asian-mena Counsel

Volume 16 Issue 1, 2018

CYBER CRIME & DATA PROTECTION

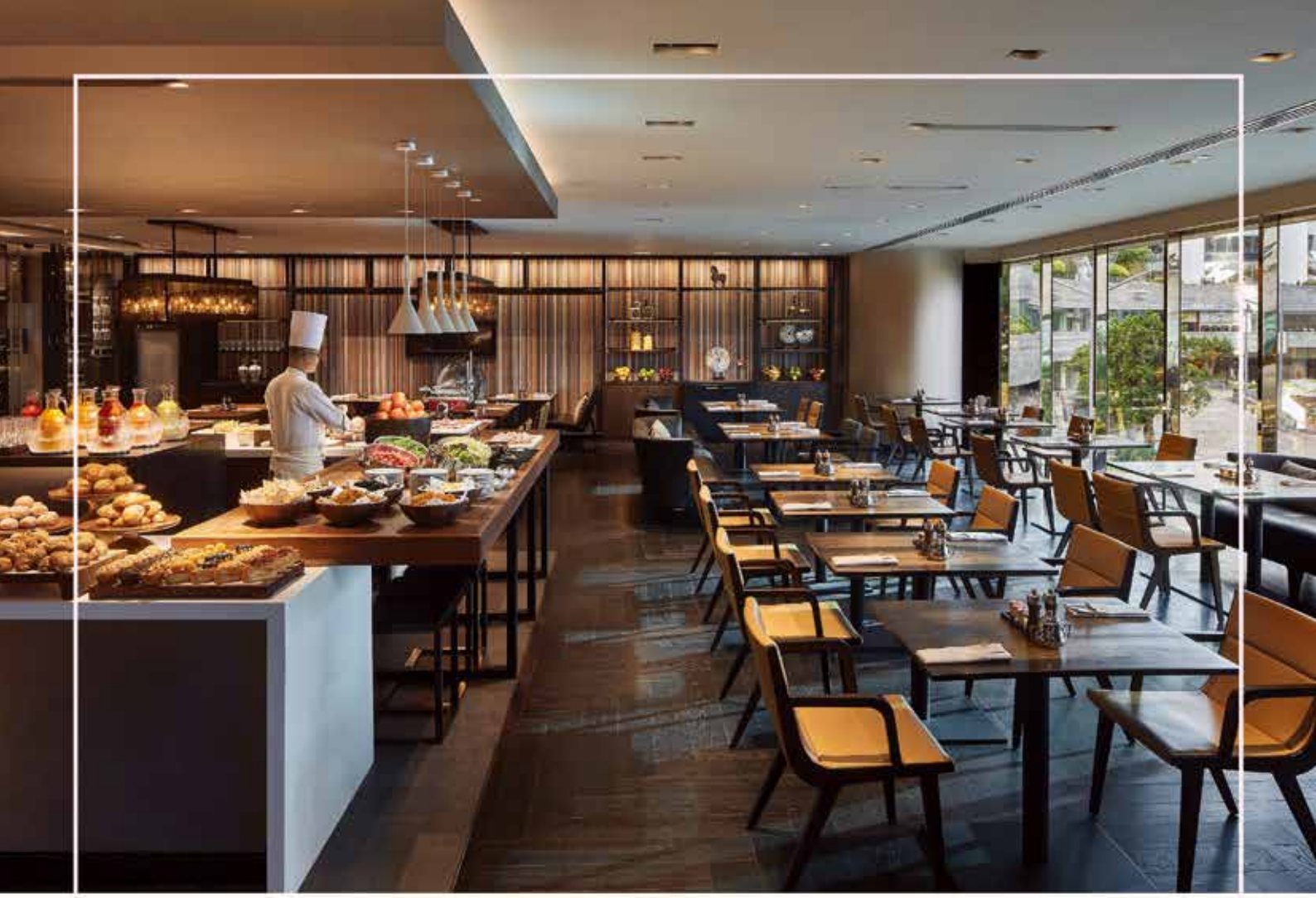
SPECIAL REPORT

Plus:

The thing about ...
Sarah Grimmer, secretary-general of the HKIAC

The gig economy
A challenge to conventional labour law

Investigative Intelligence
Stepping up defences against Information security



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Ethiopia's arbitration law challenges

Tewodros Meheret, a senior lawyer at LEX Africa Ethiopian member, GETS Law Offices, and outgoing president of the Ethiopian Bar Association, made an opening address at the East African International Arbitration Conference (EAIAC) in Addis Ababa recently.

Arbitration, he told the delegates, is perceived as one of the alternative solutions to congestion in the court system and consequent delays in delivering justice. The success of arbitration is a function of several components, such as an enabling legal framework, qualified and dependable human resources and the institutional support needed to make it functional.

"Regrettably, Ethiopia does not currently have any of those components for the effective utilisation of arbitration or other forms of alternative dispute resolution," said Meheret. "Disputes are inevitable and the state has an obligation to provide an efficient and credible forum for dispute resolution while lawyers have professional obligations in helping their clients to choose the most appropriate means of resolving differences."

He went on to explain that in Ethiopia, the legal framework, which is mainly incorporated in the Civil and Civil Procedures Codes, has not been modernised and does not create an enabling legal infrastructure to make alternative dispute resolution effective. Currently, several questions are outstanding starting from deciding on the appropriate code or legislation to incorporate a new dispute resolution law to specific issues relating to, for instance, finality and binding effect of an award.

> "Disputes are inevitable and the state has an obligation to provide a forum, and lawyers have a professional obligation in helping their clients choose the most appropriate means of resolving differences"

He also advised that a dispute resolution mechanism should take into account not only local needs but the needs and aspirations of foreign investors as well as regional integration and standards. "The proposals to reform the law have not yet become a reality although several draft laws were drawn up," he said. "Contributions and advice from foreign colleagues adds value to the continuing reform effort, which is expected to address dispute resolution mechanisms."

Meheret advised that another challenge is the lack of existing skills, experience and resources. Many senior lawyers who are appointed as arbitrators have no formal training in the field.

Another issue is that arbitration clauses are often not included in contracts which are amenable to arbitration taking into account the relationship of the parties and nature of the transaction. Even when arbitration is mentioned, the necessary elements of an effective arbitration clause may be omitted. If the provision is not drafted meticulously, it can itself become a ground for dispute rather than a remedy to the problem. Notwithstanding the delays and congested court rolls, businesses continue to lodge claims with the courts. One may speculate whether doing so is the best business option available. Further study needs to be undertaken on the efficiency of alternative dispute resolution in general and arbitration in particular in Ethiopia.

The courts support arbitration and we have become rather dependent on this. The assistance not only calls for execution and enforcement of the arbitral award but also with regard to the initiation of the arbitration process itself. It is quite common that a party becomes compelled to seek the assistance of the court due to the reluctance of the other party to appoint or cooperate in the appointment of an arbitrator.

A single arbitration institution linked to the Addis Ababa Chamber of Commerce strives to provide a forum for those who prefer institutional arbitration although there have been a few instances where an arbitration clause is stipulated in a contract but has not been fully relied on by the parties to the dispute.

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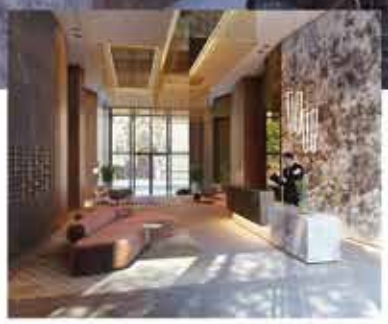

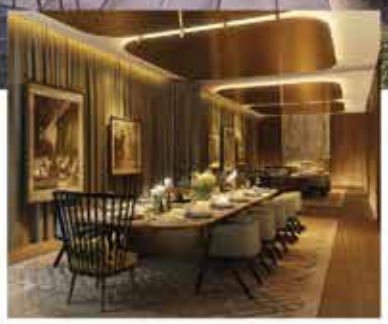

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The PCC's Joint Venture Guidelines

Last September 9, 2018, the Philippine Competition Commission (PCC) published the Joint Venture Guidelines (JV Guidelines) aimed to help businesses determine when a joint venture shall be subject to compulsory notification pursuant to its power to issue guidelines on competition matters for the effective enforcement of the Philippine Competition Act (PCA).

Under Philippine setting, a joint venture (JV) may be formed through any of the following schemes, among others: a) incorporation of a new company; b) entering into a contractual JV; or c) acquiring shares in an existing JV entity. The JV Guidelines provided the basis for computation of the notification thresholds for JV transactions and declared that a transaction is notifiable when parties to a JV meet both the size of party test and size of transaction test.

Pursuant to the JV Guidelines, the size of party test is met when the aggregate annual gross revenues in, into or from the Philippines, or value of assets in the Philippines of the ultimate parent entity (UPE) of at least one of the acquiring or acquired entities, including that of all entities that the UPE directly or indirectly controls, exceeds P5 billion. On the other hand, under the size of transaction test, the JV is subject to compulsory notification when the aggregate value of the combined assets of the JV Partners in the Philippines or contributed into the proposed JV exceed P2 billion, or the gross revenues generated in the Philippines by assets combined or contributed into the JV exceed P2 billion. In the case of the acquisition of shares in an existing JV entity, the JV Guidelines provide that the assets or gross revenues generated by such assets of the existing JV entity shall be included in determining the threshold. Assets refer to both tangible and intangible assets pursuant to the Guidelines on the Computation of Merger Notification Thresholds of the PCC.

In case the JV Partner intends to defer its contribution to the JV, the deferred contribution forms part in determining the amount of contribution to the JV, provided it is contemplated in the JV agreement. Should the JV Partners agree to transfer assets which constitute successive contributions not included in the JV agreement, the subsequent transfer of assets contained in any subsequent agreement within one (1) year from the JV agreement shall be treated as part of the JV agreement. In case the JV Partners agree to transfer assets subject to conditions that may or may not occur, the JV Partners are required to notify the PCC within thirty (30) days from fulfilment of such condition.

> "The JV Guidelines mandate that if joint control exists after completion of the transaction, the parties need to make a merger notification"

The JV Guidelines mandate that if joint control exists after completion of the transaction, the parties need to make a merger notification. Joint control, which may be established on a de jure or de facto basis, is the ability of the JV partners to substantially influence or direct the actions or decisions of the JV, and exists when an entity has the ability to determine the strategic commercial decisions of the JV (positive joint control), or to veto such strategic decisions (negative joint control), except for ordinary veto rights. Veto rights over specific decisions critical or essential for the JV in the particular market it operates or will operate may be an important element in establishing the existence of joint control. A joint control may manifest in different forms such as equality in voting rights or appointment to decision-making bodies, veto rights, joint exercise of voting rights. However, equity ownership alone does not establish the presence or absence of joint control. The JV Guidelines recognise that although a JV Partner may hold a minority stake in the JV, he may still exercise substantial influence on the JV. In the acquisition of shares in an existing entity, there is no minimum percentage of shares that must be acquired to establish joint control.

It is worth noting that entities intending to form part of a JV are presumed to acquire joint control whether through the formation of the JV or through the acquisition of shares in an existing entity conferring joint control, post-transaction.

In the end, the PCC must strive to strike a balance — it must be encouraging and permissive enough to allow the emergence of pro-competitive JVs, while continuing to be the vanguard against activities and transactions that would stifle competition and harm consumer welfare.

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

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The Gig Economy: A challenge to conventional labour law

Labour law, as it is traditionally understood, modifies conventional contract law to protect workers by recognising the difference in power between the employer and the employee, as well as the unique characteristics of labour contracts. In that sense, labour law presupposes a dichotomy between the employer and the employee. However, with the rise of the so-called Gig Economy, we see an increasing number of grey areas where that dichotomy cannot easily be applied.

Although each nation's labour laws may contain somewhat different details, whether a person is considered an employee is essentially determined by what may be termed subordinate labour relations. In a traditional relationship in which the employee performs the designated work at a time and place specified by the employer, the determination is fairly straightforward. But if we attempt to apply the conventional standards of labour law to the temporary or flexible relationships that characterise the Gig Economy, many ambiguities arise.

Recently, the California Supreme Court adopted the "ABC test" as a tool to determine the legal nature of workers in *Dynamex Operations West, Inc v. Superior Court of Los Angeles County*, a class action involving delivery drivers who were reclassified as independent contractors by their employer. Under the ABC test, a person is assumed to be a worker unless: A) the worker is free from the employer's control or direction in performing the work; B) the work takes place outside the usual course of the business of the company and off the site of the business; and C) customarily, the worker is engaged in an independent trade, occupation, profession or business. The above ruling is seen as a ground-breaking decision more favourable to workers than earlier laws. Observers are closely following whether the same legal principle will affect wage lawsuits filed by Uber drivers both in the US and the UK.

