asian-mena Counsel

Volume 15 Issue 2, 2017

Projects & Energy Special Report

Plus ...

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Kirsty Dougan, managing director of Axiom, on disruption

Network security
Are you ready for China's new protection requirements?

Investigative Intelligence
The link between environmental destruction and corruption

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JURISDICTION UPDATES

Key legal developments affecting the In-House Community along the New Silk Road

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Right to privacy and data protection in India

The concept of data protection and privacy has not been addressed in any exclusive comprehensive legislation in India. However, the Supreme Court of India through a recent landmark judgment has heralded right to privacy as a fundamental right guaranteed to an Indian citizen under Article 21 of the Constitution of India. Such right to privacy impliedly includes the protection of personal and sensitive data of a person such as age, sex, date of birth or sexual orientation (which are all important aspects of dignity).

Right to privacy and data protection

The sphere of privacy stretches at one end to those intimate matters to which a reasonable expectation of privacy may attach. It expresses a right to be left alone. A broader connotation which has emerged in academic literature of a comparatively recent origin is related to the protection of one's identity. Data protection relates closely with the latter sphere.

On August 24, 2017, in a landmark nine-bench ruling, the Apex Court in Puttaswamy vs Union of India unanimously declared right to privacy as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution of India.

On the point of data protection, the Apex Court has ordered the government to ensure a "robust regime for data protection" that would deliver "a careful and sensitive balance between individual interests and legitimate concerns of the state" is put into place soon.

Data protection

The Information Technology Act, 2000 (Act) contains specific provisions intended to protect electronic data (including non-electronic records or information that has been, is currently or is intended to be processed electronically). The Act was subsequently amended in 2008 to provide for protection of "sensitive personal data or information" (SPDI) and deal with compensation for negligence in implementing and maintaining reasonable security practices and procedures in relation to SPDI. SPDI includes passwords, financial information, such as bank account or credit card details, physical, physiological and mental health condition, sexual orientation, medical records and history, and biometric information.

> "It is imperative for foreign companies establishing business in India to ensure that their local Indian entity adheres to Indian data privacy and data protection law requirements"

On the point of SPDI, the Ministry of Communications and Information Technology adopted the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (Rules). The Rules relate to SPDI and are applicable to a body corporate or to any person located within India. Outsourcing companies/ intermediaries located within or outside India are exempt from the provisions of collection and disclosure as set out under the Rules, however, a body corporate providing services to an information provider directly under a contractual obligation is not exempt from these provisions.

Corporate obligations

A body corporate providing services relating to collection, storage, dealing or handling of SPDI under contractual obligation with any information provider shall be subject to compliance of the Rules. Information providers are those natural persons who provide SPDI to a body corporate.

To sum up, the Rules broadly regulate the: (a) collection, receipt, possession, use, storage, dealing or handling of SPDI; (b) transfer or disclosure of SPDI; (c) security procedures for protecting SPDI; (d) transfer of SPDI outside India; and (e) disclosure of SPDI to the Government.

Conclusion

Data privacy and data protection laws by their very nature need to be dynamic, constantly expanding and improving to deal with new impediments and hindrances. One such hindrance was the recent WannaCry ransomware cyber-attack which affected many globally. At the same time, domestically, one such encouraging step towards data protection is the Supreme Court case ruling on 'right to privacy'.

It is imperative for foreign companies establishing business in India to ensure that their local Indian entity adheres to Indian data privacy and data protection law requirements even if the local entity has been following global best practices in this regard. Further, the privacy policies and other related policies of a body corporate should be in line with the Rules so as to protect the SPDI of the information provider.

Stand Out With Hughes-Castell

In-house

Senior Legal Counsel | 10-12 yrs pqe| SG/HK REF: 14199/AC

This multinational FINTECH company needs a Senior Legal Counsel with strong regulatory compliance skills to oversee its fast-growing business line. Based in Singapore or Hong Kong with substantial travel required, you will primarily be responsible for providing expert and strategic legal support on its global financial technology businesses. Ideally, you are US/UK/Commonwealth qualified lawyer with over 10 years' PQE in card schemes and funds transfer at financial institutions with experience in the FINTECH industry highly desirable. A capable team player with the ability to meet deadlines in a fast-paced environment is preferred, together with an excellent command of both spoken and written English and Mandarin.

Senior Lead Counsel, APAC | 8-10 yrs pqe | SG/HK REF: 14198/AC

This global FINTECH company is searching a Senior Lead Counsel with solid regulatory compliance experience to support its businesses in the ASEAN region. Based in Singapore or Hong Kong, you will be responsible for providing legal, regulatory and compliance support on business operations, operating policies, standards and investment projects across the region. Ideally, you are UK/US/Commonwealth qualified lawyer with at least 8-10 years' PQE in financial institutions or in FINTECH companies. Strong regulatory compliance knowledge related to the FINTECH business is essential, together with a good understanding of relevant licensing laws and regulations in the regions. A highly motivated team player with the ability to work independently in a fast-paced environment is preferred. You must have fluent English and Mandarin skills.

Legal Counsel | 8+ yrs pqe | China REF: 14207/AC

This Fortune 500 financial services company is seeking a qualified lawyer with over 8 years' PQE to join its expanding China legal team. Based in Beijing or Shanghai, you will assist the Head of Legal to provide legal advice and support on contract drafting/negotiating and complex deals. Ideally, you are PRC and/or Common Law qualified with over 8 years' PQE in leading national/international law firms or in MNCs. Knowledge of antitrust, anti-bribery, privacy and IP law is highly desirable. You must have excellent communication skills plus fluent English and Mandarin.

AVP, Derivatives | 4-7 yrs pqe | Hong Kong REF: 14194/AC

A well-known global investment bank is looking for an experienced derivatives lawyer/ISDA negotiator to support its Hong Kong office. You will be part of a high calibre legal team to advise and support on derivatives transactions across Asian jurisdictions. You will draft and negotiate ISDA Master Agreements, provide on-going consultation and co-ordination with internal business units and external counsels, and ensure legal risks abide by bank's policy and guidelines. In addition, you will advise and support the implementation of global regulatory changes and their impact on derivatives. Ideally, you will be a Commonwealth-qualified lawyer/ISDA specialist with 4 to 7 years' experience in derivatives at a financial institution or in legal private practice. Strong interpersonal and communications skills with fluent Mandarin are essential.

Legal Counsel | 4-5 yrs pqe | Singapore REF: 14205/AC

A leading regional investment bank is seeking a Singapore qualified lawyer with solid knowledge of capital markets and IPO to join its Singapore office. You will be responsible for providing legal advice on regulatory compliance and contract drafting/negotiating. Ideally, you have a law degree from a reputable law school with at least 4-5 years' PQE at leading investment banks or at top-tier capital markets practices in law firms. Familiarity of equity capital market operations is essential for this role. A capable team player with the ability to work independently under pressure is preferred. Strong drafting skills are a must, in addition to fluent Mandarin to communicate with colleagues/clients from China.

Private Practice

TMT Partner | 10+ yrs pqe | Hong Kong REF: 14180/AC

This international law firm is looking to make a Partner-level hire into its technology, media and telecoms team in Hong Kong due to its continued growth. You will be responsible for handling outsourcing deals, commercial contracts, data privacy and cyber security work for their global client base. A mix of contentious and non-contentious experience would be a huge bonus. You must possess solid market knowledge of the Asia TMT sector.

Banking & Finance Partner | 7+ yrs pqe | Shanghai REF: 14189/AC

Excellent opportunity for a Banking and Finance Partner to join this thriving team of a top-tier law firm in Shanghai. You will play a lead role in further developing this team working in tandem with lawyers in banking, private equity, IPO, and structured and project finance. Ideally, you are PRC qualified with proven experience in general banking work at leading banking and finance practices. Established track record is highly desirable but not essential. You must have fluent English and Mandarin skills for the role.

M&A/FDI Partner | 7+yrs pqe | China REF: 14188/AC

A reputable international law firm is seeking a junior partner or experienced partner with revenue to join its expanding M&A/FDI team in Beijing or Shanghai. You will be working closely with their corporate team advising multinational corporations on high-profile transactions across China. Significant transactional experience of the China market along with a strong local relationship with regulators is essential. You must have PRC legal qualification plus fluent English and Mandarin skills.

Corporate Lawyer | NQ-1 yr pqe | Hong Kong REF: 14208/AC

This award-winning offshore law firm is seeking a junior Corporate Lawyer to join its Hong Kong team, one of the most active and regarded in the region. The ideal candidate will have top-tier law firm training and experience in corporate work. Commonwealth qualification is a must. You must have fluent written and oral English, Cantonese and Mandarin for the role.

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The risk of government force majeure under PPA

The electricity industry is known to be a complicated but important industry, where external factors that are beyond the control of the parties involved can cause problems to the progress and/or cost of the projects. Some risks can be tackled through the proper application of risk management if they are known ahead. However, the same cannot be said for unforeseeable risks. The risk of government force majeure is one of these risks that can pose significant threats and uncertainties to a project.

The electricity business in Indonesia is unique, as the only two parties to the power purchase agreement (PPA) are usually a private sector developer, and a state-owned utility company (PLN). The basic principle of proper risk allocation is that risk should be assigned to the party best positioned to mitigate its impact. Naturally, in Indonesian PPA models, the state-owned entity shall take responsibility for actions and/or inactions of the state.

This means that PLN should fully accept the financial impact to developers for such events in the form of tariff adjustments or, in the case of prolonged delays of the project due to government force majeure (usually exceeding 180 days), PLN must purchase the project for an amount agreed in the PPA if the developer chooses to terminate the PPA. This has been the practice in Indonesia's PPA models for years.

When the Minister of Energy and Mineral Resources issued Regulation No. 10 of 2017 on Main Provisions for Power Purchase Agreements (MEMR Regulation 10/2017) on January 23, 2017, there were strong reactions in the market. This regulation provides that both PLN and the developers will together take responsibility for government force majeure events, which are defined as changes in policies or regulations. This shifts the risk traditionally borne by PLN to the developer. The Article 28 paragraph 7 of MEMR Regulation 10/2017 implies that where the project is terminated due to a government force majeure, then PLN has no obligation to buy out the project.

> "It was crucial for the market to know whether the coverage of force majeure under government guarantees that had been issued for several IPP projects in the past were still valid"

MEMR Regulation No. 10/2017 sparked more controversy because it affected risk allocation under the government guarantee for eligible independent power producer (IPP) projects in the form of business viability guarantee letters issued based on Minister of Finance Regulation No. 130/PMK.08/2016 of 2016 on The Procedures of The Issuance of Government Guarantee for the Acceleration of Electricity Infrastructure Provision (MoF Regulation 130/2016). Based on this regulation the government would guarantee PLN's financial obligations, including its obligations arising from political risk. Political risk in the MoF Regulation 130/2016 is defined as unjustified government action or inaction and/or change in law. In other words, government force majeure as a project risk could be covered under the government guarantee. However, by the issuance of MEMR Regulation 10/2017 it became uncertain whether the government could still guarantee such risks for new projects for which PPAs had not yet been signed. In addition, it was crucial for the market to know whether the coverage of political/government force majeure under government guarantees that had been issued for several IPP projects in the past were still valid.

Complaints from private sector developers resulted in the issuance of MEMR Regulation No. 49 of 2017 on the Amendment of Regulation 10/2017 on August 8, 2017 (MEMR Regulation 49/2017). There is significant change from MEMR Regulation 10/2017 to MEMR Regulation 49/2017. This amendment removed the risk of government force majeure from the list of risks that must be covered together by the developer and PLN. It means parties to the PPA are free to negotiate and can agree on risk allocation, particularly on government force majeure, as previously practised in other PPA models in Indonesia. It also means the political risk as mentioned in MoF Regulation 130/2016 can still be covered under the government guarantee.

Although, the issues within MEMR Regulation 10/2017 are not only concerning government force majeure risk being shifted to the developers, addressing this issue was indeed a completion of one major task in order to reassure developers and lenders that the new generation of PPAs in Indonesia still provide a model in which they are willing to invest.

The JLegal PQE

Personality Questionnaire Experience

Every month, JLegal examines the PQE of a senior in-house counsel. This month we talk to Wei Kurk Fong, an adventurous traveller with a love of gangster movies.

- **What is on your mind at the moment?**
  How to be a better version of myself.
- **What secret talent do you have?**
  I have the ability to read minds. See, I know what you're thinking now. You just went "yah right!"
- **If you weren't a lawyer you would be a ...**
  PE teacher, which I was at one point in my career. Helping kids learn to play a sport and get fitter is one of the best feelings of accomplishment.
- **Where is the best place you have ever been to?**
  Wow...I could name so many interesting places. If I have to choose one, it'd be the Gobi desert in Mongolia. There's nowhere else where you can find desert, lush plains, glaciers, snowy hills, dinosaur fossils, giant sand dunes and rockscapes resembling Mars, all in one place!
- **What is your idea of misery?**
  Proofreading an IPO prospectus from cover to cover. Did an all-nighter in my first week of pupillage doing that and just wanted to die.
- **What irritates you?**
  Lack of patience.
- **What is the strangest thing you have seen?**
  Houses in rural Vietnam made from any and every thing - wood, straw, mud, etc. It's like seeing the Three Little Pigs in real life!
- **What is your motto?**
  Be excellent in everything.
- **Top 3 favourite movies of all time?**
  Forrest Gump, Infernal Affairs (the original Hong Kong version please, not the Hollywood copycat) and the Young and Dangerous series. Man, being a gangster was never cooler...
- **What was your last Google search?**
  What that Norwegian sheep's head dish was called (see below).
- **What's the one food you could never bring yourself to eat?**
  Balut. And probably Smalahove. I already consider myself an adventurous eater!
- **Which of the Seven Dwarfs is most like you?**
  Growing up I was Sneezy Dwarf due to my sinus problems. Now I am probably most like Happy Dwarf - thankful that those sneezing days are gone!

