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Volume 16 Issue 3, 2019

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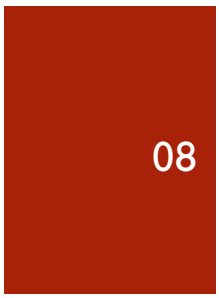
Key legal developments affecting the In-House Community along the New Silk Road



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Blockchain, cryptocurrencies and the law in Uganda

By far the most significant headline-grabbing development in 2017 and 2018 relates to the stunning rise of blockchain technology. The technology has the potential to dramatically transform practices in significant segments of the Ugandan economy.

Cryptocurrency is the most popular example that is intrinsically tied to blockchain technology. It is also the most controversial one. Nonetheless, blockchain technology itself is non-controversial, has worked flawlessly over the years and is being successfully applied to both financial and non-financial applications within Uganda.

Uganda continues to see a lot of growth in the cryptocurrency and blockchain industry. In the past year the country has hosted various blockchain conferences, we have witnessed a mushroom of blockchain associations and communities with a lot of support from government at cabinet level.

Ugandan President Yoweri Museveni has spoken positively about blockchain technology. At the Africa Blockchain conference held in May he said that there is a need "to look for a new technology of enabling things to move faster and new systems that go with it".

Several crypto-to-fiat currency exchanges have been launched in Uganda, like BitPesa, Coin Pesa and Binanace Uganda. Binance is the the biggest fiat-to-crypto exchange by trade volume in the world. And some businesses like restaurants, hotels and shops accept payment in cryptocurrencies in Uganda.

The government of Uganda is also considering the use of blockchain in various ministries, such as the Ministry of Lands, where all properties in Uganda will be registered on the blockchain. This project is being led by Bitland Uganda in partnership with Bitland Global a land registry application on the blockchain that maintains tamper proof, immutable land records. We believe this process will spark a lot of growth in the real estate industry as it will get rid of the major ills that the industry has grappled with for a long time, such as fraud. Land title registration on the blockchain will mean transparent, tamper proof, fast and inexpensive transactions.

> "Blockchain has enabled Ugandan businesses to access global markets by removing barriers, such as intermediary banks, high costs, interminable waiting periods and regulatory restrictions"

With the range of blockchain applications being implemented in Uganda, from enabling micropayment systems to digital identity management to smart contracts, there is no doubt that blockchain-based solutions can leapfrog traditional or non-existent technology infrastructures in the country and the continent at large. Such revolutionary developments are the drivers of a new era of more inclusive growth in which "no one is left behind".

Blockchain has facilitated an increase in cross-border transactions to the benefit of Uganda. Most African countries face a lot of difficulties with costly financial systems due to the various currencies, regulatory systems and exchange rates among African countries. However, blockchain has enabled, for example, flow of assets across borders at the lowest rates.

Blockchain has enabled Ugandan businesses to access global markets by removing barriers, such as intermediary banks, high costs, interminable waiting periods and regulatory restrictions.

Regulation

The biggest challenge is the absence of a regulatory regime. Regulators and lawyers are still grappling with how to navigate the new technology. Luckily, Uganda is one of the few countries on the African continent whose government has shown willingness to embrace the technology. Most of the blockchain technologies and cryptocurrencies are not facing much resistance from regulators in Uganda, unlike in most countries across the continent.

Current status of policy and regulation

The Ugandan government is in the process of developing policy guidelines and encouraging industries to utilise the technology. Further, there is a need to review the existing Data Protection and Privacy Bill in the context of emerging new technologies.

Conclusion

The next decade will bring with it tremendous advancements in technological and economic artistry that cannot presently be envisioned, and nearly all of those innovations will need to be understood and analysed through a legal lens. The global blockchain and cryptocurrency community needs a strong, yet quickly adaptive base of legal understanding on which to build and blossom.

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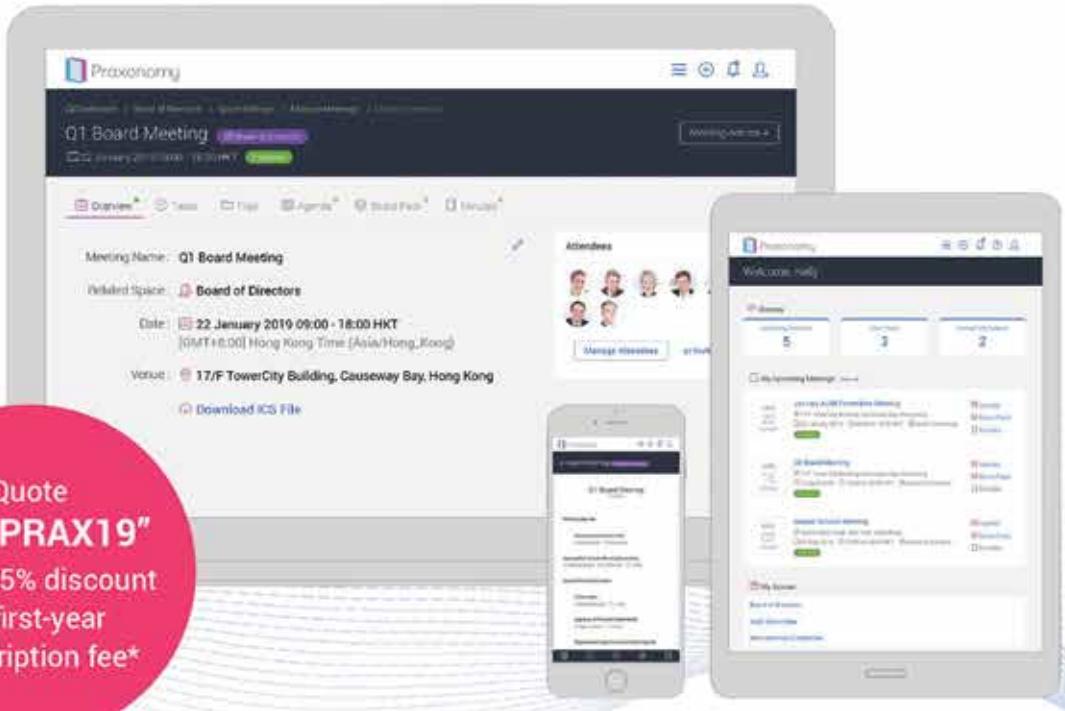

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The right to know: Freedom of information in the Supreme Court

Freedom of Information (FoI) is a right enshrined in our fundamental law. It refers to the right of the people to information on matters of public concern. It is the right of every citizen to access official records, documents and papers pertaining to official acts, transactions or decisions, as well as to government research data used as basis for policy development (Sec. 7, Art. III, 1987 Constitution). This includes the public's right to know the public officials' and employees' assets, liabilities, net worth and financial and business interests.

So as not to render this right ineffectual brought about by the lack of a law therefor, President Rodrigo Roa Duterte passed Executive Order No. 2, Series of 2016, which implemented the FoI Program in the executive branch. For its part, the Supreme Court passed the Rule on Access to Information About the Supreme Court early this year. The Supreme Court likewise ordered the creation of FoI Manuals in the entire judiciary, ie, Court of Appeals, Sandiganbayan, Court of Tax Appeals and lower courts.

The Rule on Access to Information About the Supreme Court guarantees one's "privilege" to either obtain a copy receive the information or gain insight to all information and records or portions of those records in the official custody, possession and control of offices in the Supreme Court. Like all other rights, the "right to know" is not an absolute right.

Excluded are those "non-disclosable information" protected by laws, rules or resolutions of the Supreme Court En Banc. For instance, access to information will be denied if the request (1) is made by one whose identity is fictitious or not legitimate; (2) is prompted by sheer idle curiosity; (3) made with a plainly discernible improper motive; (4) made for a commercial purpose; (5) is contrary to laws, morals, good customs, or public policy, eg when the request pertains to privileged documents or communications.

To obtain access, the requesting party must submit to the Supreme Court's Public Information Office (PIO) two filled-up copies of an Access to Information Request Form (AIRF) stating therein his/her personal information, the requested information and the purpose of the request, together with two of his/her valid IDs.

However, securing the Justices' Statements of Assets, Liabilities and Net Worth (SALN), Disclosures of Business Interests and Financial Connections, Personal Data Sheets (PDS) and curriculum vitae (CV) follows a different procedure as the contents thereof are deemed non-disclosable when requested or to be used for any purpose contrary to morals or public policy, or any commercial purpose other than by news communication media for dissemination to the general public. As a general rule, only copies of the latest SALN, PDS and CV may be requested, and requests for previous records may be covered only if so specifically requested and if considered as justified. Nevertheless, information as to whether or not such statements have been filed shall be fully disclosable.

To request for SALN, PDS or CV of a Supreme Court Justice, the requesting party must state the specific purpose and individual interests sought to be served as well as a commitment that the request shall only be for such purpose. For members of the media, the same must be supported by proof under oath of media affiliation and certification of the accreditation of their respective organisations as legitimate media practitioners. In all cases, the requesting party must have no derogatory record of having misused any requested information previously furnished to him/her. For SALNs of Justices of Supreme Court as well as those of the Court of Appeals, Sandiganbayan and Court of Tax Appeals, the authority to disclose shall be made only by the Supreme Court En Banc.

In an En Banc Resolution, the Supreme Court has granted requests for SALNs for varying purposes, including transparency and governance, media database, posting in a website for the general public, reference materials for newscasts and for academic purposes.

Non-disclosure of SALNs, PDSs and CVs is a privilege that belongs to the Supreme Court as an institution, not to any justice or judge in his/her individual capacity. Hence, no sitting or retired justice or judge, even the Chief Justice, may claim exemption without the consent of the Court.

Significantly, the Rule on Access to Information About the Supreme Court likewise provides for administrative liabilities and penalties ranging from reprimand, suspension and dismissal, and even indirect contempt for disclosures in violation of the rule on confidentiality and provision of any false information in the AIRF and its accompanying documents.

To borrow the words of the Supreme Court, "while the Constitution holds dear the right of the people to have access to matters of concern, the Constitution also holds sacred the independence of the judiciary". Thus, the passage of the Rule on Access to Information About the Supreme Court, which allowed people to exercise their right to know by allowing access to public and official records in the custody of the Supreme Court subject only to reasonable requirements provided therein.

The views and opinions expressed in this article are those of the author. This article is for general informational and educational purposes, and not offered as, and does not constitute, legal advice or legal opinion.

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

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Preventing allegations of breach of trust for management decisions in Korea

In Korea, company officers and directors may ask the question: "Is there any chance that I will be accused of breach of trust if I proceed with this transaction?"

If you are an attorney who provides legal advice to employees and executives of corporations, often you may have heard concerns like the one above. In Korea, it is a real concern, not only from a civil liability standpoint but also because of the prospect of criminal liability based on a company engaging in certain transactions.

When an executive makes a decision to choose one business option out of many others, it may not be clear as to what is the best option. If breach of trust was decided simply by determining whether the company has suffered damage as a result of a particular transaction taking place, then it would undermine the commitment of executives to act creatively and aggressively for the benefit of their companies. In situations where executives have to make quick decisions multiple times a day on matters that are difficult to predict accurately, not all decisions will be profitable for their companies. Therefore, what would be an appropriate standard for executives of a company who want to work enthusiastically and conscientiously, to prevent them from being punished for breach of trust, due to decisions they have made for their companies in good faith?

A business judgment rule is one of the standards used to strike a balance between efficiency in achieving business objectives while maintaining compliance with corporate rules and regulations designed to protect shareholders and the public. Unfortunately, the business judgment rule is quite subjective and does not provide a bright line test for avoiding liability.

Let's look at some concrete examples. In a case where Company A acquired issued shares of Company B at a higher value than the shares' fair value, the Supreme Court considered various circumstances when deciding if there had been a breach of trust. These included the facts that (i) Company A conducted a comprehensive review of the acquired company's technological prowess, its corporate stature among the public, its brand value, etc; (ii) the acquisition was not made out of an intention to seek any personal benefits such as direct financial gains of the defendant executives; (iii) the financial burden borne by Company A due to the acquisition was not too significant; (iv) the acquisition was made through a lawful resolution of the board of directors of Company A; and (v) Company B normalised its management and improved its position using the funds obtained from the sale of shares.

In light of above circumstances, the Supreme Court ruled that it would be difficult to conclude that the representative director and director of Company A, who made the decision on the acquisition, had an intention to breach the trust of Company A (Supreme Court judgment 2007Do10415).

