where he has more than 10 years of experience. He specialises in equity capital markets, M&A and Hong Kong listing compliance work.

Latham & Watkins has added **Catherine McBride** as a contentious regulatory partner in its Hong Kong office. She will be a member of the white-collar defence and investigations practice and the financial institutions group. McBride is one of the most experienced contentious regulatory practitioners in Asia. She brings expertise, insight and solution-focused, practical advice to banking, private equity and corporate clients in the region. She has many years of experience handling contentious matters, including regulatory proceedings, regulatory and criminal investigations and

civil claims across the Asia Pacific. Most recently, she served as associate general counsel, head of litigation and regulatory enforcement for North Asia-Pacific at Deutsche Bank, based in Hong Kong. McBride has handled a wide range of matters before a full spectrum of regulatory authorities, including the Hong Kong Securities & Futures Commission and the Hong Kong Monetary Authority. She has substantial experience handling regulatory, governmental and internal investigations, as well as a number of civil claims in Hong Kong, China, Japan, Korea and Taiwan. Prior to joining Deutsche Bank, McBride also held senior roles at KPMG and Ernst & Young, in China and the UK, respectively, where she gained significant experience handling complex commercial, regulatory and litigation matters. In addition, she has 10 years of litigation experience at a magic circle law firm, where she advised on a wide variety of contentious cross-border matters. She is admitted as a solicitor in England and Wales and also in Hong Kong.

Walkers has added **Callum McNeil** in its Hong Kong office as a partner in the insolvency, restructuring and dispute resolution group. He has more than 16 years of experience, with 11 of those focused on offshore law, working in the major offshore jurisdictions of the British Virgin Islands, the Cayman Islands and Guernsey. He has regularly appeared before the Grand Court of the Cayman Islands and, for the past six years, the BVI Commercial Court. McNeil has broad experience across the contentious sector, with particular expertise in investment funds disputes, shareholder disputes, cross-border insolvency and trust litigation.

Withers has expanded its corporate practice in Hong Kong with the hire of **Mike Suen** from DLA Piper. His practice focuses on Hong Kong initial public offerings, though he also has extensive experience in M&A, corporate reorganisations and compliance pertaining to Hong Kong listing rules and local securities regulatory compliance.


Mike Suen

INDONESIA

HHP Law Firm, Baker McKenzie's Indonesian member firm, has strengthened its M&A practice with the addition of **Gerrit Jan Kleute**. He joins from Clifford Chance, where he has worked in its offices in Amsterdam, London, Singapore and, lastly, Jakarta (through its associated firm LWP). He brings a wealth of experience in M&A, restructuring, contractual and corporate partnerships, joint ventures and private equity.


Gerrit Jan Kleute

ZICO Law's Indonesia office, **Roosdiono & Partners**, has added **Fadjar Kandar** and **Barryl Rolandi** as partners. Kandar and Rolandi, along with a team of seven lawyers, join from Indonesian law firm Kandar & Partners. Kandar, who has previously worked at Mochtar Karuwin Komar and Freshfields, has advised local and multinational companies on project developments in the energy and natural resources sectors. He has also assisted in project financing, as well as acquisition of interest or shares, in infrastructure, project finance, corporate, M&As, foreign investments, telecommunication, aviation and shipping. Rolandi has been extensively involved in advising local and multinational clients on banking and financial transactions. His experience and expertise covers a broad range of legal practice areas, including banking and finance, project financing, M&A, general corporate and foreign investment, insurance, mining, telecommunications and bankruptcy.


Fadjar Kandar


Barryl Rolandi

SINGAPORE

Mayer Brown JSM has added **Kayal Sachi** and **Ian Roebuck** as banking and finance partners in Singapore. The new hires, who are joining from Allen & Overy, will focus on acquisition and leveraged finance, event-driven finance, corporate lending and restructuring transactions in Southeast Asia and India, on behalf of regional and global financial institutions, corporates, private equity funds and debt funds. Sachi has advised and acted for a wide-range of local and global companies and financial institutions over a career spanning more than three decades. Having served global banking institutions and leading international law firms in London, Singapore and Australia, she has built up a wealth of experience advising clients on a diverse range of products, including acquisition and leveraged finance, project finance, telecoms finance and asset finance. Roebuck has more than 14 years' experience advising global and regional clients on complex cross-border financings in Southeast Asia, India and Europe. He has a background in acquisition and leveraged finance transactions and has worked on many recent acquisitions and leveraged finance transactions in Southeast Asia and India. He also has significant experience advising on high profile share-backed financing, corporate financing and restructuring transactions.

UAE

Eversheds Sutherland has strengthened its international arbitration team in the Middle East with lateral partner hire **Paul Taylor**. With extensive regional and international experience of a broad range of commercial disputes across various industry sectors, Taylor specialises in construction and engineering law focusing on contentious work. He has advised employers, contractors, subcontractors and consultants across a range of domestic and international construction and engineering projects in litigation, arbitration and all forms of alternative dispute resolution. He was previously at Reed Smith.

EVENT REPORTS

12th annual Middle East In-House Community Congress, Dubai

On February 21, The Address Dubai Mall played host to the first In-House Community gathering in our 20th year, the 12th annual Middle East In-House Congress, Dubai.

The plenary themes the Community will address for the year ahead were given their first airing, namely, 'Women in Law: Women in In-House': a discussion regarding mentorship and meaningful careers; and 'The Path to Excellence – How to benchmark the in-house team's evolution?'. The discussions were moderated by Sadiq Jafar, managing partner, Dubai, Hadef & Partners with vital contributions from Deepa Tharmaraj, senior legal director, Dell EMC; Lena El Malak, lead commercial attorney, Microsoft Gulf FZ; Ghada Qaisi Audi, general counsel, Seddiqi Holding; Rima Mrad, partner, BSA Ahmad Bin Hezeem & Associates; Bree Miechel, partner, Reed Smith; Mark Anderson, director – Middle East, Turkey and Africa, Taylor Root.

The day also included engaging presentations and workshops on areas as varied as India Investment; the Life Cycle of a Tech Venture; Going Beyond the Basics to Design the Contract Your Business Needs; the Introduction and Implementation of VAT in the Gulf; Offshore Corporate Structuring in the Digital Era; the New FIDIC Forms; Dispute Resolution Essentials; the Arbitration Minefield; and Family Businesses: the Next Generation.

Discussing 'Women in law – women in in-house' in the Middle East

To close the day, Hadef & Partners hosted an In-House Community social at which we were able to shine a light on the MENA-based in-house legal teams whose excellence has led to their being shortlisted for recognition at this year's In-House Community Counsels of the Year Ceremony in May.

Thanks go to BSA Ahmad Bin Hezeem & Associates; Conyers Dill & Pearman; Hadef & Partners; Hogan Lovells; Luthra & Luthra Law Offices; Reed Smith; Taylor Root; and Trowers & Hamlins for their support of this important In-House Community event.

"All sessions have been interesting and the programme varied"

"Great event and organisation!"

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

2018 IN-HOUSE Congress MIDDLE EAST, DUBAI

Omar Al Heloo
Dispute Resolution Partner
Hadef & Partners

Mark Anderson
Director – Middle East, Turkey and Africa
Taylor Root

Ghada Qaisi Audi
General Counsel
Seddiqi Holding LLC

Walid Azzam
Dispute Resolution Partner
Hadef & Partners

Nadim Bardawil
Senior Associate
BSA Ahmad Bin Hezeem & Associates LLP

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

Lena El Malak
Lead Commercial Attorney
Microsoft Gulf FZ LLC

Charles Fuller
Partner, Dubai
Hogan Lovells

Alastair Glover
Partner
Trowers & Hamlins LLP

Simon Harvey
Partner
Reed Smith LLP

Nicola Jackson
Senior Associate
Trowers & Hamlins LLP

Sadiq Jafar
Managing Partner, Dubai
Hadef & Partners

Bill Jefferies
Partner
Trowers & Hamlins LLP

Mark Junkin
Indirect Tax Partner
Deloitte LLP

Bree Miechel
Partner
Reed Smith LLP

Rima Mrad
Partner
BSA Ahmad Bin Hezeem & Associates LLP

Mohit Saraf
Senior Partner
Luthra & Luthra Law Offices

Imtiaz Shah
Partner, Dubai
Hogan Lovells

Oliver Simpson
Associate
Conyers Dill & Pearman

Charlotte Stanley
Indirect Tax Manager
Deloitte LLP

Andrew Tarbuck
Partner, Dubai
Hogan Lovells

Deepa Tharmaraj
Senior Legal Director
Dell EMC

Victoria Woods
Partner, Head of Commercial Practice Group
Hadef & Partners

Asian-mena Counsel Deal of the Month

Google's abuse of dominance case in India

Everyone's favourite internet search engine has been fined in India after a six-year investigation.

Justice in India may not be swift, but it gets there in the end. Six years after matrimony.com lodged a complaint against Google, the Competition Commission of India has found that the internet search giant abused its dominant position.

The CCI decision on January 31 held that Google enjoys a dominant position in "online general web search" and "web search advertising services". While the case centred around online shopping, the commission's finding of dominance may be relevant to a broad range of businesses that Google undertakes in India.

In particular, the company was found to have abused its dominance by favouring its own services in search results.

An EU competition investigation came to a similar conclusion last year, though the penalties were vastly different. While EU authorities fined Google roughly US$3 billion, in India the company was asked to pay just US$21 million.

However, the commission's order not only requires Google to stop returning biased search results, but also encouraged other startups to question Google's practices if they consider it to be favouring their own services. Now that it has been defined as a dominant search provider, such cases will be easier to prove in future.

One of Google's arguments in the case was that it is a free service and therefore should not be regulated by competition law. This is a defence relied upon by many social media companies, including Facebook, so the commission's rejection of it is a potentially significant decision.

It is certainly true that companies such as Google and Facebook have a huge effect on competition in the sectors they dominate. Facebook, for example, has spent billions of dollars buying social media rivals such as Instagram and Whatsapp. The fact that users do not pay to use these services does not exclude them from competition probes — at least not in India or the EU. The attitude in their home market is somewhat different.

Shardul Amarchand Mangaldas & Co represented Matrimony.com as a customer of Google's services, while a second compliant against Google was filed by the Consumer Unity and Trust Society. Partner **Naval Satarawala Chopra** led the transaction.

Other recent transactions:

Rajah & Tann Singapore has acted as Singapore counsel to **Bumi Resources** on one of the largest and most complex debt restructuring transactions completed in Southeast Asia. The restructuring primarily involved the issuance of new loans and securities, comprising of senior notes, mandatory convertible bonds and contingent value rights, in exchange for US$4.5 billion of Bumi's financial debt. Partners **Abdul Jabbar**, **Sim Kwan Kiat** and **Lee Xin Mei** led the transaction.

Freshfields advised **Prudential** on its auction sale of 100 percent of Prudential Vietnam Finance, a Vietnam-based consumer finance business, for US$151 million. The purchaser is Shinhan Card, a subsidiary of the Shinhan Financial Group, and the sale is subject to regulatory approvals. Prudential and Shinhan have also agreed on a new long-term bancassurance partnership in Vietnam and Indonesia in connection with the sale. The Freshfields team advising on the deal was led by Hong Kong partner **Edward Freeman**.

Weerawong C&P represented Singapore-listed **Thai Beverage** on the US$4.83 billion acquisition of 53.59 percent of Vietnam-listed Saigon Beer Alcohol and Beverage (Sabeco) by Vietnam Beverage, an associated company of Thai Bev, from the Vietnam Ministry of Industry and Trade. This is the highest value privatisation and the highest value acquisition in Vietnam to date. The firm also advised on the financing for the acquisition. Vietnam Beverage and Beerco financed the purchase through a mix of its existing equity capital and loans from Thai and foreign banks. The financing comprised Bt20 billion (US$634.7m) of bilateral loan agreements from five major Thai banks and US$1.95 billion from Mizuho Bank, as mandated lead arranger and bookrunner, and Standard Chartered as mandated lead arranger. Thai Bev provided a corporate guarantee of performance under the loan facility. Senior partner **Weerawong Chittmittrapap** and partners **Sunyaluck Chaikajornwat**, **Samata Masagee** and **Passawan Navanithikul** led the transaction.

Allen & Gledhill's Myanmar office advised **TMH Telecom**, as issuer, and **Myanmar Securities Exchange Centre**, as sole bookrunner, sole lead manager and underwriter, on the initial public offering of TMH in Myanmar. A telecommunication service provider founded in 2006, TMH is the fifth corporation to be listed but the first to offer new shares in Myanmar. The IPO will generate approximately K1.634 billion (US$1.2m) new capital for the company. TMH's listing is the first true IPO in Myanmar, as the first four listings were by way of introduction of existing shares. This listing also sets a precedent for other companies to consider IPO as a channel for raising funds. Managing director **Minn Naing Oo** led the transaction.

Chin Yong Kwek
Kroll Associate Managing Director

Singapore gets serious in fight against bribery and corruption

Conducting joint investigations and joint enforcement actions with foreign authorities may become a new norm.

On December 22, 2017, Keppel Offshore & Marine (KOM) and its wholly owned US-based subsidiary signed agreements with US authorities that resulted in the payment of approximately US$422 million of penalties for violations of the US Foreign Corrupt Practices Act (FCPA). This is the seventh-largest FCPA settlement ever and the first of its kind for a major Singaporean company.