> "If we attempt to apply the conventional standards of labour law to the temporary or flexible relationships that characterise the Gig Economy, many ambiguities arise"

In Korea, as a detailed criteria to determine whether there exists an employment relationship between a worker and an employer, the Supreme Court ruled in 1994 that a number of different factors should be reviewed, focusing on substance rather than form, including (i) whether the person is governed by the rules of employment or other service (personnel) regulations; (ii) whether the person, while at work, is subject to specific and individual supervision or instructions by the employer; (iii) whether there exists any base or fixed salary given to the person in exchange for the work he/she has provided; (iv) whether the person who works is covered by employment insurance and health insurance; or (v) whether taxes are withheld by the employer on wage income. In 2006, the court instructed that those factors which an employer can control and may use to create the appearance that a worker is not an employee, such as by not withholding taxes or by not paying the worker's four major social insurances, should be considered only secondarily as they are subject to manipulation by an employer. The stance of the Supreme Court reflects the increasingly flexible forms of employment that have been evolving and may be seen as an emphasis on substantiality in determining whether the person is an employee or an independent contractor.

The courts may not be the best vehicle for dealing with the issues raised by the gig economy. A more comprehensive solution may require the enactment of new labour laws that strike a proper balance between the workers and the hiring companies

In Germany, such changes in technology and industrial structure are recognised in the concepts of Industry 4.0 (Industrie 4.0) and Work 4.0 (Arbeit 4.0), introduced by the Federal Ministry of Labour and Social Affairs as a framework for discussion of labour relations as a whole. The Ministry of Health, Labour and Welfare of Japan has also published a report titled *2035: The Way of Working in the Future* in 2016, which discusses how to refine labour laws and labour policies to recognise the evolving way that work will be performed, especially work done with fewer time and space constraints. Korea's Ministry of Employment and Labour is also continuing to discuss related matters.

The question of how to resolve these issues is becoming increasingly difficult as a result of the changes in the industrial structure brought about by the gig economy. However, until such issues are resolved in a new legal framework, the criteria that courts have used to date are likely to continue being applied, despite the difficulty. Both employers and workers should pay attention to these issues as they define their relations to avoid, as much as possible, unwelcome surprises in the future.

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Restructuring options in the Cayman Islands

A question that we are regularly asked by general counsel is what options are available where a Cayman Islands holding company is facing an imminent debt crisis. In such circumstances, its board of directors must have regard to creditors' interests as a whole when discharging their fiduciary duties and should ideally be engaging with the company's creditors in order to try and agree upon a consensual restructuring solution. However, such a consensual out-of-court process would typically require unanimous support (or acquiescence) from all of the company's creditors and therefore the board may wish to consider alternative options to mitigate the risk that a disgruntled creditor may seek to disrupt any restructuring process by commencing winding up proceedings against the company.

One option would be for the company to petition the Cayman Islands courts (the "Court") for a provisional liquidator to be appointed on a "soft touch" basis in order to implement the proposed restructuring and to protect the company from creditor enforcement action or proceedings being commenced or continued without the leave of the Court. The moratorium that is triggered on the appointment of provisional liquidators provides breathing space for a company to negotiate with its stakeholders and implement a restructuring without the risk of the process being derailed by the actions of one or more dissenting creditors.

Under Cayman Islands law, a winding up petition may be presented by the company, any creditor, any contributory or the Cayman Islands Monetary Authority (in certain circumstances). However, an application seeking the appointment of "soft touch" provisional liquidators to effect a restructuring may only be made by the company itself. While the presentation of a winding up petition is required to access the provisional liquidation regime, provisional liquidation does not necessarily result in the formal winding up of the debtor company. Rather, where provisional liquidation is used to support a successful financial restructuring where the debtor company survives, the end result is usually that the winding up petition is dismissed and the newly restructured company continues as a going concern. Provisional liquidation when used in a restructuring context in the Cayman Islands is therefore somewhat of a misnomer since the object of the proceedings is to typically rescue the company as a going concern rather than to liquidate and dissolve the company.

> "In a "soft touch" provisional liquidation, the provisional liquidators would typically work alongside the existing directors to develop and propose a restructuring without completely displacing the directors' powers"

In a "soft touch" provisional liquidation, the provisional liquidators would typically work alongside the existing directors to develop and propose a restructuring without completely displacing the directors' powers. Ultimately, the order appointing the provisional liquidators will clearly set out which powers the provisional liquidators are able to exercise (often limited to oversight of the progress of the restructuring and reporting to the Court and the company's creditors) and which powers will be retained by the directors. The Court is generally flexible in allowing sufficient time for the provisional liquidators to consider whether a restructuring is capable of being agreed and implemented.

It is proposed that a new Court supervised restructuring moratorium regime will be in force in the Cayman Islands by the end of 2018. The process would allow a company to petition for the appointment of restructuring officers to obtain a stand-alone restructuring moratorium (separate from the winding up regime) thereby offering companies with more avenues by which to benefit from an automatic stay on claims.

In the meantime, "soft touch" provisional liquidation is an extremely helpful tool for any Cayman Islands company that is considering its options in the face of a possible default, and provides a formal Court-led process, and statutory protection, in order to effectively restructure its debt and continue as a going concern.

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A prestigious international law firm is looking to add a Corporate Lawyer to join its Shanghai office. You will join one of the premier names in the field and work with most notable multinational companies. You ideally have at least 5 years' PQE in corporate work in PRC. Native-level English is required; Mandarin Chinese skills are preferred but not a must.

Dispute Resolution Lawyer| 5+ yrs pqe | Shanghai **REF: 14680/AC**

A top-tier PRC law firm is seeking a senior Dispute Resolution Lawyer with strong technical skills to join their Shanghai office. The ideal candidate will be PRC qualified with over 5 years' relevant PQE at a leading international or domestic law firm in China. Solid knowledge of Chinese Law is a must. An additional Common Law qualification is highly desirable. You must have fluent English and Mandarin Chinese skills for the role.

Sr Banking & Finance Associate| 4+yrs pqe | HK **REF: 14684/AC**

This leading global law firm requires an experienced finance lawyer who is Hong Kong qualified or has Common Law qualification. You must have particular experience in general banking and acquisition finance gained in top-tier law firm in Hong Kong. You must be fluent in written and spoken English and Chinese for the role.

Banking Lawyer | 3+ yrs pqe | Shanghai **REF: 14695/AC**

A leading PRC law firm is seeking a PRC-qualified Banking Lawyers to help grow their Shanghai and Shenzhen offices. To qualify for this role, you need strong law firm training and a minimum of 3 years' PQE in banking and finance practice at top-tier PRC or international law firms in China. Fluent written and spoken English and Mandarin Chinese are required.

Associate, US Capital Markets| 2-3 yrs pqe | HK **REF: 14677/AC**

This White Shoe law firm is looking for a junior lawyer to join their leading US capital markets team in Hong Kong. The role covers both debt and equity capital markets work so experience in both would be ideal. Paralegals with 2-3 years' relevant experience or fresh JD graduates are welcome to apply. There is a short associate track for the right candidate to progress.

Derivatives Associate | NQ-3 yrs pqe | HK **REF: 14656/AC**

This Magic Circle law firm with a strong banking and finance team now has an opportunity for a junior derivatives lawyer to join their Hong Kong office. Ideally, you are Common Law qualified with experience in OTC derivatives and structured products gained in a leading law firm in Hong Kong. Previous coverage of Hong Kong regulatory issues is highly desirable. Fluent English is a must while Cantonese and Mandarin Chinese skills are preferred but not essential.

Job Search

HUGHES-CASTELL

To find out more about these roles & apply, please contact us at:
T: (852) 2520-1168
E: hughes@hughes-castell.com.hk
W: www.hughes-castell.com
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MOVES

The latest senior legal appointments around Asia and the Middle East

AUSTRALIA

Clyde & Co has also added a new partner in Sydney. **Jacinta Studdert** joins the firm with more than 25 years of experience in environment, development and planning law, including 18 years as a partner. Her practice focuses on environment and planning requirements, compliance, risk management and regulatory issues associated with property, project and infrastructure development. This includes residential, commercial and industrial developments, as well as the construction and operation of infrastructure, for transport, energy, resources, and waste and water facilities.


Jacinta Studdert


James Beckley

Gadens has appointed **James Beckley** as a partner in its corporate advisory team in Sydney. He joins Gadens from Ernst & Young, where he was a director in its corporate law team. Prior to that, he was part of the corporate & commercial law team at PwC, having joined there from Gadens in 2012. James brings extensive expertise in mergers and acquisitions, corporate fundraising, debt and equity restructures, foreign investment into Australia, and commercial contracts and compliance.

White & Case has added **Brad Strahorn** as a partner in the global commercial litigation practice in its Sydney office. Strahorn has extensive experience in construction disputes across a wide range of energy and infrastructure sectors, including road, rail, upstream and downstream oil and gas and electricity. He has litigated cases involving the construction of assets in each of these sectors, typically concerning design liability, defects, performance failures, delays and disruptions. Formerly a partner at Herbert Smith Freehills, Strahorn also provides strategic advice to companies during the course and at the conclusion of their projects. He has counseled them on project-delivery frameworks, such as traditional and alliance contracting and public-private partnerships, and in the negotiation and drafting of contracts.

HONG KONG

Withers has added **Junko Pitt (Shiokawa)** as a partner in its Hong Kong office. Pitt joins from the Hong Kong office of Harneys, an offshore law firm, and specialises in investment funds, corporate and private clients. She has extensive experience acting as lead counsel for Japanese and other Asian financial institutions and investment managers in the structuring and formation of various types of funds, including private equity funds and hedge funds. She has also worked on a number of corporate matters, including Hong Kong IPOs and financing transactions of private and listed companies. In addition, Junko will continue to focus on Japanese private client matters including cross-border succession planning and divorce. Pitt started her career at Nagashima & Ohno (currently known as Nagashima Ohno & Tsunematsu). Prior to joining Withers, she spent over eight years working in offshore law firms. Before she moved to work in offshore law firms, she was a director at Barclays Capital Japan and has also worked as an associate for Sullivan & Cromwell in its New York and Tokyo offices.


Junko Pitt

JAPAN

Davis Polk has added **Ken Lebrun** as a partner in the Tokyo office. Lebrun joins from Shearman & Sterling, where he was a partner in the M&A practice based in Tokyo. His practice focuses on public and private cross-border M&As, joint ventures, strategic alliances and private equity transactions. He has represented major Japanese companies and financial institutions on many of their largest and most significant transactions. A Japanese speaker, Lebrun is admitted in New York and is a registered foreign lawyer in Japan. He serves as chair of the foreign direct investment committee of the American Chamber of Commerce in Japan.

OMAN

Clyde & Co has appointed Omani advocates **Ali Al Rashdi** and **Abdullah Al Nabhani** to grow its dispute resolution practice in Oman. With these two hires, the firm adds local dispute resolution capabilities to its now 10-strong legal team in Muscat, less than a year after opening there in association with Fatma Al Mamari Advocacy and Legal Consultancy Firm. Al Rashdi is an experienced local advocate with an extensive background in arbitration. He brings more than 12 years of experience advising major corporate entities, government bodies and private individuals. Al Nabhani is a dispute resolution lawyer with over 10 years' experience, advising local and international companies operating in Oman. Both are admitted before the Primary Courts and Courts of Appeal in the Sultanate of Oman and join Clyde & Co as senior associates.


Ali Al Rashdi

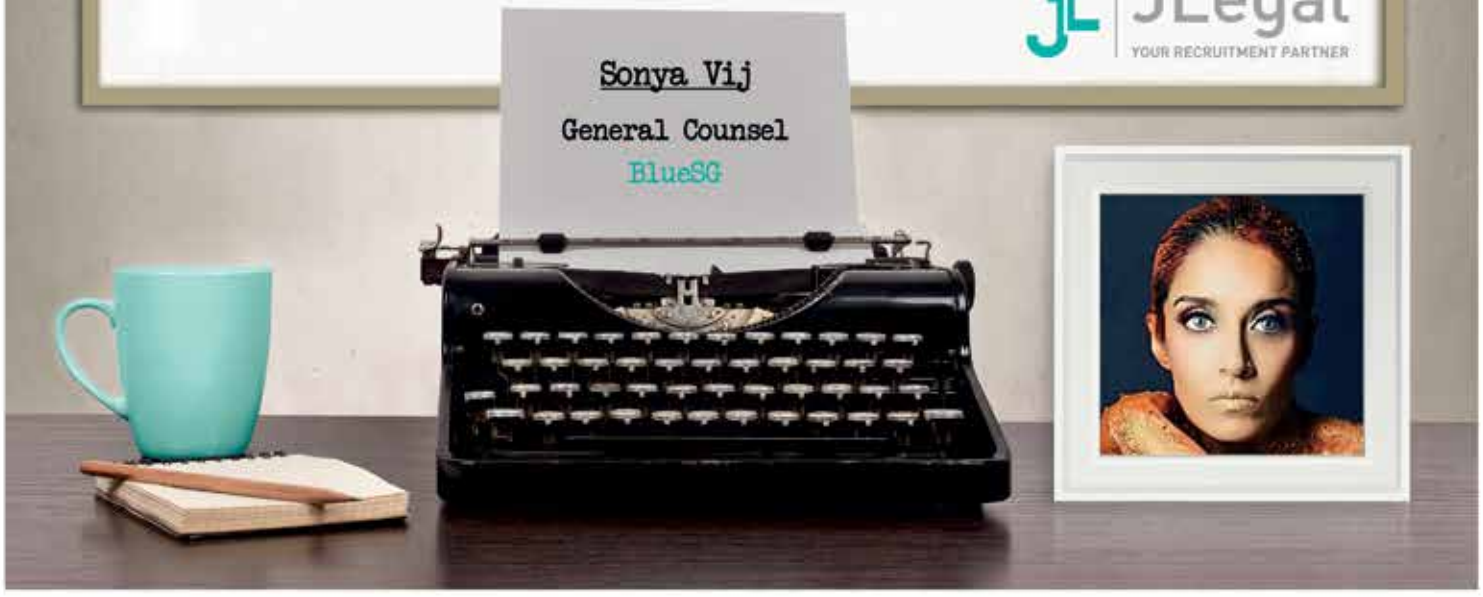
The JLegal PQE

Personality Questionnaire Experience

Throughout the year, JLegal examines the PQE of a senior in-house counsel. On this occasion we chat with Sonya Vij, a lawyer who has a love for the gym, blood and gore, but not movies!