In contrast, the Supreme Court made an opposite ruling in a different case. The court ruled that when the director of a limited-liability company endorsed (endorsement is similar to a guarantee) on behalf of his company, a promissory note issued by another person, if the director knew that endorsing such a note would cause damage to his company because the other person was not financially solvent, then such director could not avoid being charged with breach of trust based on the director exercising his business judgment (Supreme Court judgment 99Do2781).

At a glance, it might appear that the two cases mentioned above are quite different from each other, since the executives in the former case only sought to advance the corporate interest, not their personal interest, and they made their decision with a sufficient amount of information, whereas in the latter case, the director was aware of the fact that his company would suffer certain damage at the time of the transaction. However, the answer is not quite that simple: what if the other person who gave the promissory note in the latter case was an important business partner of the company? What if the director had no other option since non-endorsement of the promissory note would have caused a problem in the business of the other person, posing adverse effects on the director's company? There may be situations where it is quite hard to determine whether a breach of trust has occurred, even when applying the business judgment rule.

Nevertheless, even in such ambiguous situations, executives and attorneys who provide advice must face the moment of decision. In this regard, there are several factors that may play a crucial role in applying the business judgment rule: information and conscience. When making a decision where one cannot accurately predict if it will cause damage to the company, executives will be required to collect reasonable and accurate information to the extent possible, which information may be the basis for their decision as to whether the proposed transaction is expected to bring profit to the company. They should do their analysis by undertaking a thorough examination based on their consciences, to determine which decision, among many options, will be the best one for the company. Unlike information, conscience is not visible. Therefore, it is important for executives to also prepare and/or secure a sufficient amount of documentation to demonstrate that they have consciously examined and analysed the collected information for the company when making their decision.

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Company Secretarial Manager
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A leading TMT company with fast growing businesses seeks a Company Secretarial Manager. You will provide the full spectrum of day to day corporate secretarial support for their group subsidiaries in Hong Kong and overseas. Ideal candidate should have 8+ years' of relevant experience. English and Chinese language skills are essential. (IHC 17046)

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By Jo Lit and Tiffy Wan

A review of Hong Kong 2018 listing reforms

Hong Kong has emerged as the top IPO market globally in 2018 in terms of funds raised thanks to several blockbuster listings including Xiaomi Corporation and China Tower Corporation, as well as attracting a variety of different issuers thanks to some key reforms to the Hong Kong listing rules.

Biggest reforms since 2000

In 2018, the Stock Exchange of Hong Kong introduced the biggest reforms to the listing regime in Hong Kong since 2000 when the Growth Enterprise Market (GEM) was introduced. With effect from April 30, 2018, three new chapters were introduced to the main board listing rules in Hong Kong:

1. Chapter 8A — companies with weighted voting rights structures (WVR)
2. Chapter 18A — dedicated to biotech companies
3. Chapter 19A — secondary listing of innovative companies

Not surprisingly, just like in 2000 when tom.com first launched on GEM, the share offerings under the new Chapter 8A and Chapter 18A in 2018 have attracted global institutional and local investors, resulting in IPOs with record-high initial market capitalisation upon listing.

Brave new world

For biotech companies, the business cycle is relatively long in comparison to other traditional industries, often taking anywhere from 15 to 20 years from initial research to product commercialisation. As a result, biotech companies require a substantial amount of upfront funding to support their research and development (R&D). Thus they have relied traditionally on government grants, university funding, investments from major pharmaceutical companies, private equity investors and personal funding.

To address the difficulties faced by biotech companies in raising the necessary capital to support their R&D, the profit requirement has been waived under the new Chapter 8A rules.

Thanks to the relatively low threshold for operation duration and profits, a number of companies have already taken advantage of the new regime with successful listings over the past six months. As of November 30, 2018, beyond the two successful listings, nine other biotech companies have also made their listing applications under the new Chapter 18A rules.

> "It is anticipated that there will be a steady increase of biotech companies listed in Hong Kong"

Some shareholders are more equal than the others

Xiaomi Corporation and Meituan Dianping are the first two issuers listed in Hong Kong with WVR. Under the new Chapter 8A of the main board listing rules, the WVR has, among others, the following characteristics:

- The voting power of the shares with weighted voting power (WVR Shares) is capped at 10 times of the voting power of ordinary shares
- WVR shares are non-listing
- Issues of WVR Shares must be capped at the same proportion as that upon listing, unless otherwise approved by the Stock Exchange

The listing applicants for WVR structures are expected to demonstrate the necessary characteristics of innovation and growth and demonstrate the contribution of their proposed beneficiaries of the WVR Shares, who must be members of the applicant's board of directors.

Apart from the weighted voting power, the WVR Shares have the same right to dividends and liquidation preference as those of the ordinary shares. Moreover, for certain reserved matters, such as changes to constitutional documents, appointment and removal of auditors and independent non-executive directors, the WVR Shares can only vote on a "one share one vote" basis.

With the introduction of the Chapter 8A, Hong Kong will be competing directly with Nasdaq and The New York Stock Exchange which already uses weighted voting right structures.

Stock Connect boost

Since its launch in November 2014, the Stock Connect scheme is a mutual market access programme between the Hong Kong, Shanghai and Shenzhen Stock Exchanges which allows international and Mainland Chinese investors to trade eligible securities in each other's markets. On December 9, 2018, the three Stock Exchanges jointly announced that they have reached a consensus on the detailed arrangement for the inclusion of companies with weighted voting rights in Southbound Trading of Stock Connect, which allows PRC institutional investors to trade in shares of companies with WVR in Hong Kong directly. It is expected that the new rules will be implemented in mid-2019.

Trends that will continue to rise in 2019

With a clear regulatory framework dedicated and tailored-made rules governing the listing of biotech companies, it is anticipated that there will be a steady increase of biotech companies listed in Hong Kong, both under the new chapter 18A and the regular listing framework.

The introduction of new rules for the Southbound Trading of Stock Connect, providing access to PRC institutional investors to trade securities of WVR directly, the Hong Kong Stock Exchange will continue to attract quality innovative companies globally.

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Senior Trademark Counsel | 8+ yrs pqe| Shanghai REF: 14833/AC

A Fortune 500 technology conglomerate is seeking a PRC-qualified IP lawyer to join their Shanghai office to provide brand protection across the Greater China region. You will implement and manage programs covering brand and trademark protection and enforcement. You must have a law degree with at least 8 years' corporate/law firm IP experience of international brand; an overseas law degree or LLM is preferred. Fluent English and Mandarin Chinese language skills are also required.

Legal Counsel, Asia Pacific | 5-7 yrs pqe | Hong Kong REF: 14839/AC

Global financial information services company seeks a Common Law qualified lawyer with Chinese skills, to support its business operations across Asia Pacific. Based in Hong Kong, you will be responsible for a wide range of corporate commercial issues including contracts, M&A, litigation and company secretarial work. You must have a minimum of 5 years' relevant PQE of which at least 3 will have been gained in a major international law firm. Reporting to the Asia Head of Legal, you must be a good team player with the ability to work autonomously and have excellent drafting skills in both English and Chinese.

Compliance Manager | 5+ yrs exp| Hong Kong REF: 14834AC

This Fortune Global 500 healthcare company seeks a Compliance Manager to cover their China business. Based in Shanghai, you will provide compliance support on their China operations and cover all M&A transaction, including due diligence and post-acquisition integration. You must have a law degree with FCPA knowledge plus a minimum of 5 years' compliance experience in M&A transactions in the China healthcare market. Excellent interpersonal and cross-cultural communication skills along with fluent English and Mandarin Chinese are preferred.

Legal Compliance Counsel | 3-5 yrs pqe | Shanghai REF: 14836/AC

Excellent opportunity for further career development in a Fortune 500 pharmaceutical company for a PRC-qualified lawyer. Based in Shanghai, you will be responsible for providing legal and compliance support to its functional units covering all business initiatives in China. You must have 3-5 years' PQE in a large-scale pharmaceutical/medical company and/or a top-tier law firm. Good understanding of the US FCPA, the PDPAC and the IFPMA is highly desirable. A good team player with ability to work independently under pressure is preferred. You must have fluent English and Mandarin Chinese.

Private Practice

Senior Associate, Financial Regulatory | 5+yrs pqe | HK REF: 14800/AC

This global law firm is seeking a skilled lawyer to support its financial services regulatory team in Hong Kong. You will take a senior role in a dynamic practice so specific experience is a must. The ideal candidate will be Hong Kong qualified with over 5 years' PQE in financial services regulatory, investigatory and compliance work with a top-tier law firm or regulatory body. Must have excellent training earned from a highly regarded international law firm. Fluency in English, Cantonese and Mandarin is preferred, high-calibre bilingual English/Mandarin lawyers will be considered.

Derivatives Associate | 2-5 yrs pqe | Hong Kong REF: 14832/AC

This Magic Circle law firm is seeking a derivatives and structured finance lawyer to join their banking and finance team in Hong Kong. Ideally, you are England & Wales or Hong Kong qualified with 2-5 years' PQE in OTC derivatives and structured finance work at leading law firms. Experience of Hong Kong regulatory matters is highly desirable. Fluent Cantonese and Mandarin Chinese skills are preferred but not essential.

FCPA Associate | 2+ yrs pqe | Shanghai REF: 14835/AC

Newly created Shanghai role for a bilingual Investigations Associate with regulatory enforcement experience from an international law firm. Your work will focus on China-related FCPA investigations across Asia. Ideally, you hold a foreign law degree and a minimum of 2 years' PQE in litigation/arbitration and FCPA investigations from a leading law firm. Candidates with experience in life sciences issues in China are preferred. Ideal for corporate associates who are keen to transition to a FCPA investigations practice. Fluency in English and Mandarin, both written and oral, is required for the role.

Associate, HK IPO | 1-5 yrs pqe | Hong Kong REF: 14843/AC

Due to rapid growth this premium UK corporate law firm is seeking to hire for their Hong Kong IPO practice. The firm is interested in candidates with 1-5 years' PQE in Hong Kong IPOs gained in an international law firm. An admission to the Bar in Hong Kong is required. Fluency in written and oral English is essential for drafting purposes, basic or higher level command of Cantonese or Mandarin would also be welcome.

IPO Associate| 1-4 yrs pqe | Hong Kong REF: 14831/AC

A Magic Circle law firm is seeking a junior to mid-level lawyer with strong technical skills to join their corporate team based in Hong Kong. You must have a minimum of 1-4 years' PQE including H-shares, red-chips and IPO work at a reputable law firm. Hong Kong or PRC qualified candidates are required. You must have fluent English, Cantonese and Mandarin skills, including Chinese drafting skills, for the role.

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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CV MAGAZINE 2016 Recruitment Awards — Hughes-Castell (Hong Kong) Limited — Best Legal and Compliance Recruitment Consultancy 2016

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Evangelos Apostolou
In House Practice Group, EMEA and APAC at Major, Lindsey & Africa, ex-General Counsel, Asia-Pacific, and Partner, Ernst & Young and ex-General Counsel, Asia-Pacific, British Telecom

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2019 Events Calendar

NOW IN ITS 21ST YEAR, the In-House Community Congress & Symposium circuit is the largest and most highly-regarded series of events specifically for the *In-House Community* of counsel and senior corporate decision makers along the New Silk Road.

• February	– In-House Congress **Dubai**
• March	– In-House Congress **Beijing**
• March	– In House Congress **Yangon**
• March	– In-House Congress **Mumbai**
• April	– *Legal Inno'Tech Forum, Singapore*
• April	– In-House Congress **Ho Chi Minh City**
• April	– In-House Congress **Shenzhen**
• May	– In-House Congress **Jakarta**
• May	– *In-House Community Awards* (in Hong Kong)
• May	– *Hong Kong Outbound Symposium*
• May	– In-House Congress **Sydney** (inc. *Australia Outbound & Inno'Tech*)
• May	– *Korea Outbound Symposium, Seoul*
• June	– In-House Congress **Bangkok**
• June	– In-House Congress **Kuala Lumpur**
• July	– In-House Congress **Manila**
• July	– *Risk & Compliance Symposium, China*
• August	– In-House Congress **Seoul**
• September	– In-House Congress **Singapore**
• October	– In-House Congress **Hong Kong**
• October	– In-House Congress **Africa** (in Johannesburg)
• October	– In-House Congress **Shanghai**
• November	– In-House Congress **Abu Dhabi**

21 YEARS
– *of the* –
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CONGRESS
1999-2019

Note: Event dates above are provisional and subject to change

For more details on the events and the In-House Community, please contact:

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

CONGRESS CALENDAR 2019.indd

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PUBLICATION FOR THE IN-HOUSE COMMUNITY

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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 Andrew Janis, a father of three and a talented barber!