This case sent shockwaves through Singapore, as KOM is partly owned by the Singapore government. What lessons does it hold for Singaporean companies?

The quick answer: This is yet another signal the Singaporean authorities will take increasingly firm action against wrongdoing even if it may adversely affect "brand Singapore". In the KOM matter, the Singaporean authorities issued a "conditional warning" to KOM and, in exchange, KOM paid almost US$53 million to Singapore as part of the US global settlement. This is unprecedented and potentially controversial, given that Singapore has never put in place a formal deferred prosecution agreement (DPA) regime and had no prior practice of entering into such DPAs.

Despite the lack of precedent, Singaporean authorities had no qualms entering uncharted territory to ensure justice was achieved. This follows in the wake of the 1MDB saga, where the authorities also used less conventional charges and relatively large regulatory fines to penalise banks and bankers for misconduct in that matter, another first of its kind. An earlier sign of increased regulatory action was the ST Marine case involving executives implicated in the giving of more than S$24 million of bribes to its customers to obtain more work, some of whom are based overseas. These cases show that Singaporean authorities will act firmly against Singaporeans, even if wrongdoing occurs outside its shores.

> "The global settlement reached in the KOM case is particularly noteworthy because it marks the first time that Singaporean authorities have collaborated with a foreign authority to reach a shared agreement with an offender"

The global settlement reached in the KOM case is particularly noteworthy because it marks the first time that Singaporean authorities have collaborated with a foreign authority to reach a shared agreement with an offender. Though uncommon in Singapore, such a practice has been adopted by many other countries such as the US, Switzerland and the UK. This could mean that Singapore may conduct more joint investigations with other foreign authorities and enter into similar agreements in the future.

Another factor to consider is Singapore's position as a significant financial centre and the fact that offenders often attempt to stash their illicit funds in the country. This could potentially mean more international cooperation and prosecutions are on the horizon.

In view of the above, joint investigations and joint enforcement actions may be a new norm. Singaporean companies must be especially wary of falling afoul of laws with extraterritorial effect, such as the Prevention of Corruption Act. What then should companies proactively do now and what options might they consider if they encounter such issues?

1. **Put in place a strong compliance framework.** This not only helps prevent wrongdoing, it shows regulators that adequate efforts have been taken to prevent wrongdoing.
2. **Consider, when appropriate, self-reporting.** In the KOM matter, the Singaporean authorities expressly stated that "due consideration was given to the substantial cooperation… and the extensive remedial measures" undertaken by KOM. Reference was made to the fact that the matter was self-reported. These were also positive points cited by the US authorities in reducing the quantum of penalties imposed.
3. **Support your decisions with independent internal investigations.** Cooperation and self-remediation are only possible if prompt internal investigations are conducted so that decisions are made with as much relevant information as possible. Such investigations should, as far as possible, be independent as this will help show that remedial actions are fact-based and genuine in nature.

chinyong.kwek@kroll.com
www.kroll.com

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.

Chief Compliance Officer APAC – US MNC,

8-15 yrs PQE, Hong Kong

A US MNC and a leading player in the sector it operates in is currently seeking a high-calibre qualified lawyer as compliance officer to set up its Asia compliance practice. Reporting to the global chief compliance officer, you will be doing a full spectrum of compliance practice for the business across APAC, including but not limited to implementing the existing global compliance practice to the Asia region, setting up tailored compliance policies and frames for Asia, creating and improving the compliance awareness of the Asia-based staff and business partners, policies, training, monitoring and investigation practice. To be a suitable candidate, you shall be a lawyer qualified in any jurisdiction, with compliance practice experience in most recent years, ideally with experience setting up Asia compliance practice, or Greater China region compliance. You shall be able to communicate in Chinese and fluently in English. The employer is willing to sponsor working visa for overseas-based candidates. [Ref: JO-1801-169335]

Contact: Sherry Xu
Tel: (852) 2520 5072
Email: sherryxu@puresearch.com

Corporate Lawyer – Asset Finance,

7+ yrs PQE, Hong Kong

A growing and thriving global asset finance leasing business is looking to appoint a corporate lawyer to assume responsibility for all its general commercial and internal governance issues. Private practice corporate lawyers keen to move in-house or in-house lawyers with good general commercial skills looking for a step-up in responsibility should apply. No language skills required. [Ref: IHC 16300]

Contact: Andrew Skinner
Tel: (852) 2920 9111
Email: a.skinner@alsrecruit.com

Derivatives VP,

4-8 yrs PQE, Hong Kong

A well-known investment bank is looking to expand its legal team with the addition of a derivatives lawyer. Candidates should have relevant experience, including in relation to distribution and regulatory issues, from other financial institutions or international law firms. Mandarin skills are strongly preferred. [Ref: PBP6780]

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

Counsel/Senior Counsel – Energy,

6+ yrs PQE, Bangkok

A Fortune Global 500 electric corporation is seeking an astute lawyer with business acumen to take up a sole counsel position covering its Southeast Asian business matters in Bangkok. You will handle a wide range of issues including legal risk, compliance matters, claim management and litigation. Ideally, you are Thai qualified with a minimum of six years' relevant PQE gained in a law firm or an MNC. Fluent Thai and English skills are essential. Some regional travel in Asia is required. [Ref: 14318/AC]

Contact: Kelvin Pho
Tel: (65) 6220 2722
Email: hughes@hughes-castell.com.sg

Legal Counsel – Hospitality,

3-5 yrs PQE, Singapore

A leading international hospitality group with a presence in many countries is currently looking for a legal counsel with a strong corporate and/or real estate background, to support its projects and developments globally. The ideal candidate should be able to work independently and be comfortable with a remote reporting structure. This role will be based in Singapore, and candidates applying should be already based here. This is a very rare opportunity to join a unique and discerning brand in the hospitality industry. [Ref: CY - IS 1766]

Contact: Clinton Yip
Tel: (65) 6818 9703
Email: clinton@jlegal.com

Vice-president APAC – FMCG,

15+ yrs PQE, Hong Kong

This is an opportunity to join a leading FMCG company as vice-president for the legal team. Based in Hong Kong, you will be supporting the company on various business operations, managing and developing the regional legal team and overseeing all corporate commercial and compliance matters in the region. The successful candidate must have at least 15 years of post- qualification experience in an MNC dealing with FMCG or consumer good/ branded business. Strong management abilities is essential and excellent command of English is essential. Spoken Cantonese/ Mandarin is preferred. [Ref: 104433]

Contact: Charmaine Chan
Tel: (852) 2951 2104
Email: charmainechan@taylorroot.com.hk

China's newly amended Anti-Unfair Competition Law changes the rules of the game

The new law has introduced substantial changes, but certain ambiguities and uncertainties still surround it.

By Hui Xu, Catherine Palmer, Tina Wang and Sean Wu,
Latham & Watkins LLP

On November 4, 2017, the Standing Committee of the National People's Congress (the NPC) of the People's Republic of China (PRC) approved and published amendments to the Anti-Unfair Competition Law (AUCL) that substantially change the previous law enacted in 1993 (the AUCL 1993). The amended AUCL (the AUCL 2018) took effect on January 1, 2018.

Notably, the AUCL 2018 introduced a number of significant revisions of the commercial bribery rules, including specified categories of bribe recipients, distinctions between employers' vicarious liabilities and employees' individual liabilities, etc.

This article summarises the key revisions introduced by the AUCL 2018, and the interpretation of "transaction counterparties". China's State Administration for Industry and Commerce (SAIC), the executive branch delegated to enforce the AUCL, is expected to publish more detailed rules by way of enforcement regulations.

It is noteworthy that, as this article is about to be published, SAIC will be merged into a new central government agency called "State Administration of Market and Supervision" according to the State Council's restructuring plan passed by the NPC on March 17, 2018.

KEY FEATURES OF THE NEW COMMERCIAL BRIBERY RULES

This article summarises below the key changes introduced by the AUCL 2018 to the commercial bribery rules.

Identifies three categories of commercial bribery recipients and excludes transaction counterparties as "bribe recipients"

The AUCL 2018 elaborates on the potential bribe recipients by listing three specific categories of entities and/or individuals:

1. employees of transaction counterparties;
2. entities or individuals hired by transaction counterparties to handle transaction-related matters; and
3. entities or individuals potentially influencing transactions by abusing their power, function, or influence.

Notably, the AUCL 2018 does not include transaction counterparties themselves as a


Hui Xu

category of bribe recipients, which, in other words, shows the view of the state legislature that a payment by a business operator to a counterparty in a transaction is not commercial bribery.

Retains safe harbour provision for business operators

Similar to the AUCL 1993, the AUCL 2018 affords business operators a degree of leeway in respect of properly documented discounts and commissions. The AUCL 2018 allows a business operator to pay discounts to a counterparty, or commissions to an intermediary or agent in the course of a transaction, provided that such arrangements are transparent and are clearly and accurately recorded. Contrary to the AUCL 1993, the AUCL 2018 apparently has deleted a sentence stating that all off-the-book rebates are treated as commercial bribery.

Clarifies corporate liability for commercial bribery

The AUCL 2018 provides that if a business operator's employee engages in commercial bribery, the activity should be viewed as the conduct of the business operator. However, the AUCL 2018 also provides that if the operator can prove that the employee's activity does not relate to the business operator's obtaining of business opportunities or other competitive advantages, the business operator will not be held liable for the employee's conduct. The burden of proof would remain on the business operator, should the business operator seek to argue no corporate liability.

Refines enforcement agency's investigation processes regarding suspected commercial bribery

The AUCL 2018 expands enforcement agencies' investigative powers by including, for example, the power to inspect premises, detain properties, or conduct inquiries relating to bank accounts, etc. Meanwhile the AUCL 2018 also imposes more processes and procedures on these agencies to prevent them from abusing their power and to address due process requirements, eg, requiring agencies to produce a written report before beginning investigative measures, and to release investigation results to the public in a timely manner.

> "One of the most discussed changes is the exclusion or omission of a "transaction counterparty" from the category of bribe recipients."

Increases administrative penalties for commercial bribery

Under the AUCL 2018, the administrative authorities are empowered to confiscate illegal gains and impose a fine of Rmb100,000-Rmb3 million (US$16,000-US$474,000), as well as to revoke a business operator's business licence in cases of severe misconduct. In addition, the AUCL 2018 provides that if a business operator receives an administrative penalty for engaging in commercial bribery, enforcement agencies will record the penalty in the business operator's public credit record. This would not only harm the business operator's reputation, but also its credit record which usually is a key factor to be evaluated


Catherine Palmer

when a business operator bids in a public tender.

Emphasises independent administrative penalties for commercial bribery

The AUCL 2018 removes the phrase "not constituting a criminal offence" that the AUCL 1993 had included as a precondition of administrative penalties for commercial bribery. The removal of the phrase emphasises that administrative penalties can be imposed regardless of whether or not an act in question constitutes a crime.

Provides measures to mitigate administrative penalties for commercial bribery

The AUCL 2018 provides that business operators that have committed minor violations can mitigate administrative penalties by proactively eliminating or reducing the harm that the violations caused. While the provision does not specify the extent of harm that should be eliminated or reduced, it provides business operators with an avenue to mitigate their exposure to penalties.

THE INTERPRETATIONS OF "TRANSACTION COUNTERPARTIES" AND POTENTIAL IMPLICATIONS FOR ENFORCEMENT

One of the most discussed changes is the exclusion or omission of a "transaction counterparty" from the category of bribe recipients under Section 7 of the AUCL 2018. The language of Section 7 appears to suggest that a party cannot be a bribe recipient if it is a counterparty in a transaction. It would hence be important to understand how a "transaction counterparty" would be interpreted to determine the scope of a bribe recipient under the AUCL 2018.

Narrow interpretations of "transaction counterparties" by Chinese law enforcement

The term "transaction counterparties" is not defined in the AUCL 2018. Neither has the Supreme People's Court or SAIC published any official interpretation of the term yet. That said, various sources indicate that the enforcement agency tends to interpret the term "transaction counterparties" narrowly.

For example, Yang Hongcan, the director of SAIC's Enforcement and Competition Bureau, reportedly commented in a newspaper interview that the phrase "transaction counterparty" should be interpreted as "actual" or "de facto" transaction counterparty. By way of illustration, Director Yang explained that if a school signs a purchase agreement with a school uniform company, the parties to this transaction should be the uniform company and all the students, who delegate the power to the school to buy uniforms on their behalf. Therefore, if the uniform company provides benefits to the school, which acts as an agent of the students, the act would constitute commercial bribery.

Such narrow or "de facto" approach of interpretation is further supported by some scholars' "influencer" or "agent" theories. For example, Professor Xiao Jiangping, the chief of Beijing University's Competition Law Research Centre, indicated in a public interview that the nature of the bribe recipient should be an


Tina Wang

entity or individual who can influence a transaction and who receives a benefit beyond the contractual price agreed upon by the transaction parties for influencing the transaction.

Whether public institutions are viewed as "transaction counterparties"

For business operators, especially those operating in an industry with relatively high risks from AUCL enforcement perspective, it is important to bear in mind the interpretation approach adopted by the enforcement agency when assessing the risks of certain practices. For example, would benefits provided to a public institution such as public hospitals or education institutions be viewed as commercial bribes?