- **What is on your mind at the moment?**
  How I'm going to survive PT tonight ... my trainer will not be amused.
- **What secret talent do you have?**
  I wish I knew ...
- **If you weren't a lawyer you would be a ...**
  forensic scientist! Blood and gore appeals to me for some reason ...
- **Where is the best place you have ever been to?**
  A few to choose from but I suppose Phuket tops my list.
- **What is your idea of misery?**
  Putting on a fake smile and pretending I'm having a blast when all I want to do is go home and get them heels off!
- **What is the strangest thing you have seen?**
  Far too many to list just one, so I'm going to go ahead and say human behaviour in the gym. Strange would be a very a mild description of things.
- **What is your motto?**
  If at first you don't succeed, dust yourself off and try again.
- **Top 3 favourite movies of all time?**
  Movies are not my thing.
- **If you could have one superpower it would be ...?**
  To know what everyone's thinking ... that would solve half my problems.
- **What do you consider the most overrated virtue?**
  Patience I suppose.
- **What irritates you?**
  Arrogant, obnoxious, condescending and downright rude humans.
- **What was your last Google search?**
  Keke Challenge gone wrong.
- **If you could time travel, where would you go?**
  Rewind 20 years and back in uni! Good times.
- **What's the one food you could never bring yourself to eat?**
  Durians! Even if my life depended on it. I would much rather die.
- **Which of the Seven Dwarfs is most like you?**
  I would say Bashful but I guess some would say Grumpy.

JLegal
YOUR RECRUITMENT PARTNER



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MOVES

SAUDI ARABIA

Ashurst is strengthening its Middle East projects practice with the addition of partner **Bilal Rana**, who will be based in Riyadh. He joins from Clifford Chance, where he has been a part of the project finance group since 2014. Rana specialises in advising regional and international financial institutions, borrowers and sponsors on Islamic finance and project finance transactions. He began his career at Linklaters in London in 2005, prior to moving to Saudi Arabia in 2009 with Baker & McKenzie.

SINGAPORE

Morgan Lewis has hired **Karun Cariappa**, a corporate partner resident in Singapore, and **Helen Fok**, an investment management partner resident in Hong Kong. They both join from Simmons & Simmons. Cariappa, who was co-leader of the India practice at his previous firm, predominantly represents corporate issuers and investment banks. He focuses on securities offerings such as initial public offerings, follow-on offerings, private placements, bond offerings, and bond restructurings across Asia. Fok advises financial institutions, banks, asset managers, hedge fund managers, custodians, exchanges, alternative trading platforms, and sovereign wealth funds on all matters under the Securities and Futures Ordinance and the Banking Ordinance. The scope of her work includes advising on licensing applications for banks, stored value facilities and financial intermediaries, conduct of business rules, client asset rules, financial resources rules, and conflicts of interests.

UAE


Taimur Malik

Clyde & Co has appointed **Taimur Malik** as a partner in its Middle East corporate practice. Malik will be based mainly in the firm's Dubai office and support clients across the region and in Pakistan. Malik joins from US law firm Curtis, Mallet-Prevost, Colt & Mosle, where he was a partner in the Dubai and Muscat offices. Prior to that, he was regional head of the legal department for Vale, one of the world's largest metals and mining companies, overseeing legal matters for high profile projects in Oman and in the wider Middle East region.

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Lewis Sanders

Legal Recruitment

Lewis Sanders is delighted to announce three new appointments as part of our continued expansion in Hong Kong. Kirsty Dougan and Jane Evans join the senior management team and will play a key role in our strategic growth. Natalie Seppi joins as a consultant in the private practice team. We continue to deliver recruitment solutions to our long-established client base across law firms, inhouse MNCs and financial services institutions and to facilitate career progression for candidates, offering options across both permanent and more flexible short term contract roles.

The market continues to be active across all areas with opportunities at all levels of seniority. Please do contact us for a discussion if you feel it's time for a move or for a copy of our recent salary surveys which include discussion around current market and compensation trends.

Kirsty Dougan

Managing Director

Kirsty has worked within the legal sector in Asia for the last 15 years and in Hong Kong since 2009. Prior to joining Lewis Sanders she headed up the Asia business of a global New Law legal services provider. Qualifying as a solicitor in Scotland in 1996, Kirsty progressed her career as a lawyer to become Regional General Counsel with Diageo in Shanghai and is also a former University law lecturer. Kirsty will focus on GC and senior level inhouse roles and will support the strategic growth of the business.

Email: kdougan@lewissanders.com
Phone: +852 2537 7630

Jane Evans

Business Development Director

Jane has worked in business development within the law firm sector for the last 20 years and was most recently Innovation Strategy Director with an international law firm in Hong Kong. She brings with her a wealth of experience across strategic and operational issues, marketing and BD and will support the team and the business across these areas as we continue to expand our Asia capability. Jane will also be actively involved in recruiting across a range of specialisms including senior level COO, BD and HR positions, assisting candidates and our law firm and inhouse clients with both short term and permanent recruitment needs.

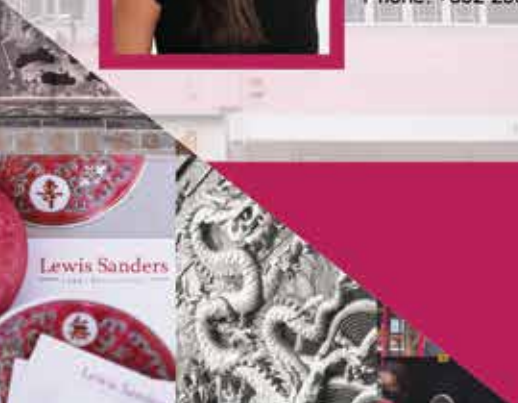
Email: jevans@lewissanders.com
Phone: +852 2537 7633

Natalie Seppi

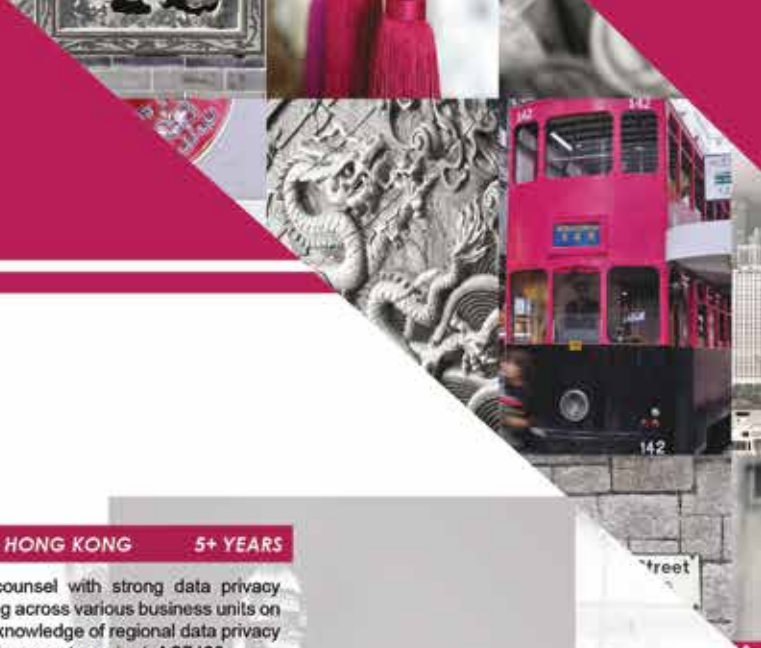
Consultant

Natalie graduated from Warwick University where she was awarded an LLB (First Class Honours). She trained and qualified as a commercial disputes lawyer at Freshfields in London, before spending two years as a compliance lawyer with Clifford Chance in London and Norton Rose in Hong Kong. Natalie focuses on private practice and inhouse recruitment across the region at all levels.

Email: nseppi@lewissanders.com
Phone: +852 2537 7408



Please contact Lindsey Sanders, lsanders@lewissanders.com +852 2537 7409,
Camilla Worthington, cworthington@lewissanders.com +852 2537 7413,



In-House

DATA PRIVACY — **HONG KONG** — **5+ YEARS**

A global bank seeks a senior legal counsel with strong data privacy experience. This is a regional role working across various business units on all data privacy issues. Comprehensive knowledge of regional data privacy laws is essential. Chinese language skills are not required. AC7428

BANKING & FINANCE — **HONG KONG** — **7+ YEARS**

A Chinese SOE is looking for a senior banking & finance lawyer to join its team. You will have at least 7 years of in-house/private practice experience from a law firm or company and will be familiar with commercial banking & capital financing products. Fluency in Mandarin is required. AC7414

FIXED INCOME — **HONG KONG** — **4-8 YEARS**

An exciting opportunity for a fixed income lawyer with a top US investment bank. You must have solid experience in general finance from an international firm. Prior experience in structured finance & derivatives would also be preferred. Chinese language skills would be ideal. AC7350

US ASSET MANAGER — **HONG KONG** — **2-5 YEARS**

US asset manager seeks a junior to mid-level lawyer to join its team. This role will support the firm's expansion into the PRC, and will involve a range of funds-related work. Those with experience in asset management will be considered. Business level Chinese language skills are essential. AC6938

LITIGATION — **HONG KONG** — **5-8 YEARS**

Well-known PRC financial services organization seeks a lawyer with strong disputes resolution experience to join its legal team. You should have financial services/regulatory experience gained from a reputable law firm or another financial institution. Mandarin skills are essential. AC7261

CORPORATE — **HONG KONG** — **3-8 YEARS**

A reputable financial conglomerate is looking for junior to senior corporate lawyers. This role will focus on M&A, DCM & corporate finance matters. You should have trained at a reputable law firm and/or have in-house experience. Business level Mandarin skills are essential. AC7260

CORPORATE — **HONG KONG** — **2-5 YEARS**

Hong Kong listed media company is seeking a legal counsel to join its team. This role will involve a mix of corporate work and PRC-related legal issues. Those with a broad mix of experience from private practice/in-house will be considered. Business level Mandarin skills are essential. AC7426

Private Practice

CORPORATE — **HONG KONG** — **2-3 YEARS**

A Wall Street firm is looking for a junior corporate lawyer to join its corporate department. Top quality work and US rates on offer. You should have 2-3 years' PQE covering both equity capital markets and M&A work. Strong academics and Mandarin language skills essential. AC7386

LITIGATION PARTNER — **HONG KONG** — **10-20 YEARS**

An international firm is looking for a commercial litigation partner to join its growing disputes practice. Whilst a partner with an existing book of business is ideal, those at counsel level looking for a step up to partnership are encouraged to apply. Strong Chinese language skills essential. AC7431

CORPORATE PSL — **HONG KONG** — **2-6 YEARS**

A Magic Circle firm is looking for a professional support lawyer to join its corporate department. This role will focus on developing the internal know-how and training of the team. You should have experience gained from an international firm. Chinese language skills not required. AC7379

INTELLECTUAL PROPERTY — **HONG KONG** — **2+ YEARS**

Excellent opportunity to join a well-known team & respected partner in an international firm. This position does not require HK qualification, however you should have solid experience handling PRC related matters. You will focus on IP litigation, patents and trademark advisory work. AC7402

BANKING — **HONG KONG** — **6-10 YEARS**

Excellent opportunity for a senior banking lawyer to join a top International firm at senior associate or counsel level. You should have extensive general banking experience with trade finance experience being highly desirable. You must be fluent in English, Cantonese and Mandarin. AC7401

FUNDS — **HONG KONG** — **2-6 YEARS**

Leading offshore firm is looking to hire a mid-level funds lawyer to assist on offshore funds law related issues. You will have experience gained from a well-regarded onshore/ offshore firm with excellent academics. Mandarin is not a prerequisite but excellent English skills are essential. AC7376

COMPLIANCE — **HONG KONG** — **3+ YEARS**

An international law firm is looking for a senior compliance manager. You must have at least 3 years' experience in an AML/CTF/in-house compliance function. Experience gained from other international firms would be preferred, but those from financial institutions may also apply. AC7369

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

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

EVENT REPORTS

Hong Kong and Singapore Congresses

The In-House Community has been bringing legal professionals and senior executives to these two Asian powerhouses for two decades.

