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Counsel

Volume 16 Issue 6, 2019

Anti-Trust & Competition

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Returning to private practice
How (and why) to make the transition

In-House Insights: Joseph Trillana Gonzales
We talk to the Aboitiz Power general counsel

THE LUXURY OF SPACE

THE PENINSULA BEIJING:
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Mayuree Sapsutthiporn is head of the China practice at **Kudun & Partners** in Bangkok. She has built a wealth of experience during her more than 10 years of experience in advising clients on foreign investment in Thailand, regulatory and licensing requirements, the formation of joint ventures and strategic alliances, and the negotiation of commercial contracts and agreements. She is also actively involved in advising and structuring alternative financial vehicles for real estate developers.

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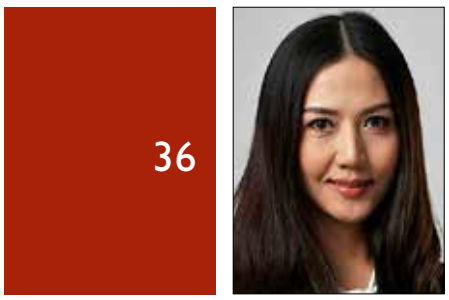
JURISDICTION UPDATES

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



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One small step for Africa

On April 2 the Gambia's parliament wrote itself into modern African history when it ratified the Africa Continental Free Trade Agreement (AfCFTA). It became the 22nd country to do so, pushing the plan across an agreed threshold for it to "come into force".

This does not mean African countries will be dropping tariff and non-tariff barriers and allowing unhindered trade anytime soon. But it does mean serious negotiation towards that goal can begin.

It is one small step towards the giant leap Africa needs to take to become a significant player in international trade. As is often said of Africa, how can it be a force in the world if its 55 countries cannot even do business among themselves?

The AfCFTA was enacted in Rwanda in March of 2018 and 52 countries quickly signed up. The lure for African leaders was being part of the biggest trade bloc in the world — 1.2 billion people and a potential market of US$3 trillion, according to the World Economic Forum.

Intra-continental trade is less than 20 percent of Africa's total, while Europe and Asia are at 69 percent and 59 percent respectively. Making it easier for Africans to exchange goods and services with one another will unlock the continent's economic potential and the AfCFTA — if implemented immediately, with 90 percent of import tariffs removed — would grow Africa's intra-continental trade to 52 percent by 2022, the African Union says.

With 22 ratifications, the AU's technocrats have the green light to start sketching out how the Big Idea might work. They must untangle a daunting web of tariffs and regulations between a patchwork of countries, not to mention eight official economic communities.

Sceptics say prospects of realising the vision are dim. After all, smaller, regional free trade pacts have been hard to conclude. The Southern African Development Community (SADC), for example, has been around for a while but its broad trade and economic integration goals remain elusive. The so-called Tripartite Free Trade Area — linking the SADC, Comesa and the EAC — was conceived more recently to much acclaim, but has stalled.

> "Pan-Africanism has long been a mantra, but realities of nationalism and sovereignty see borders and divisions remain firmly in place — and there are real concerns that free trade could see smaller economies and communities adversely disrupted"

Free trade areas offer many advantages, such as greatly expanded markets for countries and companies, big and small; economic growth, thanks to growing manufacturing sectors, burgeoning small businesses and job creation; attracting more foreign direct investment; and reduced input costs due to cheaper raw material imports and location of production in cheaper centres.

Add in the greater international bargaining power of a single, large bloc over individual small economies and consolidation looks like a no-brainer.

Pan-Africanism has long been a mantra, but realities of nationalism and sovereignty see borders and divisions remain firmly in place. And there are real concerns that free trade could see smaller economies and communities adversely disrupted, even swept away. Africa has wider wealth disparities than any other region of the world, with more than 50 percent of its GDP contributed by Nigeria, South Africa and Egypt. Harmonising economies to create a fair and equitable trading environment will be extremely challenging.

As much as open trade routes help small businesses grow, they threaten those not as competitive as the "invaders". Localised job losses are feared.

These are among the reasons why the continent's biggest economy, Nigeria, is the elephant in the room — one of the three countries not to have signed the AfCFTA. The others are Benin and Eritrea.

Ayuba Wabba, Nigeria's leading trade unionist, describes the AfCFTA as "an extremely dangerous and radioactive neo-liberal policy initiative".

However, the agreement does offer some comfort to doubters, for example specifically having provision for anti-dumping measures and protection for "infant industry".

Concerted diplomatic efforts are being made to bring Nigeria around. Its leaders are hearing persuasive arguments about how intra-African trade can turn the tide on the continent's poverty and dependency.

LEX Africa is an alliance of law firms with over 600 lawyers in 24 African countries formed in 1993. More information may be found on **www.lexafrica.com.**

8 Number of drugs approved by the FDA to treat childhood cancers in the last 40 years.

Children's Cancer Therapy Development Institute

The Children's Cancer Therapy Development Institute

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The 11th Foreign Investment Negative List and its impact on online businesses

For many, this author included, what comes to mind when hearing the term internet businesses, are online selling websites. Ever since e-commerce has evolved to make products easier to discover and purchase through online retailers and marketplaces, the Philippines has cashed in on the trend with emerging websites like Lazada, Zalora and Food Panda.

The 11th Foreign Investment Negative List (FINL) was promulgated last October 29, 2018. Among the notable changes from the 10th FINL is the liberalisation on foreign ownership for internet businesses, which now allows 100 percent foreign ownership. The FINL adopted the definition found in DOJ Opinion 40 (s.1998), which says internet businesses refer to internet access providers (PLDT, Sky Broadband, etc) that merely serve as carriers for transmitting messages, rather than being the creator of messages/information. The same opinion held that internet access providers are no longer considered mass media. This is significant, as mass media is not allowed to have any foreign equity.

By way of background, prior to the 11th FINL, the 1987 Constitution under Article XVI Section 11(1) restricted foreign ownership over mass media saying that it should be 100 percent Filipino owned. Moreover, Republic Act (RA) No 7042, otherwise known as the Foreign Investments Act of 1991, and the 10th Regular Foreign Investment Negative List provide that except for recording, no foreign equity is allowed in mass media. When the 1987 Constitution was passed, the internet was not in existence and traditional mass media was limited to print and broadcasting. However, subsequent legislations and opinions of the Securities and Exchange Commission (SEC), considered the internet and mobile technology as platforms for mass media.

> "If these businesses can be completely foreign owned, e-commerce companies like Amazon, Alibaba or eBay could expand their business in the Philippines and bring in more investment"

RA No 7934, otherwise known as The Consumer Act of the Philippines, defines "mass media" as any means or methods used to convey advertising messages to the public such as television, radio, magazines, cinema, billboards, posters, streamers, hand bills, leaflets, mails and the like. Likewise, under RA No 9211, otherwise known as the Tobacco Regulation Act of 2003, "mass media" is defined as any medium of communication designed to reach a mass of people. For this purpose, mass media includes print media such as newspapers and magazines, broadcast media such as radio and television; and electronic media such as the internet. These descriptions of mass media covering internet businesses were reiterated by the Department of Justice in a 1986 opinion.

The 11th FINL, however, is not explicit as to whether the same liberalisation applies to internet-based platforms for selling, such as the above-mentioned online retailers. Several SEC opinions has since provided guidelines and held that internet-based platforms used for selling products are forms of mass media since the internet is used as a digital platform to broadcast information to the public.

In light of the current administration's movement towards easing restrictions on foreign ownership, a more liberalised foreign participation may change the internet-based business landscape in the Philippines. Online-based businesses would be ideal in the Philippines as nearly 60 million netizens have access to the internet. Many Filipinos spend a lot of their time doing online shopping. There are also more than 50 million Facebook users in the country. If these businesses can be completely foreign owned, e-commerce companies like Amazon, Alibaba or eBay could expand their business in the Philippines and bring in more investment. Conversely, Filipinos will also have more options on what website or online businesses to avail of to suit their needs. Whether this is good or bad through nationalistic eyes is a whole other topic and as I ponder on this question, I will order a burger from Food Panda.

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

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Commercial
4-6 Years | Hong Kong

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3-7 Years | Hong Kong

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10+ Years | Singapore

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4-6 Years | Singapore

A Wall Street law firm is looking to hire a mid-level US capital markets lawyer to join its team in Singapore. This role will offer an excellent career track and opportunity to grow the practice. You must be US qualified and ideally from a peer firm. AC7849

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3-5 Years | Hong Kong

An offshore firm is currently looking to hire a corporate lawyer for its Hong Kong office. You should preferably have a UK qualification, though candidates qualified in other common law jurisdictions may also apply. Chinese language skills would be an added advantage. AC7840

Funds
2-5 Years | Hong Kong

A US firm is looking to hire a funds lawyer to join its team in Hong Kong. This role will offer exposure to a broad range of funds work advising on private equity funds, hedge funds and other closed and open-end fund structures. You should be NY or E&W qualified. Mandarin is not essential. AC7845

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NQ-6 Years | Hong Kong

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Korea promotes a new regulatory "sandbox" system to fuel innovation

Domestic Korean business organisations and foreign chambers of commerce have repeatedly complained about the highly regulated business environment in Korea. While recognising the need to protect the public, these business organisations have criticised what they have perceived as an overregulation policy that goes well beyond what is reasonably necessary. Even the new Korean government administration has taken note of the regulatory obstacles that are delaying the development of new markets and commercialisation of new technologies. President Moon Jae-In is reported to have stressed the need to relax the very restrictive regulatory environment to promote innovation and encourage the creation of new industries and new jobs.

In furtherance of this goal, late last year the Korean National Assembly passed a number of regulatory "sandbox" laws that are designed to exempt businesses from certain regulations, to enable them to more quickly adopt and commercialise new technologies and business models in Korea. These laws provide for regulatory exemptions to be given to certain businesses, for a set amount of time, to develop and test new products, services and business methods. The system is referred to as a "sandbox" because it gives companies the freedom to open their minds to new ideas and to test them, like children playing in a sandbox. This regulatory sandbox system will be available in Korea for at least two years and may be extended for an additional year.

Companies wishing to take advantage of this change in the law will need to apply with the government, specifying the intended products, services and/or business methods they wish to develop. After receiving the applications, they will be reviewed by committees within the appropriate government regulatory bodies. Those regulatory bodies are supposed to inform the applicants within certain periods whether the applicants' proposed ideas will conflict with existing regulations. If there is a conflict, the government now has the ability, if appropriate, to provide exemptions to enable the businesses to proceed. In some cases, the government may impose certain conditions along with the exemptions. These could include requirements to purchase insurance and to accept liability in the event that the new businesses cause harm to others. But the overall goal is to relax the more rigid regulations and provide pathways that will enable innovative business ideas to move forward without a lengthy regulatory delay.