To apply SAIC's narrow interpretation, the answer is more likely to be Yes, as, for example, a public hospital may be viewed as an agent of its patients when entering into a contract, and the patients, rather than the hospital itself, are the de facto transaction counterparties that are excluded from the category of bribe recipients under the AUCL 2018.

Recent enforcement actions taken by some local AICs show a continuous focus on pharmaceutical companies' dealings with hospitals. For example, after the AUCL 2018's enactment (but before the amended law became effective), the Shanghai AICs took enforcement actions against multiple companies and issued administrative decisions, which seem to confirm that benefits provided to hospitals and/or their employees may constitute commercial bribery. A summary of these administrative decisions follows.

- On November 7, 2017, a district-level AIC in Shanghai imposed a fine of Rmb100,000 on a joint venture pharmaceutical company and confiscated its illegal gains over Rmb700,000 for sponsoring a doctor from a public hospital for his flight to attend an internal academic conference. The AIC decided that such act violated the PRC Drug Control Law which prohibits a drug manufacturer from providing benefits to the relevant personnel in a medical institute that uses its products.

> "The nature of the bribe recipient should be an entity or individual who can influence a transaction and who receives a benefit beyond the contractual price."

- On November 22, 2017, the Shanghai AIC issued administrative penalties against a Chinese domestic pharmaceutical distributor by imposing a fine of Rmb180,000 and by confiscating the company's illegal gains over Rmb11.4 million under the AUCL 1993. The Shanghai AIC decided that the distributor violated by AUCL 1993 by using company funds to provide benefits to multiple departments of a hospital and relevant hospital staff, including meeting sponsorships, meals, and gifts.
- On December 6, 2017, a district-level AIC in Shanghai fined a Chinese domestic medical device company Rmb100,000 and confiscated illegal gains over Rmb700,000, on the basis that the company provided medical devices to a hospital for free before selling machine consumables to the hospital.


Sean Wu

Whether all off-the-book rebates or commission shall be treated as "commercial bribery"

The AUCL 1993 defines off-the-books rebates as commercial bribes, including hidden, falsified, or wrongly recorded discounts and commissions. However, the AUCL 2018 omits the provision prohibiting off-the-books rebates. The amended law only requires discounts and commissions be transparent and accurately recorded.

> "Companies doing business in China should continue to closely monitor regulations and implementation rules to be issued by the SAIC and its successor."

Some legal practitioners and commentators are of the view that commercial bribery requires a purpose of seeking transaction opportunities or competitive advantages. Given that transaction counterparties are no longer specified as potential bribe recipients, only off-the-books rebates to third parties to advance a business purpose may constitute commercial bribes. Some argue that although off-the-books rebates are not necessarily commercial bribes, they are important evidence for evaluating whether commercial bribes have been offered.

It appears that by omitting the prohibition provision, the legislators intended to avoid punishing all off-the-books rebates. Further, they seem to want to distinguish payments which are genuine accounting mistakes from real commercial bribes.

Conclusion

While the AUCL 2018 has been effective since January 1, 2018, certain ambiguities and uncertainties still surround the amended law, including the definition of commercial bribery recipients. The SAIC will likely issue implemental rules and regulations to address some of these questions. However, the contemplated restructuring of the State Council is expected to cause some delays of promulgation of the implementation rules and regulations.

Companies doing business in China should continue to closely monitor regulations and implementation rules to be issued by the SAIC and its successor "State Administration of Market and Supervision." In light of the all uncertainties and lack of clarifications as discussed above, companies are advised to hold a conservative opinion and to continue complying with the new changes introduced by the AUCL 2018 as well as the existing rules and guidelines adopted by SAIC and local AICs.

LATHAM & WATKINS LLP

hui.xu@lw.com
catherine.palmer@lw.com
tina.wang@lw.com
sean.wu@lw.com
http://www.lw.com

Comparison chart — the AUCL 2018 v the AUCL 1993

	The AUCL 2018	The AUCL 1993
Scope of potential bribery recipients	1. Employees of transaction counterparties 2. Entities or individuals hired by transaction counterparties to handle transaction-related matters 3. Entities or individuals that potentially affect transactions by abusing their power, function, or influence	1. Transaction counterparties 2. Employees of transaction counterparties 3. Entities or individuals closely related to the transaction
Rebates, discounts, and commissions	1. Business operators may, in an express manner, offer discounts to buyers or commissions to middlemen, provided such arrangements are entered into the business operators' accounts. 2. Business operators may offer discounts to buyers or commissions to middlemen, provided such arrangements are accurately entered into the business operators' accounts. 3. Business operators that accept the discounts or commissions shall accurately record the discounts or commissions into their accounts.	1. Any off-the-book rebates to units or individuals shall be treated as bribes, and any acceptance by any units or individuals of such rebates shall be treated as acceptance of bribes. 2. Business operators may offer discounts to buyers or commissions to middlemen, provided such arrangements are accurately entered into the business operators' accounts. 3. Business operators that accept discounts or commissions shall accurately record such arrangements into their accounts.
Corporate liability and employee liability	1. Bribery committed by a business operator's employee shall be deemed as conduct of the business operator itself. 2. However, if the business operator can prove with evidence that such bribery does not relate to efforts of seeking a transaction opportunity or competitive advantages for the business operator, then the practice shall not be deemed as the business operator's act.	The acts of employees of a business operator, using commercial bribery, for the purpose of selling or purchasing commodities for the business operator shall be regarded as the acts of the business operator. [See Interim Provisions of the State Administration for Industry and Commerce on Prohibition of Commercial Bribery, 1996.11.15]
Enforcement agency's investigation processes	1. Entering business premises to conduct inspections 2. Questioning business operators, interested parties, and other related entities and individuals, and requiring them to explain relevant situations and to provide evidentiary materials or related information 3. Accessing and copying agreements, account books, bills and invoices, documents, records, business letters and correspondence and other data relating to the suspected unfair competition conduct 4. Sealing and/or detaining properties related to suspected unfair competition 5. Inquiring into bank accounts of business operators that is suspected of the unfair competition conduct	1. Questioning business operators and other interested entities and witnesses according to prescribed procedures, and requiring them to explain relevant situations and to provide evidentiary materials or related information 2. Accessing and copying agreements, account books, bills and invoices, documents, recordings, business letters or telegrams, and other materials associated with the conduct of unfair competition 3. Checking properties associated with the unfair competition and, if necessary, requiring those business operators to explain the sources and quantities of the commodities, to temporarily halt sales and not to transfer, conceal or destroy the money and materials which await examination
Increased administrative penalties for commercial bribery	1. Confiscation of illegal gains 2. Administrative fines from Rmb100,000 to Rmb3 million 3. Revocation of business operators' business licences 4. Recording administrative penalties in business operators' credit record documents and disclosing to the public	1. Confiscation of illegal gains 2. Administrative fines from Rmb10,000 to Rmb20,000
Independent administrative penalties for commercial bribery	Where a business operator bribes any other party in violation of commercial bribery provisions, supervision and inspection authorities will impose administrative penalties.	If a business operator uses bribes to buy or sell commodities, which constitutes a crime, criminal liability shall be imposed; and if the commercial bribery does not constitute a crime, administrative penalties shall be imposed.
Measures to mitigate administrative penalties	1. A business operator who commits unfair competition takes initiatives to eliminate or relieve the harmful consequences caused by its illegal act, it shall be given a lighter or mitigated administrative penalty 2. A business operator may not be subject to an administrative penalty if the business operator commits a minor violation and corrects it in a timely manner, without causing harmful consequences.	

Understanding "BUSINESS TRANSFER"

Business transfer as a structuring tool — when, how and what to note.

Hong Bui
LNT & Partners

By Hong Bui, **LNT & Partners**

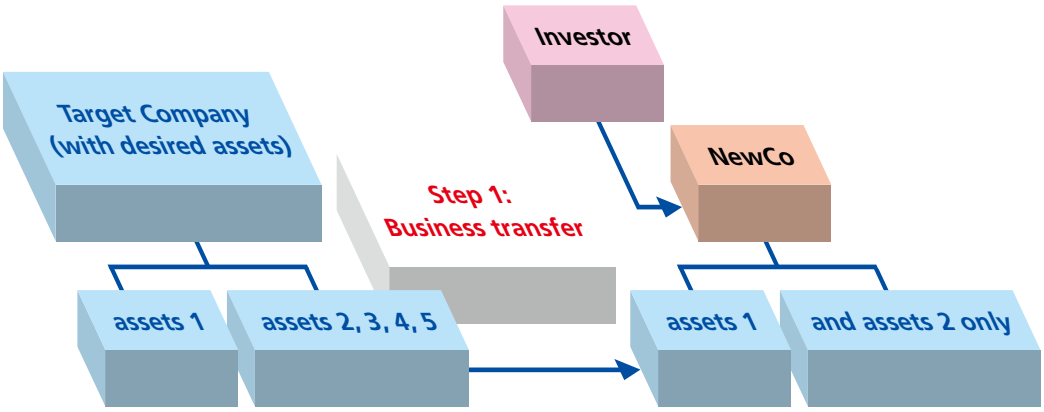
When investing in a business in Vietnam, an investor may prefer to cherry-pick a specific part of the business rather than buying the entire company. In such cases, an asset acquisition may be the best choice — however, in special situations where a share transaction is more appropriate, the transaction needs to be structured as a share acquisition and accordingly a "business transfer" needs to be used.

A business transfer usually covers the transfer of the targeted business to a newly incorporated company (NewCo), so that NewCo will be transferred to the buyer. The transfer generally includes assets, employees, licences and on-going contracts.

Typically, a business transfer can be conducted via two steps.

- Step 1: the seller establishes NewCo and transfers the targeted business to NewCo
- Step 2: the buyer acquires share capital to own Newco, thus owning the targeted business

Although there can be some variations, the whole transaction can generally be illustrated as seen in the chart.



Business transfer — an efficient tool for investment

Why and when should investors use business transfer for their investment? By purpose, business transfer helps the buyer to cherry-pick only the asset they wish to acquire. Meanwhile, by nature, business transfer is a means to conduct the contemplated transaction by way of a share acquisition. The hybrid nature of business transfer brings all the pros and cons of an asset deal and a share deal, which makes it a useful structuring tool when a deal needs to take advantage of both asset deal and share deal structures.

Usually, business transfer should be a preferred tool to structure a deal when one or more of the following come into play:

a. the targeted business is only part of a larger business that the buyer wouldn't want to acquire entirely;
b. the company originally owning the targeted business may raise concerns for the buyer about accumulated liabilities that may remain hidden or unacceptable to the buyer;
c. the licences for engaging in the targeted business are under the name of a company, and accordingly the acquisition transaction must be in the form of a share acquisition deal, not an asset deal; or
d. it isn't justifiable for the purchase price to structure the deal purely as an asset acquisition deal, meanwhile a share acquisition deal can help make the purchase price justifiable.

Generally, a transaction by way of business transfer is often more complicated than a purely asset deal or purely share deal. However, when the above listed items become relevant concerns, business transfer may be a preferred solution. Knowing how to use business transfer is therefore necessary.

Some key points to note when consider whether or not to use business transfer

The first point to consider is the transferability of each asset comprising the targeted business. Under Vietnamese law, the transferability of some assets can be conditional or subject to permission or consent by the government or by a third party. For example, land use rights may be restricted from transferring; some licences are granted to a legal entity on the ground of some conditions which may not be met by Newco; some contracts are transferable only upon consent by third party. Transferability, depending on the particular asset, could be decisive when considering whether to use business transfer.

The second point to consider is whether or not the operation of the business to be transferred can be maintained uninterrupted. Transferring an on-going business can be like trying to dismantle and re-assemble the parts of a running engine. In this regard, transfer of existing contracts should be handled carefully.

The third point to consider is the time to be spent for conducting a business transfer. Depending on the specific business component to be transferred, the business transfer process could take a long time to complete. Typically, business transfer of the targeted licences or the like can be very time-consuming and may mean that the business transfer structure is undesirable.

> "Transferring an on-going business can be like trying to dismantle and re-assemble the parts of a running engine."

The fourth point to consider is the possibility and arrangements for the potential buyer to control the business being transferred, so that any liabilities newly incurred are monitored and subject to being approved or otherwise controlled by the potential buyer. This control is very important in many aspects, especially to ensure that the objects being transferred comprise only those that are targeted, and any liabilities incurred during the time when the business transfer is conducted are accepted by the potential buyer.

The last key point to consider is the tax perspective. For example, if the company with the targeted business is incurring substantial losses that could be deducted by the buyer, or it currently enjoys a special tax incentive that is no longer obtainable by a company newly incorporated like NewCo, it could become undesirable to use business transfer. Further, tax arising from the acquisition transaction could be a concern as well. That is, in case the company owned by the seller's sole business is the one to be transferred; accordingly, after the business is transferred, the transferring company will be liquidated. In this case, the seller may be subject to both corporate gains

tax (on the purchase price) and individual gains tax (to the shareholder, if the shareholder is an individual), and may find business transfer undesirable.