On October 4, the In-House Community celebrated its 20th annual In-House Congress in Hong Kong. Tim Gilkison, managing director and one of the organisation's founders, opened the Congress in front of the assembled 500-plus delegates at the JW Marriott Hotel (the event's home since the first year), noting that much had changed for in-house counsel since the inaugural gathering back in 1999, though the title of the very first plenary session — "The changing role of In-House Counsel in Asia" — was as applicable today as two decades ago.

The event opened with an address by Brent Snyder, chief executive of the city's Competition Commission, followed by two panel disscussions, one on resource strategy and technology, and the other on women in law, moderated by Evangelos Apostolou, who heads the in-house practice group for EMEA and APAC at Major, Lindsey & Africa, with Corinne Katz, senior director for group legal affairs at CLP Holdings, Crystal Lalime, head of global markets legal for Asia Pacific at Credit Suisse, Mun Yeow, a partner at Clyde & Co; Karen Chan, partner at Davis Polk, Olga Boltenko, a partner at Peter Yuen & Associates in Association with Fangda Partners, Dan Wright, a partner at Osborne Clarke, and David Wu, head of financial services for Asia at Axiom.

The day continued with practice area workshops that covered intellectual property in fintech, blockchain and the internet of things with AWA Asia; recent updates to BVI and Cayman Islands law with Conyers Dill & Pearman; US sanctions regulation and enforcement, and fintech and techfin regulatory trends with Davis Polk; international and Hong Kong regulatory updates by Debevoise & Plimpton, as well as a workshop on the illegality defence in international disputes; IT and outsourcing projects with Addleshaw Goddard; arbitration clause negotiation with Clyde & Co and the Hong Kong International Arbitration Centre; fraud detection with the Mintz Group; the legal team of the future with Eversheds Sutherland; and the management of transactions, portfolios and external lawyers by Osborne Clarke. The 20th annual Hong Kong gathering was also supported by Hughes-Castell, Lewis Sanders, Major, Lindsey & Africa, Taylor Root, LODHA, and LEX Africa.

In Singapore, the city's 19th In-House Congress got off to a start with an India update by Mohit Saraf, senior partner of L&L Partners, followed by a panel on in-house lawyering and the relationship between cost, quality and value moderated once again by Apostolou, with participation from Nawal Ismail, general counsel of HelloGold; Lynette Lim, assistant general counsel for Asia Pacific at Hilton Worldwide; Valerie Velasco, head of legal for APAC at NetApp; Navrita Kaur, group general counsel, Omesti; Sarah Chung, lead counsel Asean for Syngenta; Ai-Leen Lim, chief executive and principal counsel at AWA Asia; and Sze-Hui Goh, partner of Eversheds Harry Elias. The panel also discussed women in law, with a focus on mentorship and meaningful careers.

The rest of the day featured a series of workshops covering investment opportunities and issues in the Philippines with ACCRALAW; global anti-corruption enforcement with Debevoise & Plimpton; third-party dispute finance for corporates with IMF Bentham; creating an efficient in-house legal department with Axiom; Vietnam's new penal code with Russin & Vecchi; the legal team of the future with Eversheds Sutherland and Eversheds Harry Elias; planning and executing M&A transactions across Southeast Asia with RHTLaw Taylor Wessing.

Thanks to all the presenters who contributed to a successful event, and to sponsors Hughes-Castell, LEX Africa, Major, Lindsey & Africa and Taylor Root.

HONG KONG

SINGAPORE

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

2018 IN-HOUSE Congress HONG KONG


Rimsky Yuen
GBM, SC, JP
Former Secretary for Justice of the HKSAR Government


Nigel Francis
Partner
Addleshaw Goddard LLP


Bill Gilliam
Partner
Addleshaw Goddard LLP


Ai-Leen Lim
CEO and Principal Counsel
AWA Asia


Thomas Ewing
Senior IP Strategist
AWA Strategy


David Wu
Head of Financial Services – Asia
Axiom


Corinne Katz
Senior Director, Group Legal Affairs
CLP Holdings Limited


Ian Cocking
Partner
Clyde & Co


Mun Yeow
Partner
Clyde & Co


Brent Snyder
CEO
Competition Commission (Hong Kong)


Wynne Lau
Counsel
Conyers Dill & Pearman


Flora Wong
Partner
Conyers Dill & Pearman


Crystal Lalime
Managing Director and Head of Global Markets Legal - Asia Pacific
Credit Suisse


Karen Chan
Partner
Davis Polk


Noble Mak
Associate
Davis Polk


Martin Rogers
Partner
Davis Polk


Patrick S. Sinclair
Partner
Davis Polk


Yuan Zheng
Registered Foreign Lawyer
Davis Polk


Chen Zhu
Counsel – Registered Foreign Lawyer
Davis Polk


Mark Johnson
Partner
Debevoise & Plimpton


Jennifer Lim
Associate
Debevoise & Plimpton


Ralph Sellar
Senior Associate
Debevoise & Plimpton


Charles Butcher
Partner
Eversheds Sutherland


Rachael Shek
Partner
Eversheds Sutherland


Jennifer Van Dale
Partner
Eversheds Sutherland


Olga Boltenko
Partner
Peter Yuen & Associates in Association with Fangda Partners


Kiran Sanghera
Business Development Deputy Director
Hong Kong International Arbitration Centre


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


Tim Gilkison
Managing Director
In-House Community


Evangelos Apostolou
In House Practice Group, EMEA and APAC
Major, Lindsey & Africa


Benjamin McLeod
Vice President and Senior Counsel, Asia Pacific
Marriott International, Inc.


Julie Yoon
Director, Hong Kong
Mintz Group


Dan Wright
Partner
Osborne Clarke

2018 IN-HOUSE Congress SINGAPORE


Neptali B. Salvanera
Partner
Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)


Aison Benedict C. Velasco
Partner
Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)


Ai-Leen Lim
CEO and Principal Counsel
AWA Asia


David Wu
Head of Financial Services – Asia
Axiom


Kelly Mahood
Managing Counsel, IST Eastern Hemisphere and Downstream Asia
BP Singapore Pte. Ltd


Maree Myerscough
General Counsel, Asia Pacific
Conergy


Philip Rohlik
International Counsel
Debevoise & Plimpton

Sze-Hui Goh
Partner
Eversheds Harry Elias

David Saunders
Partner
Eversheds Sutherland

Jennifer Van Dale
Partner
Eversheds Sutherland

Stephen Hopkins
Partner
Eversheds Sutherland

Nawal Ismail
General Counsel
HelloGold Sdn Bhd

Lynette Lim
Senior Vice President & Assistant General Counsel, Asia Pacific
Hilton Worldwide

Clive Bowman
Chief Executive - Australia and Asia
IMF Bentham

Tom Glasgow
Investment Manager
IMF Bentham

Tim Gilkison
Managing Director
In-House Community

Rahul Prakash
Publisher
In-House Community

Mohit Saraf
Senior Partner
L&L Partners

Evangelos Apostolou
In House Practice Group, EMEA and APAC
Major, Lindsey & Africa

Valerie Velasco
Head of Legal, APAC
NetApp

Navrita Kaur
Group General Counsel
OMESTI Berhad

Andrew Grant
Sr. Director and Asia Pacific Regional Counsel
Red Hat Asia Pacific

Azman Jaafar
Deputy Managing Partner
RHTLaw Taylor Wessing LLP

Nguyen Huu Hoai
Partner
Russin & Vecchi

Nguyen Huu Minh Nhut
Partner
Russin & Vecchi

Sesto E Vecchi
Partner
Russin & Vecchi

Agnieszka Verlet
Head, Legal, SC Ventures
Standard Chartered Bank

Sarah Chung
Lead Counsel ASEAN
Syngenta

DEAL OF THE MONTH

Asian-mena Counsel Deal of the Month

China Re's US$950m acquisition of Chaucer Group

The state-owned reinsurer is expanding its footprint to service Belt and Road projects.

China Re is buying specialty insurer Chaucer Group from Hanover Insurance for US$950 million in a deal that furthers the Chinese reinsurer's international ambitions.

The deal includes a cash payment from China Re of US$865 million, plus a pre-signing dividend from Chaucer of US$85 million, which was paid to Hanover in the second quarter of this year. The cash amount also includes a contingent consideration of US$45 million to be held in escrow, which may be adjusted downwards if catastrophe losses incurred by Lloyd's underwriter in 2018 are above a certain threshold.

The sale is expected to close within the next six months, subject to various approvals around the world, including from regulators in the UK and China, as well as from Lloyd's and China Re shareholders. The transaction also includes two British and Australian holding companies that Hanover used to acquire Chaucer in 2011.

Once complete, Chaucer's senior management team will continue to lead the business under the Chaucer brand through Lloyd's syndicates 1084 and 1176, its international network and underwriting agencies, and its insurance unit in Dublin.

China's Belt and Road initiative is a key driver of the state-owned reinsurer's bid to increase its presence internationally. The government's vast scheme of infrastructure building around the world is projected to cost more than US$1.5 trillion during the next decade or so, but as HSBC chairman Mark Tucker noted at a Belt and Road summit in June, the risk appetite in some countries is lacking, particularly in areas such as political risk and trade credit.

These are both areas that Chaucer specialises in. Just last year, it joined forces with fellow Lloyd's syndicates Beazley and Talbot to form a political risk consortium in Asia. It also has experience writing specialty risk, including political risks, energy and infrastructure, for the African market thanks to a partnership with Axa.

For Chaucer, the deal potentially gives it access to new capital as well as the wealth of opportunities flowing from Chinese infrastructure projects.

Hanover hired Goldman Sachs as financial adviser for the sale, with legal advice provided by Debevoise & Plimpton.

Sidley Austin represented **China Re** with a team led by partners **Henry Ding** and **Martin Membery**. The transaction team included members from Hong Kong, Beijing, London and the US offices. **Debevoise & Plimpton advised** Hanover.

Other recent matters include:

Cyril Amarchand Mangaldas has advised **YES Bank** as the lender on the financing of India's first national highway project undertaken on toll, operate and transfer basis, comprising nine national highway stretches in the states of Andhra Pradesh, Orissa and Gujarat to be undertaken by nine SPVs, which are the borrowers promoted by Macquarie Asia Infrastructure Investments 2. The funding came through three rupee term loan facilities aggregating to Rs61 billion (US$853m), for financing the upfront concession fees payable to the National Highways Authority of India, meeting the costs to be incurred for initial improvement works of the project highways, first major maintenance expenditure and for other transaction-related costs. The project is one of the largest foreign direct investment in public infrastructure in India and the single largest in India's road sector. Mumbai project financing partners **Amey Pathak** and **Subhojit Sadhu** led the firm's team in the transaction, while **Baker McKenzie** acted as offshore counsel. **Bharucha & Partners** advised the Macquarie Group, while **HSA Advocates** advised the **National Highways Authority of India**.

King & Wood Mallesons has acted as international and China counsel to **Shanghai Lingang Economic Development (Group)** on the debut issuance of its US$300 million 4.625 percent guaranteed notes due 2021. Shanghai Lingang is the only large-scale state-owned enterprise directly held by Shanghai Municipal State-owned Assets Supervision and Administration Commission that focuses on the investment, development and operation of industrial parks and the provision of related services. Shanghai Lingang is also a key participant in the development of Tesla's "Gigafactory" in Shanghai, which is expected to be the largest foreign invested manufacturing industry project. Hong Kong partners **Hao Zhou** and **Michael Lu** and Shanghai partner **Liu Dongya** led the firm's team in the transaction.

Skadden has advised leading e-commerce service company **Meituan Dianping** on its US$4.2 billion IPO, before the underwriters' exercise of an over-allotment option, in Hong Kong. Trading in the shares commenced on September 20, 2018. Hong Kong partners **Julie Gao** and **Christopher Betts** led the firm's team in the transaction. The firm previously represented the company in its US$3 billion series B preferred shares and US$4 billion series C preferred shares private placement financing, and in its US$3.7 billion acquisition of Mobike.

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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.