> "These laws provide for regulatory exemptions to be given to certain businesses, for a set amount of time, to develop and test new products, services and business methods"

The regulatory sandbox system is intended to cover a wide array of products and services and it is not restricted to small and medium-sized companies and enterprises. Large companies also can take advantage of this opportunity. Some of the companies that have reportedly already applied and been approved for new ventures under this program include: Hyundai Motors for the installation of hydrogen fuel charging stations in Seoul; Macrogen, to enable it to provide genetic testing for a broad spectrum of diseases; JG Industry for installing LCD and LED advertising panels on buses; Charzin for installing electric charging stations; KB Kookmin Bank for providing finance-telecom products; Directional for offering a blockchain–based P2P stock lending platform for certain investors.

Given the government's current high level of interest in creating new jobs and growing the economy, there is significant incentive for the regulatory authorities that will be reviewing regulatory sandbox applications to approve those applications. Indeed, Korea's Financial Services Commission recently announced that it had approved nine fintech service providers as the initial participants in its newly established fintech regulatory sandbox and it was expecting to approve quite a few more in the near future.

Consequently, companies that have been considering developing new products and services, or entering new types of markets in Korea, but have been concerned because of clear regulatory hurdles or ambiguous regulations that may pose obstacles, should strongly consider applying now for regulatory sandbox exemptions. There may be no better opportunity than there is at the present time.

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Encouraging foreign direct investment in the education sector

In the middle of the year 2018, the Government of Vietnam issued Decree No. 86/2018/ND-CP (Decree 86) to regulate foreign cooperation and investments in education sector in Vietnam, taking effect as from August 1, 2018 and replacing Decree No. 73/2012/ND-CP (Decree 73) and Decree No. 124/2014/ND-CP (Decree 124).

One of the noteworthy points under Decree 86 is educational association, which is defined as twinning between Vietnamese private kindergartens, Vietnamese private general educational institutions and foreign educational institutions accredited by an education quality assessment organisations or foreign competent authorities in order to implement the integrated education programme; provided however that the educational association and the integrated education programme must be approved by the Vietnamese competent authorities. The period of educational association shall not exceed five years from the date of approval, which can be extended five years for each renewal.

The remarkable regulations to implement the integrated education programme under Decree 86 includes: (i) foreign education programme used in the integrated education programme shall be accredited in the home country or by an educational competent authority of the aforesaid country; (ii) the integrated education programme shall ensure the objectives of the Vietnamese education programme and still satisfy the requirements of the foreign education programme; learners shall not be forced to re-study the same contents, and the integrated programme shall maintain its stability throughout the study level and the interconnection between levels for the interests of the students; and ensuring volunteer participation and not overwhelming the students; (iii) the size of class and the facilities shall adequately meet the requirements of the integrated education programme and shall not affect the teaching activities of the Vietnamese educational institution during the education association process; (iv) the Vietnamese teachers assigned to teach an integrated education programme shall satisfy the training requirements according to the regulations of Vietnamese laws; the foreign teachers assigned to teach an integrated programme is required with a bachelor's degree corresponding to his/her teaching majors and also a teacher certificate or equivalent.

> "The administrative procedure provided under Decree 73 to obtain decision on establishment of foreign invested centres providing short-term training on foreign languages, IT, cultures and specialised skills are repealed under Decree 86"

One more notable point is that the administrative procedure provided under Decree 73 to obtain decision on establishment of foreign invested centres providing short-term training on foreign languages, IT, cultures and specialised skills are repealed under Decree 86. Accordingly, the establishment of such centres is subject only to the following procedures: (i) obtaining Investment Registration Certificate for foreign investors; (ii) obtaining Enterprise Registration Certificate for enterprise operating the centres and (iii) obtaining approval of educational operation and publication on the websites of the licensing competent authority. Under Decree 86, in order to issue Investment Registration Certificate, the licensing competent authority (ie, Department of Planning and Investment) is required to send the official letter to get the appraisal of the corresponding Department of Education and Training; however, in practice, the licensing authority at its discretion may ask for further appraisal from District People's Committee and Department of Transportation.

In addition, the limitation of Vietnamese students has been raised from 10 percent of primary and 20 percent of secondary students under Decree 73 to a higher percentage of not exceeding 50 percent of the total enrolment of the international school.

Lastly, Decree 86 opens more opportunities for the foreign-invested kindergartens to enrol Vietnamese children under five years old which was previously prohibited under Decree 73.

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Head of Compliance — Hong Kong — Senior

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Asset Manager — Hong Kong — 10-15 PQE

Institutional arm of leading asset manager seeks a senior lawyer with Asia Pac asset management experience for its Hong Kong office. Knowledge of both the Hong Kong and Singapore regulatory environment would be very helpful. Fluent Mandarin is critical for this role. (IHC 17386)

Funds — Hong Kong — 10+ PQE

Senior lawyer with authorised funds and some knowledge of the MPF and SFC codes, rules and regulations sought by this well-known asset manager. Lawyers from either private practice or in-house will be considered for this role. Proficiency in Chinese is important. (IHC 17422)

MNC — Hong Kong — 10+ PQE

This well-regarded MNC has a vacancy for a senior in-house commercial lawyer with good China and regional experience. Work will involve advising senior management on an interesting mix of contract, general commercial, employment and some compliance legal matters, and advising senior management on strategic matters. Fluent Mandarin skills highly desirable. (IHC 17200)

Technology Company — Hong Kong — 5-10 PQE

Exciting opportunity to join a newly formed group of an MNC that is looking for a mid to senior level lawyer who is passionate and interested in the technology sector. You will need general commercial and corporate skills but have had some exposure to companies investing in new technologies. (IHC 17532)

Insurance – Legal Counsel — Hong Kong — 4-8 PQE

Large MNC consulting firm seeks a mid-level lawyer with some experience in non- contentious insurance work gained in-house or with a law firm. No language skills required. Good commercial outlook and problem solving skills important. (IHC 17529)

MNC - PRC Counsel — Hong Kong — 4-6 PQE

PRC lawyer with commercial experience gained at an international firm or MNC is sought by the Hong Kong office of this well-known US MNC. Experience in advising management in China on general commercial matters is important. (IHC 17426)

Senior Counsel — Hong Kong — 12+ PQE

A global technology company seeks a seasoned transactional lawyer to join its team. You will have experience in leading all legal aspects of complex M&A transactions in the PRC and internationally. You should have a deep understanding of the internet business. Very competitive salary on offer. (IHC 17265)

Trademark — Hong Kong — 6+ PQE

A leading technology company seeks a senior trademark counsel with solid experience in domain name and copyright (non-contentious, contentious, commercial and compliance related). Ideal candidate should have team management skills and solid experience in intellectual property worldwide outside of China and Hong Kong qualified. (IHC 17361)

Senior Associate — Beijing — 6+ PQE

A well-known UK law firm is looking for an experienced M&A lawyer to join their fast-growing Beijing Corporate team. Candidates should possess good knowledge in both in-bound and out-bound M&A projects. PRC Bar is essential, foreign education background is a plus. (IHC 14212)

Legal Director — Singapore — 15+ PQE

Global IT and e-commerce services company seeks a senior legal counsel to join their team. The ideal lawyer should be admitted to a common law jurisdiction with corporate experience working in the e-commerce or trade industry and familiarity with the laws across the ASEAN region. (IHC 17516)

Senior Legal Counsel — Singapore — 8-12 PQE

Global consulting company is looking for a senior legal counsel to join their legal team based in Singapore. The ideal candidate should be Singapore qualified with strong corporate experience gained in a top tier law firm or in-house doing regional work. (IHC 17526)

Legal Counsel — Singapore — 4-8 PQE

Global consulting company with focus in the insurance sector is looking for a legal counsel to join their team based in Singapore. The ideal candidate should be qualified in a commonwealth law jurisdiction with experience doing insurance work but are open to seeing someone who comes with good corporate background. (IHC 16575)

Legal Counsel — Singapore — 3-6 PQE

Major US listed company in the IT space is looking for a legal counsel to join their team based in Singapore. The ideal candidate should be qualified in Singapore or a common law jurisdiction with good corporate commercial or commercial litigation experience. Some familiarity of Korean law would be ideal, but not essential. (IHC 17477)

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

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By Tom Cochrane

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Venture capital flourishes in the MENA region on a strong offshore foundation

The recent announcement of Uber Technologies Inc's acquisition of its Middle Eastern based competitor, Careem, in a cash and stock transaction worth US$3.1 billion, has renewed the spotlight on the burgeoning venture capital market in the Middle East and North Africa (MENA) region. In doing so, the continued popularity and benefits of using offshore vehicles to facilitate and implement venture capital investments has also been highlighted.

The Uber-Careem transaction, which is thought to be the largest-ever technology industry transaction in the MENA region, comes less than two years after the announcement of Amazon.com, Inc's acquisition of Souq.com, an e-commerce marketplace headquartered in Dubai, in a transaction estimated to be worth approximately US$650 million.

These two transactions are high-profile examples of what is occurring more and more frequently throughout the MENA region: a greater emphasis on developing and promoting local and regional businesses (particularly in the technology space), and a more committed and sophisticated regional venture capital industry for raising the funds needed to effect such development and promotion.

With respect to the venture capital industry in the MENA region, the use of Cayman Islands and British Virgin Islands domiciled entities continues to be widespread. In terms of an investment vehicle through which to accept contributions from investors, the offshore "corporate model" (typically involving a Cayman Islands or British Virgin Islands company in which investors are admitted as shareholders) and the Cayman Islands "LP/GP" model (involving a Cayman Islands exempted limited partnership, in which investors are admitted as limited partners, and a separate general partner entity, typically a Cayman Islands exempted company with limited liability) continue to be the most commonly used structures.

"With respect to the venture capital industry in the MENA region, the use of Cayman Islands and British Virgin Islands domiciled entities continues to be widespread"

The reasons for using a Cayman Islands based structure in a venture capital context include certain benefits reflecting the Cayman Islands as a jurisdiction more broadly, such as its familiarity to regional investors, its tax neutrality, the high levels of confidentiality which apply in the Cayman Islands, the flexibility of its laws, its political stability and well-regarded judicial system, and the high calibre of service providers, in both the public and private sectors, in the Cayman Islands.

In addition, the flexibility of the LP/GP structure more specifically (for example, the ability to easily and effectively call for and accept contributions from investors on a periodic basis, as and when appropriate investment opportunities are identified) is highly appealing to both venture capital investors and fund managers. Furthermore, the ability for investors to be excluded or excused from certain investments is a particular drawcard for investors based in the MENA region who may, for example, be limited to investing only in strictly Shariah compliant investments and who would need to be formally excused from investments which are not Shariah compliant.

Beneath any investor-facing structure which is utilised in a venture capital context, it is typical to have special purpose vehicles (SPVs) set up for the purpose of making each relevant investment. Such SPVs are typically set up as corporate entities domiciled in the Cayman Islands or the British Virgin Islands as they can be set up quickly and in a cost-effective manner in jurisdictions which are both flexible and familiar to investors. Such SPVs provide a "ring-fencing" of liability (ie, preventing the ability of creditors' claims to attach to the assets of the SPV's shareholders) and can easily accommodate co-investors if necessary or desirable. In addition, the use of such SPVs can help to facilitate exits of investments (for example, by allowing a buyer to simply purchase all of the issued shares in the relevant SPV, as opposed to triggering a direct change of ownership in the underlying investment entity).