Some technicalities to help investors conduct a business transfer

Conducting due diligence (DD)

When it turns out that a business transfer is to be used, the DD should focus on only the targeted business, which is to be reflected in a checklist. Accordingly, the existing company's liabilities which shall not be the subject of the business transferred can be excluded from the DD scope.

In conducting the DD, the transferability — legal and practical — of each item of the targeted business should be verified. When transferability of an item in the targeted business is conditional, eg subject to another party's consent, obtainment of such consent should be raised for possible solution. When re-issuance of some licences for continuing the targeted business require NewCo to meet some conditions, it should be confirmed that NewCo can meet the respective conditions.

> "Under Vietnamese law, the transferability of some assets can be conditional or subject to permission or consent by the government or by a third party."

Conducting the business transfer

The parties need to agree on how to implement the business transfer. The buyer needs to have the business transfer conducted so that all the targeted business is transferred properly. In case any desired assets are not transferred, that has to be taken into account, eg for possible price adjustment. Any liabilities incurred to NewCo should be monitored and controlled by the buyer.

Preparing transactional documents

With the investigation results from the DD, transactional documents will be prepared. These may include memoranda of understanding (MOU), master agreement, shareholders' agreements and other agreements to implement the business transfer and to realise the contemplated transaction.

In an acquisition transaction that involves the use of business transfer, a master agreement should be deployed. The master agreement sets out the terms to conduct the deal, and especially the business transfer — by using many affiliate agreements. Examples of these affiliate agreements include real estate transfer agreement, intellectual property transfer agreement, assignment agreements for each on-going commercial contract and employment contracts such as termination minutes, and new employment agreements.

Special transaction terms: In addition to the standard terms, a transaction involving the use of business transfer may require the transactional documents to take into account the following:

- *The status and performance of the business to be acquired should be detailed.* A list of assets, detailing tangible and intangible ones, commercial contracts, liabilities, employees, etc, with detailed status should be annexed to the purchase agreement.
- *Agreement on how the business transfer should be conducted should be set out.* As mentioned, a deal using business transfer involves establishment of NewCo, transferring the targeted business from the selling company to NewCo. Accordingly, the method of transfer, the transfer procedures, the record of acquired assets to the NewCo's accounting system need to be anticipated and agreed beforehand by the parties.
- The buyer's right to *manage, monitor and check the status of business transfer should be set out*. Frequently, the business keeps running during the transfer process and the acquisition. New inventories may be acquired, and new sale contracts and purchase contracts may be concluded. These events may affect receivables and payables of the targeted business. Transactional documents should provide appropriate mechanism to deal with those scenarios. The agreement may set certain rules applicable to the seller in operating NewCo, for example, (i) list of action requiring the buyer's consent (eg change of NewCo's charter capital, business lines, loan obtainment, change of management structure, etc); (ii) list of transactions to which NewCo being a contracting parties require the buyer's consent (which can base on criteria of value or nature of transactions); (iii) agreement between the seller and the buyer so that persons

appointed by the buyer will hold some managerial position in NewCo even before the closing.

- As to *purchase price*, the transactional document should include a mechanism to evaluate the targeted business at the closing, with the applicable accounting standard rules to apply.
- And, similar to any M&A deal, the transactional documents should record detailed arrangements on how the buyer can take over the business, including conducting necessary registration procedure, appointment of key managerial positions, decision-making rules, etc.

Some points to note in conducting the transfer of the targeted business

- Asset transfer: In Vietnam, some types of assets require ownership registration, such as real estate, ships, vehicles, etc. When dealing with transferring these types of assets, it should be clear who is responsible for the registration.
- Commercial contracts: Transfer of existing contracts to NewCo requires the consent of the contract counterparty. Negotiating a new agreement may result in the loss of attractive terms.
- For supply contracts and customer contracts: there can be two options, signing new ones or having contracts assigned. In any case, the parties should agree on which obligation to be transferred, how to deal with payables and receivables, and whether NewCo or the buyer shall absorb such rights and obligations.
- For lease agreement, deposit should be a concern. In practice, the lessor normally does not want to return the deposit. Therefore, the transferor and the transferee to the lease must agree on how to deal with such amount, eg whether this amount should be added to the purchase price.
- Employment transfer: Basically, for conducting employment transfer, the selling company shall reach agreement with the employees to terminate the employment relationship, and at the same time, NewCo shall enter into new employment contracts with the employees. A note from practice is the termination agreement should include all severance payment amounts payable to the employees. Also, the selling company should have a good filing system to keep all relevant documents recording the fulfilment of its relevant obligations, including confirmation of employees on receiving the payment, no claims declaration.

> "A transaction by way of business transfer is often more complicated than a purely asset deal or purely share deal."

- Sublicences: Except for certain sublicences attached to assets and being confirmed transferable, NewCo/the seller needs to reobtain all required sublicences before starting running the business. In Vietnam practice, obtaining sublicences can be very time-consuming. This should be taken into account to avoid the situation where the company has to open without the required licences.

In summary, business transfer can help buyers to cherry-pick desirable assets, avoid liabilities and, when needed, make the purchase price justifiable. Offering all the advantages of both asset deal and share deal structures, a transaction by way of business transfer is often more complicated than a purely asset deal or purely share deal. When business transfer has to be deployed to get a deal through, nevertheless, the deal should be conducted with care, including utilisation of the dos and don'ts for a hybrid of share deal and asset deal, in an on-going business.

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hong.bui@lntpartners.com
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Deploying AI in the legal department

Starting with the idea of incorporating artificial intelligence into the legal team might be the wrong approach.

By Bill Novomisle, co-founder and chief design officer,
In-Gear Legalytics

Artificial intelligence (AI) is changing the face of global legal practice and will continue to do so for the foreseeable future. Although there has been extensive coverage of AI in legal applications in North America and Europe, significantly less attention has been given to the unique challenges and opportunities for this technology in Asia. Within the Asian market there is a lot of confusion regarding what AI actually can do, how it works, and what opportunities may exist for adopting AI within legal departments in this region.

Perhaps the greatest source of confusion comes from asking the wrong question. Too often, users ask: "How can I use AI in my legal department?" A potential purchaser of legal technology should not start with the technology they are hoping to use and then try to back-in to a use-case for the technology. Rather, they must understand the problem they are hoping to solve first and foremost. Once a use-case has been identified, including a clear vision of what "success" looks like and the role that technology can play in the path to success, then technology can be evaluated to see if it is the correct fix for the problem at hand. Nevertheless, the topic of artificial intelligence comes up regularly as a starting point (rather than end-point) for a discussion about how the practice of corporate law is changing. Despite the tremendous amount of talk surrounding AI, many lawyers do not actually understand how this technology works nor are they aware of specific pitfalls that apply across numerous Asian jurisdictions to the adoption of AI-powered tools.

Purchasing legal technology is a significant undertaking, both in terms of time and money. The goal of this article is to give readers a better appreciation of how the tools they are considering adopting actually work as well as increasing their sophistication as consumers of legal technology. Input from legal leadership, practitioners at all levels, and IT resources, are all necessary to the successful selection and implementation of legal technology. Experience in this area is invaluable and irreplaceable. Resources are available that have experience in selecting and implementing these tools that also bring practical experience in delivering legal services to drive business strategies and legal operations. For this reason, at a minimum, a potential purchaser is advised to speak to others who have already implemented the technology under consideration and ensure they have adequate internal resources to fully manage the project's implementation.

One source of confusion when discussing AI comes from the different types of technologies that all fall under the broader umbrella of AI. As an introduction to some of the types of technology that can be described as AI, the three forms of AI that have been meaningfully applied in legal practice are explained below. In practice, these three forms are not mutually exclusive, and indeed most AI tools incorporate at least two of the below forms in practice. Nevertheless, by dividing the technology into these three categories, a basic understanding starts to emerge regarding how AI works in the law.

Deep learning

Perhaps the aspect of AI that causes the greatest amount of excitement and fear is the idea that this technology has the ability to "learn". Rather than a static system that takes predictable inputs to produce consistent outputs, AI has the ability to get better over time. As the AI algorithm encounters more and more situations it has the ability to adapt itself to those previously unexplored inputs. Most lawyers, however, do not understand what deep learning is or how it works.

The first concept to understand with deep learning is the idea of "layers" of learning. Layers refer to the complexity of the relationship between variables. To use a mathematical example, imagine that you are trying to teach a single-layer deep learning algorithm to recognise the relationship y=2x. You throw a bunch of numbers at the machine, and then "teach" the algorithm by telling it when the rule is satisfied (for example, when y=4 and x=2). You also would have to teach the machine when the rule is not satisfied (for example, when y=10 and x=1). Eventually, after being trained with enough examples, the machine would identify the relationship between x and y and would be able to both predict situations when the rule was satisfied (for example, if you told the machine that x=7.5 it could predict that y=15) and situations when the rule would not be satisfied (for example, it would predict that x=7.5 and y=14 would fail the rule).

It is fairly clear that a single-layer deep learning algorithm has no practical worth in legal practice. Consider a document or diligence exercise that was focused on a transaction called Project Prometheus. A basic search can simply scan through electronically stored information and quickly and easily match the search term "Project Prometheus" to all documents containing those words. However, if a practitioner wanted to use a single-layer deep learning algorithm to perform that same search, she would have to manually train the algorithm to identify positive and negative hits. Given that non-AI search technology can do that same task near-instantly and with no human intervention, single layer deep learning AI is obviously the wrong tool for the job. This is why single-layer deep learning does not exist as a practical matter.

However, as deep learning adds layers, its ability to recognise and adapt to patterns that have more complex relationships increases and begins to approximate human decision-making more closely. The time and number of

Bill Novomisle

> "A potential purchaser of legal technology should not start with the technology they are hoping to use and then try to back-in to a use-case for the technology."

examples needed to train the system also correspondingly increase. Because of the investment in time that is needed to train the system, the efficiency savings are only realised when seeking out "positive" hits in a data set with several hundreds of thousand documents. There, a diligence review could be completed in a matter of hours by a machine rather than in the matter of weeks or months that a manual review would require.

Note that this result is dependent on two factors. First, the number of layers that the deep-learning technology employs is a key limit of the capabilities of technology. Buyers should not necessarily flock to the most complex deep-learning algorithms, but should carefully consider the complexity of the problems they hope AI will help them address (now and in the future) and make sure that the solution is appropriately sized for the problem. Often, determining whether the solution is "right-sized" will require expertise in both law and technology — which may not always be available within a single individual, or even an organisation.

The second factor necessary for success is that the algorithm is given the appropriate amount of training. This critical step is easily overlooked by buyers of legal tech that are eager for an "out of the box" solution and is the first place that adoption of AI based legal technology tools across Asia deviates from markets in North America and Europe. Long-established technology companies with significant track records (eg, the amount of data that has passed through their machines) are able to claim for their products "out of the box" ability to do certain high-volume tasks. Today's purchaser is able to take advantage of the years of training that the machine already has experienced.

However, the buyer of legal technology is cautioned here to make sure they check their tool of choice well before purchasing. The adoption and sale of AI tools in Asia has been fairly limited thus far. As experienced practitioners are well aware, local formatting and style of legal documents in Asian jurisdictions is often unique and particular to its jurisdiction — even if the language of the document is solely English. If the use-case under consideration is deeply localised, some scepticism is warranted. Make sure to insist on a test case demonstration performed at your offices, using your actual data. Take the time after the demo to independently verify the results of the machine's work. You may find the accuracy is closer to 80 percent, which may be good enough with the understanding that you will be undertaking training yourself to bring the machine up to higher levels of accuracy. However, you will understand both the work necessary to improve the tool and the best way to implement the tool by doing your appropriate diligence.

Natural language processing

As its name implies, natural language processing (NLP) is a form of AI that is concerned with teaching machines to understand and even converse in natural human language. NLP is the technology that underlies smartphone and smart-home assistants (such as Siri and Alexa), as well as digital chat bot assistants found on many websites. In order for an NLP system to function effectively, the technology must be able to tackle four interrelated and overlapping aspects of linguistics: syntax, semantics, discourse, and speech. While anyone who has used Siri or Alexa will recognise that these systems are remarkably effective, particularly in spoken English, to apply NLP to Asian languages requires material adaption of both syntax and semantics (syntax is the breaking down of language, semantics is the aggregation of language into meaning).

Perhaps the greatest challenge for NLP applications in Asia lies in teaching computers to apply the correct morphology (a type of syntax) that converts native characters into words. Mandarin Chinese (to use the most commonly spoken language in East Asia), incorporates many out-of-vocabulary words such as proper names that pose a significant challenge for machines because unlike English and other Indo-European languages, there are no spaces between words/characters. For example, "Canada" is translated as 加拿大, which are the characters for "to add", "to hold" and "big" respectively. This is borrowed from Cantonese, where the sound of the word — "Ganádà" — is a close approximation of the English word. Mandarin has in turn adopted the same characters for the name of the country, resulting in a word that is pronounced "Jianádà". This type of out-of-vocabulary word poses translation challenges for NLP systems.