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By Philip Teoh

Managing risks along China's belt and road initiative

Types of risks

China's belt and road initiative (BRI) involves Chinese companies investing in or with companies in the belt-and-road countries. Many of these investments will be in infrastructure and development projects such as roads, rail and ports. The initial phase of these projects will involve a gamut of activities including preliminary risk assessments, project financing and setting up joint ventures to build the infrastructure assets. Other investments will be made in logistics and manufacturing.

As the partner countries are at different stages of development and have different legal systems, there will be related challenges.

Local parties

In most cases, the partner countries will require the projects to be undertaken by local companies through joint venture enterprises, which would be locally incorporated. It can be challenging to match the companies capable of undertaking the BRI projects. At the beginning, parties will need to be certain of both their partners' standing and their capabilities.

For complex projects, the joint venture entity may comprise more than two parties. Two of these parties will likely comprise a Chinese party and a party from the BRI partner country, and the third will likely be a foreign party with the necessary technical expertise. Apart from this, there may also be a need to engage foreign consultants and experts to conduct comprehensive studies. These are all areas of potential disputes, particularly if the contractual parties and experts are not properly selected.

Legal systems risk – Contract drafting

The parties' challenge will be to secure one another's commitments through secure, comprehensive and—most importantly—enforceable contracts. The structures of the legal systems in countries receiving the investment will need to be considered.

Apart from the terms themselves, which will be dependent on the tightness and clarity of contractual provisions, it will also be important to understand the legal environment of the relevant BRI partner country or the chosen system of law. These contracts need to be based on an agreed, stable and understandable system of laws.

Failure to agree upon the governing law will mean that there could be disputes even before the deciding tribunal embarks on addressing the actual dispute.

Resolving disputes

Once the governing law has been decided, parties will need to decide how they would want to resolve disputes. This decision must be prompted by objective criteria and not parochialism—there is no point in settling disputes in a particular court when a decision of that court cannot be enforced in the country where the losing party may be located.

In international contracts, the primary advantage of international arbitration over court litigation lies in its enforceability. An international arbitration award is enforceable in most countries in the world according to the mechanism set up under the New York Convention. Other advantages of international arbitration include the ability to select a neutral forum to resolve disputes; that arbitration awards are final and not ordinarily subject to appeal; the ability to choose flexible procedures for the arbitration; and confidentiality.

For the most part, the general acceptance of the New York Convention worldwide means that enforcement is not problematic. However, there has been some evidence of problems of enforcement in China. If this is the case, parties in large infrastructure contracts will do well to explore obtaining independent security—for example, by way of performance bonds that are enforceable in neutral jurisdictions. These bonds are often subject to a neutral law different from the governing law in the operational contract.

Another area that parties need to be mindful of is the language of arbitration. It cannot be assumed that English will be the default language even in cases where the contract is laid out in English. The Chinese party may nominate a CIETAC Centre as its chosen arbitration venue. Lawyers advising the BRI partners would do well to be familiar with the available arbitration centres before agreeing to a particular centre. Regional arbitration centres such as the Kuala Lumpur Regional Centre for Arbitration, the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre would be able to offer parties independent and neutral venues for dispute resolution.

China's BRI is likely to change the world economic landscape and propel development in many countries; and it will certainly provide opportunities to international contractors, advisers and professionals. In their eagerness to participate in this initiative, however, participating parties should not neglect the need to have proper contracts in place, including having appropriate law and dispute resolution provisions.

Lewis Sanders

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In-House

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A leading insurance company is looking for a Head of Legal with at least 13 years of experience to join its team in HK. You will have experience advising on/drafting life insurance related matters as well as managing a team. Fluent written & spoken English & Chinese required. AC6708

SHIPPING / COMMERCIAL — HONG KONG — 8-15 YEARS

Conglomerate focused on maritime services seeks a senior level lawyer with experience in contentious & non-contentious shipping & insurance matters. Commonwealth qualification & prior experience in Asia are essential. Chinese language skills are not required. AC6613

HEAD OF LEGAL — HONG KONG — 8-12 YEARS

MNC in consumer products industry seeks a Head of Legal to provide legal support in the Greater China region & to develop legal strategy & structure. HK qualification & corporate/commercial experience in HK & China are essential. Fluent English, Cantonese & Mandarin are required. AC6619

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Rare opportunity for a litigator to join a HK conglomerate. You will handle contentious matters arising from the operations of the Group & will also have the chance to work on commercial matters. Solid commercial litigation experience and fluent Cantonese & Mandarin are essential. AC6666

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Bulge-bracket bank seeks a VP to focus on equities trading, OTC, listed/ corporate derivatives & structured products. Prior in-house experience would be ideal. Chinese language skills preferable but not essential. Top quality work & attractive remuneration on offer. AC6638

LITIGATION / REGULATORY — HONG KONG — 4-5 YEARS

Global investment bank is looking for a mid-level litigator to handle securities litigation and contentious regulatory matters. Experience in investment banking/global markets preferred although candidates from top tier law firms will be considered. AC6620

REGULATORY – AVP — HONG KONG — 3-5 YEARS

Investment bank seeks an AVP to join its regulatory team. This role has an APAC coverage & will involve providing analysis & implementation of new regulations. You will be at least 3 years' qualified in HK/a Commonwealth jurisdiction. Chinese language skills are not essential. AC6609

Private Practice

CORPORATE — HONG KONG — 6-9 YEARS

Global international law firm in Hong Kong is looking for a Senior Associate to join its Corporate team. This role will be predominantly focused on IPOs with some M&A matters. You must be Hong Kong qualified and have strong IPO and M&A experience. Mandarin is essential. AC6656

FUNDS — HONG KONG — 3+ YEARS

Top tier firm seeks a funds associate with 3 to 5 years PQE, solid training from a peer firm and be admitted in a Commonwealth jurisdiction. Lawyers with M&A or finance experience will also be considered. Chinese language skills are preferred but not required. AC6355

LITIGATION — HONG KONG — 3-5 YEARS

A Magic Circle firm is looking for a mid-level dispute resolution associate to join its leading litigation practice. Candidates should have at least 3 years' solid litigation experience from a top tier international firm. Chinese language skills are required. AC6654

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CORPORATE — HONG KONG — NQ-2 YEARS

Magic Circle firm seeks a junior corporate associate. You will be involved in a mixture of M&A, IPO transactions & listing compliance work. 2017 qualified trainees with corporate experience gained in a top tier international law firm are welcome to apply. Chinese is required. AC6653

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

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The internet and doing business in the Philippines

Earlier this year, the Philippines Securities and Exchange Commission (SEC) issued an opinion stating that an online gaming system with absolutely no physical presence in the Philippines shall be considered as "doing business" in the Philippines and was thus required to obtain a licence to do business from the SEC.

It did not matter that the company had no physical office, no employees and no physical servers located within the Philippines. Anyone from the Philippines who has access to the internet could access the website, open an account and purchase online gaming content. There is no physical delivery of any product to the Philippines, as the content is offered, sold and accessed exclusively online.

The hallmark test for determining whether an entity is doing business in the Philippines is twofold: first, there must be a showing that the foreign corporation is continuing the body or substance of the business or enterprise for which it was organised; and second, the foreign corporation is engaged in activities which implies a continuity of commercial dealings, and contemplates the progressive prosecution of the purpose and object of its organisation. This definition has been codified in the Foreign Investments Act.

So the question remains — is mere online activity sufficient to constitute "doing business" within the Philippines? The SEC seems to answer in the affirmative. The SEC cited several factors to justify that the corporation was doing business in the Philippines: 1) creation of the online account takes place in the Philippines; 2) access is made by users located in the Philippines; 3) payment of the content is made from within the Philippines using local credit cards; and 4) delivery of the online content is made in the Philippines. The IP address located in the Philippines receives the offer of services, sends the acceptance of the offer to the virtual plane and, finally, the content or service is delivered through said virtual plane to the account holder's IP address in the Philippines. Clearly, says the SEC, "the transactions will be consummated in the Philippines".

Under existing laws, a foreign corporation deemed "doing business" in the Philippines is required to obtain a licence to do so from the SEC. The failure to obtain such licence will prevent the foreign corporation from having the personality to take refuge in Philippine courts and from invoking Philippine law, if aggrieved. However, despite the inability to maintain any suit or proceeding, such corporation may be proceeded against before Philippine courts. In short, it can be sued, but it cannot sue.

> "Will online media such as The New York Times and even Facebook now be prohibited from making its content accessible in the Philippines?"

The SEC opinion, however, has far-reaching implications beyond the requirement to obtain a licence to do business, which may prove problematic for all other entities similarly situated operating solely via the internet. What could be the impact to online retail stores like Amazon and eBay; online social platforms like Facebook; online news portals like The New York Times and all other entities that have not established physical presence within the Philippines and yet derive business and online traffic from within the Philippines — will all such entities now be required to obtain licences from the SEC? If so, how will Philippine regulatory agencies regulate these activities and impose sanctions, if needed? If these entities will be considered doing business in the Philippines, are nationality requirements applicable to them? And if so, how could the same be enforced against them? This is particularly significant given the recent controversial pronouncements of the SEC defining "mass media", which must be 100 percent Filipino owned, to include "any medium of communication deigned to reach the masses". To this end, the SEC has classified even billboards as mass media, which must therefore be 100 percent Filipino owned. Given this, will online media such as The New York Times and even Facebook now be prohibited from making its content accessible in the Philippines? The implications to business and investment are endless and it may take a bit longer than a fortnight before we get some clarity.

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

We wish you a Happy Mid-Autumn Festival!

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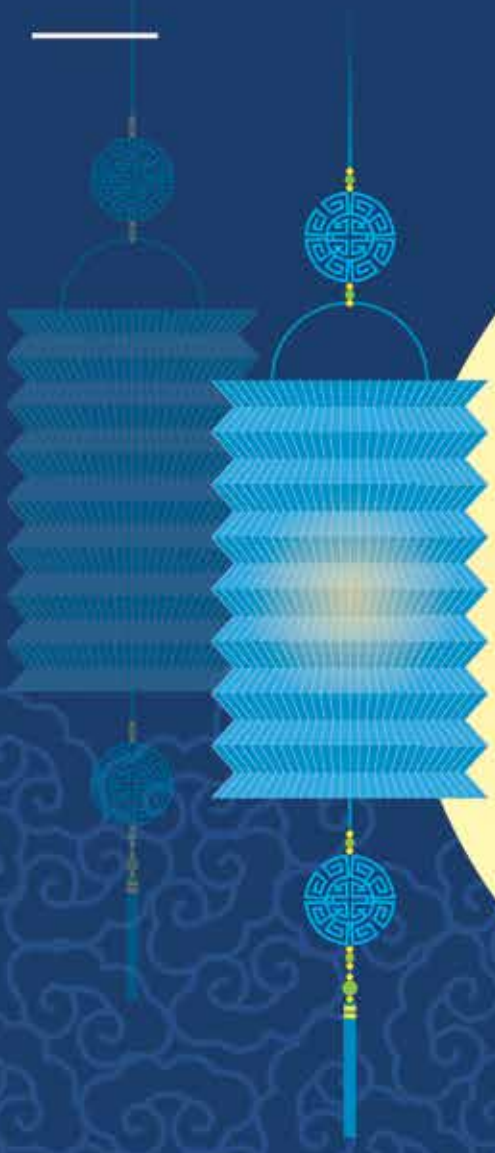

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An American MNC with a well-established presence in the financial services sector seeks a dynamic general corporate/ commercial lawyer for their team in Singapore. Intellectual curiosity and dynamism are essential key attributes for the successful hire, with a varied scope of work on offer.

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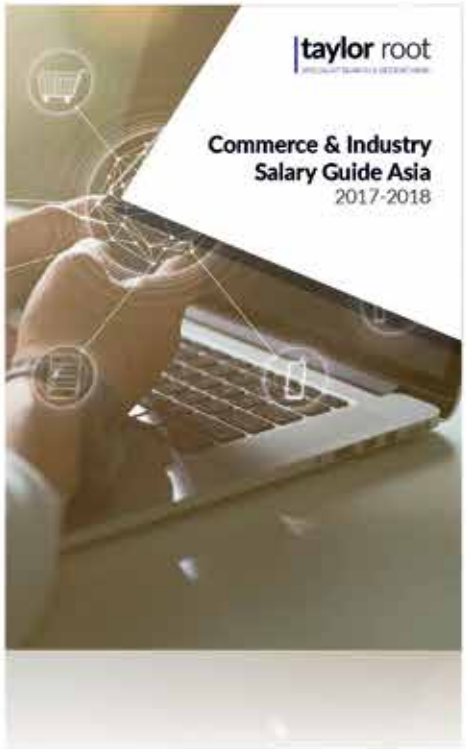

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A reputable US pharmaceutical company is looking for their head of legal China. The role will be responsible for managing the Company's legal band Business Conduct matters in China, reporting to both the Asia Pacific Legal Head. Ideal candidate shall have 10+ years relevant law firm or in-house experience. Experience in multinational pharmaceutical or biotech industry is required.