Of late, we have seen an increased use of SPVs domiciled in the Abu Dhabi Global Market (ADGM) where the underlying investment opportunity is in a regional entity. Such ADGM SPVs combine many of the benefits of SPVs domiciled in the Cayman Islands or the British Virgin Islands with other local and regional benefits (including, for example, the ability to obtain a tax residency certificate from the Ministry of Finance in the United Arab Emirates in order to benefit from the country's double tax treaty network).

In summary, the venture capital industry in the MENA region has grown rapidly in the last few years and, on the back of the recent high-profile transactions referred to above, we expect this trend to continue. Underpinning such growth is the use of entities domiciled in the Cayman Islands, the British Virgin Islands and ADGM, which provide a critical conduit for connecting regional investors with the businesses in need of capital in their quest to become the next Careem or Souq.com.

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In-house

Regional Head of Legal | 12+ yrs pqe | Singapore **REF: 15023/AC**

A multinational retail giant is looking for a Regional Head of Legal to support their growing business in the ASEAN region. Based in Singapore, you will be responsible for providing legal support on the company's ASEAN businesses with a focus on retail, e-commerce, digital trade, and operation related matters. You must be a qualified lawyer in Singapore or one of the Commonwealth jurisdictions with over 12 years' PQE, preferably gained in-house or with a leading law firm. Prior experience in managing a legal team and implementing legal operations will be an advantage, as will previous in-house experience in e-commerce at an MNC or retail/FMCG company. Frequent travel is a feature of this position.

Head of Legal | 10-15 yrs pqe| Hong Kong **REF: 15025/AC**

A global manufacturing company is seeking a high calibre lawyer to take on a senior legal position based in Hong Kong. You will cover general corporate and commercial matters in Greater China and the Asia Pacific. The ideal candidate will have a mix of international law firm and in-house MNC experience along with strong leadership and communication skills. Significant experience in liaising directly senior management on general commercial work is highly desirable. Fluency in English is mandatory; Mandarin skills are advantageous. Willingness to travel is required.

Senior Compliance Manager | 7+ yrs exp | Shanghai **REF: 15021/AC**

This is a unique opportunity for an experienced compliance professional to take on a senior role at this prestigious luxury brand in Shanghai. You will be responsible for ensuring the business activities, store operations, and provider contracts comply with regulations and company's objectives. You ideally have a law degree with over 7 years' legal and/ or compliance experience in retail. Excellent project management and communication skills along with the ability to handle sensitive and complex matters in highly confidential situations are required. Excellent command of English and Mandarin is mandatory.

Legal Counsel, North Asia | 6+ yrs pqe | Hong Kong **REF: 15034/AC**

This US manufacturing company is seeking an experienced corporate commercial lawyer to be based in Hong Kong covering its business across APAC, with a focus on the PRC market. You will provide legal counselling and guidance on general commercial matters, contracts negotiation and review, and the company's compliance ethics programs. You ideally will be a qualified lawyer with a minimum of 6 years' PQE at reputable law firms and/or multinational corporations. Extensive PRC knowledge is highly desirable. Excellent interpersonal and communication skills are essential as well as fluent English and Mandarin.

Senior Contract Lawyer | 5+ yrs pqe | Shanghai **REF: 15038/AC**

This fast-growing technology company with a proven track record in China and Asia, and with further growth potential, is seeking an experienced contract lawyer to join its legal team based in Shanghai. You will review, draft, advise and negotiate on various agreements and contracts for the company's China business. The ideal candidate will be a PRC-qualified lawyer with knowledge of Chinese corporate law and general commercial-related matters plus hands-on working experience in a fast-paced environment. Fluent spoken and written Mandarin and English are required.

Private Practice

Senior Associate, IP | 8+ yrs pqe | Shanghai **REF: 15017/AC**

This international law firm's growing presence in China has led them to seek a Senior Associate to join its intellectual property team in Shanghai. You will be responsible for advising clients on the full spectrum of IP protection work including trademarks, patents, know-how, trade secrets, domain names, licensing agreements and IP enforcement. You must be PRC qualified with over 8 years' PQE in this practice area. Experience in TMT and anti-competition work is highly desirable.

Capital Markets Lawyer | 5+ yrs pqe | HK/Beijing **REF: 15016/AC**

Senior-level lawyer with solid capital markets experience from leading international firms is sought by this prominent US law firm. Based in Hong Kong or Beijing, you will work closely with leading partners on a good mix of corporate M&A, listings transactions and equity & debt securities. Ideally, candidates have US qualification plus over 5 years' relevant PQE. Fluency in English and Mandarin is required.

M&A Lawyer | 3-5 yrs pqe | Shanghai **REF: 14993/AC**

This global law firm is seeking a junior to mid-level M&A Lawyer to join its Shanghai office. This role presents a unique chance to work closely with a premier name in the M&A field on advising many notable TMT companies on cross-border transactions and FDI projects in China. You ideally hold 3-5 years' PQE gained at a top-tier law firm specializing in China-related cross-border M&A and capital markets deals, with technology transaction experience a bonus. Dual qualifications in the PRC and the US/UK/HK are highly desirable. You must have fluent English and Mandarin skills.

Finance 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 skills are preferred but not essential.

Associate, US/HK IPO | 2-4 yrs pqe | Beijing **REF: 15004/AC**

This leading US law firm is looking for a US-qualified lawyer to join its Beijing office. Ideally, you hold 2-4 years' PQE of corporate finance transaction work with a focus on US or HK IPO deals at reputable international law firms. Strong drafting and interpersonal skills are required as well as fluent English and Mandarin.

Paralegal, Corporate | 0-2 yrs pqe | Beijing **REF: 15033/AC**

This Magic Circle is urgently seeking a junior level Paralegal or Legal advisor to join its Beijing corporate team. You will be responsible for providing legal research and administrative support to the corporate practice and handling general corporate matters. The ideal candidate will be a PRC-qualified lawyer with a US LLM/JD plus solid knowledge of PRC corporate and contract law. Excellent verbal and written English and Mandarin skills are essential.

Job Search

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EVENT REPORTS

Sixth annual In-House Community gathering in HCMC

The Lotte Legend Hotel Saigon again played host to our annual HCMC In-House Community Congress on April 9. A day of lively networking, learning and discussions, encompassing workshops on Antitrust and Fair Trade, Hiring & Firing in Vietnam, the new Cybersecurity Law, Vietnam and Asean Compliance and the Value of Internal Non-financial Audits.

These were all preceded by two panel discussions based on key elements of the In-House Development Model, namely 'technology' and 'talent management' in the legal department, moderated by In-House Community founding director Tim Gilkison with Tran Vo Quoc Son, general counsel, head of internal audit, legal & compliance, Samsung Vina Electronics; Michelle Thai, general counsel, Siam City Cement (Vietnam); Lê Lan, head of legal, Total Vietnam; Bui Ngoc Hong, partner, LNT & Partners; Adrien Bizouard, country manager, Robert Walters and Jihoon Cha, partner, Yoon & Yang.

In the area of technology, our panelists shared what innovative solutions they were brining into their departments and how the overall business benefited from its use. Talent management, and particularly retention, is proving to be an area of great challenge for legal teams, both in-house and external, in Vietnam. With a shortage of experienced corporate lawyers in the country, and when there always seems to be another organisation willing or able to pay more, "how do we hold on to our best and brightest?" was a question asked by many, with our panel stressing the importance of investing in training and providing a good work-life balance to counter the lure of a bigger salary.

Thanks to all our speakers and co-hosts, which in addition to the above included Dong Hoang Nam, Unilever Vietnam; Maurice Burke and Vi Vu, Hogan Lovells; Sesto E Vecchi, Nguyen Huu Minh Nhut, Philip Ziter, Tran Ngoc Han, and Le Ton Viet, Russin & Vecchi, Thomas Treutler, Vinh Quoc Nguyen, and Chuyen Hong Huu Le, Tilleke & Gibbins (Vietnam); and Sean Sinsung Yun and Ha Thi Tinh, Yoon & Yang Law Vietnam.

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

"The In-House Congress was informative and mind-broadening"
– HCMC Congress delegate

2019 IN-HOUSE Congress HO CHI MINH CITY

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General Counsel, Head of Internal Audit, Legal & Compliance
Samsung Vina Electronics., Ltd

Lê Thị Tuyết Lan
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Maurice Burke
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MOVES

The latest senior legal appointments around Asia and the Middle East

AUSTRALIA

Gadens has added **Hazel McDwyer** as a partner in its intellectual property and technology team. With nearly 20 years of experience, McDwyer specialises in all aspects of contentious and non-contentious intellectual property law, including trademarks, patents, copyright and designs — from brand protection to enforcement and cross-border issues — along with Australian Consumer Law, privacy and information technology matters.

SINGAPORE

The **Singapore International Arbitration Centre** (SIAC) has appointed **Michele Park Sonen** as head of North-East Asia. She succeeds Seah Lee and will be based in Seoul, where she will oversee SIAC's activities in South Korea and Japan. Sonen is qualified as an attorney in the US and previously served as law clerk to a federal appeals court judge and a federal district court judge in the US.

USA

Sidley Austin has added **Tai-Heng Cheng** as partner in its New York office. He joins from Quinn Emanuel Urquhart & Sullivan, where he chaired the New York international arbitration practice. He was previously a tenured professor of law at New York Law School and served as co-director of the Institute for Global Law, Justice and Policy. Cheng will be based in New York, but will also be spending time in Asia and Europe. Fluent in English and Mandarin, he focuses on international commercial and investor-state arbitration, having achieved victories in high-profile matters in Asia, New York and Europe. He enjoyed a prominent win in Vantage v Petrobras, where the International Centre for Dispute Resolution awarded US$622 million plus 15.2 percent compound interest for the client. He has also represented his clients in litigation, investigations and government enforcement matters across the globe. Cheng has also served as tribunal chair or co-arbitrator in numerous arbitrations before major international arbitral institutions across multiple continents, and is a member of the arbitration panels of arbitration institutions in North America, Europe and Asia.

Asian-mena Counsel Deal of the Month

Hong Kong grants virtual banking licences

Three new online-only banks will be up and running before the end of the year.

The Hong Kong Monetary Authority (HKMA) has issued the city's first three virtual banking licences to Livi VB, SC Digital Solutions and ZhongAn Virtual Finance.

All three expect to go live during the next six to nine months. Livi VB is backed by Bank of China, JD Digits and Jardine Matheson. SC Digital Solution is a joint venture between Standard Chartered, HKT, PCCW and Ctrip. ZhongAn Virtual Finance is supported by Chinese digital insurer ZhongAn Online and Sinolink.

The winning licensees were among 29 institutions that applied for the virtual banking licences from the HKMA, the government authority in Hong Kong responsible for maintaining monetary and banking stability.