- **What is on your mind at the moment?**
  Balance - we just had our third child, so I think a lot about how to divide my time appropriately.
- **What secret talent do you have?**
  Evenly cutting my own hair (what little is left).
- **If you weren't a lawyer you would be a ...**
  general contractor - lots of satisfaction in visualising something, seeing it get built and then appreciating the result.
- **If you could change one thing about yourself, what would it be?**
  I wish I was a bigger risk-taker, especially when I was younger and too focused on academic and professional achievement.
- **What is your idea of misery?**
  Lactose intolerance (if I ever have another theme party, I'll choose cheese).
- **What irritates you?**
  Disappearing charging accessories.
- **What is your motto?**
  Act or accept.
- **What is the strangest thing you have seen?**
  A conference hall full of people getting hypnotised.
- **If you could have one superpower it would be ...?**
  I'll reserve my save-the-world responses for another day and go with unlimited food intake with no weight or health consequences.
- **On what occasion do you lie?**
  Regularly telling HSBC customer service that I'm about to move my business to another bank.
- **What was your last Google search?**
  "How to relieve knee pain with a foam roller" (one of my many old-man searches).
- **Where would you most like to live?**
  Los Angeles, but in the future when Uber Elevate is operational and I won't have to deal with traffic.
- **Which of the Seven Dwarfs is most like you?**
  I have a Juris Doctor degree, so I guess Doc.

JLegal
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Andrew Janis
Head of Legal, Southeast Asia & North Asia
Uber

Lewis Sanders

Legal Recruitment

What we do

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Strong track record of placing partners, associates and paralegals at international law firms across the region

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Leading In-House practice supporting Financial Services, MNCs and HK Listed Companies for legal and compliance roles

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Contracting

Specialist contracting and interim resourcing covering legal, compliance and business support

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Providing first rate support for law firms from COOs and office managers, through to tech support, change management and legal secretaries

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3-5 Years

- Join a well-established US firm
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- Must have a US JD
- Chinese language skills are not required
- Opportunity to work with an eminent partner and practice

Ref: AC7356

Litigation PSL
Hong Kong
3-10 Years

- Join a leading disputes practice and top tier litigation team
- Competitive salary package
- Part-time role
- Chinese language skills preferred but not essential

Ref: AC7265

Corporate/Commercial
Hong Kong
2+ Years

- Join a global technology company
- At least 2 years of relevant corporate and commercial experience required
- Exposure to TMT transactions preferred
- Responsible for providing legal advice to support the global group

Ref: AC7602

Corporate
Hong Kong
12+ Years

- Join an established legal team within the hospitality industry
- Must be trained at a top tier firm
- Strong academics and Chinese language skills required
- Excellent remuneration package
- Good opportunity to work closely with senior management

Ref: AC7561

Corporate M&A
Hong Kong
2-4 Years

- Join a US bank's global banking and markets team
- 2 to 4 years of corporate M&A experience gained at a leading international firm required
- Prior capital markets experience is preferred

Ref: AC7580

Funds Partner
Hong Kong
10-15 Years

- Great opportunity for the next step up to either Counsel or Partner
- Strong technical skills are a must
- Portable book of business preferred
- Hong Kong qualification required
- Excellent platform to build a practice

Ref: AC7560

Corporate Partner
Hong Kong
12+ Years

- Partner role to build a practice at an international firm
- Excellent M&A/PE experience required
- A book of business is strongly preferred
- Mandarin language skills not necessary

Ref: AC7125

Lewis Sanders
Legal Recruitment

Contact us to find out more

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MOVES

The latest senior legal appointments around Asia and the Middle East

HONG KONG

King & Wood Mallesons has hired **Ashley Wong** from Mayer Brown to lead its Hong Kong aviation practice. She has more than 15 years of experience in aviation matters, advising airlines, leasing companies, maintenance and repair organisations and other market players in the aviation industry on a wide range of areas including aircraft portfolio acquisitions and disposals, pre-delivery payments financing, sale and lease-back arrangements, acquisitions and disposals of new and used aircraft and engines, dry leasing and wet leasing of aircraft, long-term airframe and engine maintenance arrangements and other commercial arrangements.


Eric Chan

Simmons & Simmons has announced that **Eric Chan** rejoined the firm as a consultant. Chan had previously completed his training contract and worked at the firm as an associate for over six years. He brings over 10 years of experience in dispute resolution, focusing on advising and representing clients on complex, high-value and high-profile disputes in Asia including Hong Kong and mainland China. Prior to rejoining Simmons & Simmons, Chan worked for Addleshaw Goddard and Freshfields Bruckhaus Deringer. He recently represented a major oil and gas company in a high-profile Singapore-seated, ad-hoc (Uncitral) arbitration case against its business partners in relation to a significant natural gas project in the South China Sea. He also recently acted on behalf of a leading electronics company in a Hong Kong-seated arbitration case under International Chamber of Commerce rules, in a dispute concerning a manufacturing plant in mainland China.

Squire Patton Boggs has added corporate partner **Anthony Chan**, who joined the firm from the Hong Kong office of Stephenson Harwood. A China-appointed attesting officer in Hong Kong, Chan's practice focuses on mid-cap corporate finance (IPO) work, representing both issuers and sponsors. He also has experience in debt financing and cross-border corporate and commercial transactions. He is also an attorney-at-law qualified in California and a member of the American Institute of Certified Public Accountants. Recent transactions led by Chan include advising BOCOM International (Asia) on HPC Holdings' HK$180 million (US$23m) Hong Kong listing and advising Zioncom Holdings on its listing in Hong Kong, making the technology company as one of the few Korean-owned businesses listed in Hong Kong.

SINGAPORE


Michelle Phang

Ashurst, through its foreign law alliance in Singapore, Ashurst ADTLaw, has appointed of **Michelle Phang** who joins as co-lead of Ashurst ADTLaw's corporate transactions practice. Phang is a corporate lawyer focusing in particular on public takeovers, cross-border acquisitions and joint ventures, regulatory compliance and has expertise in the digital economy sector. Phang joins from Shook Lin & Bok, where she was a key partner of the corporate / M&A practice group for 10 years. Prior to that, Phang spent two years in the London office of an international law firm. Phang will join the growing Asia-based corporate practice operating out of Singapore, Hong Kong, Tokyo, Beijing, Shanghai, and Jakarta and led by partner Mark Stanbridge.

Pinsent Masons has appointed **James Harris** as an energy and infrastructure project finance partner Harris has more than 30 years' experience in energy and infrastructure projects and is a market leader in Asia. He will be responsible for further developing the firm's regional projects practice and expanding its capabilities across the energy and infrastructure space, with a focus on project financing and PPPs in Asia. Harris joins from Jones Day where he was a partner in its Singapore office. Prior to this, he was global head of infrastructure at Hogan Lovells and was the firm's Singapore managing partner for 11 years. His reputation and experience extends across project finance (acting for a wide range of sponsors and lenders including multilateral development banks), project development and the secondary market/infrastructure M&A market.


Philip Lee

DLA Piper has strengthened its corporate and finance offering with the appointment of **Philip Lee** as a partner in its corporate practice, based in Singapore. Philip Lee joins the firm from Herbert Smith Freehills, where he has been a partner since 2012. He specialises in debt capital markets work and has experience advising on complex securities transactions, especially related to structured finance and general securities. Philip has been involved in a number of award-winning equity-linked, bank capital and other finance transactions. He also has wide ranging experience in syndicated and secured bank lending with particular emphasis on structured finance, project finance and acquisition finance.

UAE


Peter Greatrex

Clyde & Co has appointed **Peter Greatrex** as a partner in its real estate and hospitality practice. Based in Dubai, he will be responsible for further developing the firm's wider Middle East offering, with a particular focus on Saudi Arabia and Oman. He joins from Trowers & Hamlins, where he spent more than 12 years building experience in all areas of real estate transactions, advising master developer clients on all aspects of their development from conception to completion in multiple jurisdictions of the Middle East. He also has particular expertise in large pathfinder public private partnerships (PPP), advising public and private sector clients on a range of mandates in the housing, transportation and infrastructure sectors. He relocated to Bahrain in 2008 and has been in Dubai since 2017.

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DEAL OF THE MONTH

Asian-mena Counsel Deal of the Month

Indonesia completes oil-and-gas restructuring

State-owned energy assets have been combined under a single holding company.

After six years of work, the Indonesian government has completed its project to turn Pertamina, a state-owned energy company, into a US$4 billion oil-and-gas holding company.

The deal is aimed at simplifying the management of gas infrastructure in the country by reducing competition between the two biggest gas companies, which the government hopes will allow them to improve efficiencies and invest in expanded coverage beyond the main islands of Sumatra and Java.

The new company, known as Indonesian Oil and Gas Holding SOE, is Indonesia's largest state-owned holding company. The two-stage deal started in 2012 and finally closed on December 28, 2018.

In the first stage, the government's Class B shares in Perusahaan Gas Negara (PGN), Indonesia's largest natural gas transportation and distribution company, were transferred to Pertamina, resulting in an additional US$2.7 billion of capital owned by the government in Pertamina.

PGN controls approximately 76 percent of Indonesia's downstream gas pipelines, operating 7,435 kilometers of gas transmission and distribution pipelines across the country. As a result of the deal, PGN will become a sub-holding company for gas assets.

The second stage got underway after the current president, Joko Widodo, signed Government Regulation No. 6/2018 on the Formation of a State-Owned Oil & Gas Holding Firm, which enabled the transfer of 51 percent of the shares in Pertamina subsidiary Pertamina Gas to PGN with a purchase price of US$1.35 billion. Pertagas operates 2,085km of gas transmission pipelines.

The new entity also comprises sub-holding entities for upstream, processing and marketing, which sit beneath Indonesian Oil and Gas Holding SOE.

SSEK Legal Consultants represented the Indonesian Ministry of State-Owned Enterprises in the first stage of the deal, and then acted for Pertamina in the second stage. Founding partner Ira Eddymurthy and partner Dewi Savitri Reni led the firm's team in the transaction.

Other recent transactions from around the region:

Dentons is advising **Tongchuangjiuding Investment Management Group** (Jiuding) on its HK$21.5 billion (US$2.7b) disposal of 100 percent equity interest in FTLife Insurance Company to NWS Holdings, the infrastructure, logistics and transport services unit of conglomerate New World Development. Jiuding previously acquired FTLife from Brussels-based insurance firm Ageas for US$1.4 billion back in 2016. FTLife is one of Hong Kong's biggest life insurance firms. If completed, it will mark one of the largest insurance M&A deals ever in Hong Kong. Hong Kong corporate partner **Gordon Ng**, supported by Beijing partners **Li Shoushuang** and **Emilia Shi**, is leading the firm's team in the transaction. **Sullivan & Cromwell** (Hong Kong), with a team led by Hong Kong corporate partners **Kay Ian Ng** and **Garth Bray**, is representing **NWS Holdings**.

Clifford Chance has advised **China Construction Bank** as coordinator, underwriter and mandated lead arranger on the US$840 million syndicated loan financing for Zijin Mining Group's successful cross-border public offer for Canadian mining company Nevsun Resources. Based in Fujian, China, Zijin is a Shanghai and Hong Kong-listed mining company specialising in gold, copper, zinc and other mineral resource exploration and development. It is one of the largest gold and zinc producers in China. Toronto and New York-listed Nevsun currently holds exploration rights in Serbia, Eritrea and Macedonia. The primary syndication comprises eleven Chinese and international banks. Beijing partner **Timothy Democratis**, supported by New York partner **Daniel Winick**, led the firm's team in the transaction.

Morgan Lewis Stamford has represented **Uber Technologies** on the S$350 million (US$258.5m) sale of Lion City Rental, which owns about 9,900 cars that were initially acquired for the ride-sharing business to be conducted in Singapore. Directors **Suet-Fern Lee** and **Wai Ming Yap** led the firm's team in the transaction.