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By Park Kwang-Chun

Amendment of Korean Fair Trade-related Laws

The Moon administration is seeking reforms in a variety of areas of the Korean economy, based on its vision of "an economy pursuing co-prosperity". The appointment of Sang-Cho Kim to lead the Korean Fair Trade Commission (FTC) also added support to this initiative as Kim is well-known for his long-standing efforts to reform chaebols (Korean business conglomerates).

Additionally, Korean fair trade-related laws, including the Monopoly Regulation and Fair Trade Act (Fair Trade Act) and the Fair Transactions in Franchise Business Act (Franchise Business Act), have been revised recently.

Main amendments to the Fair Trade Act

(1) Introduction of criminal punishment for refusal and obstruction of investigations (Article 67, implemented on July 19, 2017)

Before the revision, the Fair Trade Act imposed only a fine when a person refused, obstructed or avoided an investigation by failing to submit or falsely submitting materials requested by the FTC, by concealing, removing, forging or falsifying materials, or by refusing to grant access to materials. However, under the revised Act there is now criminal punishment: imprisonment of not more than two years or a fine not exceeding W150 million.

(2) Introduction of a financial penalty to compel businesses to correct their failure to meet reporting obligations and/or failure to submit materials or objects to FTC (Article 50-4, to be implemented on October 19, 2017)

Under the prior Fair Trade Act, a company would be fined if it failed to take corrective measures related to anti-competitive activities. But under the revised act, a company that fails to report or submit required materials or objects to the FTC, will be required to pay a fine amounting to 3/1000th of its average sales per day for each day that it fails to comply with the FTC's order.

Main revisions to the Franchise Business Act: Introduction of a punitive damages provision (Article 37-2, to be implemented on October 19, 2017)

Under the new Act, a franchisor will be required to pay damages to a franchisee, in an amount up to three times the losses incurred by the franchisee, in the event that the franchisor (i) provides false or exaggerated information; (ii) conceals or understates factual information that materially impacts a franchise contract; or (iii) illegally suspends, refuses or significantly restricts the provision of goods or services or support to a franchisee. Further, the franchisor will bear the burden of proof to show that the franchisor was not at fault and/or had no intent to violate the Act in any of the above-mentioned ways.

Predicted policy change

On August 25, 2017, during a "core policy discussion" that occurred during a meeting attended by the Korean president and heads of three major government authorities (Ministry of Strategy and Finance, FTC, Financial Services Commission), the FTC announced its new policy and action plan to fulfil its mission. The following are some of the FTC's proposed actions:

- Ex officio investigations into conglomerates alleged to have violated laws;
- Award of prize money when the illegal actions of a conglomerate owner family is reported to the appropriate government authorities;
- Designation of more conglomerates, the status of which is required to be publicly disclosed;
- In subcontract transactions, prohibiting large companies from forcing persons to sign a subcontract only with the company or business operators designated by the company without reasonable grounds;
- As to mandatory purchase items (required to be purchased by a franchisee), increasing the scope of information the franchisor is required to disclose (eg, identifying royalties that the franchisor takes from each purchase) ;
- Introducing liability arising from "owner risks" (damages incurred by a company as a result of irregularities or corruption involving the chaebol families who own/control the company); and
- Revision of standard franchise contracts: adjusting franchise amounts (royalties, prices to purchase necessary products, etc) to correspond to costs that have increased, such as minimum wage costs.

Implications

The Moon administration is ratcheting up its efforts to impose stronger regulations and enforcement in fair trade areas. In this new business climate, companies failing to adjust their business practices risk exposing themselves to serious losses. To successfully adjust, companies need to understand the revised regulations, closely track policy developments and be careful to avoid activities in their business operations that will run afoul of the FTC's new rules and requirements.

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FMCG — Hong Kong — 8-12 PQE

UK listed company with significant growth plans for Asia Pac has headcount to appoint its first in-house counsel in Hong Kong to support the regional management team covering Asia Pac. Work will involve negotiating a range of commercial agreements and providing general in-house advice. Great opportunity to support a dynamic and young executive team. (IHC 15027)

General Counsel — Beijing — 8-12 PQE

A privately owned education group is seeking a legal director to support its operations in China. You should have both transactional and general commercial experience. Some exposure to US capital markets would be useful. (IHC 15631)

ASEAN Legal Counsel — Singapore — 7-12 PQE

A leading regional F&B Company is looking for a legal counsel to oversee their fast expanding business in Singapore and the ASEAN region. You should have good commercial and M&A experience, dealing with laws in different countries across SE Asia. Singapore or common law qualified lawyers with proficiency in Mandarin required. (IHC 15718)

Employment Lawyer — Hong Kong — 4-8 PQE

A high profile conglomerate seeks a commercially astute lawyer to assist in a range of employment and commercial litigation matters. Employment advice will span both contentious and non-contentious matters, while dispute issues will include contractual, suppliers, personal injuries, IP and discrimination claims. (IHC 15675)

Legal Counsel — Hong Kong — 4-8 PQE

Our client is a global medical care group with a strong presence in Asia. They are looking for a HK qualified lawyer to join the well-established legal team to support both the APAC regional functions as well as the HK business. This is an excellent opportunity to work on a broad range of complex and strategic commercial matters. (IHC 15736)

APAC Legal Counsel — Singapore — 7+ PQE

Conglomerate is expanding its existing business in SE Asia and is setting up a new legal team in Singapore. Working independently and with senior management, you will advise on a range of commercial matters for the company's businesses around Asia, including licensing, outsourcing, leasing, insurance, restaurant and concession business and food related matters. (IHC 15718)

Senior Legal Counsel — Beijing/Shanghai — 7+ PQE

A leading investment company is looking for senior legal counsel to support its china investment activities. Strong transactional experience representing foreign investors investing into the PRC and familiar with its foreign investment laws, especially in relation to joint ventures and mergers and acquisitions are desirable. (IHC 15738)

Commercial Counsel — Singapore — 4-7 PQE

Major US listed company in the IT space is looking for a legal counsel to join their team based in Singapore. The legal counsel will be part of a dynamic team of lawyers supporting the business across the APAC region where he/she will be involved in advising and negotiating on a broad range of customer service related contracts. (IHC 15575)

Legal Counsel — Hong Kong — 6+ PQE

Our client is a leading logistics business and is looking to hire a senior shipping lawyer to support their fleet management operations. Experience preferred in shipping, insurance, vessel management. Open to all common law qualified lawyers. Open to lawyers qualified in HK. (IHC 15624)

Legal Counsel — Shanghai — 5+ PQE

A leading sport group is hiring a legal counsel in Shanghai to join their legal team. Experience from a top law firm with outstanding education background. Labour law experience would be a plus. Excellent communication skills in both English and Mandarin are essential for this role. (IHC 15717)

Legal Counsel — Hong Kong — 3-5 PQE

Conglomerate in the travel and aviation business seeks a commercial lawyer with experience in international investment to join their new legal team. Working closely with their GC, you will focus on a range of investment work for their business teams including take-overs, and venture capital. Strong command of Mandarin and English required. (IHC 15806)

Something Different — Hong Kong — NQ-4 PQE

A leading information service provider is seeking lawyers to join their legal product division. Successful candidates are expected to oversee strategic accounts across the region by providing training and product demos. You will need solid business acumen and good presentation skill. Chinese language is required. (IHC 15733)

Junior China Counsel — Hong Kong — 1-3 PQE

Global asset management firm seeks a junior legal counsel to provide legal and regulatory support to their funds business in Singapore and the Greater China region. You should have experience in funds work, although they are also open to consider lawyers with strong regulatory or corporate finance background. Strong proficiency in Mandarin is required. (IHC 15535)

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New regulations on technology transfer

The Law on Technology Transfer No. 80/2006/QH11 (the 2006 LOTT) was issued on November 29, 2006 when Vietnam was preparing for its accession to the WTO. During its more than 10 years of implementation, the 2006 LOTT contributed an important role in promoting innovation activities and technology transfers, applying advantages of science and technology in product manufacturing as well as frequently providing improvements in the lives of the people.

However, with rapid developments in technology, especially in information technology, along with changes in the economy and society, the 2006 LOTT has shown certain shortcomings and become, to some extent, no longer suitable or sufficient for governing issues in the field. There have also been changes in related laws, such as the 2009 Law on Intellectual Property; 2013 Law on Science and Technology; 2014 Law on Investment; 2014 Law on Corporate Income Tax; 2015 Law on Statistics, and so on, that have caused much of the 2006 LOTT to be inconsistent.

On June 19, 2017, the government issued the Law on Technology Transfer No. 07/2017/QH14 (the 2017 LOTT), which will supersede the 2006 LOTT from July 1, 2018 — the effective date of the 2017 LOTT. Some important contents of the 2017 LOTT are summarised below.

The 2017 LOTT provides for the following forms of technology transfer (i) independent technology transfer; (ii) sections on technology transfer of: investment project; capital contribution by technology value; franchise; transfer of IPRs; purchase of machines in case of know-how transfer; and (iii) other technology transfer forms as regulated by the prevailing laws, wherein the technology transfer as capital contribution is a new form of technology transfer.

> "With rapid developments in technology, along with changes in the economy and society, the 2006 LOTT has shown certain shortcomings and become, to some extent, no longer suitable or sufficient for governing issues in the field"

A technology transfer agreement relating to the technology transfer form is required to be registered with the competent authority, except for the case of technology being subject to the limited transfer which has already been granted a technology transfer certificate, in case of technology transfer from abroad to Vietnam or from Vietnam to abroad, or domestic technology transfer using the state budget or state capital, except for instances wherein the certificate of registration of results of implementation of science and technology duties have been obtained.

Regarding the transfer of technology in investment projects, the 2006 LOTT provides regulations for controlling technologies being subject to limited transfer only, and therefore is insufficient for control and prevention of the importation of backward technologies which may cause adverse impact on the environment. Accordingly, the 2017 LOTT requires the approval of investment projects using transferred technologies which are using public investment capital; are subjects of limited transfer; or have the risk of causing damage to the environment. In addition, for the case of an investment project using the state budget, the value of technology used as capital contribution in such investment projects shall be evaluated in accordance with the prevailing laws and regulations.

Under the 2017 LOTT, the parties to a technology transfer agreement have the right to agree on the price of technology transfer. However, the 2017 LOTT requires that the price of transferred technology be audited and implemented in accordance with the tax laws in the cases of technology transfer between parties in which: (i) one or more parties have state capital; (ii) parties having the parent-subsidiary relationship; and (iii) parties having affiliate relationship under the tax laws and regulations.

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

EVENT REPORTS

Second annual Africa In-House Congress in Dubai

Alongside our co-hosts Cliffe Dekker Hofmeyr and Clyde & Co; the In-House Community hosted our second annual Africa In-House Congress at the Raffles Hotel, Dubai on September 12.

The Congress was attended by more than 40 in-house counsel with an Africa responsibility. The day started with a plenary discussion titled 'The Biggest Challenges in my job are...?'. The discussion was led by Rahul Prakash, Associate Publisher, Asian-mena Counsel and In-House Community; Dawda Jawara III, Legal Director, Clyde & Co; Gasant Orrie, Cape Managing Partner, Director, Cliffe Dekker Hofmeyr; and Vanessa Abernethy, General Counsel, Emirates International Investment. The session discussed the pre-event survey results and challenges counsel face when doing business in Africa.

Subsequent practice area workshops included 'Key Legal and Regulatory Trends Impacting In-House Counsel in Africa'; 'Cross-Border Deal Structuring in Africa – Challenges and Opportunities'; and 'Spotlight on Kenya'.

We would like to thank all whose work helped make this event a success as well as the UAE chapter of the In-House Community for their attendance and support.

"Informative and well-delivered. A real insight on doing business in various regions in Africa"

– In-House Congress Africa delegate

18th annual In-House Congress Singapore

Some 180 of our In-House Community members gathered at the Marina Mandarin on September 27 for the 18th annual Singapore In-House Community Congress.

The event opened with a topical introduction to "The Arrival of Litigation Finance in Singapore" by Tom Glasgow, Investment Manager (Asia), IMF Bentham.

This was followed by our themed discussion for the year, "The Path to Excellence: How to benchmark the In-House Team's evolution, and the role for External Providers". Moderated by Patrick Dransfield, Co-Director, In-House Community, our panellists: Stelios Moussis, General Counsel, Lazada Malaysia; Lynette Lim, Senior Vice-President and Assistant General Counsel, Asia Pacific, Hilton; Stephen Hopkins, Partner, Eversheds Sutherland; Michael Lew, Founder, LegalComet; and Chew Seng Kok, Managing Director, Zico Holdings, provided one of the most insightful discussions of the year. The need for in-house counsel to demand that their external counterparts bill them for "value provided" as opposed to "time spent" being one of many key takeaways.