Clifford Chance advised **BOC Hong Kong (Holdings)** on the establishment of Livi VB. BOC, JD Digits (through its subsidiary JD New Orbit Technology (Hong Kong)) and Jardines (through its subsidiary JSH Virtual Ventures Holdings) have a total joint initial investment of HK$2.5 billion (US$318.8m) and a shareholding of 44 percent, 36 percent and 20 percent, respectively. Partner **Virginia Lee**, supported by partners **Yong Bai** and **Ling Ho**, led the firm's team in the transaction.

King & Wood Mallesons advised **Zhong An Virtual Finance** (ZAVF) on its successful application. ZAVF's licence took effect on March 27, 2019. Hong Kong partners **Minny Siu**, **Richard Mazzochi**, **Hayden Flinn** and **Peter Bullock**, and China partners **Stanley Zhou** and **Chai Zhifeng** led the firm's team in the transaction.

Other recent transactions from around the region:

Davis Polk has advised the underwriters on the SEC-registered IPO by UP Fintech Holding (Tiger Brokers) of 13 million American Depositary Shares, each representing 15 Class A ordinary shares, for total proceeds of US$104 million. Tiger Brokers has granted the underwriters an option to purchase up to an additional 1.95 million ADSs. The ADSs are listed on the Nasdaq. Tiger Brokers is a leading online brokerage firm focusing on global Chinese investors. Its proprietary trading platform enables investors to trade in equities and other financial instruments on multiple exchanges around the world. Corporate partners **Li He** and **James Lin** led the firm's team in the transaction.

Rajah & Tann Singapore, a member firm of Rajah & Tann Asia, has acted for data centre start-up **AirTrunk** on the Singapore real estate aspects of its S$450 million (US$399m) debt and equity financing and acquisition of land to build its first state-of-the-art facility, which will be the largest carrier neutral 60+ megawatt hyperscale data centre in Singapore. Partners **Benjamin Tay**, **Jared Kok**, **Regina Liew** and **Tanya Tang** led the firm's team in the transaction.

Skadden has advised **Bilibili**, a leading online entertainment platform for young Chinese, on its offering of US$500 million convertible senior notes due 2026, and a concurrent US$373 million follow-on primary and secondary offering of American Depositary Shares in the Nasdaq. Bilibili will use the proceeds of the offerings to enrich content offerings, invest in research and development, and for other general corporate purposes. Hong Kong partners **Julie Gao** and **Jonathan Stone** and Shanghai partner **Haiping Li** led the firm's team in the transaction.

For a week by week searchable archive of Asia deal activity go to: https://www.inhousecommunity.com/deals

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Opportunities of the Month ...

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

Head of Legal – Manufacturing

10-15 yrs PQE, Hong Kong

A global manufacturing company is seeking a high calibre lawyer to take on a senior legal position based in Hong Kong. You will cover general corporate and commercial matters in Greater China and the Asia Pacific. The ideal candidate will have a mix of international law firm and in-house MNC experience along with strong leadership and communication skills. Significant experience in liaising directly with senior management on general commercial work is highly desirable. Fluency in English is mandatory; Mandarin skills are advantageous. Willingness to travel is required. [Ref: 15025/AC]

Contact: Kelly Zhang
Tel: (86) 21 2206 1200
Email: sherryxu@hughes-castell.com.hk

Legal Counsel – Procurement

6 yrs PQE, Singapore

A large global MNC is currently seeking a legal counsel (procurement) to be part of its high performing legal team. Reporting to the associate general counsel, you must be comfortable with minimal supervision to draft, review and redraft through to completion a wide range of complex procurement contracts relating to mainly IT (tech) and real estate. You should proactively identify legal risks and provide the business with creative but legally compliant solutions. Additionally, you should seek to enhance procurement and supply chain capabilities by establishing good governance practices and providing support and training to ensure compliance. Ideally, you are with at least six years PQE, with both in house and private practice experience. Candidates fresh from Practice may apply if your specialisation is with the TMT group. [Ref: J0 MK875620-90]

Contact: Michelle Koh
Tel: (65) 6956 6583
Email: michellekoh@puresearch.com

Prime Brokerage VP

5-8 yrs PQE, Hong Kong

Bulge bracket bank is looking for a financial services lawyer to take on a role that supports its prime brokerage business in Hong Kong. Candidates with prime brokerage experience will be have a strong advantage. Those with a funds, equity or derivatives background will also be considered. Chinese skills are not essential, and top candidates from overseas are welcome to apply. High calibre team and attractive remuneration on offer. [Ref: AC7844]

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

Technology Company

5-10 yrs PQE, Hong Kong

Exciting opportunity to join a newly formed group of an MNC that is looking for a mid to senior level lawyer who is passionate and interested in the technology sector. You will need general commercial and corporate skills but have had some exposure to companies investing in new technologies. [Ref: IHC 17532]

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

Adopting eDiscovery for internal investigations

In-house counsel are often called on to manage an internal investigation. How can you effectively plan for and manage these investigations? We explore how electronic discovery (eDiscovery) tools help you mitigate risk and achieve your fact-finding mission.

Internal investigations may be required for a number of reasons, including a whistleblower complaint for suspicion of fraud or in response to regulator's request. The objective of any investigation is to assist with fact-finding. You want to gather evidence and strategise your response plan based on the findings.

THE SCENARIO – FRAUD INVESTIGATION

Your company has received whistleblower allegations for fraud and corruption. You need to manage the internal investigation and form the investigation team. The local regulators have also heard of this wrongdoing and made a regulatory request for information. The board may decide to proceed with litigation if necessary.

INVESTIGATION STEPS USING EDISCOVERY

At the beginning of the internal investigation, acting quickly and ensuring that no potentially relevant data is destroyed is essential. Scoping your next steps begins with investigation planning.

INVESTIGATION PLANNING

It is important to identify the nature of the fraud and corruption allegation, and plan the investigation accordingly. The investigation will uncover any evidence of the fraud/corruption and helps the board decide on the appropriate action. Whether the investigation is in-house or you are using a third party, such as a law firm or external provider, you need a comprehensive investigation plan. At the initial planning stages, you want to define the issues to be resolved to give all parties clarity.

For the information gathering stage, the sources of data and collection methodologies should be mapped. Identifying key persons and custodians involved in the allegation will help you focus on the right data sources. Important evidence could be found in emails and documents collected from laptops, phones and company servers related to these key persons.

Preliminary steps to take include:

- Removing access to company servers and devices for the suspected wrongdoers
- Suspension of employment
- Alerting your IT Team to monitor for any deletion or copying of data

The question of who should undertake the investigation is also decided at this stage. If a third party provider, ensure there are no conflicts and they are objective and independent. Also, establish clear reporting and escalation lines during your planning.

EVIDENCE COLLECTION

Your next step is to collect the evidence. If the data is located in multiple locations and jurisdictions, you may have to take into account different laws of data privacy, state secret laws and privilege laws.

There is a high risk that relevant data will be deleted or changed by the wrongdoer. It may be appropriate to undertake a full forensic collection instead of a basic collection. Forensic collection meets requirements for evidence in relation to chain-of-custody and authentication. Whichever method you choose, it is important that defensible preservation and collection methods are used so evidence is acceptable in court proceedings should litigation arise.

Confidentially is a major issue when considering collection methodology, particularly when deciding who will review the evidence. Finally, collection parameters and timelines must be carefully set so nothing is missed but time and resources are not wasted.

USING EDISCOVERY FOR REVIEW

Your investigation may involve reviewing thousands or tens of thousands of emails and data. Today, there are tools available to cut down on time and costs.

Let us assume that your investigation involves 88GB of email data. Reviewing this using the traditional approach of printing (1.2million pages) and reviewing in hard copy would be challenging. You may struggle to conduct the investigation in time for the board to make decisions and to meet the regulator's request deadline.

The eDiscovery method uses an online review platform powered with analytics tools. One of the advantages is the ability to conduct an Early Case Assessment (ECA). ECA helps you quickly identify key documents within large datasets so you can focus on critical evidence first and prioritise these for review. ECA provides you with a high-level overview of the data and helps you remove duplicated or irrelevant information.

INVESTIGATION REPORTING

The investigation report will help you report to all stakeholders in sufficient detail. You can then maintain privilege and make recommendations to the board. In the process, you can examine the root cause of the wrongdoing and consider any lessons learned.

CONCLUSION

With eDiscovery tools, your internal investigations can be more efficiently and accurately conducted, especially if it involves large data sizes. As companies move into the world of Big Data it is increasingly important to be aware of the investigation options available to select the most appropriate.

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The Philippine Competition Commission bares its teeth

For the first time since its inception in 2015, the Commission has blocked a merger after conducting its review.

By Francisco Ed Lim, Eric R Recalde, Korina Ana T Manibog, **ACCRALAW**

It is difficult to imagine that it has only been less than four years since the Philippine Competition Act (PCA) took effect in the Philippines after decades of being stuck in legislative limbo. The law came into effect on August 8, 2015, intended to enhance economic efficiency and promote free and fair competition, prevent economic concentration that will stifle competition, and penalise all forms of anti-competitive agreements, abuses of dominant position, and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare. It also established the main antitrust authority in the Philippines, the Philippine Competition Commission.

Despite the relatively short time since the law has taken effect, the Commission has made its presence known. The Commission has spared no effort in conducting information dissemination on the PCA, its implementing rules, and its programs to the public, through various fora, press releases, consultations, targeting not just conglomerates, but also small to medium enterprises, and other stakeholders. The Commission has also provided support to the Philippine Judicial Academy in terms of educating judges and court personnel about this fairly recent legal development.

The stakes are higher now for businesses and practitioners to educate themselves on the provisions of the law considering that some acts and agreements which they were doing prior to the enactment of the law may now raise red flags, and may potentially lead to hefty fines, and even imprisonment.

Since the lapse of the two-year curative period for companies to renegotiate agreements or restructure their businesses to comply with the provisions of the law last August 8, 2017, the Commission has become aggressive in carrying out its mandate under the law. In 2017, the Commission

announced that it was conducting probes into the cement, power, garlic and health industries for potential anti-competitive acts. The Commission also indicated potential probes into the manufacturing, agricultural, and transport sectors.

Later in the same year, the Commission started to open Phase II reviews of transactions which raise preliminary anticompetitive concerns. This is significant because when the Commission began conducting merger review, notified transactions were generally approved during the Phase I review. The Commission's willingness to open Phase II reviews for transactions was a marked sign of its enhanced capability to spot actual or potential anticompetitive concerns during the course of its review in the relevant markets covered by the notified transactions.

Internally, the Commission also worked on streamlining the protocols and procedure to be followed for merger reviews and enforcement actions. The Commission released its rules of procedures on merger reviews, and enforcement against anti-competitive agreements and acts of abuse of dominant position, a move welcomed by practitioners and companies as it provided much needed structure in how merger reviews and enforcement actions are conducted.