Commercial Lawyer – Media

5-10 yrs PQE, Hong Kong/Beijing

International media business has a vacancy for commercial lawyer to be based either in Hong Kong or Beijing. With responsibility for advising on commercial legal matters for its growing Greater China business this is a unique opportunity for a commercially minded lawyer to handle a range of media matters. Commercial IP experience would be helpful. Fluency in both Mandarin and English is critical. [Ref: IHC 16995]

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

ECM Lawyer – Investment Banking

4+ yrs PQE, Hong Kong

A well-established investment bank is looking to add a mid to senior-level ECM lawyer to its team in Hong Kong. Candidates with a US qualification will be strongly preferred. You must have experience in HK IPOs and the ability to speak and write Mandarin fluently. Excellent opportunity to join a fast-growing platform and to work with a well-known lawyer in the financial services industry. [Ref: AC7453]

Contact: Roshan Hingorani
Tel: (852) 2537 7416
Email: rhingorani@lewissanders.com

Legal Counsel – MNC

8-10 years PQE, Singapore

A multinational company is looking for an experienced legal counsel to support the SEA region. To support the work and the team, the ideal candidate should be admitted to the bar in Indonesia or Vietnam. This position will be reporting to the head of legal, and the successful hire should have strong commercial sense. This role will be based in Singapore, and an additional SEA language proficiency would be an added advantage. [Ref: JGB - IS 1809]

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

Associate General Counsel

10+ yrs PQE, Singapore

This global company is seeking a Singapore-based associate general counsel with excellent business acumen and solid corporate experience to cover their worldwide operations. This is a true generalist role, handling a wide remit including operations, general corporate/commercial, intellectual property and litigation work. You must have 10 years' PQE, a Singaporean or common law qualification plus proven in-house experience. Bilingual candidates with strong communication and negotiation skills are preferred. [Ref: 14678/AC]

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

Regional Senior Counsel/Legal Director – TMT

7-12+ yrs PQE, Hong Kong

In view of its expansion in various regions, a leading player in the TMT space with international presence is looking to hire a senior counsel/legal director for its legal team. The role will manage all legal and compliance matters across various regions for its international business, including drafting, reviewing, negotiating on various commercial agreements, providing advice to business team on business strategies, commercial agreements, product launch/review, supporting on commercial aspects of M&A transactions. The ideal candidate will be a common law qualified lawyer (US, UK, HK, AUS, etc) with 7-12+ years PQE, from top-tier law firms/leading corporate/institutions, with strong academics, open to legal qualifications. Importantly, they would be looking for someone with a passion in technology who enjoys working in a dynamic environment, with corporate and commercial experience, and strong command of English and Mandarin. [Ref: JO-1222-16241]

Contact: Alex Tao
Tel: (852) 2499 9293 / 6019 7216
Email: alextao@puresearch.com

General Counsel – Energy

8+ yrs PQE, Singapore

Be part of a dynamic team, working on renewable energy projects. The candidate must possess in-depth experience in power project development and/or financing and attendant regulatory issues in Indonesia and Vietnam. The successful candidate will also work closely with external advisers to the firm on capital-raising matters. This is an opportunity for an independent self-starter, with a demonstrated track record of managing complex issues and exercising good judgement, to develop beyond the confines of a purely legal role. [Ref: A43627]

Contact: Surene Virabhak
Tel: (65) 6214 3310
Email: resume@legallabs.com

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Paul Jackson
Managing Director,
APAC Leader, Cyber Risk, Kroll
paul.jackson@kroll.com

Defeatist data security cultures no more

Organisations need to recognise that information security is a question of risk and step up defences now.

Attend just about any information security conference these days and you will see a huge array of security products, each promising to solve your data protection issues and keep the hackers at bay.

Yet, the breaches continue. Where are we going wrong?

Kroll investigates numerous security incidents each year, and contrary to what is passing for conventional wisdom these days, the vast majority were preventable. Certainly, the use of sophisticated software products, when correctly selected and implemented, can add a heightened level of protection. But when it comes to data loss prevention, a leadership-driven security culture is imperative.

Asian jurisdictions upping the ante for data breaches

Authorities around the globe are no longer accepting the "it's not if, but when" defeatist culture that pervades in respect of being hacked. Inspired by the European Union General Data Protection Regulation (GDPR) that recently came into effect with its frightening penalties, Asian jurisdictions are also upping the ante. Data protection laws in Australia and the Philippines are just the beginning as many others are looking to follow suit. Now, concerns are no longer restricted to reputation and business disruption; but now potentially also heavy fines, the requirement for thorough investigation, notifications to customers (and the associated costs therewith) and the threat of class actions loom in the future.

Strong top-down governance strengthens data security throughout organisation

The good news, though, is that there are steps that drastically reduce the risk of a data breach. From the outset, organisations must address the issue of information security as they would any other mission-critical aspect of their business, and this means direct leadership involvement via top-down governance. By continually focusing on and raising cyber security awareness throughout the organisation, leaders can help provide a mature, defensible and flexible structure for protecting sensitive data, eliminating many of the most common threats. This can also help to ensure compliance and encourage good cyber security hygiene among employees, partners and suppliers.

> "Authorities around the globe are no longer accepting the 'it's not if, but when' defeatist culture that pervades in respect of being hacked"

This approach need not be prohibitively expensive, especially when security measures are considered within the context of how the organisation conducts its business and particularly how its employees work. Ultimately, an organisation must answer four questions:

1. What data do we have and what are the risks of exposure for each?
2. Do we have a security framework (people, processes and technology) in place that protects the data and is it commensurate with our risk tolerance and provides meaningful metrics?
3. Are there well-thought-out plans in place for responding to and remediating a cyber security incident?
4. Lastly and perhaps most importantly, have we tested all of our assumptions and plans, and do we have a roadmap for continuous testing and monitoring in light of an ever-shifting threat landscape?

Role of virtual chief information security officers and data protection officers

The basics of information security are remarkably straightforward to implement, but very often, the devil is in the detail, and unfortunately, organisations find their strategies and plans to be inadequate or flawed at the worst possible time, ie, in the midst of a data breach or cyber crime crisis.

We increasingly see organisations engaging services from a virtual chief information security officer (vCISO) to complement their existing resources and to help ensure all gaps are plugged. Likewise, legislation in many jurisdictions is mandating that organisations identify and assign a designated individual with Data Protection Officer (DPO) responsibilities. However, when this additional burden proves too time-consuming or difficult for the employee to effectively carry out, turning to external DPO services can be the better option.

Many organisations find it eminently logical to engage an adviser with the global reach and credibility to help guide it on the path to cyber security maturity. In reality, few companies have the scale to hire such capabilities in-house. Independence is also key — security advisers should not be aligned with specific products or services because each environment is unique. By applying the most appropriate and cost-effective tools for the organisation's needs and risk appetite, the vCISO or vDPO can promote better security at a lower cost.

Ultimately, information security is a question of risk. The stakes are getting higher and the question of whether to accept the risk, reduce the risk or transfer the risk (via cyber insurance) is a business decision — and organisations need advice that they can trust. The journey to resilience in the context of cyber security is a daunting one, but the consequences of failure are starkly exposed in the all-too-regular news headlines. More importantly, our experience shows that with a combination of leadership, carefully selected resources and best practices, organisations can prevent a critical number of breaches, which is good news indeed!

Kroll is the leading global provider of risk solutions with more than 45 years of experience in helping clients make confident risk management decisions about people, assets, operations and security. For more information, visit www.kroll.com.

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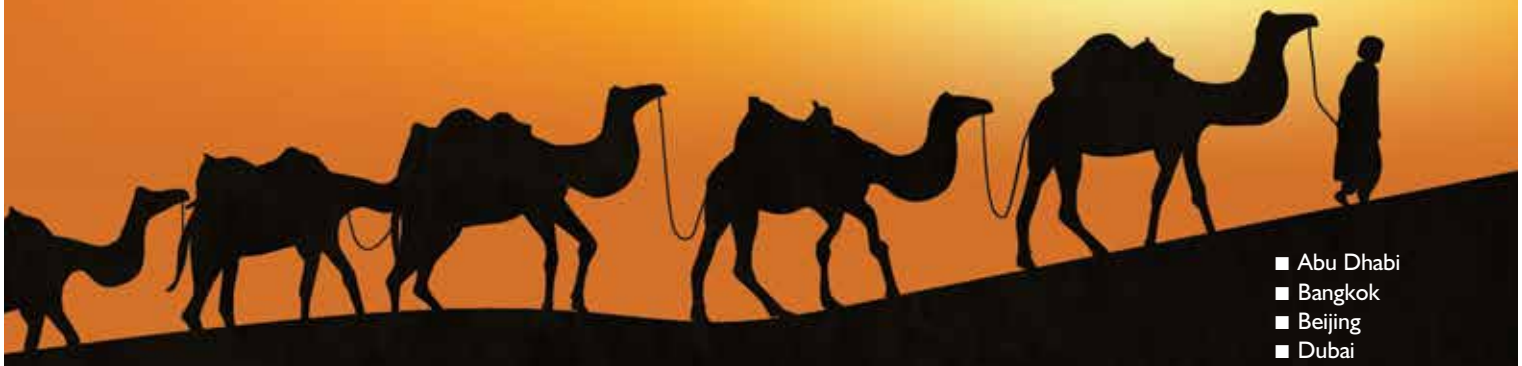

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When disaster strikes – seven lessons in handling a cyber attack

Proper preparation and planning can help organisations set out a clear path for responding to a cyber breach.

Ling Ho

By Ling Ho, Donna Wacker, Lijun Chui, William Wong and Nigel Sharman of **Clifford Chance**

An unexpected phone call, an unwelcome email. The first signs perhaps that corporate IT systems have been compromised, with the attendant risks of financial loss, disastrous publicity and evaporation of trust, combining together to lead inexorably to possible corporate ruin. So, what should your first reaction be? Who should you call? What should you do?

We look at a possible scenario and seven lessons we can learn about handling what may quickly turn into the biggest corporate crisis your company has faced in its lifetime.

An unusual Monday

It is Monday morning and Julia returns from a weekend away to her job as General Counsel of the online shopping startup, "ToyzForKidz". The company has been an early adopter of cloud technology and big data. While it has invested heavily in developing the online customer-facing interface and IT infrastructure, it does not have a cyber security incident plan.

An email hits Julia's inbox at 8.40am from the head of IT, Eddie.

"We had an incident this morning. One of our main data centres in Singapore may have been hacked. We don't know how many customers may have been affected yet, but the centre holds the details of all of our 650,000 customers across the globe, including their email addresses and credit card details. We are unable to access any of our systems. The monitors are showing a picture of a shadowy masked man demanding US$1 million before we can get back in. I have told the boss. Let's speak ASAP."

While Julia is still digesting the email, John, Director of Communications, walks in:

"Did you hear about the cyber attack? I had a few newspapers from different countries on the phone just now telling me they are about to break a hacking story. Apparently, people have contacted them saying that unauthorised deductions have been made from their credit cards. We need to decide what to say."

Before Julia can respond to John, she receives a call from Jason, the CEO. "Can you come to the collaboration area as soon as possible please? We have to decide what to do now. I am thinking to pay the ransom, pay off

the affected customers and deny these stupid hacking rumours. We can't afford this getting published!"

Julia tries to look through the deck of business cards she has received from law firms and realises that she does not know which firms have the relevant experience and expertise in cyber incidents on such a potentially huge worldwide scale.

Lesson 1: The missing plan

The responses from Eddie, John and Jason are a natural consequence of the absence of a cyber security incident plan in ToyzForKidz. This may prove costly — when a crisis happens, it is tempting simply to rush in headlong to try to fix the situation which may result in bad judgment calls. The amount of time required to make decisions can be shortened substantially if the issues have already been properly considered and rehearsed in advance. Having a fully functioning response team ready to go can help reduce the cost of a data breach.

A proper cyber security plan should identify the incident response team members (including the emergency contacts of external counsel), set out who is responsible for what, describe the escalation matrix, include a template for statements to be released to employees, the media and customers, and explain what to do in the case of a ransom demand.

As incident response is multifaceted, building the right response team will demand a range of capabilities from across human resources, legal, IT, public relations, security and business functions. The team should ideally be led by someone who can direct other business units during the investigation. For many organisations, this individual may be the CRO, CIO or CISO.

The incident response plan should be kept in several hard copy manuals that are readily accessible in the offices of the key staff likely to be involved. There should also be regular rehearsals that allow staff to familiarise themselves with the steps set out in the plan.

Lesson 2: Priority actions

Ascertaining the key facts is always the most important first step. An investigation which starts before basic facts are confirmed can become unfocused and result in wasted time and resources. In this case, one of the first key steps would be to determine the number of customers whose personal information may have been compromised. Offering compensation to any customer without ascertaining the full scope of the breach may have unintended consequences and tie the hands of ToyzForKidz in handling future complaints.

In the initial response stage, you should assemble the response team, review network-based and other readily available data, determine the type of incident and assess the potential impact with a view towards gathering enough initial information to allow the team to determine the appropriate response.

> "The company has been an early adopter of cloud technology and big data. While it has invested heavily in developing the online customer-facing interface and IT infrastructure, it does not have a cyber security incident plan"

IT specialists, internal or external, should be engaged to advise on investigating and containing the breach. Containing the breach may require all networked devices to be taken offline and an assessment made of which PCs and servers may have been affected. In the absence of confirming how the attacker gained access or what else the attacker may have done, you may not be in a position to start addressing the problem immediately. Taking action too soon may mean destroying vital evidence that could help you make significant progress in your investigation. Taking action too late could mean that you remain vulnerable to attack. It is therefore important to determine the timing of remediation with the appropriate specialists.

Once the key facts have been ascertained, depending on whether the business affected is in a regulated industry (such as financial institutions) and the applicable personal data laws, it may be necessary to notify regulators.

There may be "breach notification" requirements that oblige the company to provide notification to regulators within a certain period, say between one and 72 hours after the event occurred. By way of example, in Singapore, designated owners of critical information infrastructure are required to report a significant cybersecurity incident within two hours of discovery. The short timeline, which runs from the time of discovery, does not give an organisation much time to come to a decision. Organisations should therefore be fully up-to-date on the reporting obligations in the various countries in which they operate, and determine in advance which (if any) data privacy legislation (including the GDPR) may require incident reporting as well as the applicable reporting thresholds.