There followed a day of congenial networking interspersed with vital and varied workshops, including those on: Global Anti-Corruption Enforcement by Debevoise & Plimpton; International Arbitration and Enforcement by Reed Smith; Privacy in the Workplace and HR Re-organisation in Vietnam by Russin & Vecchi; Third Party Funding by Clyde & Co Clasis Singapore; and Multidisciplinary Platform (MDP) for Alternative Legal Solutions by Zico. Our closing session hosted by Eversheds' Harry Elias was an interactive one, asking "Senior In-House Counsel: We know our challenges, we even know some of the solutions but how do we implement them today?".

Thanks go to all our speakers and co-hosts as well as Hughes-Castell and Taylor Root for their support of this important In-House Community gathering.

"The Congress gave me greater awareness of challenges for in-house counsel. I can see that a lot of effort, thought and collaboration have been put in. Thank you!"

– In-House Congress Singapore delegate

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

Africa IN-HOUSE Congress Dubai, 2017

Ian Gaitta
Partner
Anjarwalla Collins & Haidermota

Deepa Vallabh
Director – Head of Cross Border M&A – Asia and Africa
Cliffe Dekker Hofmeyr Inc

Gasant Orrie
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MOVES

The latest senior legal appointments around Asia and the Middle East

AUSTRALIA

Corrs Chambers Westgarth has further strengthened its intellectual property team with the appointment of **David Fixler** as partner, based in Melbourne. Rejoining the firm from King & Wood Mallesons, he will focus on patent litigation matters, in which he has significant experience, while also advising clients across the complete range of IP rights. Fixler acts for both domestic and international clients across a wide range of industries and sectors, including pharmaceuticals, mining, water filtration, fast-moving consumer goods, health insurance, IT and steel. He had been with the firm for seven years, before moving to KWM almost two years ago as a senior associate.

The firm has also significantly bolstered its restructuring and insolvency, and banking and finance practices with the appointment of **Patrick O'Grady** and **Cameron Cheetham** as partners in the Sydney office. Both joining from Henry Davis York, the new partners have experience acting for leading insolvency practitioners, government, litigation funders, commercial banks and non-bank alternative capital providers. They have a deep history of acting for major Australian banks in contentious and non-contentious engagements, together with other major financial institutions.

K&L Gates has continued to strengthen its finance team with the appointment of **Richard Gray** as a partner in the Sydney office. Joining from HWL Ebsworth, Gray has more than 30 years of experience working as a finance lawyer in Australia, with a particular focus in various forms of secured and unsecured financings, including project and infrastructure finance, structured financings of property assets, securitisation, syndication, and tax-based and cross-border structures. He also advises on lending, swaps, major work-outs, and European, US and domestic note issues and programs. Gray counsels lenders, borrowers and arrangers across a broad range of sectors, including property, government, resources, infrastructure, energy, transport, innovation, funds management, hotels and finance.

Norton Rose Fulbright has hired energy and resources lawyer **Shamim Razavi** as a corporate and M&A partner in its Sydney office. Razavi will relocate to Sydney from Jakarta, where he currently works for Indonesian associate firm TNB & Partners, with a focus on cross-border transactions involving Asean countries, Korea and Japan. He has extensive experience advising foreign investors in the Asia-Pacific region, across the financial services, technology and energy industries, with a particular focus on oil and gas. His clients include major banks and insurance companies, technology enterprises, private equity houses, hedge funds, energy production interests and offtakers.


Shamim Razavi

The firm has also poached Clayton Utz's **Jasmine Sprange** and Ashurst's **Paul O'Donnell**. Sprange will join as a Sydney corporate partner focusing on domestic and cross-border M&A across the financial services, infrastructure and real estate sectors. Her M&A work extends to corporates and funds, acquisitions and restructuring, regulatory issues involving the Australian Securities and Investments Commission and Foreign Investment Review Board, and joint ventures. She has advised some of Australia's largest financial services groups along with global private equity firms and financial sponsors. She will join in October this year. O'Donnell specialises in tax and joins as a special counsel. He focuses on income tax; structured, asset and project financing; and debt restructuring. He also has significant experience advising on the corporate tax affairs of Australian and foreign banking groups, with an emphasis on business and investment banking and funds management. He will also join in October this year.


Jasmine Sprange

CHINA

AWA Asia in Beijing has added **Xiaofan Chen** as a partner and Yuanyuan Chu as a senior patent attorney. Chen joins from Liu Shen and has both contentious and non-contentious experience in patent rights management. He regularly advises on patent validity, infringement and freedom-to-operate analysis cases, and has successfully represented clients on civil and administrative patent disputes. Chu's patent practice focuses on computer science, electrical engineering, electronics, microelectronics, semiconductor devices and processes. Apart from assisting international MNCs on their patent prosecution and disputes in China for the last 13 years while at her last two firms, CPA and Liu Shen, she also has considerable experience in coordinating US patent matters.

Simmons & Simmons has added **May Lu** as a partner in the firm's employment practice in Shanghai. She joins from MWE China Law Offices (a strategic alliance with US firm McDermott Will & Emery), where she advised on labour and employment law, investigations and labour arbitrations in China. Lu works closely with multinationals, as well as Chinese clients.


May Lu


Matthew Durham

The firm has also added **Matthew Durham** as a partner in its China employment practice, based in Shanghai. He trained with the firm and qualified as a solicitor in 1998. He previously worked in the firm's Shanghai office for many years, becoming a consultant in 2009. He now rejoins from Winston & Strawn, where he was a partner based in its Shanghai

and Beijing offices. Durham has lived and worked in Shanghai since 1999, and has extensive experience advising international clients on labour, employment and corporate law issues in China. Clients he advises sit across a diverse range of sectors, including pharmaceuticals, retails and insurance. He also assists on all issues surrounding labour, including employment questions, separations, union matters, stock options and incentive schemes.

HONG KONG


Brett Feltham

Gadens has added **Brett Feltham** as a partner in its employment advisory team. He joins from DLA Piper, and has also previously worked at PwC Legal and Deacons (now Norton Rose Fulbright).

Jones Day has added **Charles Chau** as a partner in the M&A practice of its Hong Kong office. An adviser for nearly 20 years to clients in Hong Kong, mainland China and the Asia-Pacific region, Chau has extensive experience in public and private company acquisitions, joint ventures, financings and pre-IPO investment transactions. His experience encompasses a wide range of industry sectors, including banking and financial services, health care, biotech, retail, real estate and manufacturing. He has represented a number of Chinese companies on their M&A transactions, including acting for China CNR on its US$26 billion merger with CSR, the first merger of two companies listed in both Hong Kong and Shanghai. In capital markets matters, Chau has worked on numerous high-profile IPOs and securities offering transactions, including the IPOs of Sinopharm Group, China CNR, China CITIC Bank, Guodian Technology and Environment Group, share placements of Evergrande Real Estate Group and Sino-Ocean Land Holdings, as well as the A+H rights issue of China CITIC Bank. He is fluent in English, Cantonese, and Mandarin.


Charles Chau

Mayer Brown JSM has appointed **Alan Linning** to the firm's Hong Kong office as a partner in its litigation and dispute resolution practice. He joins from Sidley Austin. With more than 25 years of experience, Linning focuses his practice on financial services regulatory matters, investigations and proceedings, as well as commercial litigation. In particular, he advises companies that are facing investigations and are defending civil claims and criminal prosecutions brought by various regulatory agencies, including the Securities and Futures Commission (SFC), the Hong Kong Monetary Authority and the stock exchange. Linning was previously the managing director and head of Asia regional compliance at a leading investment bank and served as the executive director of enforcement and a board member of the SFC.


Etelka Bogardi

Norton Rose Fulbright has hired **Etelka Bogardi** as partner in the firm's corporate practice in Hong Kong. In her new role, Bogardi will focus on providing financial services regulation advice. She joins from the Hong Kong Monetary Authority, where she was senior counsel and advised on all aspects of its operations, including banking conduct and stability, supervision, policy, enforcement, monetary management and direct investment. This included advising on new financial services legislation and its implementation, licensing and authorisation issues, financial market infrastructure, external matters (including co-operation with foreign and international supervisory bodies), sanctions, as well as legal issues relating to the development of the financial infrastructure of Hong Kong.

Seyfarth Shaw has hired **Raymond Wong** as managing partner for its Hong Kong office. Wong, who joins from King & Wood Mallesons, focuses on mergers and acquisitions, general corporate and commercial, corporate strategies, IPOs, regulatory compliance and public takeovers in Hong Kong, China and the UK. He has advised many Chinese and international clients on a variety of landmark global offerings and listings on the London, New York, Luxembourg, Hong Kong, Shanghai and Tokyo stock exchanges, as well as cross-border transactions in the real estate and energy / natural resources sectors.

INDIA

J Sagar Associates has added **Megha Arora** to its projects service line as a retained partner in the Bengaluru office, effective September 8, 2017. She has over 12 years of experience working with leading corporates in the Indian infrastructure space, spending the first six years working at JSA offices in Delhi and Bengaluru. Her return will strengthen the firm's presence in South India, focusing on infrastructure.

PAPUA NEW GUINEA

Corrs Chambers Westgarth has added Papua New Guinea (PNG) resources sector specialist **Vaughan Mills** as a partner, to head the firm's establishment of its presence in Port Moresby, splitting his time between the firm's Port Moresby and Brisbane offices. Mills joined from Allens, where he developed and led the PNG practice for nearly 20 years. He has been advising on energy and resources projects in Australia and PNG for more than 23 years, including while based in Port Moresby for almost a decade. Mills has acted as PNG counsel advising ExxonMobil as operator of the PNG LNG Project. Recently, he advised Oil Search in its US$2.5 billion bid to acquire InterOil, which holds a 37 percent interest in the PNG LNG Project. In Australia, he advised Shell Australia on its 20-year retail fuel Alliance with Coles Express.

DEAL OF THE MONTH

Asian-mena Counsel Deal of the Month

ZhongAn debuts in Hong Kong

Shares in China's first online insurer got off to a flying start on their first trading day in Hong Kong on September 28.

ZhongAn Online P&C Insurance raised US$1.52 billion through its initial public offering of H-shares in Hong Kong after pricing the shares at HK$59.70 — and by the time it started trading on Thursday morning the stock was already changing hands at HK$69, up more than 16%, prompting many investors to take their profits immediately. Even so, the stock still managed to close its first day of trading at HK$65, representing a respectable 9% gain.

The company is backed by "the three Mas" Alibaba-affiliated Ant Financial, controlled by Jack Ma; Tencent, controlled by Pony Ma; and Ping An Insurance, controlled by Ma Minzhe. Japan's SoftBank came in as a cornerstone investor.

The listing is said to mark the world's first insurtech public offering and is the largest technology IPO in Hong Kong this year. The question now is how the company will perform in the long term.

Its original growth was driven by selling insurance policies to cover the cost of returning goods bought online, mostly through the Alibaba-owned Taobao and Tmall sites. That still contributes a significant chunk of premiums — more than one-third during 2016, but is down from 77% in 2014.

> "The listing is said to mark the world's first insurtech public offering and is the largest technology IPO in Hong Kong this year"

Today, the company has expanded its product range to include policies that protect against flight accidents and delays, cracked smartphone screens and even drone accidents. It has also broadened its ecommerce business through merchant policies that save sellers on Taobao and Tmall from having to pay a deposit.

However, the company is still heavily reliant on premiums generated through its three biggest shareholders — close to three-quarters in 2016, and more than 50% through the Alibaba group. It also faces competition from rivals that have copied its once-innovative policies, but the company is hoping that expansion into new products and new markets will drive continued growth.

Skadden advised **ZhongAn Insurance**, led by Hong Kong partners **Julie Gao**, **Christopher Betts** and **Will Cai**. **Paul Hastings** advised **SoftBank** as the cornerstone investor, led by partners **David Wang**, **Jia Yan**, **Nan Li** and **Bonnie Yung**.

Other recent and notable deals include:

Majmudar & Partners represented **Cigna**, one of the largest healthcare insurance and ancillary services providers in the US, on the proposed increase in stake, from 26 percent to 49 percent, in its insurance joint venture in India, CignaTTK Health Insurance, and on the proposed replacement of Indian conglomerate TTK Group by the Manipal Education and Medical Group as Cigna's Indian joint venture partner. CignaTTK is among the six stand-alone private health insurers in the country. Managing partner **Akil Hirani** and associate partner **Amrit Mehta** led the transactions, which are subject to the approval of the Insurance Regulatory and Development Authority of India. **Tatva Legal** represented the **Manipal Group**.

Luthra & Luthra advised **Citi**, **Jefferies**, **Axis Capital** and **YES Securities** on NTPC's sale of approximately 547.15 million equity shares, representing 6.64 percent of the company, for Rs91.28 billion (US$1.42b), as part of the Indian government's disinvestment programme. With the exercise of the oversubscription option, the offer increased to approximately 579.4 million equity shares, comprising 7.03 percent of NTPC's paid-up share capital. Partner **Geeta Dhania** led the transaction, while **Herbert Smith Freehills** acted as US counsel. **Squire Patton Boggs**, led by partner and co-chair of India practice **Biswajit Chatterjee**, acted as US counsel to **NTPC** and the **Department of Investment** and **Public Asset Management**, while **AZB & Partners** acted as Indian counsel.