Semantics also poses a challenge in Asia. Semantics focuses on the relationship between

the units of language and how they combine to form meaning. Semantics is a particular challenge to legal documents because the relationship between words is the entire key to the meaning of a law or regulation. To continue with Mandarin as an example, consider this sentence from the China Securities Regulatory Commission amendments to the Securities Issuance and Underwriting Decision Law (2014):

网下和网上投资者获得配售后，应当按时足额缴付认购资金

This can be translated as: "After offline and online investors receive the placement, they should pay the subscribed-to funds on time and in full." However, a semantic mistake made by a machine could confuse dependency of the clauses and translate this law as requiring the funds to pay the investors once placement is completed. This type of error turns the intent of the law on its head! Highly accurate semantic analysis of native language is absolutely essential before any reliance on AI-driven technology can be justified.

Expert systems

Expert systems are some of the oldest forms of AI technology. Indeed, expert systems have become so commonplace many people do not recognise (or acknowledge) that many well-established business software products are AI-enhanced expert systems (eg, SAP, Siebel, Oracle). An expert system emulates the decision-making skills of a human. The technology uses two components: a knowledge base and an inference engine.

The knowledge base simply represents what the machine is told are the facts regarding the world. These can be laws, fact patterns or a combination of both. The inference engine is the automated reasoning system that takes the existing knowledge base and by applying its rules to the knowledge base, generate new knowledge. The system is highly adaptable, such that it can recognise when there is a change in the fact pattern and is able to immediately reapply the inference engine to determine any changes in output. The system can also handle hypothetical reasoning (eg, multiple parallel possibilities) as well as assigning probabilities to outcomes rather than rigid certainty to evaluate more complex decisions (fuzzy logic). The most recent development in expert systems allows the system to analyse data patterns for causal or dependency relationships. This in turn can be used to create predictive models and decision support systems.

In addition, an expert is agnostic to the input language that is used for its knowledge base and for the search query. For this reason, a buyer of an expert system has no regional-specific obstacles to overcome.

Opportunities for AI-powered legal technology in Asia

Before focusing on the marketplace in Asia, this discussion must shift from the types of technology employed to the type of solution the technology purports to offer. These are:

- Legal research aids
- Litigation prediction/strategy support
- Preventative law (monitoring)
- Unstructured data analysis (due diligence, contract analysis, document review)

> "Buyers should not necessarily flock to the most complex deep-learning algorithms, but should carefully consider the complexity of the problems they hope AI will help them address."

In the current state of the market, not all of these above use-cases are likely immediate-term targets for AI-based tools (however, it is only a matter of time). Legal research tools targeted to private consumers has proven elusive for the most part. Within China, the Supreme People's Court started using an AI-enabled legal research tool called FaXin to search for precedent and identify analogous decisions to help guide judges. With a Mandarin-only interface, Legal Miner is also offering AI-assisted legal research tools. Singapore saw the introduction of Intelllex to assist law students and junior lawyers with legal research tasks. Indian legal research tool CaseMine has achieved some success in offering both legal research and automation of basic tasks. To date, no litigation monitoring or prediction tool has been offered commercially in any Asian jurisdiction.

When it comes to unstructured data analysis, there are major advancements that have occurred in Asia and it is reasonable to expect that more will be forthcoming in 2018.

Axiom has introduced its Contracts Intelligence Platform, which is targeted to all aspects of the M&A process (buy side, sell side, and post-merger integration) which offers both streamlined clause extraction to aid in diligence, as well as advanced data visualisation to provide business intelligence regarding deal synergies and risks. It is well known that other companies have been examining similar technology (eg KorumLegal, Loom Analytics, Surukam) and more announcements may be forthcoming in 2018.

> "When it comes to unstructured data analysis, there are major advancements that have occurred in Asia and it is reasonable to expect that more will be forthcoming in 2018."

In addition, Deloitte Legal has now introduced an NLP-driven tool to assist corporations with compliance across a myriad of Chinese regulations. This has the potential to be the leading edge of a new wave of NLP products that expand well beyond the English language tools that currently dominate the market. This is not a traditional legal research tool in the sense that a law firm lawyer would use, but it does allow a corporate client a technology assisted solution for compliance with a myriad of local, regional and state-level regulations that are prone to change rapidly and with little notice.

Beyond that, the usual list of global players (IBM, Microsoft, Kira, Luminance, Elevate, Seal, LawGeex, ContractPod, Ayfie, among others) continue to be open to opportunities for sales and development across the region. While most of these players offer out-of-the-box solutions that can be applied to large data sets, they have not specifically targeted the Asian region (in the sense of setting up a permanent sales/support force) to date. These players can also help create bespoke technology solutions, ranging from chat-bots to business intelligence dashboards for corporate clients.

There is one form of AI that does not seem to get much attention in Asia, but can be used to address the need for efficiency in many routine, high-volume requests and tasks. This is the use of custom designed expert systems. These systems (eg, Neota Logic) can be set up to handle complex but routine questions (such as those involving labour law, advertising and marketing restrictions, non-disclosure agreements, routine renewals for licensing or intellectual property, periodic financial closings, etc.) and can be programmed by a lawyer without technical or coding skills. For a corporate client looking to create a self-service tool for high-volume, routine legal questions, this has tremendous potential for efficiency gains while still maintaining visibility and control over the process.

The key for any potential purchaser of legal technology is to start with the problem — not the solution. For organisations that have been specifically mandated to start incorporating AI into the legal work they perform, there are current opportunities and there will likely be even more in the near future. None of the pitfalls described in this article are insurmountable, nor should a potential purchaser be deterred from taking the leap into the future of law. They should merely do so with eyes wide open, and with the most sophisticated understanding of their undertaking as possible. There is no time like the present to become part of the future.

In-Gear LEGALYTICS

Bill Novomisle
Founder and chief design officer, In-Gear Legalytics
bill@iglegalytics.com
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Hongye Zhao

We talk to the legal vice-president for Nike Greater China about his role and the challenges of managing a China legal team for a high-profile multinational company.

By Nick Ferguson, **In-House Community**

Hongye Zhao
Legal vice-president for Nike Greater China

AMC: Can you describe your professional background and your current role?
HZ: I have been working as legal VP for Nike Greater China for more than seven years. Before joining Nike, I worked as China legal director for Amazon.com and legal VP for Joyo.com [Amazon's JV partner in China], senior legal counsel for AMD (China) and Sun Microsystems (China). Before going in-house, I worked at several US law firms including Thelen, Reid & Priest and O'Melveny & Myers.

AMC: How big is the team you manage and how is it structured?
HZ: We have 17 members in Nike GC legal team including 12 lawyers and 5 paralegal/assistants. Those team members are divided into three small practice teams: commercial legal team to support our retail/wholesale/logistics business, a brand and compliance legal team to support marketing/compliance/corporate governance, and an IP legal team to support our IP protection.

Among those in-house lawyers, we have expert lawyers and window lawyers. Expert lawyers have special expertise in a certain practice area such as real estate and construction, IP, anti-trust, consumer protection, data privacy etc. We encourage every lawyer to develop some expertise in a certain practice area which is relevant to our business. A window lawyer serves as a single point of contact for a specific business unit and takes full responsibility for this business client. Window lawyers participate in their clients' business meetings, deeply understand the business that they support, develop a trusted business partner relationship, and provide quick and practical responses or solutions to our clients.

We usually arrange a lawyer with certain expertise mostly required by a business unit to serve as the window lawyer for the business unit. For example, the window lawyer supporting the retail business has strong experience in retail real estate. Most of the legal requests from a business unit are handled directly by its window lawyer. However, if any legal request is beyond the window lawyer's expertise, the window lawyer will work together with an expert lawyer who has such expertise to develop a practical solution for the client. In this way, business clients do not need to figure out which lawyer should handle what issues or shop around, and we provide our clients with one-stop legal service. Our window lawyers and expert lawyers are working together as a team to provide aligned legal advice to our business clients.

AMC: What are the biggest challenges you face in this role?
HZ: The biggest challenge is how to support a large multinational company' aggressive business growth in the dynamic and complex regulatory environment in China. We have seen inconsistence among national laws/regulations, local laws/regulations and government policies at various levels. We have also seen political and social factors playing an important role in legislations, law enforcement and implementation of government policies. Therefore, when we make a compliance decision or counsel our business clients on any compliance matters, we will not only analyze the letters of the law, but will also take into account changeable political and social factors as well as industry practice so that we could give the right counselling to our management about what to comply and how to comply.

AMC: What are the most important qualities of a good general counsel?
HZ: First, I think that a good general counsel should not only have top lawyering skills, but also possess strong leadership skills. She/he should be a strategic thinker, a good business partner, and a forward looking person who is able to identify potential high-risk issues for the company and proactively take precautionary measures, and help their client do the right thing in the right way. Second, a good general counsel should have a trusted relationship with senior business management, not only able to help them to reduce risk exposure, but also help them to balance risks and benefits to grow business. Third, a good general counsel is not a lone hero. She/he should be a good team leader and know how to coach, develop and lead a strong, diversified and talented legal team.

AMC: How is technology changing the way you work?
HZ: First, digital and internet technology is changing people's daily life and consumer behaviours, and therefore changing the market and the way how we are doing business. For example, retail is no longer just a brick-and-mortar store business. New retail combines both online and offline business and provides seamless service to meet consumers' needs. Such new retail business raises many new legal issues (cybersecurity, data privacy, online advertisement, digital compliance, etc.) and we in-house lawyers need to monitor and learn about the regulatory development in those new areas and get familiar with those issues to support the new digital business development.

Second, we also need to take advantage of the digital and internet technology development to improve our in-house legal work efficiency and productivity. For example, we are using online contract and invoice management systems and an internal legal portal containing self-help legal tools for client use. We will continue to explore and leverage new technology to improve our legal work efficiency and productivity.

AMC: How has the in-house legal function changed during your career?
HZ: I have seen that in-house lawyers have changed from reactive legal advisers to proactive business partners. We no longer just provide legal advice to our client. We provide a practical solution to help our clients resolve various legal or non-legal issues.

AMC: What about the way you work with external firms and other providers of legal services — have you seen significant changes there?
HZ: When we engage outside counsel, we no longer need outside counsel just to write us a lengthy legal analysis. We need them to provide a practical solution to help us to resolve the issue we raised. In order to provide such practical solutions, outside firms do not only need to know the law and the practice, but also need to understand our business and our client's need. Given budget controls, we prefer outside counsel to provide a fee cap instead of billing us based upon their billable hours.

AMC: Looking forward, what changes do you foresee in the way that legal services will be provided in the future?
HZ: I would think that more digital, internet, big data and even AI technology will be used in legal services, and such technology will change the traditional way that we provide legal services. Because of the fast market and business change, our legal service will be requested to be provided in a faster and more effective way.

AMC: What advice can you give to young lawyers starting out in their careers today?
- If a young lawyer would like to start an in-house legal career, I have the following suggestions:
- Be patient. Whatever you work on, try to become the best in that area. Don't be picky.
- Develop solid basic lawyering skills and have a good understanding of your company's business. You cannot give practical advice if you do not know the business..
- Develop good communication and interaction skills.
- Know what your manager and client expect and develop a trust relationship with them.

AMC: What is your hinterland — what are your interests outside of the legal profession?
HZ: I like water sports such as swimming, scuba diving and fishing.

The thing about ...

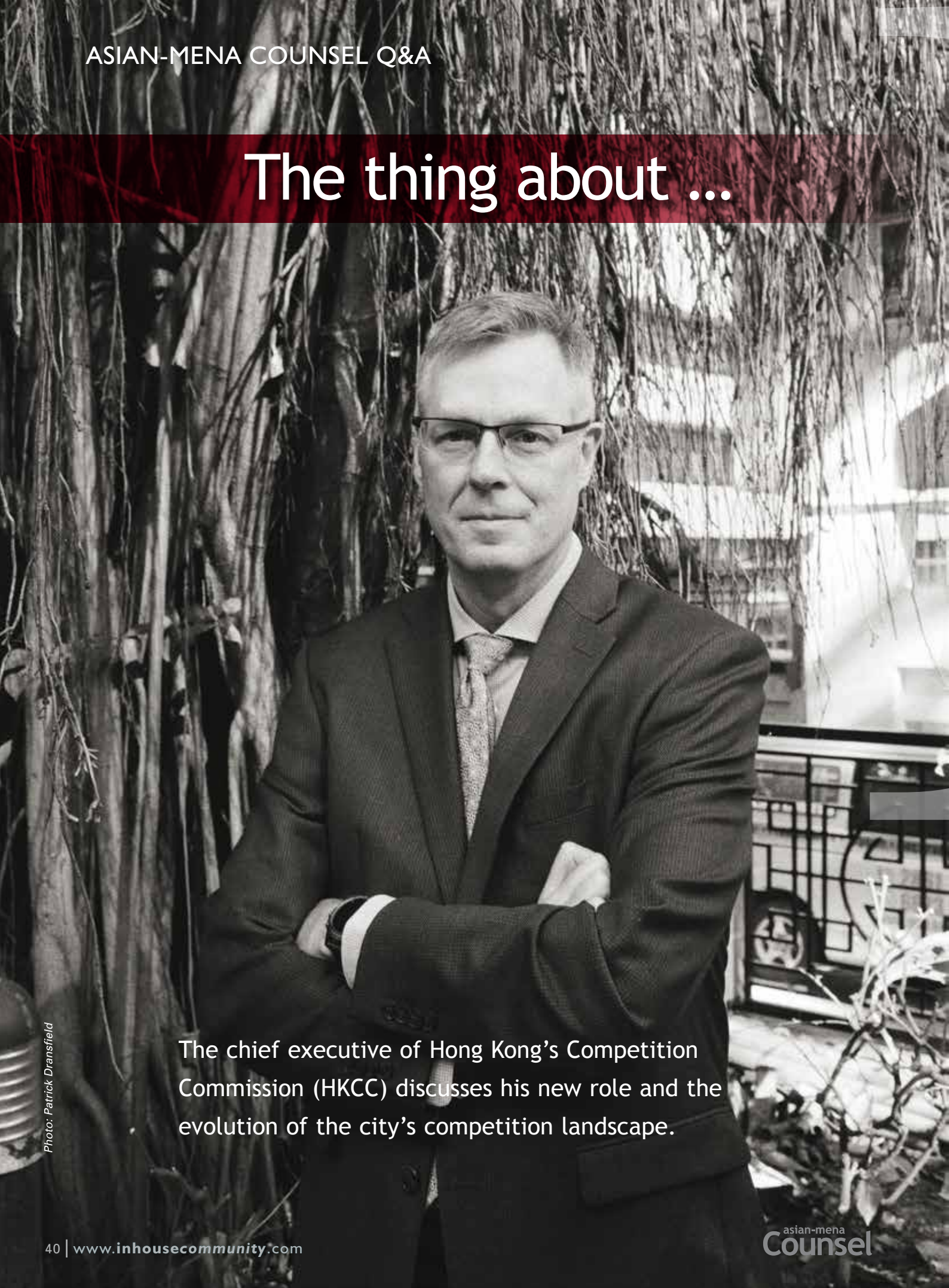

Photo: Patrick Dransfield

The chief executive of Hong Kong's Competition Commission (HKCC) discusses his new role and the evolution of the city's competition landscape.