Reporting of data breaches is a requirement which is still being developed in many countries and even if there are no mandatory reporting requirements, it may be prudent for an organisation to notify its regulator(s).

> "Depending on the scale of the incident and the jurisdictions involved, it may be advisable to engage a professional PR firm to assist in managing the media interest"

Lesson 3: What to tell the media and customers

Depending on the scale of the incident and the jurisdictions involved, it may be advisable to engage a professional PR firm to assist in managing the media interest — there may be circumstances where it is preferable to remain reactive, rather than proactive, at least at an early stage. A properly drafted media statement will enable ToyzForKidz to manage the narrative once the story goes to press and ensure that "lines-to-take" are consistent.

Some jurisdictions require organisations to contact affected individuals as soon as possible while other jurisdictions may have no such requirement. When and how individuals are notified can determine not only the organisation's liability with respect to the regulators, but also liability in relation to the affected individuals. In most cases, it will be preferable to contact customers proactively as soon as possible, informing them of which personal details may have been released and advising them immediately to change their password for the site and for any other sites they log in to regularly, and to cancel their credit cards if necessary.

If customers cannot be contacted individually, announcements may need to be made to the public. Updates should be issued at regular intervals as more facts about the severity of the situation come to light, while trying not to worry customers unnecessarily or overload them with notifications.

The tone of the message going to the media and customers will need to be adjusted depending on whether the cyber attack has already been widely reported in the news media. Statements should be factual and honest. Blanket denials should be avoided and any temptation to bury bad news should be firmly resisted. All external communications should be approved by the legal team.

Lesson 4: What to tell employees

Communication should also take place with employees on an appropriately open and transparent basis. ToyzForKidz should provide instructions to employees on how to respond if they are contacted by customers (or any other third parties such as the media) about the incident — in most cases they should be directed to the company's communications department or the PR firm engaged.

Some employees may fear for their jobs, wondering if they might have done something that let the door open for hackers to enter. It may be necessary to carry out a full investigation and the possibility of disciplinary sanctions cannot be ruled out at this stage. HR should be involved in devising the necessary internal communications.

Lesson 5: Ransom — to pay or not to pay?

It may be tempting for ToyzForKidz to simply pay off the attackers in the hope that this will quickly restore operations. But there are other issues to consider.

Firstly, there is no guarantee that one will recover the compromised data and regain access to the systems affected. Secondly, and more importantly, one may be committing a criminal offence in some jurisdictions by doing so. Legal advice should be sought; and companies may decide to inform law enforcement agencies if only to obtain additional assistance in investigating or remediating the breach. In such circumstances, calling in security professionals may be the best course of action to regain access and controls over the company's systems.

Lesson 6: Follow-on litigation

The fact of the breach may have left ToyzForKidz at risk of claims from customers and suppliers, if a court eventually takes the view that the company has been negligent in looking after customers' personal data. The legal department will need to review existing contracts carefully to ascertain whether notification is also required to third-party suppliers.

In some jurisdictions, there is legislation preventing the admission of an apology by one party as evidence of admission in civil proceedings.

With retail customers, the risk lies in a class-action lawsuit. Depending on the jurisdiction, private actions may be brought by affected individuals, whether in the form of representative actions or otherwise.

Lesson 7: Involve legal counsel

Legal counsel have a critical role to play. Here, Jason, the CEO, correctly involved Julia in the decision-making process for responding to the attack.

A cyber attack is not simply an IT issue. Legal counsel should be involved early on to advise on the regulatory obligations that may apply, potential legal liabilities and how best to mitigate the organisation's potential liability. This may include advising on issues such as cloaking the correspondence and findings with privilege (where appropriate), and the evidence that may be required for defending claims from those affected or prosecuting claims against the perpetrator. Furthermore, given the cross-border nature of most cyber security incidents, it is important to seek advice from counsel who have the necessary geographical coverage and expertise. Depending on the severity and scale of the attack, external counsel may need to get involved. If so, external counsel should be involved in the organisation's cyber resilience planning as familiarity with the incident response plan will help expedite the incident response.

> "It may be tempting for ToyzForKidz to simply pay off the attackers in the hope that this will quickly restore operations, but there are other issues to consider"

Conclusion

With proper preparation and planning, a Monday morning scare such as this need not get out of hand. Specialist external counsel with the right mix of global experience, can play a key part in helping organisations prepare for the worst, setting out a clear path for organisations to follow when disaster strikes.

Clifford Chance's global cybersecurity team advises organisations on local and cross-border cyber incident response and risk transfer solutions. They regularly offer guidance on cybersecurity requirements in key jurisdictions in APAC including the PRC, Singapore, Hong Kong and Australia. With more than 30 offices globally, the team's capabilities stretch beyond Asia and frequently advise on incidents which concurrently impact locations in Asia, Europe and the US.

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The Law on Cybersecurity and its effects on enterprises in Vietnam

Foreign service providers may be affected by a new regulation aimed at improving cybersecurity in the country.

By Nguyen Xuan Thuy, Tran Dinh Vinh and Phan Vu Minh Truong, of
LNT & Partners

From January 1, 2019, internet-based activities and services in Vietnam are expected to undergo drastic changes regarding the way they are conducted. This is a result of the enactment of the first Law on Cybersecurity passed on June 12, 2018 during the National 14 Assembly (the "Law").

Aimed to safeguard cyber activities in Vietnam, the Law is meant to reinforce the internet's security by setting out the dos and don'ts for both users and providers of cyber services. While waiting for detailed guidelines of the Law to be issued by the government and relevant ministries in 2019, this article will discuss certain potential impacts that this new cyberspace regulation may have on cyber business participants in Vietnam, including foreign service providers.

Introduction

The Law is meant to regulate activities conducted in cyberspace and introduces new measures and conditions to ensure cybersecurity.

Prior to the Law's enactment, multiple draft versions of the Law were proposed to solicit the public's and experts' opinions. Most opinions were directed towards the new conditions imposed on internet-based service providers, raising concerns that the conditions might deter foreign investment and stunt the growth of the digital economy. Indeed, some conditions put forth by the Law might cause foreign investors in the telecommunications sector and internet-related services to have difficulty accessing Vietnam's market. Nonetheless, after rounds of updates, the requirements for internet-based service providers remain unchanged.

The Law did not go into effect immediately, so there is a window of time until January 1, 2019 to prepare for compliance with any newly imposed requirements.

Who has to be prepared?

The Law does not include a provision detailing the entities required to comply with it as other laws usually do. Instead, these entities can be deduced from the Law's purview (ie entities related to the protection of cybersecurity) and from the Law's required or prohibited actions. This means that a broad range of entities (whether based inside Vietnam or outside) can be targeted, including internet service providers, internet software/hardware manufacturers, e-retailers, mobile app owners, social network operators, and others.

Of all the Law's targets, attention is mostly drawn to offshore service providers which, due to the much debated requirements of data localisation and legal presence in Vietnam, are to be immediately affected once the Law is given effect. In addition to foreign tech firms, local tech firms should also be preparing during this time if they have not met the same demand for data storage.

How are enterprises affected?

Among the Law's requirements and prohibitions, perhaps the most notable ones are those stipulated in Article 26.3:

(i) "*personal data, data about the relationships of the service users and data created by service users in Vietnam*" collected, handled and/or analysed by cyber service providers to be stored within Vietnam for a period of time determined by the government; and

(ii) overseas enterprises providing services telecommunications networks, the internet and value-added services on Vietnam's cyberspace to establish their branches or representative offices in Vietnam.

In the Law's earlier draft versions, the local presence and data storage requirements were only applicable to internet-related service providers when their cyber services catered to 10,000 Vietnamese or more, or when the government made the request. However, the service user threshold and the governmental factor have been removed from the official version, broadening the applicable scope of the above requirements. Therefore, any service

Nguyen Xuan Thuy

> "The Law is meant to regulate activities conducted in cyberspace and introduces new measures and conditions to ensure cybersecurity"

Phan Vu Minh Truong

provider who collects, handles and/or analyses *personal data, data about the relationships of the service users and data created by service users in Vietnam* (eg, tech giants like Facebook and Google, and mobile app services like Viber, Line, Airbnb and Tinder) may be targeted and will need to ensure data localisation in Vietnam.

Concerns are thus raised regarding the feasibility and costs for overseas tech firms to install storage systems and set up their commercial presence (either branch or representative offices) in Vietnam. While large firms like Facebook or Google may not mind spending extra money to comply with these requirements, many smaller services may shun Vietnam's market. The latter reaction could in turn hurt Vietnam's economy and deprive consumers of options.

Apart from the two most prominent requirements above, under Article 26.2 of the Law, internet-related service providers are also asked to:

(i) provide the information of service users to the competent authorities upon their written request to serve the purpose of inspecting and handling violations in cybersecurity;
(ii) prevent and remove from the systems under their management any violation cybersecurity within 24 hours from the request of the competent authorities;
(iii) save the system log for the purpose of inspecting and handling violations in cybersecurity;
(iv) stop providing services to users committing violations in cybersecurity upon request by the competent authorities.

Cybersecurity violations include, among other actions, spreading information in cyberspace that offends the State of Vietnam, inciting public-disturbing gatherings, slandering other entities and inducing false public understanding about goods consumption, banking activities, the stock market, and others. However, the Law's language regarding these violations is still vague and ambiguous, and there has not been any further guidance, leaving authorities the discretion to interpret its meaning. Therefore, it is hard for internet service providers to determine whether or not contents posted on their websites/apps are prohibited under Vietnamese law.

> "While large firms like Facebook or Google may not mind spending extra money to comply with these requirements, many smaller services may shun Vietnam's market"

What are the implications of not complying with the Law on Cybersecurity?

In the event internet service providers violate the Law's regulations, the providers may be subject to disciplinary forms, administrative or criminal responsibilities under Article 9 of the Law. We are still waiting for regulations detailing which disciplinary forms and administrative responsibilities, as well as necessary procedures, will be imposed on such internet service providers.

With respect to criminal responsibilities, when considering whether criminal responsibilities are applicable for an internet service provider's violation of the Law, the internet service provider should determine whether such violation falls under the scope of crimes applicable to commercial legal entities under the new Criminal Code 2015.

What has to be done and what is expected?

A large number of offshore and onshore companies expressed their concerns regarding the promulgation of the Law. For example, during the mid-term Vietnam Business Forum 2018 held in Hanoi on July 4, 2018, the American Chamber of Commerce Vietnam's member companies were particularly worried about the Law's requirements regarding the establishment of representative offices, as well as regulations on user data and the storage of user data in the host country. They were concerned because the requirements might increase unnecessary costs without helping improve Vietnam's cyber security environment. However, the National Assembly gave its approval based on the need to ensure national defence and security.

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> "The Law's language regarding cybersecurity violations is still vague and ambiguous, and there has not been any further guidance, leaving authorities the discretion to interpret its meaning"

The Law's regulations are still vague and need to be clarified; the Ministry of Public Security expects that there will be approximately 25 decrees and circulars issued detailing the Law's provisions to facilitate its enforcement. These legal documents are expected to be presented to the government in October 2018 and may help clarify legal grounds for internet-related service providers to comply with the cybersecurity laws, as well as to resolve the dilemma in which companies are forced to choose between investing in Vietnam as one of the world's most dynamic economies and protecting their consumers' rights.

This article is for information purposes only. Its contents do not constitute legal advice and should not be regarded as detailed advice in individual cases. For legal advice, please contact our partners.

Tran Dinh Vinh

Is blockchain the answer?

Counsel need to be aware of the potential legal and other limitations of this rapidly evolving technology.

By Ronald Yu

There is much talk about blockchains, with billions of dollars being invested in the technology and many organisations looking to apply it in some fashion to their respective operations. But there are important questions counsel should ask before jumping in.

A blockchain can be thought of as a cryptographically secure database of digital transactions (ie, a ledger) shared across a network of participants (nodes) over public or private networks, where each participant holds a copy so all the information on the database is potentially available to all participants at any moment in time.

Blockchains are distributed and incorporate a public/private key infrastructure (ie, you need a public and private key for access). Proponents of blockchain talk of its immutability; meaning that once data is stored it cannot be altered (at least not easily).

These characteristics raise several very significant managerial and legal issues.

Is distributed best in all cases?

If you need centralised control (for example, to manage corporate confidential information), a transparent distributed system may be problematic. In a public blockchain, the audit history is publicly viewable, which means:

- One might be able to indirectly derive identifying information based on transaction patterns, timing, volumes, etc.
- It may not be private. Web trackers and cookies have been used in investigations to track down identities of blockchain users. Critics decried the UK Department of Work and Pensions' trial of a blockchain application to track how welfare claimants spend their benefits in 2016 as a waste of public funds and a violation of users' privacy.
- There are associated cybersecurity risks. Blockchains are potentially at risk from cyber attacks.