In 2018, the Commission flagged competition concerns arising from the takeover of ride-hailing app Grab of its main rival in the Philippines, Uber, and conducted a motu propio review of the transaction. Before it could get clearance for the transaction, Grab had to agree to submit to voluntary commitments relating to quality and pricing standards in order to address the concerns raised by the Commission. Grab was also fined P16 million (US$310,000) for violating interim measures during the Commission's review. The Commission has continued to monitor Grab's compliance with the voluntary commitments. As recently as January of this year, Grab was fined once again for providing deficient, inconsistent, and incorrect data for the monitoring of its compliance with its commitments.

Also in 2018, the Commission nullified the acquisition by Chelsea Logistics Holdings. of Trans-Asia Shipping Lines. and imposed a penalty of P22.8 million on the parties for failure to notify the Commission of the transaction. This was the first time the Commission exercised its power to nullify a transaction based on the parties' failure to comply with the notification requirement under the PCA. The Commission also began fining parties for late filing of notification to the Commission, starting with AXA's merger, through its subsidiary Camelot Holdings with the XL Group, with the latter surviving the merger as a wholly-owned subsidiary of AXA. Since the parties notified beyond the 30-day period (but before consummation of the transaction), they were fined 0.5 percent of 1 percent of the value of the transaction or P123,861.86. Macsteel Global and MSSA Investments were also fined an amount of P526,219.50 for failure to notify within the prescribed notification period. In 2018 alone, fines for such gun-jumping violations amounted to P31.74 million.

Francisco Ed Lim

> "The Commission also began fining parties for late filing of notification to the Commission, starting with AXA's merger, through its subsidiary Camelot Holdings with the XL Group"

The Commission has not spared government-owned and controlled corporations from being penalised. Earlier this year, the Commission fined the Bases Conversion and Development Authority, a government-owned and controlled corporation, and SM Prime Holdings. for failure to notify on time, with the fine amounting to P2 million.

The PCA authorises the Commission to adjust the notification thresholds from time to time. Pursuant

Eric R Recalde

to this authority, the Commission has made considerable adjustments to the merger notification thresholds in recent years. In 2018, it increased the size of party and size of transaction test, to P5 billion and P2 billion, respectively. The year after, the Commission further increased the thresholds to P5.6 billion and P2.2 billion, respectively. This was another move welcomed by many stakeholders as many were of the view that the initial P1 billion threshold was too small. Further, since the load of covered transactions subject to review has been lightened, the Commission can make more efficient use of its time and resources to better scrutinise those transactions covered by the new merger review thresholds.

> "The transaction was disapproved as the Commission was of the view that allowing the transaction to push through would create a monopoly that would result in harming the welfare of sugar cane planters"

The Commission also become more aggressive in its enforcement activities, opening eleven preliminary inquiries, nine of which ripened into full administrative investigations. The Commission has identified the following priority sectors to study or probe in 2019: rice, energy, fuel, logistics supply chain, corn milling and trading, refined petroleum manufacturing and trading, sugar, pesticides, baked products, and milk products.

The year 2018 saw the release of various Commission issuances mainly related to merger reviews, such as those guidelines specific to joint ventures, non-coverage, and consolidation of ownership. In 2019, the Commission issued the Guidelines to Pre-Merger Exchanges of Information to regulate the exchange of confidential business information between notifying parties, prior to a merger or acquisition. The Commission is also currently working on updating its notification form template for notifiable mergers.

This year, for the first time since its inception, the Commission blocked a merger after conducting its review. The transaction was a proposed acquisition by the Universal Robina Corporation of the assets of Central Azucarera Don Pedro and Roxas Holdings, all engaged in the sugar milling industry. The transaction was disapproved as the Commission was of the view that allowing the transaction to push through would create a monopoly that would result in harming the welfare of sugar cane planters. Consider this in relation to the first two years of the law's existence, wherein reviewed transactions were generally approved. The Commission has truly started to bare its teeth.

Another first for the Commission was the filing of a case by the Commission's Enforcement Office against a mass housing developer for abuse of dominant position by engaging in an exclusive internet service tie-up on its property. In the early years of the Commission's existence, it was more focused on merger reviews. This case demonstrates that it is ready to be more active in cracking down on cartels and those companies that abuse their dominant position.

The Commission has also ramped up its efforts coordinating with other regulatory agencies and government arms. Currently, the Commission has entered into memoranda of agreement with the Office of the Solicitor General, Securities and Exchange Commission, Commission on Audit, Philippine Statistics Authority, Bangko Sentral ng Pilipinas, Insurance Commission, Office of the Ombudsman, Department of Justice, Public-Private Partnership Centre, Integrated Bar of the Philippines, University of the Philippines College of Law, and the Department of Trade and Industry. These memoranda will greatly aid the Commission in its efforts to establish itself as the main authority on all matters related to competition, and may

facilitate the Commission in its information gathering efforts in relation to their investigations and reviews of mergers and acquisitions.

Expect closer coordination between the Commission and the Philippine Securities and Exchange Commission moving forward. The Revised Corporation Code, which came effect recently, has included provisions which acknowledge or require the Commission's inputs for certain matters. In particular, the Code acknowledges that the Commission may prescribe additional qualifications for directors or trustees. The Code also recognises that increases or decreases in authorised capital stock, and the sale or disposition of assets may also be subject to the Commission's approval. The Code also allows the legislature to set maximum limits on stock ownership whenever necessary to prevent anti-competitive practices as provided in the PCA.

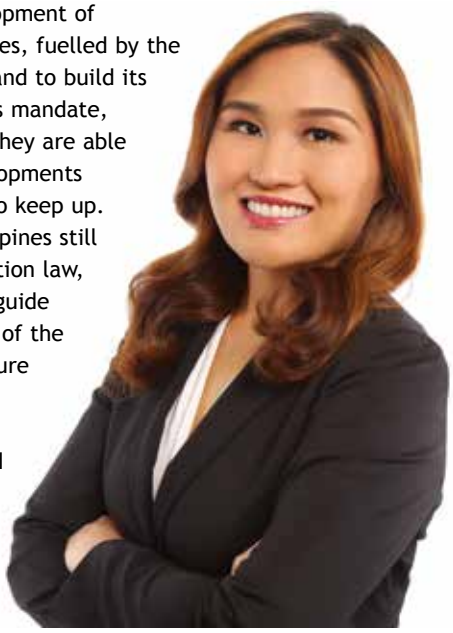
Interestingly, the Commission has clashed with another government agencies in the exercise of its mandate. In an amicus curiae filed with the Supreme Court, the Commission expressed its discontent over a provision in the implementing rules and regulations of the Contractor's Licence Law which allows the Philippine Contractors Accreditation Board to licence local contractors on a yearly basis, while requiring foreign contractors to obtain a new licence per project. For the Commission, this constitutes unfair competition as it creates a barrier to the entry of new players, and thus should be nullified. The Commission has also expressed conflicting views with the Energy Regulatory Commission on who has jurisdiction to resolve cases of competition concerns in the energy sector. The Energy Regulatory Commission insists it has jurisdiction as provided under the Electric Power Industry Reform Act of 2001. However, the Commission is contesting this position, asserting its primary authority over all competition matters, even those in the energy sector. A case is currently pending in the Supreme Court, the decision of which is expected to resolve the issue.

The Commission continues to charge ahead. In January of this year, the Commission launched a leniency and whistleblower programme for cartel members, offering immunity from suit and reduction of penalties to cartel members who provide information that may aid the Commission in its investigations. The Commission recently expressed its intention to check allegations of collusion among power plant operators amidst recent outages in the Philippines that may have contributed to price increases in the retail electricity market. It also just recently announced its plans to form a task force that will look into previously-approved mergers and acquisitions. The Commission is also conducting public consultations on its proposed expedited merger review procedure for certain covered transactions.

Companies are slowly learning to live in a world where the Philippine Competition Act exists. They are more careful in entering into agreements and in engaging in activities that may be construed as a violation of the law. Industry and trade associations have also adjusted their rules of interaction lest they be subject to investigation by the Commission. Others, particularly those with frequent acquisitions, are becoming more adept in preparing notifications to the Commission.

"The Commission recently expressed its intention to check allegations of collusion among power plant operators amidst recent outages"

Considering the rapid development of competition law in the Philippines, fuelled by the Commission's efforts to evolve and to build its capability to better carry out its mandate, practitioners must ensure that they are able to keep abreast of all the developments occurring in this field in order to keep up. As many businesses in the Philippines still remain unfamiliar with competition law, they rely heavily on lawyers to guide them navigate the complexities of the Philippine Competition Act. Failure by practitioners to update themselves on advances in this field may prove detrimental and costly to their clients. The state of competition law in the Philippines will continue to grow, and practitioners must grow alongside it.



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Merger clearance matters in the UAE

Despite the limited number of filings and the dearth of decisions, parties conducting M&A in or from the UAE should consider the impact of the competition regime.

By Danielle Lobo and Abdus Samad, **Afridi & Angell**

The United Arab Emirates (UAE) promulgated legislation to specifically address the regulation of competition (being Federal Law 4 of 2012, or the Competition Law) several years ago but until recently, it has been the case that the requisite implementing regulations and processes were not in place. This is no longer the case. Not only have the much anticipated implementing regulations been issued, the UAE Ministry of Economy (the Ministry) (being the regulator in charge of administering the UAE competition regime) has now formed the required committee and issued the anticipated guidance and forms to allow concerned parties to make merger clearance submissions to the Ministry where required to do so pursuant to the Competition Law.

In this article, we highlight the key issues that those with market share in the UAE should consider in an M&A context.

IN WHAT INSTANCES IS A REQUEST REQUIRED TO BE FILED?

A merger clearance request is triggered (and must be filed) in cases where there is an "economic concentration", unless an exemption applies.

The concept of an economic concentration is defined in the Competition Law as: "any act resulting in a total or partial transfer (merger or acquisition) of property, usufruct rights, rights, stocks, shares or obligations from one establishment to another, empowering the establishment or a group of establishments to directly or indirectly control another establishment or another group of establishments".

The requirement to submit a merger clearance request is accordingly triggered in all cases where there is an economic concentration, irrespective of whether the parties to the concentration have a formal, licensed presence in the UAE. The test is an effect-based test (see article 3 of the Competition Law) — hence why foreign-to-foreign transactions must also be notified if they otherwise qualify for a filing.

Cabinet Resolution 13 of 2016 (the Ratios Resolution) further stipulates that merger clearance is required to be sought where the overall market share of the parties to the transaction exceeds 40 percent of the relevant market.

For the purposes of this analysis, the Ratios Resolution does not stipulate any conditions or formulae for how the threshold must be met. In other words, it does not appear to be relevant whether the parties to an economic concentration together or separately meet the threshold, so long as together (ie, after the concentration is complete), they would have a market share of at least 40 percent of the relevant market.

EXEMPTIONS AVAILABLE UNDER THE COMPETITION LAW

As noted above, there are a number of exemptions contained in the Competition Law. To the extent that one or more of the concerned parties to a concentration qualifies for an exemption, the obligation to seek merger clearance does not arise.