Brent Snyder

Asian-Mena Counsel: Now that you've had a few months in the new role, what do you see as your primary goals during your term?

Brent Snyder: First and foremost, my goal is to work to ensure that the residents of Hong Kong receive the many benefits that flow from competition, including better, cheaper and more innovative products and services. That is why I am in this line of work. Achieving that will require a strong and effective HKCC.

We are still a new and developing agency. As a result, our internal focus is on consolidation, developing and retaining experience, and continued capacity and expertise building. We will become a more effective agency with greater experience.

Locally, we continue to investigate and bring cases that address competitive abuses. Our primary focus will remain hardcore cartels — price-fixing, bid-rigging, market sharing and output restrictions — which are the cardinal sins of competition law, although we will not ignore other anticompetitive agreements or abuse of market power that we uncover through our investigations. We will also partner with the government to ensure that its programs and initiatives are safeguarded from collusion and that its regulations and ordinances take into account any impact on competition.

There is also a significant international component to competition law enforcement. International liaison plays a vital role for competition agencies not only on the law enforcement front but also in terms of capacity building. We are and will remain actively engaged internationally.

AMC: What do you think will be the biggest challenges?

Snyder: In my last position at the US Department of Justice, Antitrust Division, I often said that the career staff was the backbone of the organisation and the key to its success. The same is equally true here. The Commission's success in carrying out its mission to promote and enforce competition will be the result of our staff, which makes developing and retaining an experienced staff a key priority and challenge. Much has already been done by the Commission, but it will continue to be a point of focus for me.

Similarly, properly prioritising our enforcement and policy work to maximise our resources and obtain results that benefit the greatest number of consumers and address the most significant competitive concerns is a challenge. I believe that the Commission has made very effective decisions about priorities to date, and this approach will continue to guide our work in the future.

Finally, getting results for consumers in a timely fashion while also managing expectations regarding the complexity of our work and the time and evidence needed to advance investigations to a resolution is important. I recently read that the average abuse of dominance investigation in the EU takes over three years, and I know that many US cartel investigations use all of the five-year statute of limitation. Against that measuring stick, the Commission's first two cases moved very quickly through the investigative process and to litigation, but not all investigations will, especially those presenting more complex issues of competition analysis.

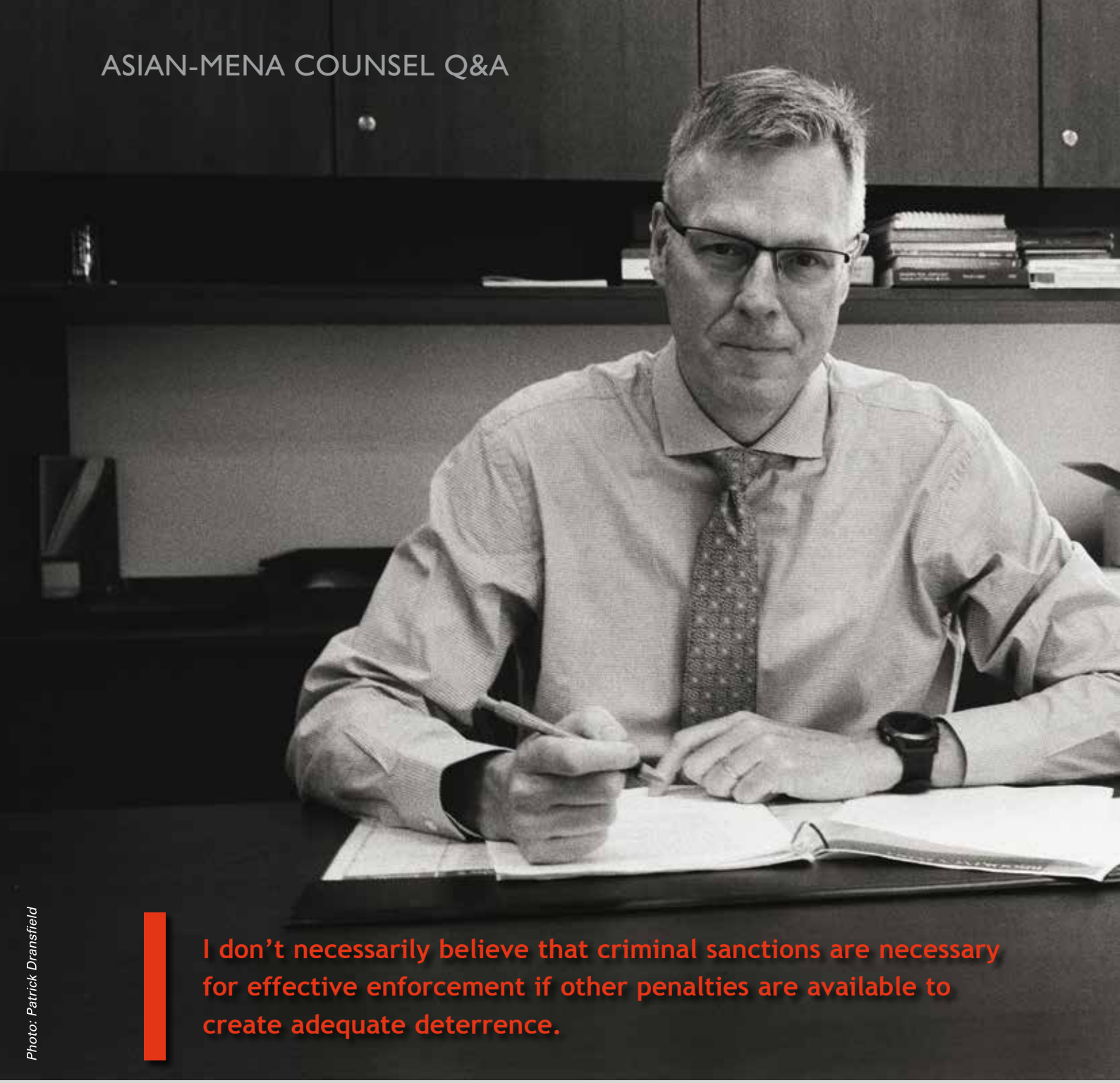

Photo: Patrick Dransfield

I don't necessarily believe that criminal sanctions are necessary for effective enforcement if other penalties are available to create adequate deterrence.

AMC: What are some of the biggest differences you've noticed compared to your experience with the US system?
Snyder: Although there are differences in the substance of the laws between the two jurisdictions, the similarities are greater than the differences. For example, there are significant similarities in the conduct prohibited in both jurisdictions, and the US and Hong Kong each have a prosecutorial approach to their respective competition law regimes.

As for the major difference, the US has an old and well established antitrust regime dating back to 1890, and the competition law there has been interpreted so often that one can find court decisions on virtually all aspects of the law, which aids in interpretation and understanding. By contrast, the Hong Kong Competition Ordinance is new and largely is yet to be interpreted. There is precedent from other jurisdictions on issues relevant to the interpretation of the Ordinance, but that precedent does not bind the court so there is at least some uncertainty until we begin to have a well-developed body of rulings.

AMC: Anti-competitive behaviour still isn't a criminal offence in Hong Kong — would you like to see tougher sanctions under the Competition Ordinance?
Snyder: It is premature for me to say whether tougher sanctions are needed in Hong Kong until we have seen what penalties are imposed in the Commission's enforcement actions and whether they appear sufficient to have a deterrent effect. Although I was in charge of criminal antitrust prosecutions in the US before coming to Hong Kong,

I don't necessarily believe that criminal sanctions are necessary for effective enforcement if other penalties are available to create adequate deterrence.

I am, however, a strong believer that effective deterrence requires holding both culpable companies and individuals accountable for competition misconduct. Upon familiarising myself with the Ordinance, I was pleased to see it allows for both. Under the Ordinance, there are pecuniary penalties for companies as well as individuals participating in cartel violations or serious anticompetitive conduct. The Commission can also seek disqualification of individuals who are at a sufficiently high level of the companies if they have been sufficiently involved and knowledgeable about the cartel activity. These are useful tools that can have individual serious consequences for cartelists. I will prioritise making use of these remedies and assessing their effectiveness here before I begin thinking about whether more severe sanctions would be a useful or necessary deterrent.

AMC: What about a general merger control regime — is that something you would expect Hong Kong to adopt?
Snyder: I know there were debates about that issue in connection with the passage of the Ordinance, and the competition regimes of most jurisdictions include merger control, but I have not been here long enough to draw any conclusions about whether Hong Kong needs it. I understand that the government intends to review aspects of the Ordinance after a period of time, so I will be giving thought to the issue.

AMC: How do you think the relationship between the ICAC and the Competition Commission will develop? It seems as though there could be overlap between some types of anti-competitive behaviour and corruption...
Snyder: The ICAC has been very supportive of the Commission during its initial phase, including by providing training, for which the Commission is appreciative. Additionally, a number of the Commission's investigators were previously with the ICAC, so the Commission also is benefiting from ICAC expertise in that way.

Substantively, there is some overlap in our mandates as both organisations have responsibility for bid-rigging, although in different forms. The Commission has been and will continue to work closely with the ICAC (as well as other law enforcement agencies where appropriate) to ensure a coordinated and effective approach to tackling such conduct.

AMC: Since you joined we've seen the Commission launch a set of TV and radio ads on market-sharing cartels and publish model "non-collusion clauses" for procurement practitioners. Can you explain some of the background to this campaign and what you're hoping it will achieve?
Snyder: Market sharing cartels can occur in any industry or sector. It may not be as commonly known in Hong Kong as some other forms of anticompetitive conduct such as bid-rigging, but it does exist, often in combination with other types of collusive conduct. For instance, bid-rigging is often a means of carrying out a market sharing cartel. Market sharing cartels inflict serious harm on consumers and businesses. The Commission's second case before the Competition Tribunal alleges market sharing and price fixing in the provision of renovation services for a public rental housing estate, and it is a classic example of market sharing.

Our initial enforcement cases have attracted significant public interest — especially our second case because it involves the housing sector, which is of great concern to most Hong Kong consumers. To capitalise on the public interest in market sharing from the filing of the second case, the Commission launched a "Combat Market Sharing Cartels" campaign in November 2017, comprising TV and radio

announcements, publications, educational videos, targeted seminars and a roving exhibition across the territory to better educate both the business community and general public about what market sharing is and why it is harmful. It has been very well received. For instance, the Commission's "A Bite of Conspiracy" education video, which is available on our website and on YouTube, has received more than 1 million views to date, which far exceeds the average government public education video.

We strongly encourage in-house counsel to take competition compliance seriously

As a further initiative, the Commission published a model "non-collusion clause" and certificate in December 2017. The aim of the models is to provide easily accessible exemplars for procurers to use to strengthen their defence against cartel conduct and other types of conduct that can distort competition in tender arrangements.

Through our advocacy efforts, we hope to raise public awareness of the different types of market sharing, call for compliance, give tips on how to detect it and encourage members of the public to report suspected cases to the Commission. The campaign has been effective in fostering a compliance culture and bringing suspected cartel conduct to our attention. This is reflected by a notable increase in the number of complaints received as well as growing requests for seminars since the launch of the campaign.

AMC: Are there any current cases that you can talk about? What is your outlook for enforcement actions?

Snyder: The Commission currently has two cases before the Tribunal. The Commission's first case was filed in March 2017, alleging that five technology companies rigged their bids in a tender related to the supply and installation of a new IT system for a social service organisation. In August 2017, the Commission brought its second case to the Tribunal, which, as mentioned, alleges that 10 construction and engineering companies engaged in market sharing and price fixing in the provision of renovation services for a public rental housing estate. Both cases are slated for trial next year, and they will serve an important role in developing precedent that will guide conduct of the business community as well as the Commission's future enforcement efforts.