Skadden acted as US counsel and **Maples and Calder** as Cayman Islands counsel to **Wynn Macau** on its offering of US$600 million 4.875 percent senior notes due 2024 and US$750 million 5.5 percent senior notes due 2027, and concurrent tender offer for repurchase of US$1.35 billion notes due 2021. The new notes are listed in Hong Kong. Deutsche Bank Singapore Branch acted as representative of the initial purchasers. **White & Case** acted as US counsel to the initial purchasers.

To receive a weekly round-up the region's top deals, as well as the latest news and legal updates sign-up to the Asian-mena Counsel Weekly Briefing at:

http://www.inhousecommunity.com/free-updates/

Cem Ozturk
Associate Managing Director

Links between environmental destruction and corruption risk in Southeast Asia

Corporate investigators need only work in corruption and fraud cases in Southeast Asia for a short while before noticing a correlation as clear as it is unsurprising: companies linked to environmental destruction are also overwhelmingly linked to issues of corruption and fraud.

While the reasons for this are unclear (although disregard for one ethical norm suggests disregard for others), the trend becomes apparent during the course of our casework in countries such as Indonesia, Myanmar and Papua New Guinea.

In Kroll's experience in the region, the trend is strong enough to suggest that if researching Company X, we encounter documented issues of unlicensed deforestation, illegal disposal of industrial waste, serial overfishing and other such environmental concerns, these issues alone are often a reliable predictor for other potentially troubling issues in the company such as corruption and fraud — and even connections to organised crime.

This correlation has been clearest in companies that are involved in land-related industries — especially timber, palm oil and mining — all of which invariably necessitate close interaction with land licence-issuing authorities, local political leaders and regulators.

What we see in our casework is that companies in these industries that routinely flout environmental laws and norms often have undisclosed relationships (commonly in the form of beneficial ownership via a proxy individual) to the very political officials who are charged with regulating them. Indeed, their ability to violate environmental laws with impunity is often due to the fact they are aligned with, protected by and often paying these officials.

Example: forestry and palm oil in Indonesia

In Southeast Asia, the illegal timber trade is still a multibillion dollar business, and the region's illicit timber still finds its way into global supply chains. In Indonesia in particular, forestry remains one of the most graft-prone industries in a country well-known for corruption. This is partly rooted in the continuing decentralisation of power to local governments since the 1998 end of the Suharto administration, which resulted in a large increase in the sale of public land from local government to private actors. Many of these transactions allegedly involved payment to local government officials, and resulted in dozens of major corruption cases in the Indonesian courts and investigative media since that time. The illegal timber trade continues today, especially in the heavily forested islands of Kalimantan/Sarawak and Sumatra.

In many of these cases, private companies purchase public land from local political authorities via third-party intermediaries, then rapidly log and/or burn the land for conversion to more profitable crops such as palm oil. Each stage of these projects — from the acquisition of the land, to the logging, burning, and palm conversion — involve the potential gratification of officials; and most (but not all) companies involved in these industries are thus continually exposed to corruption risk.

Implications for anticorruption due diligence

Despite these links, environmental issues are not always captured in basic counterparty risk and due diligence assessments, particularly for low-cost and high-volume assessments produced for compliance purposes. The issues of environmental destruction and corruption are seen as separate — but they are often not.

Our experience is that a company's linkages to illegal environmental destruction are often highly correlated to other significant potential problems with corporate governance, and is often co-incidental with such issues as corruption, tax evasion, opaque ownership and worse.

While relationships with environmentally destructive counterparties may have limited legal implications for multinational companies in and of themselves, the fact that these counterparties are also often potentially linked to corruption is important to consider when calculating counterparty risk. Much more often than not, a poor environmental track record suggests a poor anticorruption track record — and a much higher risk.

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Opportunities of the Month ...

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

Head of Compliance, Financial Services
10+ yrs PQE, Hong Kong

An excellent opportunity for a senior compliance professional to take on an MD role at this established Hong Kong-based financial services company. This is a pivotal leadership role and presents an exciting opportunity to oversee the full scope of compliance functions, including control room, surveillance, staff dealing and business advisory matters. You need to have a minimum of 10 years' compliance experience in investment banks or financial services firms. Candidates who have a broad business exposure with an international background and relevant PRC experience are best suited. You must have fluent written and oral English and Mandarin. [Ref: 14211/AC]

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

Regional Legal Director
8-12 yrs PQE, Hong Kong

A UK listed company with significant growth plans for Asia Pac has headcount to appoint its first in-house counsel in Hong Kong to support the regional management team covering Asia Pacific. Work will involve negotiating a range of commercial agreements and providing general in-house advice. Great opportunity to support a dynamic and young executive team. [Ref: IHC 15027]

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

Head of IP, US MNC
15+ yrs PQE, Shanghai or Beijing

A US MNC and a leading player in the sector it operates in is currently seeking for a high calibre experienced patent professional to set up its Greater China IP practice from scratch. Reporting to the global chief IP counsel directly, you will build and manage all IP matters across the Greater China region, including but not limited to patent, trademark and trade secret matters, with the potential to extend the coverage to the rest of the Asia region. You will collaborate closely with R&D, legal and government affairs departments, and be a member of the Greater China senior management team. The ideal candidate will be a seasoned patent professional with an education background in science or engineering, with hands-on experience in both patent prosecution and enforcement, and experience in building up an IP team. [Ref: R/JO-1707-168142]

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

Head of Legal, Insurance
13+ yrs PQE, Hong Kong

A leading insurance company is looking for a head of legal with at least 13 years of experience to join its team in Hong Kong. The ideal person will have experience advising on/drafting life insurance related matters as well as managing a team. Fluent written and spoken English and Chinese required. Competitive package on offer. [Ref: PBP6708]
Contact: Karishma Khemaney

Tel: (852) 2537 0895
Email: kkhemaney@lewissanders.com

General Counsel, Real Estate
18+ yrs PQE, Singapore

A senior real estate lawyer is sought with good business acumen, management skills and prior experience working closely with senior management. You will be managing an existing team of lawyers who support the region inclusive of China. The scope of work mainly involves project development, project financing and acquisitions. The successful candidate must be resilient, be able to juggle a busy workload and excel in stakeholder management. Only candidates based in Singapore will be considered. [Ref: JGB — IS 1741]

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

Legal Counsel, Asia Pacific, Hospitality
1-3 yrs PQE, Hong Kong

An excellent opportunity for a legal counsel to join this prestigious hospitality group where you will be responsible for all legal matters within the Asia-Pacific region in the group. Due to business expansion, the group is looking for an additional lawyer to join its regional team in Hong Kong. You will be reviewing, negotiating major contracts, advising on IP, litigation, data privacy and anti-competition matters. Candidates must be common law qualified with at least two years PQE with strong corporate experience gained from law firm or another hospitality group. Excellent communication and interpersonal skills with strong command of English and Chinese language skills would be essential for this role. [Ref 10153]

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

Projects & Energy Special Report

Power struggle

The Indonesian government is making a regulatory push to meet its ambitious power targets.

By Ferdinand Jullaga and Aka Fajaretta Nurafia,
Mochtar Karuwin Komar

Recent years have been challenging for the power sector in Indonesia. Despite the government's ambitious target to install 35,000MW of new capacity by 2019, the development of the electricity sector has not gone at the expected pace. Some power projects awarded to investors have successfully achieved financial close, notably the 2x1,000MW Central Java coal-fired power project and the Muara Laboh geothermal power project, but progress on other projects in general has been quite slow.

One of the reasons for the slowdown in power project development might be the introduction of several regulations by the government that were not warmly welcomed by investors. The government might have sensed the cold reception and responded by changing the regulations to try and turn things around. The government knew that it needed to find a way to encourage investors to meet its 35,000MW target, and regulatory change is one of the significant breakthroughs expected by investors, even if it means making significant changes to the recently promulgated regulations.

> "MEMR 42/2017 requires electricity supplier companies, geothermal energy companies and mining and oil & gas companies to obtain approval from the ministry before a change in ownership can be carried out."

There have been, in fact, several regulations issued by the government to address the widespread concerns of investors. Notably, Minister of Energy and Mineral Regulation No. 42 of 2017 on Supervision of Business Activities in Mineral and Energy Sectors (MEMR 42/2017) that was issued on July 17, 2017 was replaced by Minister of Energy and Mineral Regulation No. 48 of 2017 on Supervision of Business Activities in the Mineral and Energy Sectors (MEMR 48/2017) on August 3, 2017. Only two weeks after the former had been promulgated was it replaced by the latter. The reason was that not long after the issuance of MEMR 42/2017, criticism from investors made its way right up to the president's office. A week later, the president gave a speech to make the point that cabinet ministers should refrain from issuing regulations that hampered the pace of investment. The minister apparently took heed of the president's remark and a new regulation was issued just a week later.

MEMR 42/2017 requires electricity supplier companies, geothermal energy companies and mining and oil & gas companies to obtain approval from the ministry before a change in ownership can be carried out. The same requirements also apply to changes in directors and commissioners. These requirements were heavily criticised by investors, as they create an unnecessary administrative burden, particularly since these actions are typically already regulated in the concession contract with the state-owned electricity company, ie in the power purchase agreement (PPA) with Perusahaan Listrik Negara (PLN). MEMR 48/2017

provides more lenient requirements by only requiring that a notification be made. The notification is to be made after the fact, which means that investors can go on with an intended transaction or corporate action (or with changing BOD and BOC members) without having to worry about securing government approval.

Another regulatory change introduced by the government was the issuance of MEMR Regulation No. 45 of 2017 on Gas Utilisation for Power Projects (MEMR 45/2017) that replaced MEMR Regulation No. 11 of 2017 (MEMR 11/2017). MEMR 45/2017 changes the gas pricing system for electricity as well as stipulating the possibility for upstream oil and gas business actors (contractors) to invest in gas wellhead power generation.

With respect to gas pricing, MEMR 45/2017 provides that PLN or Independent Power Producer Companies (IPP) may purchase gas through a pipeline at the plant gate, with the highest price being in the amount of 14.5 percent ICP. While in the previous MEMR 11/2017, the highest price which could be paid was only in the amount of 11.5 percent ICP in the event the power plant was not located at the gas wellhead. As is the case with MEMR 11/2017, MEMR 45/2017 also allows PLN and/or IPP PLN and/or IPP to purchase LNG (liquefied natural gas) if access and LNG infrastructure facilities are provided if they fail to obtain a gas price equal to or less than the higher price.

To encourage gas utilisation for power generation, MEMR 45/2017 also allows contractors to establish a subsidiary to play the role of an IPP for gas wellhead power generation. Further, such an IPP can be directly appointed by PLN if it meets the requirements for direct appointment, ie if the gas price is not higher than 8 percent; if gas supply and allocation are sufficient during the period of the sale and purchase gas agreement; and if power plant efficiency with specific fuel consumption (SFC) is equivalent to that of high speed diesel in the amount of 0.25 litres/ kWh.

In addition to the issuance of MEMR 48/2017 and MEMR 45/2017 noted above, there have been two other regulations issued by the government to boost electricity infrastructure development as elaborated upon below.

Bankability of power projects

The Minister of Energy and Mineral Resources recently issued Regulation No. 49 of 2017 (MEMR 49/2017) which amends Minister of Energy and Mineral Resources Regulation No. 10 of 2017 on Main Provisions for Power Purchase Agreements (MEMR 10/2017). MEMR 10/2017 was widely criticised by investors, as it regulates the substance of a power purchase agreement (PPA) including the aspects of risk

Aka Fajaretta

> "To encourage gas utilisation for power generation, MEMR 45/2017 also allows contractors to establish a subsidiary to play the role of an IPP for gas wellhead power generation."

allocation, which was usually determined by mutual consent of the parties in a PPA (before the issuance of MEMR 10/2017). MEMR 10/2017 limits the flexibility of PLN in the negotiation of a PPA to accommodate the concerns of lenders of a project which impacted upon the bankability of a project.

One controversial issue under MEMR 10/2017 is the stipulation on the risk of government *force majeure* that was assigned to both PLN and the project company. It provides that both PLN and the project company must be relieved from any obligations should the project be terminated due to a government *force majeure* event. In practice, the PPA typically provides a certain amount of compensation to the project company, which should be sufficient to cover the remaining debt if a project is terminated due to a *force majeure* event. This is a critical factor for the bankability of a project. A bank would not view a project to be bankable if the project company did not have any recourse in the event of a change in government policy that could lead to termination of a project.

MEMR 49/2017 settles this issue by removing the provisions under MEMR 10/2017 which refer to government *force majeure* events. In this regard, a PPA is allowed to provide that PLN has the responsibility to pay compensation to a project company (and buy out the project) if a project is terminated due to government *force majeure* (change in government policy). However, the scope of government *force majeure* is still not clear under the ministerial regulation, as it still retains certain provisions which refer to a change in regulations. We may need to wait to see how PLN will implement the change introduced by MEMR 49/2017.

MEMR 49/2017 was surely welcomed by investors, as it removes the issue of government *force majeure* risk which previously called into question the bankability of a project. Unfortunately, several issues still remain under MEMR 10/2017 that were not addressed by MEMR 49/2017 including the risk of 'Act of God' *force majeure* events which could affect PLN's ability to take on the electricity generated (deemed dispatch payment by PLN).