Rajah & Tann Singapore has acted for **Razer** (Asia-Pacific) on its build-to-suit lease from Boustead Project's joint venture company of its new South-East Asia headquarters at One-North, Singapore. This is the first building that will be customised to its requirements and use, representing the company's support for the development of technological innovation and a strong technology pool in Singapore. Hong Kong-listed Razer is a world leader in high-performance gaming hardware, software and services. Partner **Chou Ching** led the firm's team in the transaction.

Baker McKenzie has advised Hong Kong-listed **Evergrande Health Industry Group** on its US$930 million acquisition of 51 percent stake in National Electric Vehicle Sweden (NEVS). A global electric vehicle company based in Sweden, NEVS' core business is focused on intelligent automobiles. It has previously acquired the core assets and intellectual property rights of Swedish automobile company SAAB Automobile. In China, NEVS has a production facility in Tianjin and is planning to develop a production base in Shanghai. Hong Kong partners **Lawrence Lee** and **Christina Lee**, supported by partners **Simon Leung** (Hong Kong), Singapore member firm **Baker McKenzie Wong & Leow** principal **Sze Shing Tan**, and Stockholm partners **Anders Fast**, **Carl Svernlov** and **Mats Rooth**, led the firm's team in the transaction.

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.

Senior Counsel – Media,
6-10 yrs PQE, Singapore

Are you a media lawyer and would be confident to manage both legal and compliance functions for the region autonomously? A global media brand is looking for a robust and commercially savvy lawyer. This is an exciting role that has been newly created due to fast expansion of the business in APAC. It will also require the lawyer to assist the business on a global basis when required. You must have experience dealing with clients in the media and news industry, and have experience in content licensing, marketing and distribution. This role will attract an in-house counsel already with a media/broadcasting company, or lawyers wanting to make their first in-house move from private practice. [Ref: JGB – IS 1817]

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

Senior Legal Counsel – Asset Management,
4-8 yrs PQE, Hong Kong

A UK-based asset manager is looking to add a senior legal counsel to its team in Hong Kong. Candidates must be qualified in Hong Kong with a solid understanding of investment funds and regulations. Chinese language skills are required for this role. Candidates with less experience can be considered for a more junior post. Great opportunity to work with a well-established brand. [Ref: AC7625]

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

Senior Commercial Litigator – Conglomerate,
8+ yrs PQE, Hong Kong

This Hong Kong conglomerate seeks a lawyer with solid commercial dispute resolution experience gained from a reputable law firm or in-house to manage the disputes including data privacy and personal injury related matters. You will guide and advise senior management on contentious matters for the group's various businesses. Cantonese language skills is mandatory. [Ref: IHC 17251]

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

Head of Legal – TMT,
13+ yrs PQE, Hong Kong

A reputable TMT company with diversified business, and they are currently looking to hire an experienced counsel for head of legal. As head of legal, you will lead a team and manage all legal matters relating to their business in Hong Kong and across regions, including: Engage with business and provide legal support, driving strategic initiatives, advising on legal matters impacting day-to-day operations; advising business on compliance issues and mitigate risks; negotiate, draft and review various commercial contracts, tenders; manage external counsels; advise on marketing activities and ensure compliance with relevant laws and regulations, as well as advising on HR issues. To qualify, you will be a common law qualified solicitor with around 13-17+ years of PQE, and more experienced candidates are welcome. Less experienced candidates may be considered for senior counsel. You are expected to possess solid legal experience including some in-house experience from the TMT sector (eg, e-commerce and/or telecommunication and/or consumer services, etc). In terms of language requirements, you are expected to be fluent in English and Chinese. For this role, you are expected to have strong communication skills and possess stakeholder management skills. Our client offers attractive package and an excellent opportunity to lead the legal function of a growing reputable business. [Ref: JO-1222-62355]

Contact: Alex Tao
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Email: AlexTao@puresearch.com

Global Head of Regulatory – Consumer,
15+ yrs PQE, Hong Kong

Excellent opportunity to take on a global leadership position at this world-renowned consumer conglomerate. Based in Hong Kong, you will lead a global regulatory compliance team setting the regulatory framework and ensuring their business operations are in line with applicable laws and regulations in Europe (in particular UK and France) and Asia. The range of issues includes data privacy, competition/antitrust, anti-bribery, corruption, consumer protection, marketing and advertising and CSR. You must be a common or civil law qualified lawyer with at least 15 years' PQE handling regulatory matters, in particular data privacy and competition/antitrust law within an international law firm and in-house at an MNC. Cross-functional and multicultural communication skills plus management experience are highly desirable. Excellent command of verbal and written English is a must; an additional language skill is an advantage but not essential. [Ref: 14850/AC]

Contact: Doreen Jaeger-Soong
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Combating private sector corruption in Indonesia: A challenge to address in 2019

With national elections in Indonesia just around the corner, corruption involving government and public service agencies will likely be a top issue for political contenders and voters alike. Indeed, results of a survey conducted in August 2018 by the Indonesia Survey Institute (LSI) indicated that corruption is a major concern for Indonesians.

However, Minister for National Development Planning Bambang Brodjonegoro has also stated that approximately 80 percent of corruption cases in Indonesia involve the private sector. Because the private sector drives an immense part of the country's economy, addressing this problem takes on great urgency.

Government leaders have made some strides in the fight against private sector corruption. The Indonesian Supreme Court has provided clear guidance under Supreme Court Regulation number 13 of 2016, which was specifically enacted to combat corporate crime. In evaluating corporate culpability, the Regulation looks at whether the corporation:

- obtained any benefit from the crime or whether the crime was committed for the interest of the corporation;
- acquiesced to the crime; or
- took the necessary steps to prevent or mitigate adverse effects and ensure compliance with the law to prevent a crime.

Persons and corporations in the private sector are also liable for prosecution under the Indonesian Anticorruption Law Number 31 of 1999, which was amended into Law Number 20 of 2001 and states that the subject of corruption prosecution could be both an individual and a corporation if it is related to the public sector.

Additionally, Indonesia has fully ratified the UN Convention Against Corruption (UNCAC) into Law Number 7 of 2006. Among the UNCAC provisions is guidance on "many different forms of corruption, such as bribery, trading in influence, abuse of functions, and various acts of corruption in the private sector".

Challenges

Translating word and intention into deed has proved challenging. At this time, almost 24 percent of suspected public corruption cases under investigation by the Corruption Eradication Commission (KPK) involve persons and corporations from the private sector. But while the KPK gets strong approval ratings from Indonesian citizens (eg, 86 percent of respondents to the 2017 poll by Saiful Mujani Research and Consulting said they trust the KPK), KPK's work is often undermined by inadequate funding, political detractors and even physical attacks on commissioners. As recently as January 9 this year, bombs were found at the homes of the commission's chairman, Agus Rahardjo, and deputy chairman, Laode Muhammad Syarif.

Further, while Indonesia's ranking in Transparency International's Corruption Perceptions Index for 2017, which measures the perceived levels of public sector corruption worldwide, has improved compared to five years ago, Indonesia still has a score of only 37, and with the scale running from 100 (very clean) to 0 (highly corrupt), the country has a corruption problem on its hands. Moreover, as noted in the media, Indonesia's scores could be putting the country at a competitive disadvantage when compared with those of neighbouring countries such as Malaysia (with a score of 47), Brunei (62) and Singapore (84).

Based on Kroll's decades of experience in anti-corruption investigations, there are some strategic best practices that the government can put into practice that have proved effective elsewhere in helping prevent and/or detect private sector corruption:

1. Mandate the declaration of all beneficial owners;
2. Criminalise conflict of interest;
3. Manage gift giving;
4. Encourage cashless transactions;
5. Require that accounting systems must record all transactions accurately and completely;
6. Require companies to maintain and archive supporting documents or data of all transactions;
7. Criminalise any off-the-books accounts hiding bribery;
8. Conduct proper and deep due diligence; contractually reserve the right to audit third parties; and
9. Obligate all companies to establish and maintain a risk-based anti-bribery management systems.

Common belief holds that many private corporations will not remain silent about cases of corruption as it will adversely impact their businesses. However, the government should exercise its legitimate power mandated by the people for a better Indonesia by taking immediate action to more rigorously combat and prosecute private sector corruption.

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.

Thailand: Projects and Energy

Commentary on the latest developments in the Thai projects and energy sector.

By Jessada Sawatdipong, senior partner, and David Beckstead, counsel, **Chandler MHM**

Jessada Sawatdipong
Senior Partner

PPP PROJECTS IN THE EEC

Thailand is aggressively moving forward with legislation that streamlines implementation of important PPP projects. This legislative trend presents new opportunities for foreign and local investors alike, with a focus particularly in Thailand's infrastructure sector.

As part of the Thai government's Eastern Economic Corridor Act B.E. 2561 (2018) (EEC Act), certain Public-Private Partnership (PPP) projects are underway which will facilitate investment in the EEC. Measures have been implemented to expedite an overall project approval process whereby the approval timeline has been reduced to 8-10 months, compared to a much longer timeline generally required for PPP projects. These regulations are applicable to investment projects deemed highly important as determined by the EEC Policy Committee, which requires submission for consideration prior to approval.

Projects that have received approval include:

The U-Tapao Airport and the Eastern Aviation City

This project has received approval for PPP's to develop the U-Tapao International Airport; part of the combined U-Tapao and Eastern Airport City project. The aim is to establish a third main international airport in Thailand. Project Components include: Passenger Terminal 3, Commercial Gateway, Phase II Air Cargo facilities, Phase II Maintenance, Repair and Overhaul (MRO) facilities, Phase II Aviation Training Centre, and a Free Trade Zone. The airport project will also serve a passenger link to Don Muang International Airport and Suvarnabhumi International Airport, while supporting growth as a regionally important aviation hub.

High-Speed Railway Connection to 3 major airports

The High-Speed Rail Linked 3 Airport Project makes use of existing structures and routes as implemented in the form of an airport rail link system. The project consists of the current Airport Rail Link route; 29 km. and a to be constructed route of 191 km.

The area development, planned to support railroad service in Makkasan (an intersection and

neighbourhood in Bangkok's Ratchathewi district), will be operated in connection with development of The High-Speed Train Project.

Map Ta Phut Industrial Port Phase III

Map Ta Phut Industrial Port Phase III involves enhancements to existing infrastructure with an aim to better facilitate shipment of natural gas and raw fluid material for the petrochemical industry.

Laem Chabang Port Phase III

This expansion project involves creation of a deep-sea port and other facilities including: implementation of a single rail transfer operator (SRTO), construction of a larger port, and renovation of diverse facilities so as to alleviate internal traffic problems ranging from networking to transportation systems.

U-Tapao Maintenance, Repair and Overhaul Centre (MRO)

This project aims to be a state-of-the-art hub for aircraft maintenance, repair and overhaul, and is set to become the most advanced MRO centre in the region.

The Digital Industry and Innovation Promotion Zone (Digital Park Thailand)

Digital Park Thailand will comprise a new economic cluster in the EEC with an aim to become the destination for digital global players and digital biz innovators. It is being planned as a data hub with ultra high-speed broadband infrastructure, including an international submarine cable station, data centre, and satellite earth station. With a maximum incentive package including both tax and non-tax measures, ease-of-doing-business incentives, and special privileges for investors and digital specialists, the goal is for the development to be Thailand's premier digital showcase. It will pioneer test beds, and adoption of state-of-the-art digital technologies; internet of things and artificial intelligence.

RECENT DEVELOPMENTS IN ELECTRICITY GENERATION AND DISTRIBUTION IN THAILAND

There is significant activity in Thailand's energy and infrastructure sectors, which presents attractive opportunities for investors. Chandler MHM expects further growth/developments in these areas during 2019.

Update on the PDP

In 2015, the Ministry of Energy revised its Power Development Plan (PDP) in order to outline Thailand's energy priorities over the coming two decades. This Plan is known as the "PDP 2015", which was itself an update on the previous PDP issued in 2012. The National Energy Policy Council (NEPC), the leading government authority responsible for recommending long-term energy policy objectives to the Cabinet, approved an update to the PDP on January 24, 2019. The Cabinet is expected to approve the PDP in the coming months.

> "Digital Park Thailand will comprise a new economic cluster in the EEC with an aim to become the destination for digital global players and digital biz innovators"

Based on media reports, we understand that the revised PDP increases projections for electricity to be generated by natural gas and renewable sources, while decreasing projected generating capacity for coal. The long-term plan to build a nuclear power plant appears to no longer be a major consideration.