Sector-specific exemptions

The Competition Law contains the following exemptions:

1. telecommunications;
2. financial sector;
3. cultural activities (readable, audible and visual);
4. oil & gas;
5. production and delivery of pharmaceutical products;
6. postal services, including express mail service;

Danielle Lobo

7. activities relating to production, distribution and transportation of electricity and water;
8. activities on the treatment of sewerage, garbage disposal, hygiene and the like, in addition to supportive environmental services thereof;
9. sectors of land, marine or air transport, railway transport and services related thereto.

Businesses owned by the Federal or an Emirate level government

In addition, there is a carve-out for entities that are owned by the Federal or an Emirate level government. In order to qualify for this exemption the relevant business must be at least 50 percent owned by the Federal or an Emirate level government. It is yet to be seen whether indirect ownership qualifies.

It is important to note that the Ministry has discretion to interpret the scope of each exemption and, as such, if an exemption is to be relied upon, this is something that must be discussed with the Ministry on a case-by-case basis.

Small and medium-sized enterprises (SMEs)

The term "SME" has been defined in Cabinet Resolution 22 of 2016.

1. **Trade sector:**
   - Micro-sized: Less than or equal to five employees, or revenue of less than Dh3 million (US$820,000);
   - Small-sized: Between six and 50 employees; or annual revenue of less than Dh20 million;
   - Medium-sized: Between 51 and 200 employees or annual revenue of less than Dh200 million.
2. **Industry sector:**
   - Micro-sized: Less than or equal to nine employees; or revenue of less than Dh3 million;
   - Small-sized: Between 10 and 100 employees; or annual revenue of less than Dh50 million;
   - Medium-sized: Between 101 and 250 employees; or annual revenue of less than Dh250 million.

Abdus Samad

DEFINING THE MARKET

The first step in considering issues of competition is to understand what the "market" is. This is not a task to be taken lightly and will usually require substantial discussion with both counterparties to the transaction and their respective commercial teams. There is as yet no official guidance available as to how the market(s) concerned are to be defined. For assistance, principles of EU competition law can be considered though these principles are not of any authoritative value under UAE law.

Broadly, the EU Commission has provided the following guidance on market definition:

1. The relevant market combines the product market and the geographic market, defined as follows:
   - a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;
   - a relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

PRACTICAL EXPERIENCE WITH THE UAE MERGER CONTROL REGIME

Afridi & Angell has recently acted on a foreign-to-foreign merger in the rail and metro transport sector. We advised both parties to the proposed concentration on all aspects of the UAE merger control process and the submission of a clearance request in respect of the proposed transaction. Though the transaction was recently blocked by the EU Commission and therefore did not proceed, it was granted unconditional approval in the UAE by the Ministry.

Despite the limited number of filings submitted to the Ministry to date and the dearth of published decisions and guidance, the UAE competition regime is in force and is fully operational. Parties doing business in or from the UAE would be well advised to consider the impact of the competition regime on their existing businesses and on any acquisitions or disposals they propose to undertake.

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Antitrust enforcement review 2018: Investigations on monopoly cases

Recent cases in China show that enterprises need to actively comply with the law, pay close attention to legislation and promote employees' awareness of compliance.

Michael Gu

By Michael Gu, Sihui Sun and Grace Wu, **AnJie Law Firm**

Last year marked the 10th anniversary of the implementation of China's Anti-Monopoly Law. In the past 10 years, China's legal framework has become more sophisticated and antitrust enforcement has been more prudent and mature. China has become one of the three major antitrust jurisdictions along with the US and EU. In 2018, the antitrust enforcement functions of the three former antitrust agencies, ie the Ministry of Commerce, the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce, were consolidated into a newly established agency, the State Administration for Market Regulation (SAMR).

In 2018, the SAMR and local antitrust agencies strengthened their antitrust law enforcement. According to the conference held by the SAMR on December 27, 2018, the SAMR initiated 32 investigations on alleged monopoly agreements and abuse of market dominance in 2018. Among them, 15 cases were closed. Furthermore, the SAMR published seven penalty decisions and local antitrust agencies published 14 penalty decisions. The SAMR still focused on industries related to livelihood. The penalties touched a variety of industries (transportation, pharmaceutical, natural gas, electricity and furniture, etc). It is notable that in 2018, the SAMR imposed a fine of Rmb84 million (US$12.5m) in total on two branches of PetroChina for resale price maintenance. Also, the identification of competitors in the Shenzhen tally companies case demonstrates SAMR's strict approach and its zero tolerance for monopolistic behaviours.

> "The SAMR has initiated 32 investigations on alleged monopoly agreements and abuse of market dominance in 2018"

Sihui Sun

Two measures on administrative penalty procedures promulgated by the SAMR

On December 26, 2018, the SAMR promulgated the Interim Provisions on Administrative Penalty Procedures of the SAMR and the Interim Measures for Administrative Penalty Hearings of the SAMR. The two measures will come into effect on April 1, 2019.

Before the establishment of the SAMR, the former State Administration for Industry and Commerce, the General Administration of Quality Supervision, Inspection and Quarantine of China, the China Food and Drug Administration, and the Price Supervision and Inspection and Anti-Monopoly Bureau in the NDRC were responsible for their relevant administrative enforcement and also stipulated corresponding administrative penalty procedural regulations separately. The establishment of the SAMR integrates the functions of the former enforcement agencies. The SAMR further promulgates the two measures to unify their administrative penalty procedures. The two measures apply to the antitrust investigation and penalty procedures, and clarify the principle of case jurisdiction, rules for investigation and evidence collection, retrieval, production and preservation, and hearing procedures. Furthermore, the two measures regulate time limit for the case handling. After the implementation of the two measures, it is expected that the investigation, hearing and penalty procedures will be more transparent. Undertakings under investigations will be provided with detailed guidance on the relevant procedure.

> "In recent years, trade associations have frequently organised their members to implement monopoly agreements or other illegal acts in the name of industry self-discipline"

In addition, with the development of internet, the SAMR also adopts technical methods to upgrade law enforcement. The two measures provide the regulations of digital data collection and extraction, and electronic delivery in order to meet the practical need in the digital era.

Investigation and penalty spotlights

Although it is newly established, the SAMR diligently performed its duty to investigate and penalise monopolistic behaviours. In 2018, the SAMR and its local enforcement agencies published dozens of cases that have attracted media attention. The investigation and penalty highlights are summarised as follows:

1. **Trade associations in the spotlight**
   Trade associations remain the target of antitrust agencies. In 2018, six cases touched trade associations, including freight merchants' association, the pharmaceutical purchasing alliance, elevator association, driver training association and gas association, etc. Trade associations should be a role model for members and encourage them to comply with anti-monopoly laws and regulations and promote awareness of fair competition. However, in recent years, trade associations have frequently organised their members to implement monopoly agreements or other illegal acts in the name of industry self-discipline. On the other hand, enterprises with a large market share may also take advantage of the trade associations to force or direct other members to reach horizontal monopoly agreements.

2. **Equal treatment, same as the private companies — PetroChina receiving the highest penalty in 2018**
   On January 26, 2018, the NDRC penalised PetroChina Daqing Oilfield Natural Gas and PetroChina Natural Gas Sales Daqing for their maintenance of a minimum resale price on their downstream distributors for gas sold to consumers. According to the penalty decision, the two PetroChina branches had been hit with a total fine of Rmb84.06 million, accounting for 6 percent of their respective revenues for the previous year. The case is a typical monopolistic case involving resale price maintenance. It can be seen that a 6 percent fine set by the SAMR is much higher compared with the previous vertical monopolistic cases. Additionally, the entities that were penalised are branches of PetroChina, a centrally administered state-owned enterprise. And the industry involved in this case is a natural monopoly industry.

The case implies that the SAMR is expected to be more aggressive in its antitrust enforcement. Whether a company is a foreign company or state-owned, and whether the related industry is or is not a special industry, if a company violates the anti-monopoly law, it should expect to be scrutinised by the SAMR.

3. Crackdowns on APIs

At the end of 2018, the SAMR successively published two cases in connection with active pharmaceutical ingredients (APIs). One is with respect to price collusion while the other one is related to abuse of market dominance. In the glacial acetic acid APIs cartel case, three glacial acetic acid APIs enterprises reached a horizontal monopoly agreement to collectively increase the price of APIs. The price of glacial acetic acid APIs increased from Rmb9.3 per kilo to almost Rmb33 per kilo. Furthermore, in the chlorphenamine APIs abuse case, Hunan Erkang Pharmaceutical Management was penalised by the SAMR for abuse of market dominance. By virtue of holding the import right of chlorphenamine APIs, the enterprise conducted many wrongdoings including implementation of unfair prices, tying and bundling, and refusal to deal, etc.

The antitrust enforcement authorities always keep an eye on monopolistic behaviours in APIs. China's antitrust enforcement authority has concluded eight cases involving 20 enterprises. Apart from reaching and implementing monopoly agreement, API enterprises are also penalised for their abuse of market dominance. The manufacturers and distributors of APIs are more likely to be identified as holding a dominant market position for the reasons of: (1) serious dependence on upstream API manufacturers by the downstream enterprises since there were only a handful API manufacturers in the relevant market; and (2) the very strict certification system for the production of APIs. However, the Anti-Monopoly Law does not prohibit the undertakings from holding a dominant position, rather it prohibits undertakings from abusing its dominant position to restrict competition. The legal risks associated with the following behaviours in the API industry are relatively high: (1) refusal to deal; (2) imposing unfair price; (3) tying and bundling; and (4) imposing unreasonable trading conditions, etc.

4. New identification on competitors — Shenzhen tally companies case

On July 20, 2018, the SAMR published a decision fining two Shenzhen tally companies a total of Rmb3,163,108 for entering into a horizontal monopoly agreement. According to the decision, China United Tally Shenzhen and China Ocean Shipping Tally Shenzhen reached and implemented an agreement to divide sales and service areas for the tallying market in the western area of the Port of Shenzhen. In addition, the two companies raised tallying prices from May 2013 to August 2016.

"Whether a company is a foreign company or state-owned, and whether the related industry is or is not a special industry, if a company violates the anti-monopoly law, it should expect to be scrutinised by the SAMR"

The notable feature of this case lies in the identification of the companies as independent competitors, for the two companies share the same shareholder, who owns a 50 percent share in the two companies respectively. First, the SAMR found that the companies' ownership structures did not negate their competitive relationship. Although the shareholder owned a 50 percent interest in both companies, it performed different roles for each. The shareholder was the controlling shareholder in one tallying company while it did not hold a controlling position in the other tallying company. Second, the SAMR found that the two companies had been independently operated and managed. In addition, the SAMR relied on the companies' articles of association and inquiry records of relevant staff to prove that there had been a competitive relationship between the two tallying companies. However, such detailed information was not disclosed in the SAMR's decision.

Grace Wu

During the investigation, the two companies argued that they were not competitors since they were both affiliates within the same group. However, the SAMR dismissed this argument for a number of reasons. It noted that according to the relevant provision regulating port management issued by the State Council and the Ministry of Transport: (1) port tally companies should introduce a competition mechanism to the market; and (2) any two tally companies in one port cannot be controlled by the same investment entity.