Moreover, while distributed blockchain ledgers may well be more secure than traditional centralised ledgers, cyber risks remain and recent events call for analysis as to who bears the loss and responsibility for damages in connection with a blockchain including:

- the Mt. Gox hack that resulted in the loss of hundreds of thousands of bitcoin;
- the January 2015 attack on Luxembourg- and London-based Bitstamp, that led to the loss of 19,000 bitcoin, valued at about US$5.1 million;
- the 2016 attack on Hong Kong-based Bitfinex resulting in a loss of nearly 120,000 bitcoin; and
- the September 2018 hack on the Japanese cryptocurrency exchange Zaif, with losses of bitcoin and two other digital currencies estimated at about US$59.67 million.

Key-ed in

As blockchains require a set of keys for access and amendment to the ledger, who holds the keys and what happens should these persons leave the organisation for whatever reason is a problem. Loss of keys potentially means loss of access, thus their management is a serious thing. Also, there is a risk that a malicious user may attempt to compromise or steal keys to gain access to the digital assets on the blockchain.

Environment and security

Organisations concerned about their environmental footprint — or energy costs — need to know that blockchain systems can consume large quantities of energy. In 2017 it was claimed that the bitcoin network consumed as much energy as was used by 159 of the world's nations. This prodigious consumption is mostly a consequence of proof-of-work (PoW) algorithms employed by many blockchain applications such as bitcoin.

Proof-of-stake systems attempt to address this issue but raise new security concerns (PoW systems are also theoretically vulnerable but this is beyond the scope of this article).

Legal issues

As with many new technologies, the law is struggling to catch up and as a result, there exist several potential legal issues surrounding blockchains and blockchain applications.

Being network based, blockchain systems can cross jurisdictional boundaries as the nodes on a blockchain can be located anywhere in the world. This can pose a number of complex jurisdictional and legal issues.

Few jurisdictions have adopted a blockchain law, while some jurisdictions have simply banned certain blockchain-related applications. (For example, in September 2017, the People's Bank of China issued a ban on ICOs totally, declaring them to be illegal and disruptive to economic and financial stability).

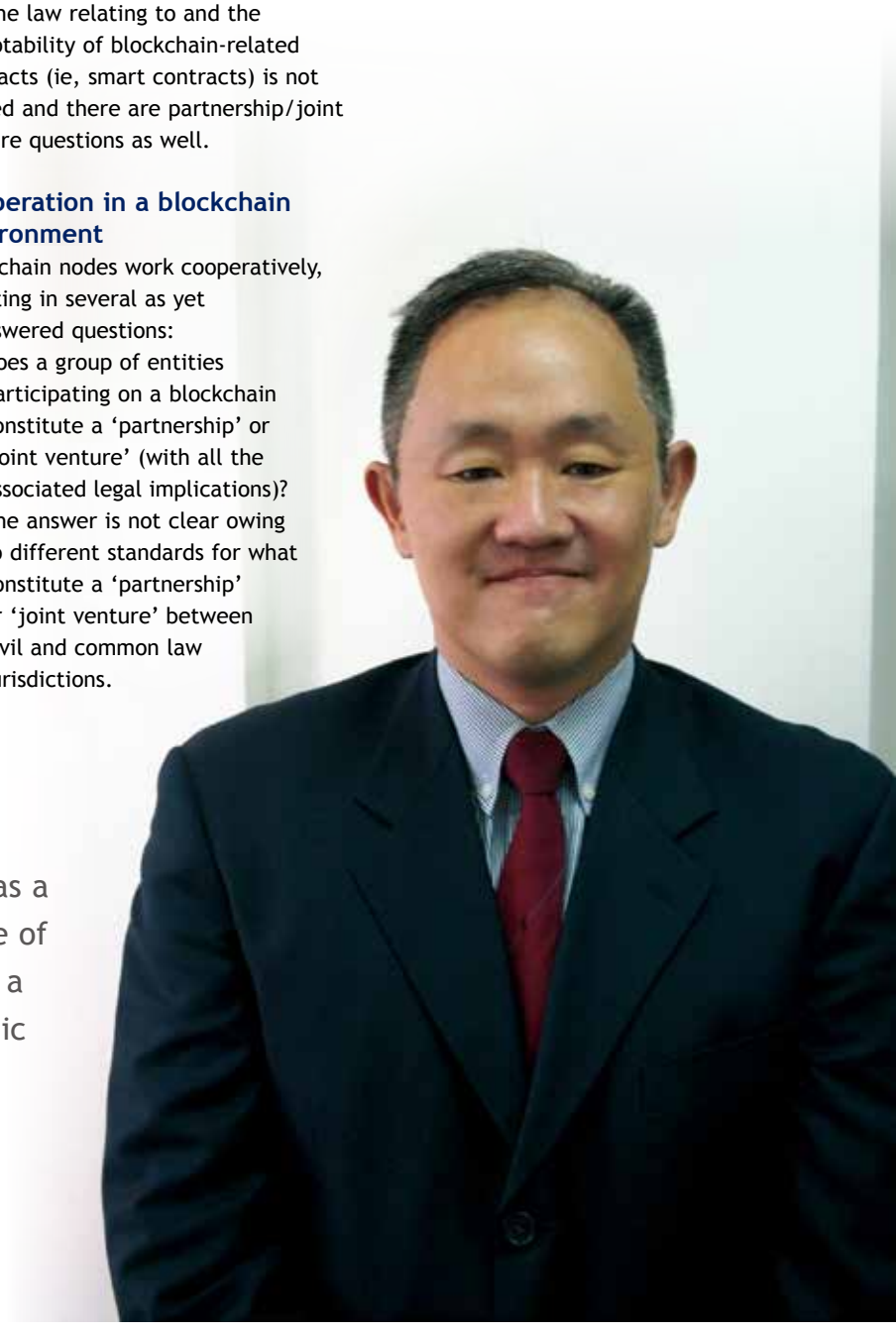
The law relating to and the acceptability of blockchain-related contracts (ie, smart contracts) is not settled and there are partnership/joint venture questions as well.

Cooperation in a blockchain environment

Blockchain nodes work cooperatively, resulting in several as yet unanswered questions:

- Does a group of entities participating on a blockchain constitute a 'partnership' or 'joint venture' (with all the associated legal implications)? The answer is not clear owing to different standards for what constitute a 'partnership' or 'joint venture' between civil and common law jurisdictions.

> "A blockchain can be thought of as a cryptographically secure database of digital transactions shared across a network of participants over public or private networks, where each participant holds a copy"



Ronald Yu

> "Blockchains do not check the data that go into them, they only check whether or not the individuals writing to the blockchain have the right to do so"

- Are individual transactions executed via a distributed ledger are likely to be considered contracts? This is important because contractual liability results in joint liability where the causes of actions are not distinct and the defendants acted in furtherance of a common objective (ie, blockchain). So, if nodes and developers cooperate in developing and managing a blockchain, could they be liable in relation to third parties?
- Is an entity operating in the blockchain potentially liable in tort if its negligent act, omission or misstatement causes loss or damage including loss, for example, due to a security breach or a coding error?

Garbage in, garbage out

Blockchains do not check the data that go into them, they only check whether or not the individuals writing to the blockchain have the right to do so.

Thus, information going into the database needs to be of high quality as data stored on a blockchain is not inherently trustworthy. Moreover, once you store data on a blockchain this data cannot easily be altered.

An inaccurate record on the system may cause losses to those relying on it. Such entity's liability in negligence will depend on whether it owes a duty of care and has breached that duty, whether the breach caused loss or damage, and whether it has effectively contractually excluded liability for this type of loss or damage.

This also raises privacy issues — how can the immutability of a blockchain be reconciled with existing privacy legislation (eg, the EU's General Data Protection Regulation) that give individuals the right to rectify or delete any data, especially incorrect data, that affects them or has been posted or uploaded without their consent?

Further details

And as if all this were not enough, there are also unanswered IP-related questions surrounding blockchains and blockchain applications, as well as ownership of the information in the database.

In particular, counsel must not be lured into thinking, as some blockchain pundits might have people believe, that a piece of content attached to a blockchain is equivalent to or can replace a registered IP right; it is not, as it lacks the same legal effect and rights as, say, a patent.

It's still developing

Finally, blockchain is still evolving as a technology, which means that several technical problems have not been settled in addition to the aforementioned legal ones and that multiple standards have emerged.

This raises:

- Interoperability risks — blockchains employing different standards may be unable to interact with one another.
- Technological risks — choosing a standard that is later superseded is potentially costly given the high initial capital costs or subsequently discovering serious flaws in the technology.

All this does not mean that companies should not employ blockchain technologies, indeed there are many worthwhile applications for blockchain in supply chains, food safety, asset tracking, etc. But counsel need to be aware of the potential legal and other limitations of this rapidly evolving technology.

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The thing about ...

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Photo: Patrick Dransfield

Sarah Grimmer

The secretary-general of the Hong Kong International Arbitration Centre (HKIAC) talks to Patrick Dransfield about the Belt and Road initiative, Hong Kong's role as an arbitration centre and the trends shaping the sector.

Asian-mena Counsel: You have a distinguished background in the field of dispute resolution, including serving at the Permanent Court of Arbitration (PCA) in the Hague. What attracted you to Hong Kong and how do you think your experience at PCA regarding multiple investor-state arbitrations is relevant to Asia?

Sarah Grimmer: I was attracted to Hong Kong for three reasons. First, I was offered the role of secretary-general of HKIAC, one of the top international arbitral institutions in the world. Taking the job was a natural next career step for me. Second, Hong Kong is a dynamic city with a fascinating history, present and future. It was a place I wanted to discover. Third, I am from New Zealand and had been living for many years far from my home country and family. Hong Kong feels very close to home compared to The Hague.

At the PCA I worked on numerous investor-state arbitrations involving Asian parties. It is relevant in this part of the world given the complex web of bilateral and multilateral investment agreements that Asian states have concluded and are in the process of negotiating. Given the scale of investment and trade in the region, investment dispute resolution is relevant and will be increasingly so, especially with the Belt and Road initiative as disputes arise.

AMC: Why is international arbitration a good solution for investors and states along the Belt and Road?

SG: The Belt and Road initiative is generating opportunities in large-scale cross-border infrastructure projects from ports, railways and roads to major energy plants in largely emerging economies. The participants in these projects will be numerous with different interests and bargaining positions including state-owned entities, multinational companies, financiers and local governments. These types of projects will inevitably involve complex transactional arrangements.

The projects are complex, capital intensive, multi-party, multi-contract and high-public interest involving jurisdictions at different stages of development with differing legal, political and economic systems. Disputes are unavoidable given the inherent political and commercial risk associated with such large-scale investment projects.

Where disputes cannot be resolved through negotiation or mediation, international arbitration offers parties a neutral venue for the resolution of cross-border disputes, which crucially, and unlike court judgments, results in an award that is enforceable in 159 countries around the world, including the large majority of Belt and Road countries. 92 percent of the original 65 Belt and Road countries are signatories to the 1958 New York Convention, the treaty allowing for the recognition and enforcement of foreign arbitral awards.

The ability to resolve your dispute in a mutually agreed neutral venue resulting in an enforceable award in most Belt and Road countries are two of the key reasons why arbitration is attractive for investors as well as states (and any other participants) along the Belt and Road. Other benefits include having the right to select an arbitrator with the required expertise, and relevant legal and cultural backgrounds and linguistic ability, as well as tailoring the procedures to the specific requirements of a dispute.

"We recently worked with the Department of Justice to secure the ICCA Congress in Hong Kong in 2022 — the equivalent of winning the bid to host the Olympics in the arbitration world"

AMC: Why do you think that Hong Kong in general and HKIAC in particular should be the number one choice for Belt and Road dispute resolution?

SG: The common denominator in Belt and Road projects is the presence of a party or parties from mainland China transacting with foreign entities. Hong Kong has long been the connecting jurisdiction between mainland Chinese parties and the parties from the rest of the world. Important to effective dispute resolution, it benefits from an independent, mature and pro-arbitration judiciary. The judiciary is known to uphold the rule of law and is comprised of some of the most eminent judges from the Commonwealth, including Australia, Canada, New Zealand and the UK. At the same time, Hong Kong is home to a deep pool of experienced professionals who are bilingual and have a strong understanding of mainland Chinese culture and practices.

HKIAC, as Hong Kong's homegrown arbitral institution, is experienced in handling disputes involving Chinese and foreign parties, and particularly joint venture, shareholder, project finance disputes as well as construction and maritime disputes, all of which are the types of disputes that will arise out of the Belt and Road initiative.

HKIAC has a well-tested set of arbitration rules and case management practices that ensure cost-effective proceedings. Complex multi-party multi-contract disputes can be combined, and expedited procedures can be applied while ensuring party autonomy and due process are maintained. This experience is one of the reasons why HKIAC awards have such a strong record of enforcement in mainland China, an important reason to include HKIAC and Hong Kong in dispute resolution clauses involving Chinese parties.

AMC: A recent arbitration survey ranked Hong Kong as the fourth most preferred seat globally, behind London, Paris and Singapore. What can Hong Kong do to promote itself as a global arbitration centre? What is HKIAC doing to lead Hong Kong in this challenge?