The other significant development in the revised PDP is the apparent plan to increase rooftop solar installations. Difficulties in the ability to sell surplus electricity back to the transmission grid have been a major deterrent to more widespread adoption of rooftop solar installations. It will be interesting to note potential opportunities to this area, once the Energy Regulatory Commission (ERC) releases detailed regulations.

In March, 2018, the Minister of Energy announced that there were no plans to purchase electricity from new renewable projects until 2023. Given the revised PDP's reported increase in projected renewable energy capacity, it will be interesting to note how much electricity government anticipates purchasing from small rooftop solar installations. In the absence of large-scale solar farms, developers have been shifting focus to private Power Purchase Agreements (PPAs).

Given that Thailand's domestic natural gas reserves are nearly depleted, the increased dependency apparently being envisioned in the PDP 2019 will necessitate additional pipelines

from neighbouring countries and/or LNG receiving terminals. In either case, there will be project opportunities for developers and construction companies operating in this sector in the foreseeable future.

Current events that are shaping the upstream oil & gas sector

Update to PA and PITA

The Petroleum Act, B.E. 2514 (1971) (PA) and Petroleum Income Tax Act, B.E. 2514 (1971) (PITA) were enacted in June 2017 to establish the production sharing contract (PSC) and service contract (SC) regimes.

Amendments to Section 23 of the PA include the additions that exploration and production of petroleum now require an application for, and a grant of, a PSC, SC or concession. The authority to determine which form is appropriate will be vested with the Ministry of Energy, with rules and procedures to be published with the approval of the Council of Ministers.

David Beckstead
Counsel

Auction of Erawan and Bongkot

The current concessions for the Bongkot and Erawan gas fields in the Gulf of Thailand are due to expire in 2022 and 2023. Bids for the Bongkot and Erawan blocks were submitted on September 25, 2018, and this tender was the first time the Ministry of Energy offered petroleum producers the opportunity to operate under a PSC. The Bongkot field is currently operated under a concession by PTTEP with Total Petroleum holding a minority interest, whereas the Erawan concession is operated by Chevron with Mitsui holding a minority interest.

There was limited interest in the tenders from outside tenderers, with each PSC only attracting two bids. Chevron and Mitsui submitted joint bids for each PSC; PTTEP submitted a joint bid with Mubadala Petroleum for the Erawan PSC, and PTTEP submitted a solo bid for the Bongkot PSC.

Winning bidders were announced in December, 2018, with PTTEP winning the Bongkot PSC and PTTEP and Mubadala Petroleum winning the Erawan PSC.

Decommissioning

Decommissioning of offshore installations is still in its infancy in Thailand and petroleum producers have taken many positive steps in preparing for the decommissioning exercise. The Department of Mineral Fuels, Ministry of Energy (DMF), has been coordinating with concessionaires as the decommissioning of offshore installations commences. Currently, the DMF is reviewing and approving decommissioning plans and decommissioning environmental assessment reports, submitted by vaious concessionaires. Currently, there is no publically available data relating to the status of this review.

In 2016, the Ministry of Energy promulgated the Ministerial Regulation Prescribing Plans and Estimated Costs and Security for Decommissioning of Installations Used in the Petroleum Industry, B.E. 2559 (2016) (the Decommissioning Regulation). The Decommissioning Regulation outlines specifics on the concessionaire submitting a Decommissioning Plan and an Estimate of Decommissioning Costs, a Decommissioning Environmental Assessment Report, and a Best Practical Environmental Option Report, to the Director-General of the DMF — within prescribed timelines.

The Director-General is charged with issuing Notifications under the Decommissioning Regulation to provide for greater clarity and specificity on concessionaires' obligations. There have been a number of Notifications issued by the Director-General, including those related to qualifications of expert appraisers and to the rules and procedures for preparing decommissioning environmental plans and management processes.

21st bid round

The Ministry of Energy announced in October 2014 the 21st bid round for petroleum concessions, which included 29 exploration blocks. The deadline for submission of bids was originally set for February 18, 2015, or a new date as may be specified by future public notice.

On October 27, 2014, an NGO filed a complaint to the Administrative Court to suspend the 21st bid round. The Administrative Court accepted this case, and there were a number of

subsequent challenges to the 21st bid round, which was finally cancelled on February 26, 2015, pending enactment of amendments to the PA.

Officials within the Ministry of Energy have indicated that a new 21st bid round will occur in the near future. As the auctions for the Erawan and Bongkot fields are now complete, it is thought that the 21st bid round will occur at some point in 2019.

BACKGROUND: EASTERN ECONOMIC CORRIDOR (EEC)

The Eastern Economic Corridor Act B.E. 2561 (2018) (EEC Act) was published on May 14, 2018. It applies in three eastern provinces: Rayong, Chonburi and Chachoengsao, and prescribes a number of incentives for private investment. It complements and builds on the Board of Investment (BOI) regime. On August 17, 2018 a new notification (the Notification) was issued to stimulate investment in target industries in the Promoted Zone of the EEC, and to encourage private participation in the development of human resources. A one-stop service to facilitate the issuance of permits and licences under various laws has been established to facilitate the startup of business in the Promoted Zones.

Promoted Zone

The Promoted Zone of the EEC consists of the following:

1. Special Promoted Zone for Specific Areas:
   - Eastern Airport City or EEC-A
   - Eastern Economic Corridor of Innovation or EECi
   - Digital Park Thailand or EECd
2. Promoted Zone for Target Industries (as announced and prescribed by the EEC Development Policy Committee):
3. Promoted Industrial Estate or Industrial Zone:

The promoted activities in the Industrial Estate or Industrial Zone are, for example:

- Section 1: Agriculture and Agricultural Products;
- Section 2: Mineral, Ceramics and Basic Metals;
- Section 3: Light Industry;
- Section 4: Metal Products, Machinery and Transport Equipment;
- Section 5: Electrical Appliances and Electronic Industry;
- Section 6: Chemicals, Plastics and Papers;

> "A one-stop service to facilitate the issuance of permits and licences under various laws has been established to facilitate the startup of business in the Promoted Zones"

- Section 7: Service and Public Utilities; and
- Section 8: Technology and Innovation Development.

To fulfil the goals of the Notification, the BOI has created tax incentives for those investing in the Promoted Zone, with the requirement to cooperate with an educational institution or program to develop human resources or technology. In particular for the development of human resources, a cooperative plan with the institution or programme identified to accept students for vocational training must be submitted. The BOI has set a minimum number of students to be accepted, which varies depending on the zone under which the project is applying, and the number of employees required for the project. Tax privileges include the exemption or reduction of taxes; right to bring in foreign experts in certain fields; 50-year land leases, with the right to renew for up to 49 years; the right to own land and condominiums for the purpose of business activities; exemptions from exchange control regulations; and exemptions from customs law compliance.

Application timeline

Applications for promotion must be submitted between January 1, 2018 to December 30, 2019, and submissions to request additional rights and benefits under this notification must be made before December 30, 2019.

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Closing the financing gap — infrastructure project bankability

The perceived lack of bankable projects by international investors, not the lack of available capital, is the key impediment.

Key extracts from a report by **Marsh & McLennan Companies' Asia Pacific Risk Centre**

Asia has become a growth engine for the world economy, with developing Asia currently driving the majority of global growth.

Given this overall boom, it is no surprise the *Asian Development Bank forecast in its report Asian Development Outlook 2017: Transcending the Middle-Income Challenge* that this region requires US$26 trillion of investment in infrastructure over the period 2016-2030. However, this expected demand is tempered by a reality in which there are significant uncertainties over where the money to fund this development will come from. The financing requirements are so large that a fundamental shift will be needed in how infrastructure projects are financed in a region where the public sector has historically covered over 90 percent of needs. Countries in the region that want to meet their required investment needs over the next decade and beyond will have to attract funds from global institutional investors who, to date, have generally been wary of infrastructure investment in emerging markets.

> "Across much of Asia, there is an insufficient pipeline of infrastructure projects that meet the bankability requirements of international investors"

Project bankability in Asia has been a key concern for investors in infrastructure for many years. Marsh & McLennan Companies' Asia Pacific Risk Centre estimates that between 55 percent-65 percent of projects in Asia are not bankable without support from government or multilateral development banks. Our organisation seeks to address the many challenges of project bankability in the region, by introducing a set of guidelines based on the combined expertise of Marsh & McLennan Companies' operating companies: Oliver Wyman, Marsh, Mercer and Guy Carpenter.

DRIVING PROJECT BANKABILITY

The perceived lack of bankable projects by international investors, not the lack of available capital, is the key impediment to solving the financing gap.

Across much of Asia, there is an insufficient pipeline of infrastructure projects that meet the bankability requirements of international investors. This issue is a key driver of the infrastructure financing gap in the region and needs to be resolved for a meaningful level of international private sector investment to be channelled towards Asia.

Consistent adherence to the set of bankability guidelines outlined here coupled with the deepening of national capital markets, could markedly change the outlook for infrastructure investment in the region by creating a pipeline of bankable projects. By highlighting the key levers to support the efficient financing and construction of a project in emerging Asia, this set of guidelines is useful to investors, governments, regulators and developers alike.

The burden of responsibility to effect change sits with national governments across Asia. While many countries have begun making changes in line with international best practices, neither the volume nor the pace of change has been enough yet. Institutional investors must also change, but are well placed to do so at a faster rate than governments. They must focus on developing a deeper knowledge base of the respective host countries. Otherwise regulatory developments at the provincial levels may render a seemingly viable project at one location unbankable in another.

PROPER DOCUMENTATION AND DEAL STRUCTURE

Successful infrastructure projects typically have a well-defined timeline and process, as well as an accompanying set of documentation and permits required — where preparation and application of permits are well built into the process. Experienced financiers and contractors typically also structure the project phases and timelines in a way that minimises additional costs or risks — for example, disbursements of financing in tranches, only upon completion of certain milestones, as well as requiring explicit legal owners (usually some municipality) for construction and maintenance of 'last mile' infrastructure or concessions to mitigate specific project risks (such as base or availability payments to account for demand risk).

A key instrument to ensure appropriate project structure and terms would be the documentation. This process can become convoluted given the number of stakeholders involved. Additionally, inconsistent approvals and the revoking of permits in some emerging markets can deter investors, leading them to build in higher hurdle rates or longer project timelines which reduce project bankability.

"Successful infrastructure projects typically have a well-defined timeline and process, as well as an accompanying set of documentation and permits required"

Potential approval and preparation process enhancements

Some governments, as part of legislative reform, try to simplify and expedite the project approval and preparation process. In Asia, there has been significant progress particularly in Thailand and Indonesia. Both have started to streamline the entire deal preparation process, learning from past experiences where land acquisition and funding issues resulted in prolonged project delays.

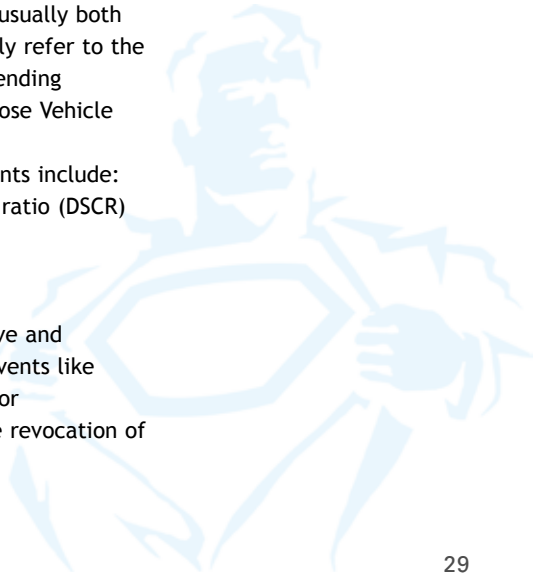
APPROPRIATE COVENANTS AND FUNDING STRUCTURE

Covenants refer to specific clauses in contract agreements between two or more parties and are set in place to protect the interests of various stakeholders. The clauses, usually both financial and non-financial, typically refer to the offtake agreement as well as the lending agreement between a Special Purpose Vehicle (SPV) and the bank.

Some common financial covenants include:

- Minimum debt service coverage ratio (DSCR) requirements.
- Interest coverage ratios.
- Prepayment options.

Non-financial covenants (positive and negative) protect parties against events like construction delays, cost overruns or extraordinary instances such as the revocation of licences or permits.



The importance of covenants

Covenants are key contractual terms set down by various stakeholders to ensure their interests are met over the lifetime of the project. Financial covenants impose certain financial obligations on the SPV. For example, the borrower could be required to maintain the minimum level of DSCR as stated in the covenant to mitigate credit risk to the debt holders.