The Commission will continue to prioritise matters that have the greatest potential consumer impact, with the pursuit of cartels being central to its enforcement efforts. However, I am also cognisant of the importance of pursuing other contraventions, such as abuse of dominance, where the facts support it, so that we can begin to develop the jurisprudence related to our entire Ordinance. I resist setting goals for particular numbers of cases, but we have some promising investigations and expect to bring enforcement actions in the coming months.

AMC: How important are in-house counsel to the work of the Commission?

Snyder: I was delighted to be asked for this interview. I am always eager for opportunities to engage directly with in-house counsel because they are on the front lines of the issues for which the Commission is responsible, and they are likely to be among the first to learn if there are competition problems. In companies fortunate to have them, in-house counsel play perhaps the most important day-to-day role in developing and monitoring compliance programmes, identifying risks, detecting potential anticompetitive conduct, making decisions about whether to seek leniency or cooperate with an investigation and generally helping to facilitate a culture of compliance. These are not easy tasks, and I know these tasks can sometimes be viewed as obstacles in some organisations, but prevention is always better than cure.

For that reason, advocacy to in-house counsel has been a focus of the Commission's work. We strongly encourage in-house counsel to take competition compliance seriously and to develop a compliance culture in their organisations. This can be done by internal training, regular assessments, as well as the adoption of policies and programmes to prevent organisations from running afoul of the Ordinance. However, this important work should not fall solely to in-house counsel. Proactive and vocal support and involvement by senior management is critical to the success of any efforts to instil a culture of compliance in any company.

AMC: What is your hinterland — what are your interests? And what has been your experience of living in Hong Kong?

Snyder: Pretty much anything you can do in the mountains — hiking, backpacking, mountaineering, ice climbing, etc. In fact, the Chinese name I have been given at work reflects that because it includes the name of a great mountain in China (Lun). I have already done quite a bit of hiking here and, along with my wife and dogs, am enjoying the many beautiful trails all over the territory. Hong Kong is a very beautiful place. Now, if it just had a glacier or two…

Brent Snyder was appointed to the position of chief executive officer of the Competition Commission in September 2017.

Prior to joining the Commission, Snyder served in the antitrust division of the US Department of Justice from 2003 until 2017, first as a trial attorney prosecuting division criminal matters, and as deputy assistant attorney general for criminal enforcement from 2013 until 2017, in which he was responsible for all criminal antitrust enforcement in the US. Prior to joining the government, Snyder practised law at Paul Hastings in Los Angeles and Perkins Coie in Seattle, where he was a partner.

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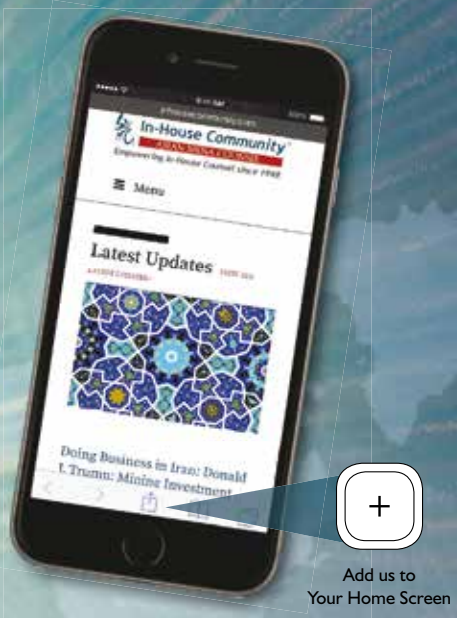

"The In-house Community website provides the window on the development of commercial law, practice and compliance in the growth markets of Asia and the Middle East"

Dr Justine Walker, *advisor to the* British Banking Association

Old wine in a new bottle or thinking about thinking

"The future is already here; it's just not evenly distributed"
– William Gibson

By Patrick Dransfield, Co-Director of **In-House *Community***

Mark Cohen recently wrote a succinct and upbeat article for Forbes on law's emerging global community. He defines this new community, the foundation of which is social media, as "transparent, collaborative, diverse, cross-border, problem-solving, tech and process-centric, interdisciplinary, merit-centric, flat, pedigree-agnostic and innovative".

What's not to like? For the baby boomers approaching retirement, quite a bit it seems. And I assure you, you are not alone if you fail to recognise this brave new legal world from where you are sitting. Indeed, assuming that Cohen's world view is not wrong and that we are indeed living in a world of change and disrupters, how is it that BigLaw (Latham & Watkins, Clifford Chance, White & Case as examples) are currently celebrating record revenues?

To begin to bring some light on this, I am going to draw on thinkers outside of the legal industry that have nonetheless thought about the Hegelian contradictions inherent in this period of digital change.

One such is the FT's Underground Economist, Tim Harford. In a recent column, he re-examined why "just because good ideas emerge does not mean that they spread quickly". Drawing on various sources, including Everett Rogers, professor of rural sociology, Harford examines the adoption of innovation among individuals and organisations, and asserts: "Good advice can work, but even good advice wears off. And we can all be resistant to new ideas. The status quo is comfortable, especially for the people who get to call the shots."

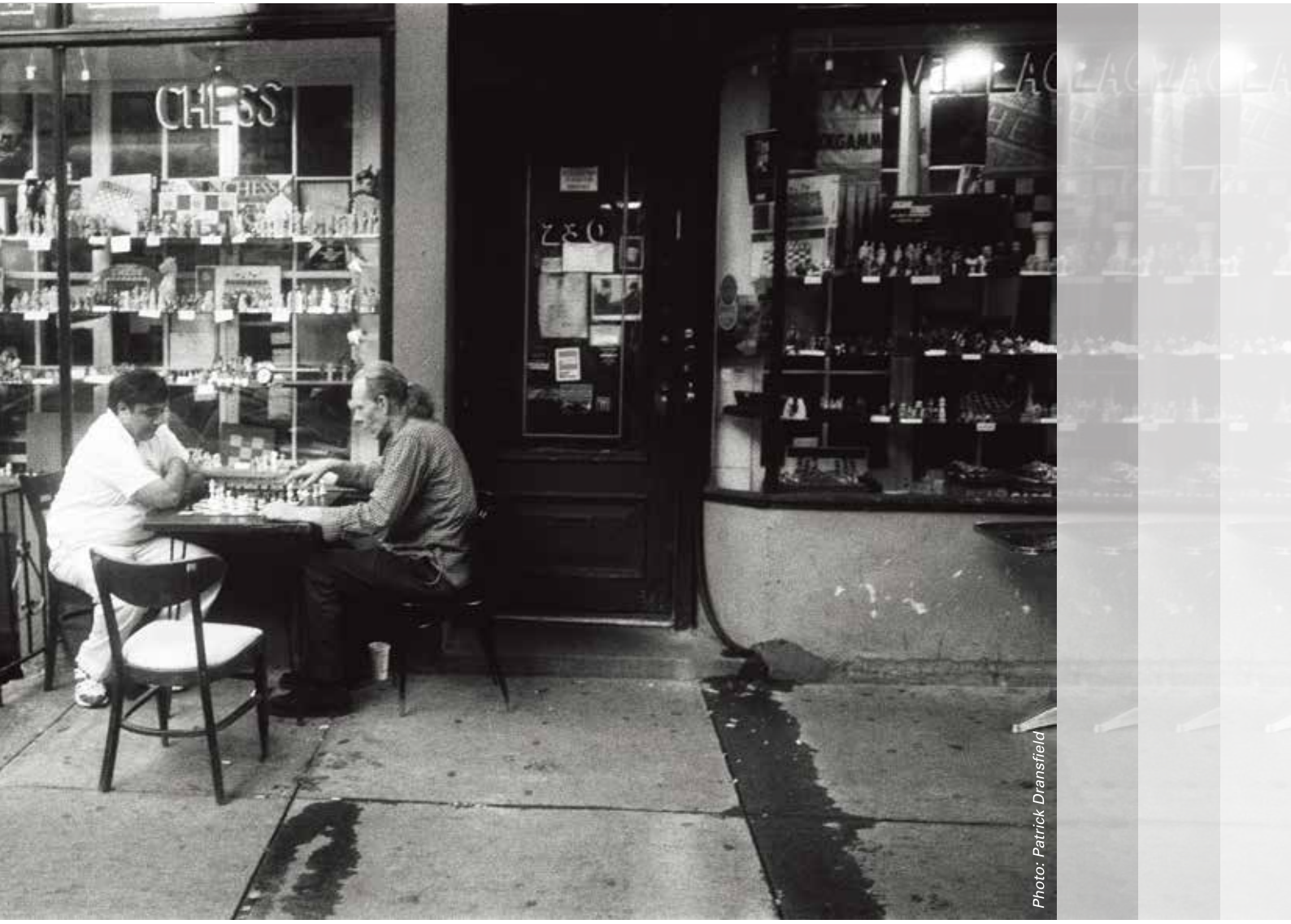

Photo: Patrick Dransfield

"Well what can a poor boy do, 'cept play in a rock'n'roll band?"

So sang Mick Jagger in 1968. Mick should be the patron saint of the baby boom legal generation as we negotiate our exit from the business of law. When asked how he felt about the fact that due to Spotify the new generation of musicians were never going to be as rich as him, he simply replied "my heart bleeds". And scratch the surface of any gathering of senior external lawyers and the Jagger sentiment soon presents itself — "What do we care, we are retiring soon." Move like Jagger.

Rogers' categories of adoption of innovation is quite instructive on this point, as the originator of the concept of 'early adopters': they are innovators, early adopters, early majority, late majority and laggards.

Back to Harford: "And for all the talk of relentless change, there is evidence that US industry is becoming less dynamic: there are fewer shocks, and companies respond less to them. The OECD research, too, suggests that the productivity laggards tend to be further behind in markets that are over-regulated or otherwise shielded from competition".

Any of this sound familiar? The exploration of whether various bar councils are helping or hindering their charges long term through paternalism is an area to be explored another day and by minds better than mine. However, it is clear that the legal community is not the only arena subject to disruption.

"In the last few years, we've moved from an information-scarce economy to one driven by an information glut," said the British author and commentator Neil Gaiman. "According to Eric Schmidt [ex-executive chairman] of Google, every two days now the human race creates as much information as we did from the dawn of civilisation until 2003. …We are going to need help navigating that information to find the thing we actually need."

From right to left: Stephen Revell, partner, Freshfields; Hermann Knutt, founding partner, Andersen Tax & Legal; Crystal Lalime, head of Asia-Pacific global markets legal, Credit Suisse; Susannah Lindenfield, managing director, legal and compliance, Blackstone; Henry Shyn, general counsel, GE Korea; and Steven Yeo, general counsel, Asia, Manulife Financial; at the IBA Law Firm Management Conference, January 19, 2018, Hong Kong

Weaving through data, there does appear to be a place for good old-fashioned lawyering after all — the need for clear-headed guidance and sound business advice based on solid legal and ethical principles has never been more in demand. But, before opening that bottle of Dom Perignon, it is imperative that lawyers think clearly and decisively about what constitutes advice and what actually holds value for the client. I want therefore to actually think about what it means to be able to give valuable advice to your client. To think about thinking.

At the IBA senior legal managers' a recent IBA law firm management conference, held in Hong Kong, Steven Yeo, general counsel for Asia at Manulife, confirmed my hunch that in-house counsel are nowadays mainly looking for advice from outside counsel in areas that the in-house team has less experience in. "One of the key differentials between law firms is the individual experience of the senior partner," Steven told me.

Most senior lawyers give valuable advice to their clients every week, but in my experience at least, rarely do they reflect on this. Also, unless one is truly remarkable, one gets muddled between the two prevailing modes of thinking identified by Nobel-prize winning economist Daniel Kahneman, who labelled them:

- System 1 — fast, instinctive and emotional
- System 2 — slower, more deliberate and more logical

Kahneman concludes that all of us experience a cognitive bias. We all have a tendency to replace complex questions with easy answers. Thus, we muddle System 2 thinking with System 1 thinking, believing that we are applying deliberate and logical thought processes to a problem when in fact we are applying fast, impulsive and emotional bias to the problem in hand. This contradiction is articulated in a different way by management consultancy guru, the late Peter Drucker, when he said: "We know what we are good at. We are usually wrong."

Let's take a closer look at System 2 thinking, as it may apply to the practice of law. Kahneman takes the situation of the almost seemingly magical prescience of a chess maestro to illustrate System 2 thinking in action: "We have all heard such stories of expert intuition: the chess master who walks by a street game and announces 'White mates in three' without stopping. …Expert intuition strikes us as magical, but it is not."

The chess maestro's judgment is based on thousands of hours of practice and, while looking like a fast, instinctive and emotional response, is actually both deliberate and logical. Closer to Asia, we can think of the work of the 18th century Zen monk Hakuin Ekaku, whose calligraphic brush strokes took exactly three minutes, but were based on 40 years of practice.