SG: It is important that the message about Hong Kong's strengths is spread widely. Hong Kong has outstanding attributes that make it a leading arbitration hub: the pro-arbitration related court decisions, first-class legislation and being home to reputable institutions support that. HKIAC's administered caseload continues to grow, increasing by two-thirds between 2016 and 2017.

HKIAC has been committed to spreading the message of Hong Kong's excellence. We regularly organise events in Hong Kong, most notably being Hong Kong Arbitration Week, now in its seventh year attracting around 400 participants locally and internationally to Hong Kong. This concept has been replicated the world over. We recently worked with the Department of Justice to secure the ICCA Congress in Hong Kong in 2022 — the equivalent of winning the bid to host the Olympics in the arbitration world! We presented Hong Kong's successful bid in Sydney earlier this year. We also have extensive outreach programmes where we engage with governments, legal professionals and businesses overseas. We have a specific focus this year on emerging Belt and Road economies in the Asean region.

AMC: Is HKIAC witnessing an increase in disputes from the mainland relating to foreign-local joint ventures? Are there any trends emerging that you can discern?

SG: Our caseload involving parties from mainland China has consistently represented over 40 percent of our total administered cases for several years. Last year the percentage reached 55 percent. In terms of sector representation, corporate disputes involving

mainland Chinese parties have steadily increased from 13 percent in 2014 to 25 percent in 2017. With mainland Chinese investment continuing and likely to grow with the announcement of initiatives like the Belt and Road, we anticipate seeing more corporate and project finance disputes in the years to come.

The size of the disputes we see is also increasing. In 2017, the total amount in dispute in our cases was US$5 billion, double the total in 2016. This reflects the increase in larger, more complex corporate joint venture-type disputes of high value.

AMC: Government officials on all sides are keen to promote the Guangdong-Hong Kong-Macau area as a unified economic region. What opportunities and challenges does this present for HKIAC?

SG: The Greater Bay Area initiative offers another opportunity for Hong Kong and HKIAC to offer a sophisticated, reliable and well-established framework to resolve disputes arising between parties from the three separate legal jurisdictions involved. HKIAC's expertise related to technology and intellectual property disputes will be particularly relevant for the types of disputes that might arise out of the Greater Bay Area. We have established a specialist panel of arbitrators experienced in the field of intellectual property matters, an area where technical expertise is often required and can add to the more efficient resolution of the dispute. Also, HKIAC arbitration rules have comprehensive confidentiality obligations. This is particularly important in intellectual property disputes where confidential information or trade secrets are at stake.

AMC: The international arbitration community is debating third-party funding for arbitrations. Do you have strong views on the issue?

SG: Third-party funding is a welcome feature of the arbitration industry in Hong Kong. It allows impecunious parties, or those looking for ways to reduce the financial risk associated with pursuing a claim, to have access to third-party funding for meritorious claims. It is essential, however, that users fully understand the risks as well as the advantages of funding, and that funders operate to a high professional standard.

From HKIAC's perspective, it is critical that the involvement of a funder does not jeopardise the arbitration process by providing grounds for challenge or set aside of an award. To prevent this, we are revising our rules to require a funded party to disclose the fact of a funding arrangement. This is to ensure that effective checks can be conducted by arbitral tribunals to ensure no conflicts of interest arise, which could potentially lead to a challenge against the arbitrator or the eventual award.

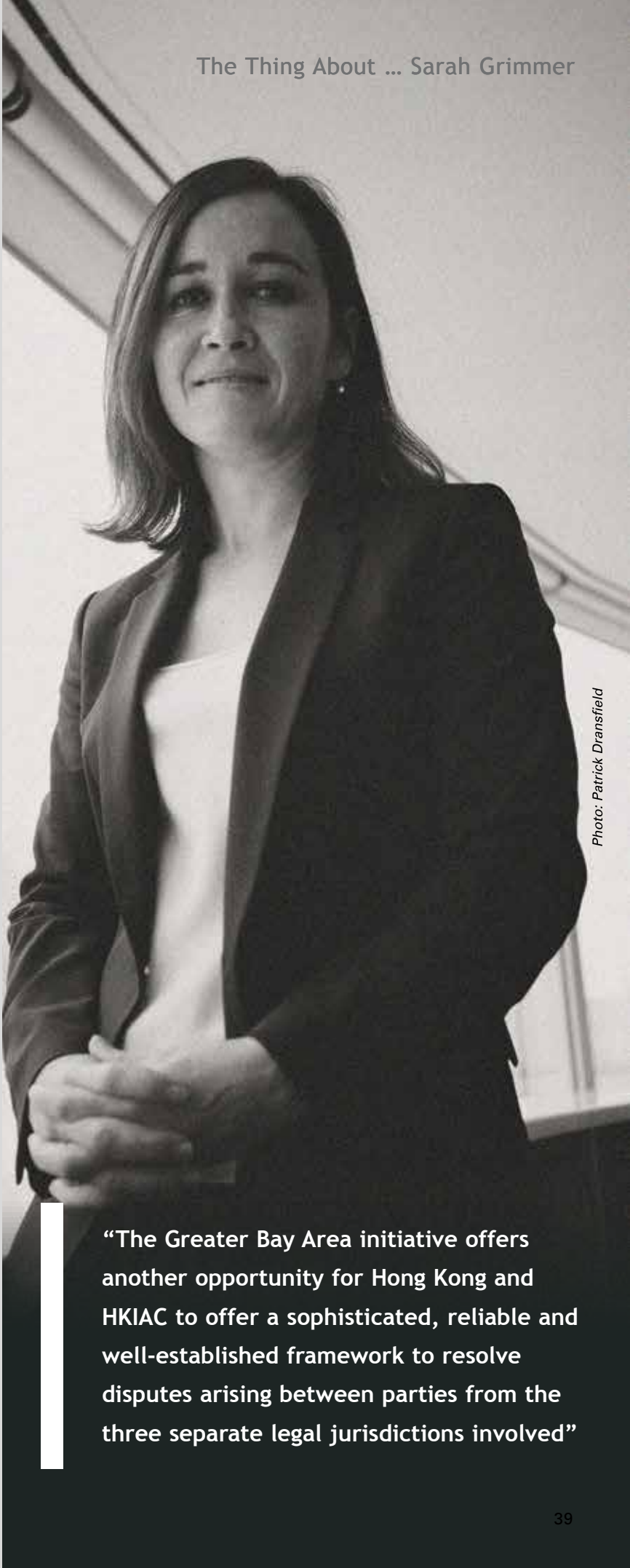

Photo: Patrick Dransfield

"The Greater Bay Area initiative offers another opportunity for Hong Kong and HKIAC to offer a sophisticated, reliable and well-established framework to resolve disputes arising between parties from the three separate legal jurisdictions involved"

> **"HKIAC is currently investigating ways in which it can share some of its internal jurisprudence and insights from its casework with the legal and business communities by publishing reports on its activities"**

AMC: Similarly, a lot of recent debate has been generated regarding the pros and cons of publishing awards on an anonymous basis to provide precedents. Does the HKIAC have a view on this?
SG: HKIAC does not have a practice of publishing redacted awards. Given the comprehensive confidentiality regime in Hong Kong, one could only proceed in this direction carefully. I recognise that there is demand in some corners for the publication of such materials. On the other hand, parties enjoy the privacy and confidentiality of their disputes in Hong Kong arbitrations. HKIAC is currently investigating ways in which it can share some of its internal jurisprudence and insights from its casework with the legal and business communities by publishing reports on its activities.

AMC: Who is your mentor?
SG: I have had several key mentors during my career. I have been lucky to have been led by excellent lawyers in each chapter of my career. Jennifer Kirby at the ICC, Brooks Daly at the PCA and Matt Gearing, chairperson of HKIAC. I also share Neil Kaplan as a mentor, along with many others who have had the fortune of meeting and working with him.

AMC: How is technology and the use of big data affecting the way that international arbitration is evolving? Are you now seeing people with different skills being called upon to be arbitrators, for example?
SG: Technology is already helping drive down the time and cost associated with arbitration, for example, law firms are using more technology in e-discovery processes to analyse data more rapidly and effectively. Parties file submissions electronically and sometimes to secured sites. This removes the need to transfer voluminous documents around the world. This year, HKIAC will introduce an online repository service to facilitate the electronic storage of entire case records. Parties and tribunals frequently hold meetings and hearings by video link or telephone call.

For all participants in international arbitration, there is increasing scrutiny and questions around cyber security. Much information in arbitrations is sensitive and confidential. It is imperative that such information is treated securely and that there are no vulnerabilities in the process by which information is exchanged. As a result, arbitrators are being called upon to improve their IT infrastructure and functioning, ie, using a secure email account rather than a gmail account, for example. HKIAC has this year upgraded its cybersecurity systems, including that all communications may be encrypted from HKIAC to the end recipient.

In terms of disputes around technology, we are seeing cases in which the parties demand that their case be determined by an arbitrator with experience in certain kinds of technology.

AMC: What is your hinterland?
SG: Outside of work I enjoy playing sport, my favourite being popular antipodean sports such as netball and touch rugby. Hong Kong has a great sporting culture and competition is good. I am also training with three colleagues to complete the Moontrekker in October this year, an overnight 30km run on Lantau Island. I have also done a lot of improvisational comedy theatre in my life (in Amsterdam and Paris) and while the scene here is a lot smaller, it exists and I happily get involved when I am in town. I am also getting married this year so am being inducted into the world of all-things-wedding related. Good times.

Sarah Grimmer is Secretary-General of Hong Kong International Arbitration Centre. She was formerly Senior Legal Counsel at the Permanent Court of Arbitration (PCA) where she acted as registrar in several inter-State arbitrations under the Law of the Sea Convention and served as tribunal secretary in multiple investment treaty arbitrations and contract-based claims.

Prior to joining the PCA, Sarah served as Assistant Counsel at the ICC International Court of Arbitration in Paris. She was also a member of the international arbitration group at Shearman & Sterling LLP in Paris, prior to which she worked in private practice in Auckland. In 2015, Sarah was appointed to the Special Tribunal for Lebanon Disciplinary Board. She is a member of the ICCA-ASIL Task Force on Damages (2016), ICCA Publications Committee (2015), the IBA Investment Arbitration Subcommittee (2014), New Zealand ICC Arbitration Committee (2014), and the IBA Arb40 Steering Committee (2013).

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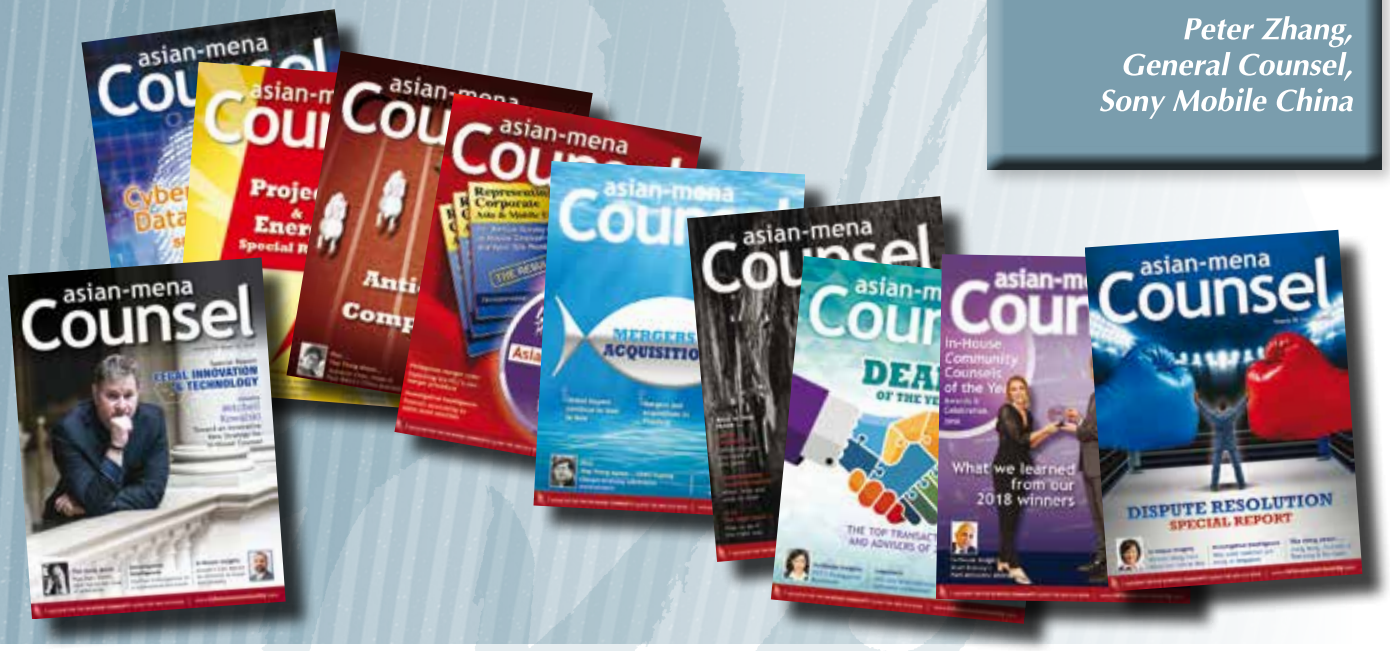

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