Non-financial covenants can either be positive or negative. Positive covenants, also known as affirmative covenants, are obligations the borrowers adhere to in the interests of the debt holders (for example, the obligation to keep required risk insurance in force). In contrast, negative covenants, also known as restrictive covenants, are obligations for the borrowers to refrain from performing certain actions (for example, the obligation for the SPV to not undertake any other activity except for building and operating the project).

Other key covenants are step-in rights (or embedded options) which allow for unique state-dependent control rights to protect the interest of stakeholders.

> "A key requirement for appropriate legal recourse preferred by emerging market financiers is sovereign immunity or named centres of arbitration"

Deciding on the right covenant levels and funding structures

There have been instances of project failures due to cash flow and liquidity challenges largely driven by slow ramp-up of demand or traffic flow.

Where there are no minimum revenue guarantees or availability payouts, financing repayment should be structured to allow for flexibility in the payment amortisation schedule (or even use of deferred interest or Payment in Kind structures) while additional financial headroom should be allowed for if the private player takes on significant volume risks with the government entity also potentially undertaking a 'first loss' guarantee on behalf of the SPV.

In the case of sectors with single offtake agreements, the financiers should also expect the project entity to take on some form of non-payment insurance which is covered in the following section.

PRESENCE OF LEGAL AND ECONOMIC RECOURSE

The construction of large-scale projects is often met with delays, disruptions or even cancellations. As such, all stakeholders in an infrastructure deal will both put in place appropriate risk mitigants as well as further escalation (terms of settlement, litigation) procedures. In such instances, players will first seek economic settlement (out of court, through insurance or contractual claims) before escalating to forms of legal recourse.

For economic recourse, there are insurance and other risk mitigation options offered by export credit agencies (ECAs) or multilateral development banks (MDBs) that provide investors with confidence and mitigate their exposure to risks.

Private investors who do not have access to ECAs or MDBs can turn to other entities for such economic recourse. An example would include clients who have sought Marsh's expertise for non-payment insurance for project finance lenders. Using the example of non-payment insurance, this policy not only mitigates risk, but also offers other advantages including reduced borrower credit risk, country exposure relief assistance and regulator capital relief.

A key requirement for appropriate legal recourse preferred by emerging market financiers is sovereign immunity or named centres of arbitration. The reason is the awarding authority in an infrastructure project will likely be a government authority and could consequently benefit from sovereign immunity. This immunity is a legal doctrine according to which the sovereign or state cannot commit a legal wrong and is immune from civil proceedings or criminal prosecution.

This way, the government is able to provide credible guarantee support to PPPs which would demonstrate to investors that there is a high quality of project preparation, including financial and structuring parameters. In the event that there is a guarantee call, there will be a claim assessment and the associated guarantee payments will be made to the recipient of these guarantees.

THOROUGH DUE DILIGENCE

Due diligence is a key aspect of infrastructure project deals. The complexity of project finance (in technical capability and financial structures), the magnitude of the financial investment, the scale of construction effort and the number of stakeholders involved, means that most projects have multiple teams addressing various feasibility considerations.

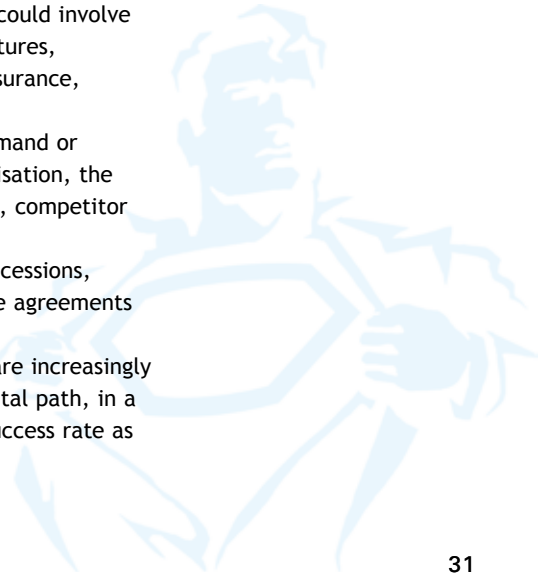
> "We need to understand why people go through the hassle of doing due diligence, pricing deals, creating covenants and negotiating rights of ways. This is because they need to quantify risk, manage their capital and ensure efficiency. They are looking for ways to expand the velocity of capital in this sector."
>
> *Eric Pascal, partner, Oliver Wyman*

Prior to the launch of any infrastructure projects, feasibility studies should be conducted to assess the technical and commercial viability of the project, typically conducted by a mix of engineering, legal, as well as finance teams. This is important given the complexity and magnitude of the financial and technical outlay involved. In developed markets, third-party companies with specialised expertise are typically contracted by the project entity to provide the due diligence required.

These services can typically be broken down into a number of categories:

- Environmental impact and technical assessments.
- Financial assessments — which could involve financing structures, deal structures, sufficiency of risk mitigants (insurance, hedging contracts, etc.).
- Commercial aspects such as demand or revenue forecasting, ROI optimisation, the political and regulatory outlook, competitor scans and pricing levels.
- Legal clauses, for example, concessions, availability of financing, offtake agreements and risk mitigants.

Projects in emerging markets are increasingly encouraged along this developmental path, in a bid to improve both the project success rate as well as project bankability.



WELL-STRUCTURED CONCESSION RIGHTS

A concession granted to the winning project bidder gives the SPV long-term rights to use public assets (land, operating licences, etc) in return for the SPV being contractually responsible for the full delivery of services. Services can include the operation and maintenance of the assets as well as for financing and managing the required investment.

> "Concessions, if well-structured, can boost project bankability and ensure private finance participation, while protecting the interests of the general public"

Concessions for usage or operation of assets are also typically coupled with offtake mechanisms. In this case, the concessionaire obtains most of its revenues directly from its users through tariff levels established by the authority in the offtake contract. These can include payment schedules, changes in payment schedules over time as well as events to trigger a review of the payment schedule.

Relying on the 'invisible hand of the free market', it is then the prerogative of the concessionaire to achieve improved levels of efficiency and effectiveness since any gains in efficiency translate into increased profits and returns to the concessionaire (although regulators may set additional key requirements such as maintenance and renewal or replacement of assets).

Additional concessions may be given (or adjusted) where the deal economics may be potentially challenging, for example if the aggregate amount of tariffs collected by the concessionaire is not sufficient to cover the cost of operation of the assets (or even maintenance or further investment). In capital-intensive projects where there is a high initial capital outlay, for instance, there has to be some degree of revenue recovery or minimum guarantees (such as availability payments or exemption of operating licence fees) to ensure the project company can sufficiently meet interest and debt repayments.

Using concession rights effectively

Concessions, if well-structured, can boost project bankability and ensure private finance participation, while protecting the interests of the general public. For example, non-compete concessions or assurances are typically demanded for volume-dependent infrastructure such as toll roads. These can include the prohibition of new entrants into the market, which could adversely affect project economics.

ROBUST RIGHTS TO PAYMENT

The right to payment is the mechanism governments use to determine payments to investors. It is used to provide an incentive for the operator to meet the availability and performance standards set out by the public authority as well as match payments to the outcomes and outputs that the authority wishes to deliver.

Developing robust payment mechanisms

The authority should structure the payment mechanism in a way that is not only realistic and fair in supporting the long-term partnership, but also objective, transparent and easy to operate. To make it more robust, the public agency should seek feedback from the operators prior to developing the payment mechanism. The payment mechanism should not only incentivise the operators to deliver the service at the required standards but also include penalties to deter the operators from providing sub-standard performance or none at all. Depending on the nature of the projects, the payments may vary with these elements:

- Availability of service.
- Performance quality of service.
- The usage of service.

Ensuring appropriate risk transfer

Defining the legal payees is important for any capital-intensive project where revenues are required to cover capital outlay as well as operations and maintenance spending. For utilities, offtake payments are common, with further guarantees required if the payor is deemed to have a high risk of delayed or missed payments. In addition, there are also increasingly more well-structured payments rights — fixed or variable charges and payment pegged to raw material cost. These payment rights may include the renegotiation of tariffs at stipulated time periods. For non-utilities such as rail and toll roads, it is even more crucial to clearly define payors and sources of income as this is crucial for understanding project economics and therefore attracting investors.

CONCLUSION

It is clear that the expected demand for infrastructure in Asia far exceeds the public sector's ability to finance them. Private sector investment into infrastructure is as critical an imperative now as it has ever been. If no action is taken, economic growth in the region will stall and the social implications will be profound.

Governments in the region must take responsibility to change their local legal, financial and regulatory environments to support fair and transparent infrastructure development. It is often the countries with the largest need for foreign investment in infrastructure which have the most work to do to create such an environment. Public-private partnerships will play a key role in changing the infrastructure landscape in the region. Where these are structured effectively and with appropriate risk allocation, the value will come not just from the supply of private sector capital, but equally from broader private sector expertise in deal financing and efficiency gains from the improved management of operational assets.

Ultimately, projects need to be seen as bankable and also provide competitive returns on a risk-adjusted basis when compared to global alternatives. The guarantees offered by governments and multilateral development banks will continue to be important in this regard, as will the use of broader risk mitigation and transfer mechanisms.

Despite the known challenges, it is an exciting time for the infrastructure industry in Asia.

The future demand for power in the region is unquestionable. What remains to be seen is how the concept of the Energy Trilemma (achieving a balance between energy security, cost of supply and environmental impact) affects the investment and technology decisions taken by governments in the region.

China's Belt and Road Initiative has a long way to go before it can be considered a success, but the scheme undoubtedly has great potential. However, questions remain as much around the geopolitical implications of the investments as financing and bankability concerns. The initiative is therefore ripe for further cross stakeholder collaboration and research.

Increased regional cooperation will not just be led by China. Discussions continue around a potential Asean power grid, while India, Nepal, Bangladesh, Bhutan, Myanmar and Thailand are progressing with a scheme to link the countries through a highway network. The outcome of the Regional Comprehensive Economic Partnership (RCEP) trade agreement impacts infrastructure development in the region as well.

While governments in Asia must take the lead in creating a more transparent and conducive environment for infrastructure investment, other stakeholders should not wait passively in the background. Those who start building their local knowledge, capabilities and partnerships now will be best placed to benefit from future changes that this report has outlined.

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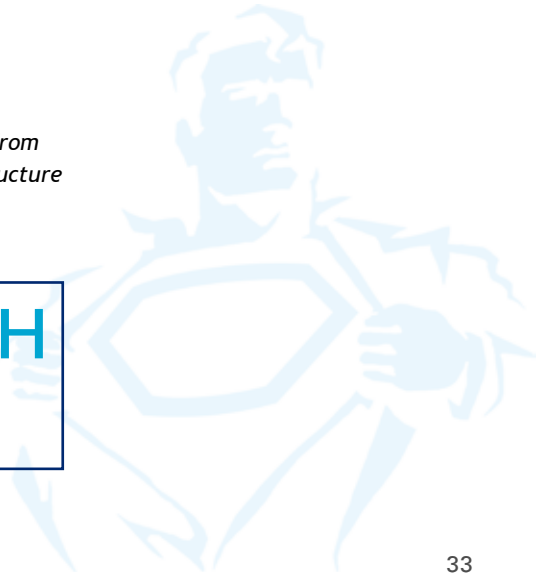

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Project finance for Vietnam's energy generation:

Powering growth and finding the (political) will

Companies that seize the green opportunity in this emerging market will gain significant advantages in the long term.

By Eli Mazur, Nguyen Van Hai and Ho Van Khanh, **YKVN**

INTRODUCTION

The most recent data for the fourth quarter has confirmed that Vietnam's economy was the world's fastest-growing in 2018, recording gross domestic product growth of 7.1 percent for the full year. In December 2017, international, bilateral and regional financial institutions, both public and private, raved about Vietnam on CNN and MSNBC and proclaimed that growth levels of 6 percent were sure to continue into 2018. Meanwhile, the world economy slumped, particularly international stocks in Western Europe and East Asia — and the only highlight from the world's wealthy countries was the American economy.

Vietnamese economic development and a shortage of power

However, Vietnam does find itself in a troubling situation — namely, to sustain its growth, Vietnam requires more and more energy. Although this is a problem that hundreds of other countries would love to be facing this new year, this is a Vietnamese problem and the solutions are unique to Vietnam's political economy.