Electricity price for renewable energy sources

Another development in MEMR policies which attracted the attention of electricity business players was the issuance of MEMR Regulation No. 50 of 2017 (MEMR Reg 50/2017), which replaced MEMR Regulation No. 12 of 2017 (MEMR 12/2017), concerning Utilisation of Renewable Energy for Electricity Power

> "Unfortunately, several issues still remain under MEMR 10/2017 that were not addressed by MEMR 49/2017 including the risk of 'Act of God' force majeure events which could affect PLN's ability to take on the electricity generated."

Ferdinand Jullaga

Generation only about seven months following the issuance of the latter regulation. The issuance of MEMR 50/2017 is expected to improve the business climate in the renewable energy sector. A highlight of this new policy is the opportunity for renewable energy players to freely negotiate the electricity sale price with PLN in the event the local BPP is equal or less than the national BPP amount.

BPP (*Biaya Pokok Penyediaan*) is the principal cost incurred by PLN to supply electricity in certain locations in Indonesia. MEMR will issue a decree annually to determine local BPP in all provinces and in certain cities in Indonesia and to determine the average national BPP. This year, MEMR issued MEMR Decree No. 1404 K/20/MEM/2017 which gives a breakdown of local BPP and sets the national BPP in the amount of IDR 983/ kWh for 2017.

Unlike the previous MEMR 12/2017 which sets out an 85 percent price cap for power generated from solar, wind, hydro power, biomass, and biogas power generation in the event the respective local BPP is less than or equal to the national BPP, MEMR 50/2017 now allows business players in solar, wind, hydro power, biomass, biogas, and additionally marine power generation, to determine the electricity purchase price based on negotiations with PLN.

MEMR 50/2017 also continues to maintain the exception of the 85 percent price cap for waste and geothermal power generation, by allowing these power generation companies to negotiate pricing with PLN. Furthermore, MEMR 50/2017 now promotes hydropower generation by allowing investors to negotiate pricing with PLN in the event local BPP is less than or equal to national BPP.

Another positive development in the new regulation pertains to hydropower generation companies. In the event the respective local BPP is higher than the national BPP, MEMR 50/2017 now provides a 100 percent price cap (previously it was 85 percent) of the local BPP. While investors in hydropower may be content with the said flexibility in determining the power price, the same cannot be said for other renewable energy sources which are still subject to the cap in the event local BPP is higher than national BPP.

> "It will be interesting to see the implementation of such regulations, particularly since they do not completely address investor concerns."

Investors should warmly welcome the introduction of the regulations mentioned above, as they demonstrate that the government is responsive and willing to address their concerns. It will be interesting to see the implementation of such regulations, particularly since they do not completely address investor concerns. For its part, the government hopes there will be significant progress in the development of electricity infrastructure in the near future and that it can still meet its ambitious targets to increase capacity nationwide.

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Off-grid energy solutions in Africa

The market is approaching a stage where alternatives to on-grid energy are moving forward into larger and more complex deployments.

By Ashen Jugoo, **Fasken Martineau**

Africa's development has been significantly affected by the energy deficit, with an estimated 70 percent of people in sub-Saharan Africa without reliable access to electricity. Consumers with high energy needs are already moving to off-grid energy solutions. Apartment blocks, hospitals, shopping malls, mining and manufacturing plants were some of the first consumers to opt for off-grid energy solutions and they have since been followed by body corporates, home associations and office parks.

Some of the main reasons behind consumers opting for off-grid energy solutions include (i) the lack of grid access in rural and undeveloped areas; (ii) the lack of reliable energy solutions in various areas; and (iii) the high prices of on-grid energy. A reliable electricity supply is vital to ensuring uninterrupted production in the operations of many consumers.

Traditionally, when confronted with load shedding and other electricity supply interruptions, consumers were forced to choose between the less than desirable options of either reducing operations or turning to other costly energy solutions, such as diesel generators. However, more and more, companies are considering and implementing long term off-grid solutions.

Financing

Securing debt financing for the initial investment in off-grid infrastructure is often difficult. Project financing is not always a viable option for these projects as the risk profile is typically unattractive to many funders given the issues around bankability and appropriate risk transfer. However, the traditional project finance structure, of financing a single project with a secure long term off-take, has paved the way for hybrid financing structures that combine components of project finance and corporate finance. Consumers with strong balance sheets may also consider financing, building, operating and maintaining off-grid infrastructure independently.

The focus has shifted from developing micro-finance solutions (which seek to finance each household or energy user) to developing financing solutions for energy service companies. This shift may resolve certain financing challenges. However, some energy service providers may elect to pre-finance the development of the project and use bank loans to refinance their initial development costs. One of the most viable financing solutions is portfolio finance. Portfolio financing allows developers to seek funding for a combination of projects and prospective lenders to assess

risk in relation to cluster of projects, rather than a single project.

Security

One reservation may be in relation to the high costs of registering the security often required by lenders and the costs of amending these security documents as and when new projects are introduced. One way of mitigating these costs would be to avoid registrable securities (ie general notarial bonds, special notarial bonds, fixed and floating charges).

Post construction refinancing may also offer a more economical solution. Projects are typically de-risked post construction and offer the possibility of procuring financing without the provision of any registrable securities over the assets. The assets being financed could also be housed in an insolvency remote equipment owning company, which would use its balance sheet to procure corporate financing. In addition, many off-grid solutions employ modular technologies which are easily redeployed. Accordingly, there is less need for need for very large initial investments and debt profiles as projects can be up-scaled (or redeployed) depending on the demand.

Off-grid regulations

There is a need for enabling legislation to promote the development of sustainable, fast and efficient off-grid electricity. Policy reform is very important, with off-grid energy solutions being included in the national electrification strategies.

The lengthy process of procuring the relevant permission and licences is also an issue as the protracted process generally equates to higher transaction costs. One of the central issues is the requirement that all energy suppliers, irrespective of their size or the nature of their operations, have to comply with the same standards of compliance.

These smaller emerging projects require a different approach, with a dedicated tariff and less onerous compliance requirements. This approach has been adopted in some other jurisdictions, including India. However, in a number of jurisdictions, including South Africa, there remains a need for a revision of the existing legislations. Regulatory standards should be realistic, affordable and enforceable, with protections extended to both consumers and investors.

Conclusion

Off-grid energy solutions are becoming more and more prevalent in the African market and may be at a stage where these solutions will soon move forward into larger and more complex deployments.

Ashen Jugoo

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Thailand: New Minerals Act

By Christopher C Kalis, counsel and *Sawanee Gulthawatvichai,* associate and *Tachatorn Vedchapun,* associate, **Chandler MHM**

A new Minerals Act (BE 2560 (2017) was published on March 2, 2017 and took effect on August 30, 2017 (180 days after the publication date).

As of September 2017, 12 notifications have been issued under the Minerals Act and there are 36 draft MRs, regulations, notifications and orders of MoI or DPIM posted on the DPIM's website, in Thai language. There were also the following numbers of SEPLs, MLs and licences issued under the former laws:

- 80 SEPLs
- 942 MLs
- 265 mineral dressing licences

The Department of Primary Industry and Mining (DPIM), Ministry of Industry (MoI), and Ministry of Natural Resources and Environment (MNRE) are the government agencies that administer the new Minerals Act (2017).

Generally, the new Act aims to provide stricter environmental controls, decentralise administrative power, encourage the use of newer mining technologies, and provide those living in mining areas more protection.

Summary of changes and amendments in the new Act

> "The Minister of MNRE and Minister of MOI are both charged with the control and enforcement of the Act, and will be able to issue ministerial regulations, notifications and other orders under defined circumstances."

Administrative overview

Additional definitions reflecting a new administrative system have been added, which includes municipal and sub-district administrative bodies. The Minister of MNRE and Minister of MOI are both charged with the control and enforcement of the Act, and will be able to issue ministerial regulations, notifications and other orders under defined circumstances. A National Mineral Administrative Policy Board (NMAP or the Board) is to be established, and the Department of Mineral Resources (DMR) shall function as a secretarial office for the Board.

The Board is in charge of preparation of a minerals administrative master plan, which will include resource surveys, restrictions on certain minerals and areas, and guidelines for mineral administration that result in appropriate benefits to the economic, social, environmental and health balance. A master plan is to be prepared in five-year intervals, and submitted to the Council of Ministers for consideration and approval.

Mineral Committee and Provincial Mineral Committees are also to be established. The Mineral Committee is in charge of advising the Ministers on bidding, issuance of ministerial regulations and notifications, approval of licences, renewals, transfer, and revocation of conditions for mining of category 2 and category 3, consider complaints, and provide assessments of the impact on people's health and environment related to mining activities.

The Provincial Mineral Committee has the power and duties to grant licences, renewals, transfers or revocation of conditions related to *prathanabat* (a document of rights granted for mining within a designated area) for mining of category 1; consider complaints or impacts of

By Christopher C Kalis, counsel and Sawanee Gulthawatvichai, associate and Tachatorn Vedchapun, associate, ***Chandler MHM***

"The Act further requires that applicants submit plans for restoration, development, utilisation and monitoring impacts from mining activities on the environment and health of people in and around the mining area after closure of the mine."

Sawanee Gulthawatvichai

mining of category 1; provide recommendations to the Provincial Governor on mineral administration in that province, and; to do other acts as assigned by the Minister and Provincial Governor.

Prospecting

Regulations in regard to prospecting remain similar to those under the Mining Act BE 2510 (1967), and still include three types of prospecting licences: an *atchayabat* (a document of rights granted for prospecting), an exclusive *atchayabat*, and a special *atchayabat*). Changes to the administrative regime of the mining industry are reflected in the application and prospecting licensing granting authorities including the following:

- An application for an *atchayabat* is applied for and granted by the local official in that locality. The validity is one year from the date of issue. The area applied for under an application is not specified under the law.
- An application for an exclusive *atchayabat* is applied for with the local mineral industries official in that locality, and issued by the DG with approval from the Board (formerly, granted by the Minister, or such person entrusted to do so by the Minister). The validity period is one to no more than two years. The area applied for under an application is not more than 2,500 rai (1 rai = 1,600 square metres).
- An application for a special *atchayabat* is applied for with the local mineral industries official in that locality, and granted by the DG on approval by the Board. The validity period is not more than five years. The area applied for under an application is 10,000 rai for an onshore exploration area and not more than 500,000 rai for an offshore exploration area.

Mining – general provisions

Applications for a *prathanabat* are submitted to the local mineral industries officer. The Act further requires that applicants submit plans for restoration, development, utilisation and monitoring impacts from mining activities on the environment and health of people in and around the mining area after closure of the mine and requires applicants to bear the cost of organising referendums for those individuals in the area of the proposed mining activities, if such individuals do not approve of such mining activities.

The Minster may issue notifications to classify mining activities into three categories, as follows:

(1) Category 1 mining, ie mining in the area of no more than 100 rais, the *prathanabat* of which shall be issued by the local mineral industries official on approval of the Provincial Mineral Committee in the province where the mining is operated;
(2) (Category 2 mining, ie mining in the area of no more than 625 rais, the *prathanabat* of which shall be issued by the DG on approval of the Mineral Committee;
(3) Category 3 mining, ie mining other than the category 1 mining or category 2 mining, offshore mining and underground mining, the *prathanabat* of which shall be issued by the DG on approval of the Mineral Committee.

The Act further states that any mining activity that requires preparation of an EIA shall be automatically classified as a Category 2 or 3 mining activity.

The maximum validity period for a *prathanabat* has been increased from 25 to 30 years. (Section 58) If the rights under the *prathanabat* are terminated for any reason listed under the Act (in Section 62), minerals remain in the mining area, and the *prathanabat* holder or successor do not apply for a permit to take possession of said minerals within 90 days from the termination date, the rights to such minerals shall devolve to the state. The DG or local mining officials may propose investigations to the Mineral Committee or Provincial Mineral Committee where complaints are lodged, or where the *prathanabat* holder's mining activities have impacted the environment or people's health and no settlement can be reached. If such investigation finds that there has been an impact on the environment, the Mineral Committee or Provincial Mineral Committee may order the *prathanabat* holder to remedy such impact(s) within a prescribed period of time.

Assignment of a *prathanabat* requires the permission of the *prathanabat* issuer (see General Mining Provisions above), with the application for transfer to be submitted to the local mineral industries official.

Provisions on restoration plan

Applications for underground mining will now require that the applicant provide a restoration plan, and place security for restoration of the mining area, and remedies for persons affected by the mining. *Prathanabat* holders for underground mining who do not provide the requisite security or insurance for any damages determined to have been caused by such mining activities within 15 days of notice of the same; the *prathanabat* issuer has the power to issue an order to revoke the *prathanabat*.

The Act includes a new section for determining compensation amounts, which shall be determined by the compensation determination committee. The Act no longer includes a section dedicated to Natural Brine Extraction.

Tachatorn Vedchapun

"The DG or local mining officials may propose investigations to the Mineral Committee or Provincial Mineral Committee where complaints are lodged, or where the prathanabat holder's mining activities have impacted the environment or people's health and no settlement can be reached."