This is worth thinking about for lawyers; I can bet

Circle Ensou (円相) and poem by Zen monk Hauin Ekaku (白隠 慧鶴), mid Edo period, early 18th century C.E., Eisei Bunko Museum, Tokyo

my bottom dollar that many of the senior lawyers among you can with unerring accuracy predict the likely series of problems I am going to have in two years' time with a joint venture with a local company, say. Indeed, senior lawyers have more than 30,000 billable hours of deliberate practice to draw upon. What clients are looking for from you is System 2 thinking: deliberate and logical — wisdom, if you will. This is the golden egg — the advice that can be in a simple word, "Yes" or "No", but built on 30 years of experience. Senior practitioners would be well served if they placed a high dollar value on System 2 advice and therefore moved away from the dreaded billable hour.

But, what happens when we muddle System 2 thinking for System 1 thinking? The life work of Kahneman and his partner, the late Amos Tversky, looked closely at the remarkable features of the human mind and exposed the faults and biases of fast thinking. And the faults and biases of fast thinking are evident in the practice of law. According to David Tang, Asia managing partner of K&L Gates: "The law is a mature profession and an immature business."

Examples within the international expansion of Western law firms during the past 20 years are prevalent. One example is the gold rush which took place around 2012 to Abu Dhabi, where 12 international law firms opened shop in Sowwah Square. Few, it seemed to me, had really analysed the true nature of the market, considered the needs of the eight potential major clients, thought about the local legal market and the incumbent legal players. The majority of 'The Sowwah dozen" opened offices with the mentality of "build it and they will come". Of those 12, only six remain in Sowwah Square.

Kahneman sums up the problem thus: "Expertise is not a single skill: it is a collection of skills, and the same professional may be highly expert in some tasks in her domain while remaining a novice in others." Put in perhaps a less charitable way, partners in law firms should be encouraged to reflect more deeply and know what they are good at (and charge accordingly): know what they are not good at — and get tools and people to supplement them in those areas. And have the confidence to charge the actual value of the wise advice that you are giving to your client.

I will leave you to ponder two economists, with more than 200 years bridging their pronouncements of wisdom — Harford and the Scottish economist and moral philosopher Adam Smith.

"All too often, we don't pick up good ideas willingly," says Harford. "We grasp for them, in desperation, only when we have no choice."

"This is a warning against the person who seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess board," wrote Smith.

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Website: www.bun-associates.com
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SCL SP&P Company Limited (Cambodia) (SCL Law Group)
Tel: (856) 21 222 732-3
Email: varavudh@la.scl-law.com
Contact: Varavudh Meesaiyati
Website: www.siamcitylaw.com
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LAOS:

SCL Law Offices Limited (Lao PDR) (SCL Law Group)
Tel: (856) 21 222 732-3
Email: info@la.scl-law.com
Contact: Nilobon Tangprasit
Website: www.siamcitylaw.com
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MYANMAR:

Myanmar Legal Services Limited
Tel: 951-657792; 951-650740
Email: info@mlslyangon.com
Contacts: Daw Khin Cho Kyi (kckyi@mlslyangon.com)
Guillaume E. Stafford (gui@mlslyangon.com)
Website: www.myanmarlegalservices.com
CMA E ENR PF RE

Siam City Law (Myanmar) Company Limited (SCL Law Group)
Tel: (951) 653348-49
Email: siamcitylaw@siamcitylaw.com
Contact: Vira Kammee
Website: www.siamcitylaw.com
CM CMA E IP PF

CHINA

AWA IP (Beijing) Co., Ltd.
Tel: 86 10 8573 1125
Email: ai-leen.lim@awapatent.com
Contact: Ai-Leen Lim
Website: www.awapatent.com
IP TMT

Broad & Bright
Tel: 8610 8513 1818
Email: broadbright@broadbright.com
Contacts: Mr Jun Ji (Jun_ji@broadbright.com)
Website: www.broadbright.com
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East & Concord Partners
Tel: (86) 10 6590 6639
Email: Beijing@east-concord.com
Contact: Mr. Qi Zhou
Website: www.east-concord.com
BF CM CMA IP LDR

HHP Attorneys-At-Law
Tel: (86) 21 5047 3330
Email: Yao.Rao@hhp.com.cn
Contacts: Mr. Yao RAO
Website: http://www.hhp.com.cn
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Llinks Law Offices
Tel: 8621-31358666
Email: master@llinkslaw.com
Website: www.llinkslaw.com
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HONG KONG

AWA Asia Limited
Tel: (852) 3959 8880
Email: ai-leen.lim@awapatent.com
Contact: Ai-Leen Lim
Website: www.awapatent.com
IP TMT

INDIA

Anand and Anand AMC 2015 2016 2017
Tel: (91) 120-4059300
Email: pravin@anandandanand.com
Contact: Pravin Anand (Managing Partner)
Website: www.anandandanand.com
IP LDR

Clasis Law
Tel: +91 11 4213 0000 / +91 22 4910 0000
Email(s): info@clasislaw.com
Contact(s): Vineet Aneja / Mustafa Motiwala
Website: www.clasislaw.com
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INDONESIA

Ali Budiardjo, Nugroho, Reksodiputro AMC 2013 2014 2015
Tel: (62) 21 250 5125/5136
Email: info@abnrlaw.com
infosg@abnrlaw.com
Contacts: Emir Nurmansyah
Nafis Adwani
Agus Ahadi Deradjat
Email: enurmansyah@abnrlaw.com
nadwani@abnrlaw.com
aderadjat@abnrlaw.com
Website: www.abnrlaw.com
FS BF CM CMA ENR PF

Assegaf Hamzah & Partners AMC 2015 2016 2017

Jakarta Office:
Tel: (62) 21 25557800
Email: info@ahp.co.id
Contacts: Fikri Assegaf (ahmad.assegaf@ahp.co.id)
Bono Adji (bono.adji@ahp.co.id)
Eri Hertiawan (eri.hertiawan@ahp.co.id)
Eko Basyuni (eko.basyuni@ahp.co.id)

Surabaya Office:
Tel: (62) 31 5116 4550
Contact: Yogi Marsono (yogi.marsono@ahp.co.id)
Website: www.ahp.co.id
MR BF CM CMA LDR PF

Lubis Ganie Surowidjojo
AMC 2015 2016 2017

Tel: (62) 21 831 5005, 831 5025
Email: lgs@lgslaw.co.id
Contacts: Timbul Thomas Lubis, Dr. M. Idwan ('Kiki') Ganie, Arief Tarunakarya Surowidjojo, Abdul Haris M Rum, Harjon Sinaga, Rofik Sungkar, Dini Retnoningsih, Mochamad Fajar Syamsualdi and Ahmad Jamal Assegaf.
Website: http://www.lgslaw.co.id
MR LDR PF CMA COM INS

Makarim & Taira S.
AMC 2015 2016 2017

Tel: (62) 21 252 1272, 520 0001
Email: info@makarim.com
Contact: Rahayu Ningsih Hoed
Website: www.makarim.com
FS BF CMA E LDR PF

Mochtar Karuwin Komar
AMC 2011 2015 2017

Tel: (62) 21 5711130
Email: mail@mkklaw.net / ek@mkklaw.net
Contact: Emir Kusumaatmadja
Website: www.mkklaw.net
AV CMA ENR LDR PF

SSEK Legal Consultants
AMC 2015 2016 2017

Tel: (62) 21 521 2038, 2953 2000
Email: ssek@ssek.com
Contact: Rusmaini Lenggogeni (Managing Partner)
Website: www.ssek.com
Blog: Indonesian Insights (http://blog.ssek.com/)
Twitter: @ssek_lawfirm
FS BF CMA ENR MS RE

MALAYSIA

Azmi & Associates
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Tel: (603) 2118 5000
Email: general@azmilaw.com
Contact: Dato' Azmi Mohd Ali (Senior Partner)
Website: www.azmilaw.com
MR BF CM CMA ENR PF

Raja, Darryl & Loh
AMC 2015 2016 2017

Tel: (603) 2694 9999
Email: rdl@rdl.com.my
Contact: Dato' M. Rajasekaran
Website: http://www.rajadarrylloh.com
MR CMA IP LDR RE TX

Trowers & Hamlins LLP
AMC 2015 2016 2017

Tel: (601) 2615 0186
Email: nwhite@trowers.com
Contact: Nick White, Partner
Website: www.trowers.com
MR BF CMA ENR IF PF

PHILIPPINES

ACCRALAW (Angara Abello Concepcion Regala and Cruz Law Offices)
AMC 2015 2016 2017

Tel: (632) 830 8000
Email: accra@accralaw.com
Contacts: Emerico O. De Guzman
Regina Padilla Geraldez
Neptali B. Salvanera
Website: www.accralaw.com
MR CMA E IP LDR TX

Morales Justiniano Peña & Lumagui
Tel: (632) 834 2551; (632) 832 7198; (632) 833 8534
Email: ramorales@primuslex.com
Contact: Mr. Rafael Morales - Managing Partner
Website: www.primuslex.com
BF CM CMA IP LDR

SyCip Salazar Hernandez & Gatmaitan
AMC 2015 2016 2017

Tel: (632) 9823500; 9823600; 9823700
Email: sshg@syciplaw.com
Contact: Hector M. de Leon, Jr. - Managing Partner
Website: www.syciplaw.com
MR BF CMA E ENR PF

Villaraza & Angangco
AMC 2017

Tel: (632) 9886088
Email: fm.acosta@thefirmva.com
Contacts: Franchette M. Acosta
Website: www.thefirmva.com
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SINGAPORE

Advocatus Law LLP
Tel: (65) 6603 9200
Email: enquiry@advocatus.sg
Contact: Christopher Anand Daniel, Managing Partner
Email: christopher@advocatus.sg
Website: www.advocatus.sg
CMA E IA LDR RES

Eversheds Harry Elias LLP
Tel: (65) 6535 0550
Email: contactus@eversheds harryelias.com
Contact: Philip Fong, Managing Partner,
Email: philipfong@eversheds-harryelias.com
Website: www.eversheds-harryelias.com
CMA IA LDR RE RES

Providence Law Asia LLC
Tel: (65) 6438 1969
Email: abraham@providencelawasia.com
Contact: Abraham Vergis, Managing Director
Website: www.providencelawasia.com/
CMA IA LDR RE RES

SOUTH KOREA

Bae, Kim & Lee LLC
AMC 2015 2016 2017

Tel: (82 2) 3404 0000
Email: bkl@bkl.co.kr
Contact: Kyong Sun Jung
Website: www.bkl.co.kr
MR FS CM CMA IA LDR RE

Cho & Partners
AMC 2012

Tel: (82-2) 6207-6800
Email: ihseo@cholaw.com
Contact: Tae-Yeon Cho, Ik Hyun Seo
Website: www.cholaw.com
IP LDR

Jipyong
AMC 2012 2016

Tel: (82-2) 6200 1600
Email: hglee@jipyong.com
Contact: Haeng-Gyu Lee (Partner)
Website: www.jipyong.com
FS COM BF CMA RE LDR

Kim & Chang
AMC 2015 2016 2017

Tel: (82-2) 3703-1114
Email: lawkim@kimchang.com
Website: www.kimchang.com
MR FS BF COM CMA IP LDR

Lee International IP & Law Group
AMC 2014 2015 2017

Tel: (82 2) 2262 6000
Email: law@international.com.
Website: www.leeinternational.com
CMA IA IP LDR RE

Shin & Kim
AMC 2015 2016 2017

Tel: (82 2) 316 4114
Email: shinkim@shinkim.com
Contact: Sinseob Kang – Managing Partner
Website: www.shinkim.com
MR FS COM BF CMA LDR RE

Yoon & Yang LLC
AMC 2015 2016 2017

Tel: (82 2) 6003 7000
Email: yoonyang@yoonyang.com
Contacts: Seung Soon Lim; Seung Soon Choi; Jinsu Jeong
Website: www.yoonyang.com
MR COM E IP LDR TX

Yulchon LLC
AMC 2015 2016 2017

Tel: (82 2) 528 5200
Email: mail@yulchon.com
Website: www.yulchon.com
MR FS COM CMA IP LDR TX

TAIWAN

Deep & Far Attorneys-at-Law
Tel: (8862) 25856688
Email: email@deepnfar.com.tw
Contact: Mr. C. F. Tsai
Website: www.deepnfar.com.tw
COM CM E IP LDR

THAILAND

Chandler MHM Limited
AMC 2015 2016 2017
Tel: (66) 2266 6485
Email: jessada.s@chandlermhm.com
satoshi.kawai@chandlermhm.com
Contacts: Jessada Sawatdipong
Satoshi Kawai
Website: www.chandlermhm.com
MR BF CMA ENR PF REG

Siam City Law Offices Limited (SCL Law Group) AMC 2016 2017
Tel: (66) 2 676 6667-8
Email: siamcitylaw@siamcitylaw.com
Contact: Chavalit Uttasart
Website: www.siamcitylaw.com
MR BF CMA E RE TX

Weerawong, Chinnavat & Partners Ltd.
AMC 2017
Tel: (66) 2 264 8000
Email: Chinnavat.c@weerawongcp.com
Veeranuch.t@weerawongcp.com
Contacts: Chinnavat Chinsangaram (Senior Partner)
Veeranuch Thammavaranucupt (Senior Partner)
Website: www.weerawongcp.com
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Hanoi Office:
Tel: (844) 3795 5261
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