Samsung, Intel, BMW and Apple all are either considering increasing or making initial investments in Vietnam, which has had the effect of launching Vietnam — in less than 15 years, according to the World Bank — from one

of the world's "least developed countries" to one of the world's 50 "middle-income countries". With, among other things, half-a-million high value-added jobs directly created by the initial investments of Samsung and Intel, the Vietnamese Government is wondering, whether electric, gas, solar, wind or, indeed, the will power will be found to allow commercially viable alternatives to the Government's monopolistic approach to the supply, purchase and distribution of energy.

The stakes are high for Vietnam's future development, particularly when the measurement criterion is the Human Development Index. If Vietnam can create a viable commercial alternative, then, perhaps, foreign investors will no longer require Government Guarantees and assorted strange Financial Documents that have become required reading — and signing — for syndicates of international banks to reach Financial Close of the most important power generation projects in Vietnam. Indeed, for a decade after the Phu My Projects in the late 1990s and early 2000s, more than 10 projects failed — until the Government finally agreed in Mong Duong 2 in 2011 to sign a set of "bankable" Financial Documents, thus allowing Financial Close and sufficient power for Samsung to create 60,000 jobs in Northern Vietnam, as reported in The Economist.

Vietnam's demand for energy has risen by an average of 9.5 percent year-on-year for the past 15 years. Over the last 25 years, Vietnam's power demand has seen expediential growth as the economic structure of the nation has continued to shift towards a higher proportion of industry-construction and services (and away from agriculture), which makes up 34.28 percent and 41.17 percent of GDP, respectively. To sustain its current growth, Vietnam is committed to importing energy and developing new sources of power. However, funding is proving to be an issue. Given that Vietnam is currently shifting away from agriculture and toward industrialisation, the country needs enough energy to power its changing economic structure.

Currently, most energy is produced in the North, and it is then transferred to the Centre and South through 500kV transmission systems, resulting in significant energy losses by the time it reaches the South. For this reason, the Government's current plan for energy production largely relies on coal. However, in the future, Vietnam has already created an initial legal framework to switch from "dirty" energy to alternative energy sources, and this legal framework comes with a strong financial incentive structure.

According to the World Bank, Vietnam will be one of the world's three worst-affected countries by climate change. Indeed, this can already be seen, measured and understood by the salinisation of the Mekong River Delta. Thus, climate change may not wait for Vietnam to be ready to embrace new solutions.

Within the context of Vietnam's rural-to-urban migration, the country has grand plans for a transportation, sanitation and climate change inspired infrastructure — the dream is to upgrade 1,000 kilometres of underground and above-ground subways and high-speed metros, which currently line the city's sky and underbelly like the skeleton of a neglected fish. But Vietnam is hungry and its next meal may, indeed, have to be the remaining meat on these bones. However, Vietnam needs the financial assistance of international banks and project sponsors.

This article presents a short summary of the strengths, weaknesses, opportunities and threats in Vietnam's conventional (dirty) and clean energy sectors. Our firm has been involved, whether acting for sponsors or lenders or advising the Vietnamese Government, in every project to have reached financial close since 1975.

Eli Mazur
Partner, Project Finance at YKVN

> "To sustain its current growth, Vietnam is committed to importing energy and developing new sources of power. However, funding is proving to be an issue"

GENERAL BACKGROUND INFORMATION

Conventional dirty energy

The country's energy mix is based today mainly on hydroelectric dams and coal-fired power plants (37.6 percent and 34.3 percent of the energy mix, respectively), followed by gas-fired power plants (17.8 percent), renewable energy (5.5 percent), oil-fired power plants (3.3 percent) and imports from Laos and China (1.2 percent), according to the EVN Activity Report 2017.

Nguyen Van Hai
Senior Associate
at YKVN

According to a report by the Ministry of Industry and Trade (MOIT), coal is still the primary source of energy in Vietnam's power generation and its privileged position is ensured because of its special status as giving "security" to the energy supplies of Vietnam. By 2020, the Vietnamese government expects its production of coal-fired energy to reach 49.3 percent of national electricity production, and 53.2 percent by 2030.

Vietnam's impressive economic growth is at risk, not to mention its air quality. The supply of coal and gas power plants is made problematic due to the depletion of domestic fossil resources, which has created a need to import energy and, therefore, diminish Vietnam's control and sovereignty, as such things relate to energy. As a result, Vietnam's coal imports reached more than 10 million tons in 2016 and continue to increase. The trends in the importation of coal and oil (crude oil and oil products) reveal that Vietnam is becoming a country dependent on imports, with net imports of 5 percent in 2015, according to the Energy Outlook Report 2017. Although Vietnam's level of imports is low when compared to other Asian countries, the current level represents a marked increase after a long history as a net coal exporter to the world.

> "Total GHG emissions and GHG emissions per capita have increased nearly three times in a 10-year period, while the carbon intensity per GDP increased by 48 percent"

The situation is dire in a number of ways. For instance, in November 2018, a coal shortage in the northern part of the country resulted in the shutdown of plants for several days, as reported in the Hanoi Times. Furthermore, as a result of this shift to fossil energy in the past decade, Vietnam has had the highest greenhouse gas emissions (GHG) emissions in the Asean region. The total GHG emissions and GHG emissions per capita have increased nearly three times in a 10-year period, while the carbon intensity per GDP increased by 48 percent, according to Dara's Climate Vulnerability Monitor.

Green energy recent developments

However, the news is not all bad. Indeed, the most encouraging sign in Vietnam for the potential development of wind power and solar power is the statutory tariff in both areas: Vietnam Electricity (EVN) must pay 8.5 cents (USD) per kilowatt-hour (kWh) for inland wind power projects, and 9.8 cents per kWh for offshore wind power projects, as well as 9.35 cents per kWh for solar power projects. Thus, the Vietnamese Government proved that it listens to investors and is trying to ensure that their investment in Vietnam into these projects will benefit both Vietnam and the investment community. These policies have resulted in measurable success. Indeed, in the past year, more than 120 solar power projects have been added to the existing master plan, as reported by the MOIT in September 2018, and the room for new projects is still available.

SWOT ANALYSIS OF THE REGULATORY FRAMEWORK

The regulatory framework for the green energy industry is, however, quite primitive at the moment. One example is that there is no master plan for solar energy development issued, and therefore, green energy projects are still categorised under the same conventional power projects in the outdated national master plan. The administration of investment procedures is merely an adaptation of the traditional framework for thermal projects, which is complicated, vague and full of risks. Notwithstanding these issues, it is time for Vietnam's new energy sector and regulations to be subject to an updated SWOT analysis.

Strengths

1. **Feed-in tariff (FiT)**: For grid-connected solar power projects, 9.35 cents per kWh, which is considered attractive to foreign investors. Similar to wind power projects, 8.5 cents per kWh for inland wind power projects, and 9.8 cents per kWh for offshore wind power projects. Such FiTs are subject to adjustment depending on the exchange rate. Note that such prices apply only for projects whose commercial operation started before June 30, 2019 for solar power and November 1, 2019 for wind power projects. However, we are optimistic that any new FiT would be in favour of investors since Vietnam is still in need of funding for green energy.
2. **Principle Approval:** As mentioned above, the competent authority has been approving a

considerable amount of new wind power and solar power projects in the past year. Such principal approvals can be considered one of the biggest challenges of a power project. Also, the regulatory approval process is simplified. One example is that investment registration certificates are no longer required for wind power projects.

Weaknesses

1. **Power Purchase Agreement (PPA):** There is a template PPA for grid-connected solar power projects with a maximum term of 20 years. There is also a template PPA for wind power projects, which is very similar to the solar PPA template and will take effect from Feb 28, 2019. Such templates are quite simple and seem to be more suitable for state-owned small solar power projects. However, large-scale international projects would need to improve such templates to be closer to international practice. The provided template of the PPA is considered non-bankable for the majority of lenders for multiple reasons. Although in practice, the PPAs for conventional power projects are negotiable, the current template of the green PPAs is still a cause of concern among lenders. For instance, because of the monopoly position of EVN — as the one and only purchaser of electricity in the market — payment risks are significant. Such risks can be minimised partly by a Governmental Guarantee and Undertaking (GGU) ensuring the payment obligations of EVN. As a matter of practice, we often observe that the Government would provide a guarantee of the payment obligations of EVN for Build-Operate-Transfer projects. Furthermore, the template green PPAs provided by Vietnam are lacking many detailed provisions, which have become a norm in large-scale internationally-financed power projects.
2. **Direct PPA is not yet allowed:** A direct PPA allows power plants to sell electricity to end-user customers such as large-scale industrial companies, including Samsung, Coca-Cola, Intel, etc. However, solar power projects are not allowed to deal with end-users directly, at least for now. To mitigate the risk of EVN's monopoly position, EVN has a statutory obligation to purchase all of the electricity produced by "green sellers".
3. **Land:** In the current green energy industry, it is rare to encounter projects with a significant production capacity; whereas the coal-power industry has projects of 2X660MW, the green energy industry is filled with projects with less than 50MW of capacity. One of the reasons that may explain this is the lack of appropriate land in Vietnam. Another reason for this disparity is the approval process: for small projects of 50MW, approval comes from the MOIT, whereas projects of more than 50MW require the approval of the Prime Minister.
4. **Governing law and dispute resolution:** Vietnamese law is the governing law for the PPA template for green energy. By contrast, for thermal power projects that have reached financial close, foreign law is the norm as the governing law clause. Furthermore, dispute resolution under the PPA template does not contemplate international arbitration but, instead, allows regulatory authorities in Vietnam to serve as the dispute resolution forum. By contrast, for thermal-power projects that have reached financial close, forum dispute resolution (in the form of international arbitration) is the norm.
5. **Shortage in grid capacity to accommodate new solar/wind power plants:** The current national grid system — transmission and distribution — is considered insufficient to accommodate all output from solar and wind projects at the moment.

Ho Van Khanh
Associate
at YKVN

> "We are optimistic that any new feed-in-tariffs would be in favour of investors since Vietnam is still in need of funding for green energy"

Opportunities

1. **Tax incentives:** A newly established enterprise for the purpose of construction of a solar power plant will be entitled to taxation incentives such as a corporate income tax (CIT) preferential rate of 10 percent for 15 years; CIT exemption for four years; CIT reduction of 50 percent for the following nine years after the (four-year) exemption period; non-agricultural land use tax exemption; land rental exemption for three years; and an import duties' exemption in perpetuity for goods imported to create the fixed assets.

2. **Policy:** Finally, investment in coal and gas power has become less attractive to international sponsors and financiers because the Government of Vietnam has started moving away from the conventional comprehensive incentive package, including the broad coverage of the GGU. The "good old days" — when investors enjoyed a strong GGU that covered a wide range of matters from full currency convertibility to the performance of Vietnamese counterparties such as the Vietnam National Coal-Mineral Industries Group (Vinacomin) and the Vietnam Oil & Gas Group (PVN) — are over. Indeed, the most recent precedents reveal that the GGU will only cover 30 percent of currency convertibility, and the Government has stopped guaranteeing the performance obligations of Vinacomin and PVN. Given that conventional dirty energy is less attractive for international investors, we have witnessed a marked increase in interest from international investors, particularly from the Asian region, in making investments in green energy, including solar and wind power projects.

Threats

1. **Transferring:** We have observed several precedents where the Investment Policy Decision of the MOIT stated that the investor must "not transfer the solar project to any other investor". Although the same policy is not clearly mentioned in any piece of a legal document (except for BOT legal framework), the investors should be aware of this practice. Furthermore, there are some provincial regulators that have taken that transfers cannot occur until construction is complete.
2. **Escrow account as security:** Some precedents provide that the government requires the investor to make an escrow deposit as security for the implementation of solar projects, i.e., at least 1 percent of the total investment capital. Furthermore, this escrow deposit must be made no later than six months from the date of the Investment Policy Decision. This is highly problematic because often the Investment Policy Decision is issued many years before the land is cleared and construction may begin.
3. **Governmental approval:** One traditional risk in the power industry, which is worth noting, is that most significant governmental approvals that would secure the right and benefit of an investor are the last approvals that are obtained. The electricity operation licence, for example, is the very last legal document to be obtained upon completion of construction of a power plant. Therefore, the traditional condition that "the project company must have all material governmental approvals necessary to carry on its respective business" is not realistic.