Mineral business operation, mineral dressing and metallurgical processing

Minerals or by products derived from mining may be purchased, sold, possessed, stored or transported. The DG may grant an approval to possess minerals derived other than through mining activities or mineral planning, on a special case basis. The DG may also issue notifications determining certain mineral controls with regard to purchasing, selling, possession, storage or transportation. Minerals that fall under a notification will require a licence issued by the DG, which will be valid for no more than five years.

The DG may also prohibit the importation or exportation of certain minerals into or out of Thailand, as well as issue permits or licences for the importation of such prohibited minerals, and issue rules and procedures on transportation of minerals within Thailand. (Sections 104 and 105)

Mineral Dressing and Metallurgical licences are to be issued by the DG and are valid for no more than five years.

Renewal of licences for purchasing, possession, storage, mineral dressing, and metallurgical processing must be filed prior to the expiration of the previous licence. Transfer of mineral dressing and metallurgical processing licences may only occur after permission is granted from the DG.

Mineral royalty, fee and special contribution

Mineral Royalties, under the Act, are listed as follows:

Under Section 131, a *prathanabat* holder, a licensee for mining on minor scale, a person who notifies mineral panning, a mineral-dressing licence holder, a metallurgical-processing licence holder or a mineral possession licence holder shall pay mineral royalty with respect to the minerals as follows:

(1) Mineral specified in the *prathanabat* including other minerals derived as by-products of mining;
(2) Minerals derived as by-products of mineral dressing or lags containing other minerals in excess of the amount specified by the DG where the mineral royalty with respect to such minerals has not been paid;
(3) Minerals derived from mining on minor scale or mineral panning;
(4) Minerals permitted for possession under Section 97, paragraph two, where the mineral royalty with respect to such mineral has not been paid;
(5) Minerals in case of purchase of minerals devolved on the state where the mineral royalty with respect to such minerals has not been paid.

Rates are capped at no more than 30 percent of the market price of the mineral. Royalty tariffs are to be established under ministerial regulations. Applicants for licences provided under the Act are required to pay a fee when submitting the application, which is refundable if the application is rejected. Fees for mineral prospecting under an exclusive *atchayabat* or special *atchayabat* will be established at a progressive rate under notifications from the Minister. *Prathanabat* holders shall pay a special contribution of no more than ten percent of the mineral royalty of the minerals produced under that licence.

> "Applicants for licences provided under the Act are required to pay a fee when submitting the application, which is refundable if the application is rejected."

Development and promotion

The Minister, on the recommendation of the Mineral Committee, may reduce fees and issue qualifications for eligibility for such reductions under defined circumstances, including "reasonable grounds."

Civil liability

The licence holder, under the Act, is responsible for compensation payment for damages arising out of their business operations.

Transitory provisions

Any related regulations under Minerals Act BE 2510 (1967) and the Act on Prescription of Mineral Royalty Tariffs BE 2509 (1966) issued before the effective date of the Act, ie August 30, 2017, shall continue to be in force in so far as they are not contrary to or inconsistent with the Act until the ministerial regulations, notifications, regulations or orders issued under this Act come into force.

"The licence holder, under the Act, is responsible for compensation payment for damages arising out of their business operations."

Further, applications which have been submitted before the effective date of the Act, ie August 30, 2017, shall be deemed applications under the Act and shall be considered and may be proceeded according to the rules provided in this Act.

Except for requirements concerning (i) preparations of mining buffer boundaries and establishment of basic data of environment and people's health, and (ii) rehabilitation of the mining area conditions, placing of the security and taking insurance against loss, all *atchayabats*, *prathanabats* or licences issued under the Minerals Act BE 2510 (1967) before the effective date of the Act, ie August 30, 2017, shall be deemed *atchayabats*, *prathanabats* or licences under this Act and shall continue to be valid until expiry or revocation provided that compliance shall be made according to the rules provided under this Act.

Lastly, all obligations under contracts made under the Minerals Act BE 2510 (1967) with the Government of Thailand by MoI and DPIM before the effective date of the Act, ie August 30, 2017, shall continue to be valid according to the obligations under such contracts until termination of the validity of the contracts. In case of filing a request for renewal of any *atchayabat*, *prathanabat* or licence, it shall be complied with the rules provided in this Act.

Additional subjects of importance to FDIs

- Restrictions on foreign ownership of mining and ore dressing projects.
- Lifting suspension of mining and metallurgical licence of the Chatree Mine.
- Restrictive policy of the Board of Investment, which currently limits promotion only to potash mining and ore dressing.
- Clarification of new environmental safeguards for exploration and mining projects.

This summary does not include:

- Provisions regarding cancellation, amendment and revocation of licences
- Provisions regarding penalties.
- Provisions regarding seizure and attachment.
- Listing of laws repealed by the new Act.

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China's new network security law may affect operations inside and outside China: Are you ready?

Network operators in China, especially of critical information infrastructure, face increasing protection requirements that could burden service contracts and affect data beyond China.

By *Hui Xu and Lex Kuo,* **Latham & Watkins**

Key points:

- China's new Network Security Law is prioritising protection of cybersecurity and individuals' privacy.
- Network operators in China, who collect personal information in China, are required to establish systems to protect their users' information.
- In-house lawyers should help their enterprises prepare for evolving and expanding cybersecurity laws.

Data protection in China is becoming increasingly challenging for network operators to navigate in the past few months. The promulgation of China's much-anticipated Network Security Law (the Network Security Law) and its accompanying regulations will likely have the most far-reaching impact of any legal measures yet.

Effective since June 1, 2017, the Network Security Law, together with its accompanying regulations, not only provides important rules for China's network data protection and security, but also poses continuing challenges for national and international enterprises. Recent news articles indicate that the Cyberspace Administration of China (the CAC) has conducted several enforcement actions relating to data protection, such as reviewing privacy policies and their implementation in practice by Chinese network operators. These are clear indicators that data protection and cyber security in China are real risks to be taken seriously. This article provides an overview of how in-house counsel can work toward compliance with these rules and the accompanying challenges.

Lay the groundwork with a cybersecurity management system

The provisions of the Network Security Law apply to network operators (ie, owners and administrators of networks and network service providers) in China, who must establish policies ensuring Chinese cybersecurity protection. Nonperformance of network security management duties under the Network Security Law will not only incur administrative penalties under the Network Security Law, such as suspension of business operation, closure of websites, revocation of permits/licences, and administrative fines applicable to enterprises and relevant individuals. The nonperformance may also trigger criminal liabilities, such as imprisonment, criminal detention, and/or criminal penalties, if nonperformance incurs certain serious consequences as defined under the PRC Criminal Law (eg, leak of user information that causes serious consequences).

In-house lawyers should ensure their enterprises comply with the relevant

requirements of the Network Security Law, including incorporating network security measures into their cybersecurity systems. For instance, network operators in China must address all of the following:

- **Cybersecurity measures.** Implement technical measures to prevent computer intrusions and to monitor network operation; appoint in-charge personnel for cybersecurity matters; keep the relevant logs no less than six months; back up and encrypt important data; and develop and rehearse emergency plans for cybersecurity hazards (eg, virus, cyber-attack, and network intrusions).
- **User Information protection.** Obtain informed consent from users before collecting their information; set up a user information protection system to keep the user information strictly confidential; establish mechanisms to accommodate users' requests to delete or to correct user information under certain circumstances; take immediate remedial measures and promptly notify users and relevant administrative authorities if personal information is or might be leaked, damaged, or lost.
- **Online content management.** Verify users' real identity and information before network operators will provide certain services related to publication or dissemination of online content, such as services regarding network access, domain name registration, access formalities for fixed-line telephone or mobile phone, information release, or instant communication; strengthen the management of user-provided information and prevent the dissemination of illegal information.
- **Network products and services requirements.** Network products and services suppliers must ensure the network products and services comply with relevant mandatory requirements under Chinese national standards; provide security support during the period required under regulations or agreed to by the parties; take immediate remedial measures and promptly inform users and relevant government authorities in case of cybersecurity hazards.

Expect increased oversight for critical information infrastructure to impact business and data inside and outside China

In addition to the aforesaid requirements applicable to network operators, enterprises that are considered critical information infrastructure (CII) are subject to enhanced cybersecurity requirements, such as heightened cybersecurity measures, data localisation requirements, and national security review on procurements of network products and services.

Evolving scope of CII

While the Network Security Law and its related regulations and standards (currently in draft form for public comments) set out high-level descriptions of industries that the Network Security Law will consider as CII, the specific scope of CII is still pending further clarifications by relevant authorities.

Hui Xu

> The Network Security Law not only provides important rules for China's network data protection and security, but also poses continuing challenges for national and international enterprises.

Lex Kuo

By way of background, the scope of CII is set out below in a chart summarising the relevant provisions in the Network Security Law and a draft of the Regulations on Security Protection of Critical Information Infrastructure (the Draft CII Regulations) issued by CAC on July 10, 2017:

	Network Security Law	Draft CII Regulations
Scope of CII	1. Important industries and sectors such as public communications and information services, energy, transport, water conservancy, finance, public utilities and e-government affairs	1. Government agencies and entities in the energy, finance, transportation, water conservancy, health care, education, social insurance, environmental protection and public utilities sector
		2. Information networks, such as telecommunication networks, broadcast television networks, the internet, and entities providing cloud computing, big data and other large-scale public information network services
		3. Research and manufacturing entities in sectors such as science and technology for national defence, large equipment manufacturing, chemical industry and food and drug sectors
		4. Press units such as broadcasting stations, television stations and news agencies
	2. Other industries and sectors that, once damaged, disabled, or data breached, may severely threaten the national security, national economy, peoples' livelihood and public interests	5. Other key entities, whose network facilities and information systems, if damaged, disabled, or breached, may severely jeopardise national security, people's livelihood and public interest

While the open-ended descriptions of CII under the Network Security Law and the Draft CII Regulations cannot completely eliminate uncertainties for determining whether an entity will be considered as CII, the Draft CII Regulations provide further clarity on the scope of CII. The Draft CII Regulations also indicate that CAC will collaborate with relevant government authorities to promulgate CII Identification Guidelines, which are expected to further clarify the scope of CII. Reports indicate that the relevant government authorities have identified a few hundred of enterprises, mostly state-owned enterprises in China, as CII operators (CIIOs). The relevant government authorities have informed these state-owned enterprises that they have been identified as CIIOs and of the relevant compliance requirements. Once the relevant government authorities reveal the initial list of CIIOs, and following the upcoming promulgation of the CII Identification Guidelines, enterprises hopefully will have more clarity on CII determination standards in the near future.

Enhanced data related requirements for CII

Pursuant to the Network Security Law, CIIOs are subject to enhanced cybersecurity requirements, such as setting up specialised agencies for cybersecurity management, providing CII cybersecurity practitioners with regular cybersecurity education and training, and implementing data categorisation, back-up, and encryption. Some of the most notable and controversial enhanced cybersecurity requirements applicable to CIIO under the Network Security Law are the data localisation requirements.

Specifically, the Network Security Law requires that a CIIO must locally store in the PRC the personal information and "critical data" collected and generated by CIIOs through their operations in the PRC. If any cross-border transfer of such information and data is necessary for business reasons, CIIOs must submit the proposed transfer to the government authorities for a security assessment, which will be subject to regulations the relevant authorities will issue. In addition to the data localisation

requirements, the Draft CII Regulations further require that any operational maintenance of CII should be conducted within the territory of the PRC, and any remote maintenance to be conducted outside of the PRC should be reported to the industry specific governing or supervising authorities and public security departments.

As many domestic and multinational enterprises could potentially fall within the scope of CII (which is still evolving at the current stage), these enterprises will likely encounter restrictions and impediments resulting from the new local data storage/transmission requirements, and, potentially, restrictions on remote operation maintenance from abroad (as required under the Draft CII Regulations). As such, enterprises must closely follow related legislative developments, and prepare in advance in order to avoid the legal repercussions of non-compliance.

Maintain protections for an expanding universe of personal information

Another notable development under the Network Security Law and its related regulations is the emphasis on protection of personal information. While similar requirements exist under various previous regulations, the Network Security law reiterates such requirements under a comprehensive and cohesive structure, requiring network operators to establish a user information protection system and to strengthen protection of user information. Crucially, in-house counsel must also review whether an enterprise conforms in all respects with the requirements to protect user information.

Particularly noteworthy under the new law is the emphasis on network operators to set up a comprehensive user information protection system, to explicitly communicate with data subjects about collection, storage, process, and transfer of personal information, and to obtain informed consents from data subjects about the aforesaid operations. Specifically, according to the Network Security Law, network operators must explicitly state the purpose, method, and scope of collecting and using users' personal information, and must ensure they have received consent from the individual for the collection, use, transfer, and sharing of personal data, which must conform with the agreement by and between such network operators and the users. Further, under the Network Security Law, network operators should not disclose user information to third parties without securing consent from data subjects with an exception for disclosure of anonymised user information that cannot be used to identify specific individual.

In practice, the emphasis on network operators has been reflected in recent enforcement actions regarding privacy policies of network operator. Recent news articles indicate that Chinese authorities have reviewed and commented on the privacy policies of at least ten leading online service providers. One of the operators of mobile map applications in China reportedly will adopt its new privacy policy based on the draft regulations entitled "Personal Information Security Regulations" (the regulations are expected to be released for public comments in the near future). Further, the Ministry of Industry and Information Technology also promulgated the Guidelines on the Standardised System Construction for Mobile Network, which contemplate including a set of Guidelines on Protection of Users' Personal Information that in-house counsel should refer to when preparing privacy policies of network operators.