It seems that the SAMR adopts a strict view on the identification of competitors. Normally, if one shareholder owns 50 percent of the shares respectively in two companies, the two companies will be regarded as jointly controlled by the same shareholder (ie, the same entity). Moreover, the fact that two companies are actually competing with each other does not necessarily mean that they constitute competitors in the sense of the Anti-Monopoly Law, for the reason that different subsidiaries in the same group can also compete with each other.

This is one of the first cases to be announced by the newly established SAMR and may therefore indicate its attitude towards certain industries and behaviours. In particular, the way in which the competitors in this case were identified could raise new compliance challenges for companies operating business in China.

> "The fact that two companies are actually competing with each other does not necessarily mean that they constitute competitors in the sense of the Anti-Monopoly Law"

5. Penalties on individuals — Guangzhou Toyota dealer obstructing investigation case

In the Guangzhou Toyota's dealer obstructing investigation case, individuals were penalised by Guangdong Development and Reform Commission (Guangdong DRC). In this case, when the Guangdong DRC investigated the Guangzhou Toyota dealer, its legal representative and general manager not only unplugged the USB of the officers that was used for evidence collection and storage, but also refused to return it as requested. The two involved individuals claimed the enforcement agents had no power to investigate and insulted the enforcement officers. The Guangdong DRC imposed Rmb20,000 of an aggregated fine on the two individuals involved.

Before this case, there are several obstructing investigation cases, eg Sunyard refusing to cooperate with an investigation and Longshunhe obstructing an antitrust investigation, etc. However, the Toyota dealer case is the first involving penalty of individuals rather than enterprises, being punished for not cooperating with investigation. In accordance with Article 42 of the Anti-Monopoly Law, the undertakings, interested parties or other entities or individuals shall cooperate during the antitrust authorities' investigation and shall not refuse or obstruct the investigation. Furthermore, according to Article 52 of the Anti-Monopoly Law, a fine of up to Rmb100,000 may be imposed on an individual or up to Rmb1 million on an entity for not cooperating with investigation. The Toyota dealer case shows the serious attitude of antitrust authorities towards investigation. Particularly after the establishment of the SAMR in 2018, the intensity of anti-monopoly enforcement has increased, thus enterprises should enhance employees' awareness of antitrust law compliance. When it comes to antitrust investigations, enterprises are encouraged to ensure that employees do not blindly 'plead guilty'. On the other hand, employees should actively react to the investigation and cooperate with investigation pursuant to the law.

6. Obtaining termination of investigation by active rectification

In 2018, the SAMR and local enforcement agencies announced five cases in which the investigation was suspended or terminated, accounting for 24 percent of the total announced cases. The termination of investigated cases reflects the importance of cooperation and active rectification by the relevant enterprises under investigation. If the enterprise actively cooperates with the

> "In 2019, we expect more guidelines will be promulgated that will promote anti-monopoly law enforcement and promote the establishment and development of a relatively mature and complete anti-monopoly legal framework'"

agency, the enforcement agency may issue a Decision on Suspension of Investigation based on the nature and duration of the violation, the assistance with the investigation and rectification commitment submitted by the enterprise under the investigation. After the rectification, the enforcement agency has the right to decide to terminate the investigation according to the effect of rectification. After obtaining the Decision on Termination, the enterprise would not be punished by the enforcement agency for alleged violations. Therefore, the enterprise that did implement a monopoly conduct could apply for suspension or termination of the investigation by active cooperation during the investigation and submitting rectification commitment and implementing rectification measures.

Conclusion and outlook

In 2018, antitrust authority enforcement concentrated on fields concerning people's livelihoods — 18 out of 21 published cases were related to the livelihood area. Another focus was trade associations, with six announced cases related to trade associations. In addition, the pharmaceutical industry also drew the attention of the antitrust enforcement agencies. The SAMR has closed two cases relating to APIs enterprises in late 2018.

On December 27, 2018, the SAMR held a national market regulation conference. Zhang Mao, the director of the SAMR, summarised the work of 2018 and the priorities for the year of 2019, emphasising that competition enforcement would be strengthened in 2019. He stated that enforcement will continually focus on industries related to livelihood such as public welfare, pharmaceuticals, building materials and daily consumer goods. In addition, enforcement authorities will strengthen the investigation on monopoly agreement and abuse of dominant position. In terms of legislation, Zhang Mao pointed out that the revision progress of the Anti-Monopoly Law will speed up to further strengthen the rule of law. In 2019, we expect more guidelines will be promulgated that will promote anti-monopoly law enforcement and promote the establishment and development of a relatively mature and complete anti-monopoly legal framework.

Enterprises are advised to actively comply with anti-monopoly law, pay close attention to legislation and promote the awareness of compliance by employees. In particular, companies in the industries that the SAMR pays close attention to — ie, public welfare, APIs, building materials and daily consumer goods — should check their anti-monopoly compliance. When being investigated, the enterprises should actively cooperate with the investigation and actively submit rectification plans and relevant evidence in order to obtain termination of the investigation or reduced penalty.

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A 'return' to private practice

It was once thought that a move in-house from private practice was a journey down a one-way street, but there has been a noticeable increase in those travelling in the opposite direction during the past few years. What is more, these days, some of those moving to private practice have actually been in-house for their whole careers. In-House Community director **Tim Gilkison** spoke to three Asia-based lawyers about their return to private practice, and how to make a successful transition.

"My time in-house was great and I really feel it enriched my experience as a lawyer," says David Lawrence, a partner at Thai firm Pisut & Partners. So why, after just a few years in-house, did he return to private practice?

"The initial project I was headhunted to undertake was the perfect fit for my skill set, and the compensation package was attractive. Whilst at Sri Trang Agro-Industry, the two major projects I worked on were separating from a long-term joint venture partner and subsequently supporting the rapid global expansion of the medical devices business. As our joint venture partner was responsible for all regulatory affairs, I was able to build that team from the ground up. [But] eventually, I saw that my opportunities to add significant value to the business were becoming fewer and further between, and I also missed the pace, challenge and diversity of problems you face in private practice."

> "Eventually I realised that the knowledge, experience and insights I had gained as an in-house lawyer could be of considerable value to entities other than my corporate employer"

When Danny Bunyi joined Divina Law in Manila, where he is a senior partner, it was after almost 30 years as in-house counsel with several major domestic and foreign banks: "What originally attracted me to be an in-house counsel was the predictability of the working hours and the regularity of the compensation. [Eventually] I realised that the knowledge, experience and insights I had gained as an in-house lawyer could be of considerable value to entities other than my corporate employer, and I felt that I needed more leeway to be able to share my expertise to a wider clientele, and in a working environment conducive to such sharing. I had also established a rather wide network of contacts which I knew [could be] potential clients."

For Michelle Gon, a partner at McDermott Will & Emery based in Shanghai, the move back to private practice was also a move back across the world: "From 1986, I had been in-house with McDonald's international legal department headquartered in Illinois in the US, but in 1989 I was invited by Baker & McKenzie [now Baker McKenzie] Taipei to join the firm as a senior associate. I had lived in US for about 10 years and decided to return to the Far East due to the anticipated economic growth in Asia."

Gon would return for another stint in-house when invited to join Semiconductor Manufacturing International Corporation headquartered in Shanghai as its chief legal officer in 2002, but she rejoined Bakers in Shanghai in late 2005. "After working in-house again for a few years, I decided to

return to private practice for its flexibility."

So what are the keys to a successful move from in-house to private practice? Well, it helps to keep in touch with the wider legal community while you're in-house. "I have been overwhelmed by the amount of support I received from my contacts, colleagues and former clients," says Lawrence. "Had I let my network degrade and connections become distant, I don't think the transition would have been quite as smooth, and I would have been a significant financial drag on my partners. In-house lawyers don't have a book so you better have a network."

Letting your clients know you have stood in their shoes can also be an asset when returning to a law firm. "The experience gained in-house may be very helpful in attracting corporate clients," says Gon. "In-house counsel generally feel more comfortable dealing with someone who also has in-house experience."

For Bunyi, the key to the transition is to remember that "since you are now an external counsel, your main role is to support the in-house counsel", and considering the many external lawyers that an in-house counsel can choose from "they will go to you not just because they are satisfied with the soundness or comprehensiveness of the legal work you provide, but also with your level of responsiveness in servicing their needs".

So does in-house experience really improve you as an external counsel?

"During my time in-house, I became extremely close to our sales and marketing teams, while working closely with top management," says Lawrence. "When I needed something, these were the people I had to convince, and they needed me to speak in commercial terms. I think this made me a better external counsel because I can draft proposals that help my counterpart on the inside get the resources they need. I also know what it's like to need an answer but not always have the budget or willingness to go through the engagement process to pay to receive it, so I take a longer-term view of my corporate clients rather than being too focused on maximising profitability for each individual matter."

Bunyi adds: "What I was able to bring from my corporate experience was knowing what an in-house counsel client is looking for in a good external counsel, understanding the dynamics of the relationship of the in-house counsel with senior management and the board of directors, and successfully striking the balance to provide

About the returnees

Danny Bunyi
Senior partner, Divina Law

Bunyi is an In-House Community Commended External Counsel of the Year, 2019. His practice focuses on corporate and special projects, banking and finance, and trust banking and investment management. His professional background includes senior in-house roles at the Development Bank of the Philippines, Robinsons Bank, Standard Chartered and the Philippine Commercial International Bank. He has also lectured at the John Gokongwei School of Management, Ateneo de Manila University, and the Trust Institute Foundation of the Philippines.

Michelle Gon
Partner, McDermott Will & Emery

Gon is a US-qualified partner with McDermott Will & Emery in the firm's strategic alliance office, MWE China Law Offices, in Shanghai. Her practice focuses on compliance and regulatory matters, including anti-corruption, unfair competition, anti-monopoly, anti-fraud, and trade sanction representations. Prior to joining the firm, she was a principal at Baker & McKenzie Shanghai from 2005 to 2015. Her in-house experience includes senior roles at Semiconductor Manufacturing International (Shanghai) and McDonald's. She lectures at the Tsing Hua University for its international EMBA programmes, including TIEMBA.

David Lawrence
Partner, Pisut & Partners

Lawrence is a US-qualified lawyer who has been working in Thailand since 2010. He joined Pisut & Partners in January 2019, where he serves his corporate, SME and personal clients over a wide range of industries, regions and matters. He previously worked in a senior in-house role at Sri Trang Agro-Industry and, before that, was a senior consultant for Tilleke & Gibbins, where he focused on complex disputes and led the firm's regional hotels and hospitality practice group. Prior to law school, he was a toxic gas research and development chemist at Matheson Tri-Gas, researching gas purification systems and materials for the semiconductor industry, and a research assistant at the US Environmental Protection Agency in Colorado.

sufficient legal protection to the corporation without unnecessarily stifling its business. Armed with this insight and experience, I am a better external counsel, as my … services can be more holistic in meeting, and often exceeding the needs of not just the in-house counsel but of his or her institution as well."