> "We have witnessed a marked increase in interest from international investors, particularly from the Asian region, in making investments in green energy, including solar and wind power projects"

CONCLUSION

As Vietnam continues to develop, this is a country that offers a large market for green technology and the development of a significant green energy industry. Given the current demand for power from industry, as well as from residential zones, the Vietnamese government has the unique opportunity to use policy to substantially increase the amount of "green energy" in total mix of energy production. By setting the tariff at over 9 cents, the Vietnamese government has made the first move. Companies that seize the opportunity will be trend-setters in this emerging market and will gain advantages in the long term.

The authors would like to thank Ines Ndonko and Souria Touihar for their diligent work, without which this article would not have been possible.

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Australia courts Asian markets — and capital

Deepening financial and trade ties are solidifying the country's role in the region.

By Tim Gilkison, **In-House Community**

During a visit to Australia three years ago, I wrote a piece for Asian-mena Counsel that I opened with the observation: "Sitting in a coffee shop in downtown Sydney, a look around at the diversity of faces … it's clear that Asia has come to Australia, [but] is Australia investing in Asia, and are Australian businesses taking full advantage of their geographical proximity to either the region's mature or fast-emerging markets?" My conclusion to that question at that time was, in short, 'no'.

I recently visited Sydney again and wondered how much had changed in the intervening three years. It's probably fair to say that Australian investors and businesses have traditionally felt more comfortable dealing with entities from the US, the UK and Europe — places where they've had both historical ties and, given the heritage of the country's legal system, face more familiar regulatory environments.

That hasn't gone away entirely, according to Simon Venus, a corporate partner with domestic Australian firm Piper Alderman. "There is a still a reluctance to take the first steps for some businesses, particularly in the SME sector," he says. "Language can be a barrier and Asian markets can also just be such an unknown for someone used to domestic consumer behaviour. Australian businesses keep getting told there are huge opportunities, but some still need to find the right platform which is a safe jumping off point."

But things have been changing. Back in March of 2018, Australia hosted its inaugural summit with the Association of Southeast Asian Nations, during which the idea of Australia eventually becoming a member of the organisation was even mooted. However distant the reality of that might be, it was a sign of the changing status of Australia-Asia relations in both business and at governmental levels, on both sides.

Simon Venus
Piper Alderman

Jason Opperman
K&L Gates

Eric Boone
K&L Gates

According to Nikkei, Southeast Asia receives as much as 12 percent of Australian exports. And in late October the country's parliament ratified the Trans-Pacific Partnership (TPP-11) agreement, which, despite the withdrawal of the US, has the support of many Southeast Asian nations. In fact, the move by the US to pull out of the TPP may well be a motivating factor in the warming ties between Australia and many of the region's jurisdictions.

Indeed, Australians doing business in China are frequently asked for insights into the US trade war, says Venus. In such an environment, not being American is an advantage — and it is one that Australian companies are becoming more confident about exploiting. The government has also been supporting businesses by providing grants that make it easier for them to expand into Asia.

"With many of the new entrepreneurial and venture capital startups in Australia, we have seen a greater willingness to look for opportunities outside of the country in order to expand their customer base and market reach," says Jason Opperman, head of the Australian finance practice at K&L Gates in Sydney, who has more than two decades of experience acting for and advising Australia's largest banks and financial institutions on a range of insolvency, turnaround and securities enforcement matters.

"If you go back a generation many businesses here looked to import goods into Australia from Asia, but local businesses often weren't really exploring the full potential of opportunities to scale up by tapping into consumer markets, and other markets across the region. That's now changing."

Importantly, this trend is not only a physical expansion into Asia. Australian companies are increasingly seeking opportunities to raise capital from Asian investors, rather than waiting for them to show up in Australia.

"Previously what we were seeing is Asian investors coming out to Australia, kicking the tyres on assets, negotiating on the ground and going back with an equity share in a business or a coal mine," says Opperman.

It is a market development that at first came as a surprise to Eric Boone, a US securities specialist with K&L Gates who relocated from the US to Australia just over a year ago. He expected to be helping corporate clients raise capital from the US under Rule 144A, but the reality has been somewhat different. "Now I find myself increasingly a Regulation S guy, working on offerings targeting Asian investment from the large pool of money which has now developed there," he says. "I must admit I've been astounded by that."

The Reg-S market, which basically refers to international capital raised outside of the US, has always existed, but Boone says the focus on Asian investors is new. The market has evolved since the global financial crisis, when bank lending dried up and Australian corporates were locked out of their traditional source of borrowing. At first they turned to the US, where there was a deep and mature community of bond investors keen to access a new market. Eventually, Aussie borrowers started to realise that they could fill order books in Asia before the American investors were out of bed — and that they could do so cheaper and on better terms.

> "Australian businesses keep getting told there are huge opportunities, but some still need to find the right platform which is a safe jumping off point"
>
> Simon Venus, Piper Alderman

"Asian investors are just a little bit less formulaic than those in the US market; more open and innovative, and a little more earnest about the opportunities when they arise, whereas in the US, perhaps they think 'another opportunity will come along'," says Boone. "We really see this in the area of the high-yield bond, where Asian investors are more risk tolerant. And of course, from here in Australia, dealing with Asia you can do things more efficiently because of the geographical proximity and the lower time difference. You can launch a roadshow in Asia more quickly, which helps down the road in terms of investor relations."

While it's still too early to say that Australia has embraced its geographical reality as an Asian country, it is clearly moving in the right direction. With its mature legal and financial system, it has plenty to offer in terms of knowhow — and plenty to gain from Asia's rapid growth and abundant capital. It will be interesting to check on progress in the coming years.

Later this year, the In-House Community™ will be hosting a Congress in Sydney focusing on regional in-house legal development and Australia Outbound issues for in-house counsel. For more information on the event, please contact **Tim.Gilkison@InHouseCommunity.com**

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The thing about ...

Christina Blacklaws

Photo: Patrick Dransfield

Patrick Dransfield speaks to the President of the Law Society of England and Wales about the evolution of the profession and the UK's role as a centre for legal excellence.

How do you see the future of the law as a profession evolving?

I will start by saying that all is not lost! There is a school of thought that contends that all legal jobs will be lost to artificial intelligence (AI) and robots in the near future. I don't hold to that, although I do firmly believe that we as a profession must embrace and own new technical advances brought about by algorithms and machine learning. We can and should own this space so that we can provide a better and more added value service to our clients and hence become more indispensable as trusted advisers. But I do concur that this will not come about without a great deal of effort. It requires all law businesses to be radical in their assessment of how they structure their approach to solving problems and also to scrutinise the tools they are currently using to consider carefully how current modes of delivery will equate with likely future requirements. After all, software is actually just another tool for us as lawyers to use. It may be a transformative tool, but a tool nonetheless.


OFFICES
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How is technology changing the face of law?

Technology is radically changing the way we operate, but it is also having some quite disruptive and challenging effects on the justice system as a whole. When we are talking about the use of algorithms and machine learning, we are usually thinking about efficiencies — making our processing more accurate and quicker. However, there are other areas where disruptive technologies are having a potentially damaging impact. For example, in relation to prediction there are a number of very powerful predictive products out there that are concerning.

"The use of innovation and technology is of equal relevance to both small and big law firms. Indeed, small businesses can punch way above their weight through the intelligent use of technology"

Part of the work we are doing through the Law Technology Policy Commission is evaluating the use of big data in the justice system, especially those that claim to be able to predict the outcome of cases. Quite specifically, data searches that look at which judge will find for which party using which cases through which advocate and what use of semantics are actually likely to work. Some of these products are very sophisticated and potentially may change the way that litigation operates and may even result in the seizing up of case development, especially in Common Law jurisdictions such as our own, where the development of law is through precedents that are in sync with societal change.

If you imagine that we get to a point where more of the outlier cases do not proceed because there is only a 50:50 chance of success, then this will have a material and adverse impact in the development of common law itself. In addition, when a machine comes to a decision, the key question is how did it come to this decision? Neural network-related results suffer from the risk of unintended biases and unbiasing AI is emerging as one of the key challenges for society as a whole — the law is certainly not immune.

What initiatives are you undertaking as president to make the Law Society relevant to everyone in the legal community, from the larger City law firms to single practitioners?

Due to the election process to become president of the Law Society I had two years to prepare and hence we have concentrated our efforts on three themes: technology and innovation; diversity and equality; and qualitative research.

The use of innovation and technology is of equal relevance to both small and big law firms. Indeed, small businesses can punch way above their weight through the intelligent use of technology.

The universal relevance of diversity and inclusion is a particular problem in England and Wales, where for example we struggle to find more than 15 percent women owners of legal businesses.

We at the Law Society have taken a systematic approach to the issue, starting with our commission of our survey in November 2017 to better understand key issues that affect women working in the law. Supported by the International Bar Association (IBA) Women Lawyer's Division and LexisNexis and with almost 8,000 respondents worldwide, we believe that it is the largest international survey conducted on the topic. One of the most significant outcomes of the research is the power of unconscious bias. In terms of qualitative research, we have conducted more than 200 roundtables, including 15 internationally, to gather the lived experiences of women lawyers and developed a toolkit to support the implementation of action-oriented and tangible solutions to addressing the barriers to women in leadership. At the tail-end of 2018 we also commenced the men's roundtable series with male business leaders who can act as "male champions for change" in their firms and organisations. I don't want to emphasise too much the point that diversity in companies does lead to profitability — it does — but I firmly believe that championing diversity and equality in the workplace and society in general is worth doing simply because it is the right thing to do.

"The universal relevance of diversity and inclusion is a particular problem in England and Wales, where for example we struggle to find more than 15 percent women owners of legal businesses"

Photo: Patrick Dransfield

What about socioeconomic diversity, in terms of encouraging the major law firms to be more accessible to candidates from less affluent backgrounds?

That is incredibly important and something we need to focus on because we are not making the changes quickly enough. One of the things we are doing at the Law Society is being part of a community called Law Smart, which puts together all of the regulators and representative bodies, including us and the City of London, NGOs, relevant charities and also the commercial providers that operate in the social mobility area, as well as legal groupings such as Prime (comprising 70 large law firms). The idea here is to pool our efforts on social mobility.

What is the Law Society's focus regarding in-house lawyers and their professional role, training and discipline?

Over one-quarter of our members are currently in-house lawyers and this is our largest (and growing) cohort outside of private practice lawyers. In this group are lawyers from the largest financial institutions as well as single practitioner in-house lawyers, and we continue to have a significant engagement with in-house counsel, including engaging with Thomson Reuters to formalise our efforts a little, including the idea of developing a charter. In-house lawyers have a great deal of power, not least through their role as purchasers of legal services and therefore can be the drivers of positive change. We hope that our in-house lawyers will see the Law Society as a means for good.

What are your plans regarding the promotion of English law outside of the UK?

The promotion of English law overseas is an incredibly important aspect of the work of the Law Society — every day and every week, the Law Society is active outside of the UK, talking to interested parties about our jurisdiction and discussing why it might be a good idea to bring cases to the UK. The independence of our judiciary, the depth and breadth of understanding and knowledge of our legal practitioners, and the flexibility and depth we have with our common law — none of which has been impacted by Brexit!

We have been very keen to promote the common law, including a campaign in 2017 called Global Legal Centre where we videoed a range of international GCs who talked quite passionately about why they use English law as the governing law in their contracts and what they see as the benefits.

"The independence of our judiciary, the depth and breadth of understanding and knowledge of our legal practitioners, and the flexibility and depth we have with our common law — none of which has been impacted by Brexit"

What issues do you see surrounding mental health and lawyers? Do you think it is a subject that has been rather swept under the carpet?

I think things are changing on this issue dramatically and quickly and for the positive. A few years ago, most lawyers and people working in legal businesses in the UK would not have been comfortable even speaking to their HR departments about it. Today we have a lot of evidence to suggest that the majority of people in our profession are affected or have been affected by low-level mental health problems such as stress and depression, and that is something that is becoming normalised to the extent that it is okay to talk about these things, and law firms and legal businesses are really responding to that. I think it is vital because so many people are affected and the law firms are to be applauded for their open and constructive response. I am not saying that we have got it finalised and that nothing more needs to be done, but I think that the direction of travel is very encouraging.

What is your hinterland?

I am married and have four chronologically adult children in their 20s, so that takes up quite a lot of my spare time. My passions are for art and the theatre — on the occasional spare evening you will find me scrambling around trying to get a ticket for the latest theatre production or at the Tate taking in one of their many blockbuster exhibitions.

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