Given the Network Security Law's potential criminal liabilities on enterprises and individuals for non-compliance at a minimum, in-house lawyers should review and conduct self-assessment on their enterprises' existing privacy policies and infrastructure on protection of personal information, in order to identify potential weaknesses and to rectify any non-compliance.

Are you ready?

In conclusion, China is not only strengthening the supervision of internet activities and data protection, but also imposing more obligations on network operators and users. Wise enterprises will take steps to prepare not only for the changes that have come, but those that are yet to come.

This article was prepared with the valuable assistance of Jennifer C Archie, partner in the Washington, DC office of Latham & Watkins.

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The thing about ... Kirsty Dou

The managing director of Axiom spoke to Asian-mena Counsel's Patrick Dransfield about disrupting the traditional law firm model in Asia.

Asian-mena Counsel: What prompted you to create the very first new model law business in Asia?

Kirsty Dougan: I was regional counsel with Diageo based in Shanghai for a few years and experienced law firm secondees. It felt a very unsatisfactory way of resourcing my team through busy periods and I didn't like the expectation of reciprocity it created. I moved to Hong Kong in 2009 and was surprised at how conservative the legal profession was here. The idea of disruption to the traditional law firm model seemed an alien concept in those days. I found lawyers in private practice to be very conservative, risk-averse and even protectionist in behaviour. But a number of very progressive in-house lawyers told me the profession was ready for change and felt the business model would work well in Asia, particularly at a time when the industry was still feeling the dramatic fall out from the global financial crisis.

The question I kept coming back to in those early years was, in a world where everyone else was trying so hard to be efficient, why does the legal industry, one of the world's largest and most important service industries, get to be so inefficient?

I saw an opportunity and in 2009 set up my own company called Asia Counsel with a former investment banker, Serena Wallace-Turner and within six months we had sold that to Axiom, opening in Hong Kong in 2010 and Singapore in 2011.

AMC: How would you describe the services that Axiom provides?

KD: Axiom is the world's leading alternative legal services provider. With more than 2,000 employees across three continents, we provide lawyers to clients by way of secondments and technology solutions to help legal departments adapt to a demanding new era. We do this in three ways.

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Photo: Patrick Dransfield

First, we offer a secondment platform. We recognise that in-house teams must be nimbler than ever and we help clients respond to this challenge by engaging proven, flexible legal talent backed by client-focused management. This helps our clients to save time, manage risk and lower costs — new teams or teammates can integrate seamlessly in a matter of days, we provide access to a bench of more than 1,500 vetted experts enabled by tools and continuing support, and this saves 50 percent to 75 percent versus law firms while avoiding the fixed costs of full-time hires.

Second, we provide contract diligence and integration. We believe there is a lost opportunity in M&A deals, for example. Traditional due diligence and integration is expensive, fragmented across multiple stakeholders and fails to use the power of contract data. Axiom can enable data-powered deal success. We've combined legal acumen and proven process to unlock the power of contract data at every stage of the deal, from collection to review and data capture to reporting and analytics and to novation and assignment.

When I moved to Hong Kong I found lawyers in private practice to be very conservative, risk-averse and even protectionist in behaviour

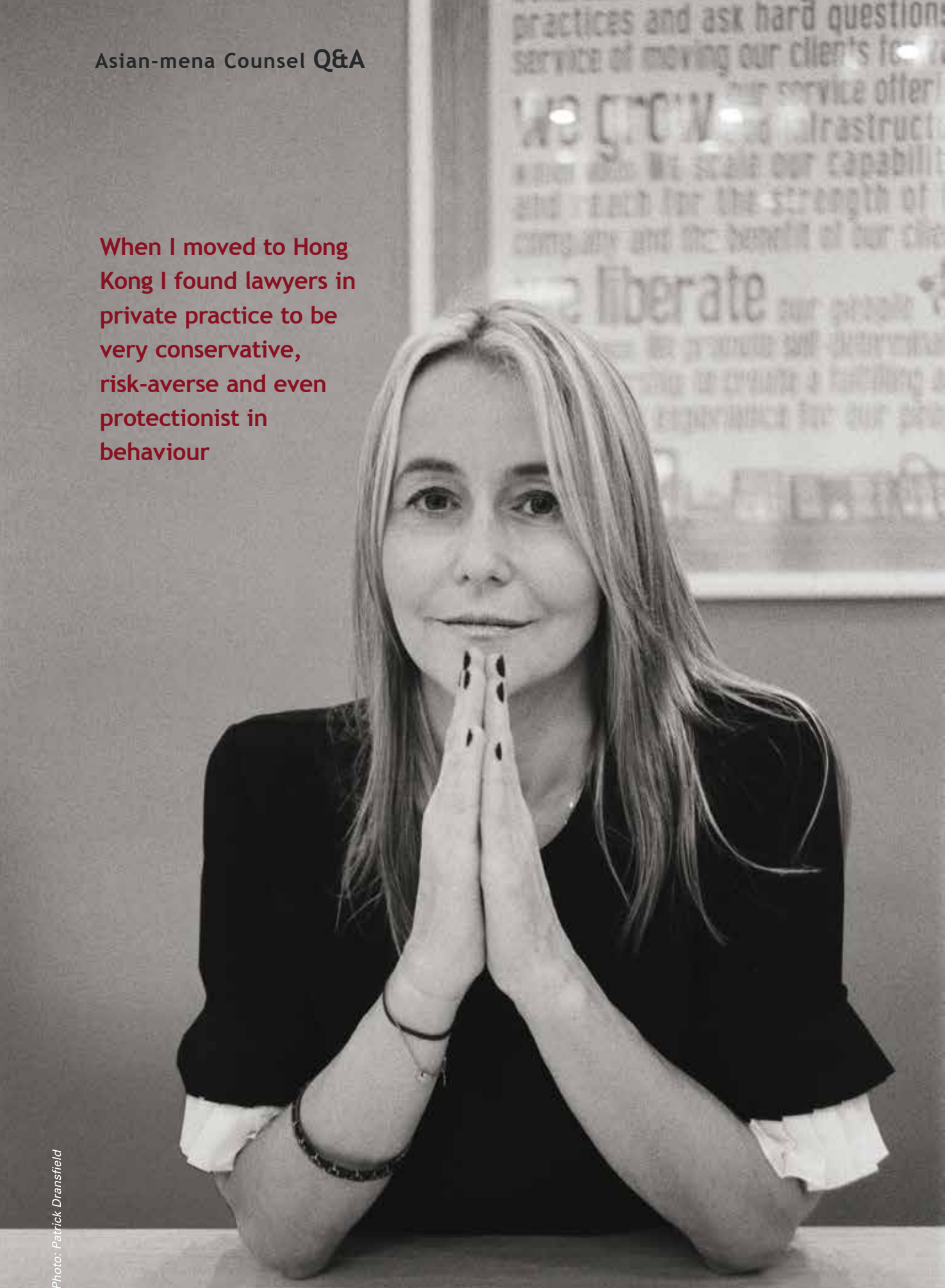

Photo: Patrick Dransfield

The third element of our service is aimed at regulatory reform, where the pace of change is clearly burying organisations in an unprecedented amount of work. Axiom's legal and process prowess helps companies achieve compliance with less disruption. By combining legal intelligence and a business-focused approach, we consistently carry large-scale compliance projects to the finish line.

AMC: How is Axiom changing the way lawyers work?
KD: We set out to create a new category of legal services and provide lawyers and clients alike with choice and control over their careers and budgets in a way they'd never had before. Even five years ago in Asia, this was an alien concept to many.
Axiom professionals typically join because they're excited by the global reach of the company, our enviable client list (we serve over half the Fortune 100 and 10 out of 10 of the top investment banks), our 90 percent utilisation rate, and our unwavering focus on this category. This is what we do — this is not a side business, it's our main business and that means we invest our heart and soul into making sure that the model works for our lawyers and our clients.
In terms of what it means for our clients, our lawyers are dedicated and focused professionals who are not only building their own brands but feel a huge sense of pride for the community and business that supports them — they want to do a good job for themselves, but also for Axiom, and that means making clients happy.
To attract the right talent, we offer full benefits to our lawyers including medical, dental, pension, work visas where required, competitive salaries, spot bonuses, annual appraisals and pay rises, client feedback and, for some who meet certain criteria, equity in the firm. This really is a unique value proposition in the market and one that clients also find compelling. They see us really investing in people and respond to it positively.

AMC: In your experience, are lawyers ready to embrace change?
KD: Yes, I believe they are hungry for change, which is why so many join Axiom and why we have seen such growth in the alternative legal service provider universe. The legal profession is the last profession to really embrace meaningful change although as Richard Susskind says it is hard to tell a room full of millionaires that they have their business model wrong!

AMC: How is Axiom helping to bring the legal profession into the 21st century?
KD: Driven by a spirit of exploration, Axiom has been at the centre of the changing legal industry for two decades, asking the big questions on behalf of lawyers, GCs and the industry as a whole. As such, Axiom provides talent and technology to help legal departments adapt to a demanding new world. And we are embracing the technology that promises to define and reform that new era. For example, in August we announced the market launch of AxiomAI — a program that leverages artificial intelligence (AI) to improve the efficiency and quality of contracts work. As part of AxiomAI, we will accelerate the use of current generation AI to help extract information from contracts in order to streamline contract analysis. At the same time, we will continue our research and development efforts to shape next-generation AI applications for more unique and transformative use cases.

We set out to create a new category of legal services and provide lawyers and clients alike with choice and control over their careers and budgets in a way they'd never had before

AMC: What are some examples of your value proposition in Asia?
KD: Axiom is known for having the most commercially minded professionals in the market and our investment in people does not end with getting the right people on board. We offer top-class business education in addition to the professional education you would expect. Our executive education programme — offered through the world's leading management consultancy company McKinsey — provides our lawyers with an MBA-like certification that covers subjects such as business strategy, risk and effective communication.
Clients can hire our lawyers on a retained basis, for example at 20 hours a week or on a full time basis — there is no minimum requirement. So our secondments can be very flexible and can be scaled-up or back at any time.

High-value insourcing has recently been very attractive to investment banks facing regulatory events — where they don't want a law firm or contractors — so turn to Axiom with confidence in the quality of our lawyers and our client service, where we're putting together concrete deliverables that clients can rely upon. In the area of margin reform, for example, we're seconding global teams to clients with detailed processes, technology and key deliverables in place. In Asia, this has been a compelling value proposition for investment banks as they struggle to manage tough deadlines set by regulators.

AMC: What does Axiom have planned for Asia in the future?
KD: Axiom was the pioneer of new model law in Asia and remains the market leader in the region, bringing meaningful change and innovation to legal departments on a scale that other providers struggle with. To stay competitive and relevant to our clients we need to look at new markets in the region and I am excited to be working on that plan right now. We are also looking at where we could put a centre of excellence to build out our contracts transaction service and projects capability in this region. Our new CEO, Elena Donio, is also driving the technology side of our business with a new CTO appointment imminent and the recent launch of our AI platform. The future looks very bright!

AMC: What has been the best piece of advice given to you in your career to date?
KD: I've had advice from a number of great people over the years, some of which I have taken on board and some I have disregarded! As a business owner with an entrepreneurial streak, I realised you have to be pretty fearless if you want to succeed running your own business. And stubborn! When I've been criticised or told my ideas won't work, it simply fuelled the ambition.
I think the single piece of advice that still resonates came from Tim Proctor, the global GC at Diageo, who was my unofficial mentor during my time there. He was with me in Shanghai one week and saw that I was working too hard and possibly heading for burn out. He took me for a walk round the block and said very firmly: 'Kirsty, you need to get cleverer with your time.'
It was such simple advice, but it has stuck with me over the years. I am razor-focused on where I spend my time now and I write much shorter emails!
I have learnt what to worry about and what not to worry about with regard to the business, and I have hired some super-smart, clever people into my team in Asia and given them the trust and empowerment to succeed.

AMC: What is your hinterland (ie, what are your interests outside of Axiom)? How do you control your time so that you can pursue them?
KD: I do a lot of yoga! And I have recently taken up kickboxing, which I find very cathartic. I am also a keen skier and love interior design and renovation projects.
I tend to come into the office pretty early and do any calls with New York/San Francisco before heading to the gym for an hour or so before anyone else is around. I am very lucky in that I can control my hours and will often relocate home early evening to spend time with the family before I do evening calls with our London and US offices. It works brilliantly for me and I think I am happier as a result. I couldn't go back to having to complete time sheets for every minute of the day or working in a company where the culture requires you to leave your jacket on the back of the chair.

Kirsty Dougan is managing director of Axiom for the Asia region, the world's leading provider of legal advisory services. She has advised general counsels on all aspects of legal department management, including restructuring and process reengineering, and has hired more than 200 lawyers across a range of disciplines covering major Fortune 50 companies along with mid-sized financial, pharmaceutical, FMCG and tech companies.

Prior to her experience with Axiom, Dougan served as regional counsel to Diageo in Shanghai, where she led the first foreign investment in China's domestic spirits industry. She was also adjunct professor at Fudan University, and previously a law lecturer in the UK, where she taught EU, anti-trust and international law, and is the author of several legal texts.

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