Gon concurs: "An experienced in-house counsel knows the needs of their company and he or she has to be a team player in assisting in the company's growth. When I was in-house, I treated my colleagues as my clients, and my team and I provided timely assistance to them. I now naturally understand more about the needs of [the firm's] clients. In that way, an external attorney with in-house experience will likely be more practical and have a wider focus on their clients' needs."

Given their experience, what would these former in-house counsel like to see change, if anything, about the way law firms generally operate? According to Gon, it's important to develop a "longer-term relationship" with clients: "Do not overdo a simple matter simply because the firm is not very busy, and do not underestimate the needs of the client simply because it entrusts you with a smaller matter during a period when your own schedule is hectic."

"I would not necessarily change the structure or operations of a law firm, as these are usually based on the individual firm's experience, culture and clientele," says Bunyi, "but [it's important to] put in place protocols and procedures to ensure we communicate to our clients the value of our relationship with them — simple things such as ensuring emails and SMS messages are properly replied to, or being committed to deadlines, etc."

What aspects of being in-house do our lawyers miss? Universally, they were happy with the lack of timesheets and need to chase client payments. "I also miss the depth of business knowledge we rarely get as external counsel," says Lawrence. "In-house counsel are truly inside the business. Sometimes fascinating, often frustrating but always eye-opening."

However, he is happy to leave behind the experience of being a cost centre. "In-house teams are viewed by management on a spectrum from 'pure cost' through 'value add' to 'strategic asset' — working in a low-margin, mature and competitive industry pushed me a bit further to the 'pure cost' end of the spectrum than where I was used to or comfortable being placed in the eyes of management."

Bunyi says he misses the regular working hours, "but I was happy to leave behind the more rigid corporate structure and limited earning capacity".

With the in-house role evolving and the changing relationship between in-house and external counsel, is moving from one to the other getting easier or more difficult? Lawrence says: "In-house lawyers now have so many tools at their disposal that sometimes obviate the need for external counsel. But in nearly all cases their reliance on external counsel for information is reduced and they come into discussions well-informed with pointed questions external counsel need to be prepared to answer. So rather than a question of fluidity, I think that in-house counsel are necessarily expanding their roles, not only because of new tools, but also because of downward pressures on external legal spend. I try to position myself to be viewed as a part of the team, helping the in-house team to be responsive to internal needs and deadlines, without them having to rework our work product to present to their businesses."

> "Most private practice lawyers would benefit from some time as an in-house counsel, however short it may be"

In Bunyi's experience, "over the last decade I have seen more private practitioners, especially those in the 30-40 years age range, moving to corporate practice and very few in-house lawyers moving to private practice. I believe it is because most corporations, for cost-efficiency purposes, are now more inclined to handle their legal matters in-house. Likewise, with the advent of compliance and governance regulations, most in-house counsel have expanded roles," and because of this "the services rendered by external counsel have become more and more critical for their in-house clients."

"A proper in-house counsel position can offer very valuable experience," concludes Gon. Bunyi adds: "I believe most private practice lawyers would benefit from some time as an in-house counsel, however short it may be, as it provides you with a better insight on how to meet the needs of in-house clients, and the interplay of law and business within a company."

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Bridging the Thai-Chinese cultural divide

跨越中泰文化差异：寻找最佳法律合作伙伴

By Mayuree Sapsutthiporn, **Kudun & Partners**

文：林小丁（Mayuree Sapsutthiporn），
泰国 Kudun & Partners 律师事务所

China will soon become the leading foreign investor in Thailand, but there are still significant challenges for the unwary.

Mayuree Sapsutthiporn

Moving to Thailand from China with my parents when I was only 13 years of age brought major personal challenges, but one of the most serious problems faced was when my parents suffered a major investment loss through a lack of understanding of Thai law. This early experience left such a deep impression that I was determined to study law and help others from China navigate Thailand's legal minefield.

Fast forward a few decades and my dream has come true as I now head the dedicated China business unit at Kudun & Partners, the first law firm in Thailand to create a specialised unit focused on China.

Continued on page 34 ▶▶▶

当她10岁随父母从中国移居泰国时，看到很多同时期的中国移民因为对泰国法律缺乏了解，投资受到重大损失。自此她矢志学习法律，立志帮助中国新移民跨越泰国的法律雷区，在泰国安居乐业。

经过多年的努力与奋斗，她的理想变成了现实。现在的林小丁已经成为泰国知名律师事务所Kudun & Partners中国区事务主任、合伙人、律师。Kudun & Partners是泰国首家设立独立中国业务部门的律师事务所。

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Approved PRC Investments in Thailand	2018 (Jan-Dec)		2017 (Jan-Dec)	
	# of projects	Investment Unit: Million baht	# of projects	Investment Unit: Million baht
Agricultural products	7	722	9	1,388
Minerals and ceramics	4	3,132	4	838
Light industries/textiles	3	529	4	2,944
Metal products and machinery	27	17,944	16	1,296
Electric and electronic products	21	760	13	417
Chemicals and paper	15	2,632	5	331
Services	20	7,091	24	4,155
Total	**97**	**32,811**	**75**	**11,371**

Source: Board of Investment of Thailand

China's increasing foothold in Thailand

China will slowly surpass Japan to become the leading foreign investor in Thailand. Foreign investment applications submitted and approved through the Board of Investment (BOI) from the PRC have nearly tripled from 2017 to involve investments of over US$1 billion in 2018 and the scope of industries continues to broaden.

While metal products and machinery continue to be the primary industries in which Chinese firms invest in Thailand, the scope has expanded to include several other industries such as chemicals and paper, electronics as well as services (including retail services, hotels and condominiums) all of which are showing year-on-year growth.

Although Japan remains the largest investor in Thailand, 2018 revealed proportionately more aggressive growth from China than from Japan. Deputy Prime Minister Somkid Jatusripitak noted this fact in a seminar held by the BOI on March 4, 2019:

"With the advantage of geography and infrastructure, Thailand has become a centre for the CLMVT region and together with the initiation of the EEC (Eastern Economic Corridor) has resulted in an increase in foreign investment in Thailand. Especially in the EEC, foreign investments have increased by more than 100 percent in the past few years. Chinese investors will definitely represent our greatest opportunity given their Belt & Road policy to encourage outbound investment by Chinese."[1]

The rebound in investment partially reflects the dramatic dip in overall China outbound investment as a result of the new PRC governmental regulations classifying investment as "encouraged, restricted or prohibited". Restricted and prohibited investments are those considered to be non-strategic and potentially used as a means to avoid capital controls. However, the turnaround in 2018 China investment in Thailand reflects an increase in the type which is "encouraged" and which forms part of the overall Belt & Road initiative.

In 2015, the PRC's Ministry of Commerce approved the establishment of the Chinese Rayong Industrial Zone in the EEC and there are now over 100 companies operating there. However, a growing proportion of Chinese investment is taking place beyond this area and involves more than the traditional manufacturing-based industries.

During the recent session of the 6th meeting of the Joint Committee on Trade, Investment and Economic Cooperation between Thailand and China, Deputy Prime Minister Somkid noted that Chinese investors are interested in new technology and innovation in the EEC locations, while State Councillor Wang Yong said that investors are interested in electric vehicles, smart logistics, digital infrastructure, education, energy, tourism and satellites.[2]

Thailand's BOI has launched the Thailand 4.0 Project. While many projects and proposed partnerships are still in the planning stages, the emphasis is on development of technology-based manufacturing and an innovation-driven economy, especially in the five areas of biofuels and bio chemicals, digital economy, medical hub, automation and robotics as well as aviation and logistics. With household name Alibaba making significant long-term financial commitments to Thailand, the country is clearly open for Chinese business.

Key difficulties faced by Chinese firms looking to invest in Thailand

Despite substantial growth in Chinese investment, certain Chinese companies have failed to capitalise on opportunities with several falling prey to investment failures. The key challenges which Chinese clients typically face in Thailand, according to many of our esteemed clients at Kudun & Partners, include the following:

1. **Uncertainty as to whether Thailand is the best destination for them to make the investment.** As Thailand vies with many other potential locations in

Southeast Asia and globally, how can they be sure that the combination of issues such as tax exemptions, foreign exchange and capital controls, transfer pricing and logistics (among others) make Thailand the most suitable destination for investments. Our clients say they prefer to find a single point of legal contact who they can trust to coordinate the necessary resources (whether inside or outside of our law firm) to provide them comprehensive advice on these issues.

2. **Inability to find Thai lawyers who understand Chinese culture and their unique business needs.** Jun Jie Sun, chief executive of Jetion Solar, which makes substantial investments in Thailand,[3] comments: "It is rare to find lawyers who can cross the cultural divide between Thais and Chinese, and it is dangerous to rely simply on translation of Thai legal documents. Chinese lawyers based in Thailand are available to handle some of our needs but we don't want to simply hire a translator. We seek to find a professional and experienced lawyer who can address legal issues from both angles and who truly has our best interests as a client in mind."
3. **Inability of Chinese lawyers to represent Chinese clients in Thai courts in the case of litigation.** According to Daniel Chernov, managing partner of Siam ADR[4], "The Lawyers Act defines a lawyer as one who pleads cases in court and does not deal with lawyers working as 'solicitors' or legal consultants. In any case, the work permit forbids foreign lawyers from engaging in legal practice. Foreign counsel can appear for their clients in arbitration proceedings in Thailand, provided that such proceedings do not involve Thai law and the awards will not be enforced in Thailand."
4. **Lack of understanding of required contract protection mechanisms.** Chinese clients have not been fully and properly advised on investment structure and the agreements required to protect their investments in Thailand. This oversight has led to many failed investments in the past. Recently a well-known Chinese real estate company entered into a joint venture with a local partner in Thailand. Given good relations at first, they did not enter into a shareholders' agreement therefore all rights and duties of the parties had not been clearly determined and properly identified. As a result, once the relationship soured, they were unable to resolve all disputes and disagreements arising out of the lack of understanding of required contract protection mechanisms.
5. **Thai lawyers lacking an understanding of Chinese government regulations on overseas investments, including tax, capital control, transfer pricing and filing requirements.** Our clients have complained that although they have identified Thai lawyers who are fluent in Mandarin Chinese, they typically don't have a thorough understanding of the PRC compliance issues.

While Thailand's internal legal framework and enforcement are becoming increasingly foreign-investment friendly and legal recourse and litigation are possible, my main advice to Chinese firms seeking representation in Thailand is to do a thorough background search and research on potential law firm candidates through various secondary sources and impartial parties such as Thailand-China business associations and chambers of commerce.

For further explanation on how Kudun & Partners have addressed each of the typical challenges outlined above, please don't hesitate to consult Mayuree.

ABOUT KUDUN & PARTNERS CHINA PRACTICE

Based on an increasingly growing clientele base from China, Kudun & Partners Limited (KAP) is the first in Thailand to have launched a premium dedicated business unit to serve the unique needs of Chinese companies with existing operations or interest in expansion into Thailand.

With experts in capital markets, M&A, tax, real estate and litigation, we draw on the specific expertise as the need arises to provide a full service one-stop solution to ensure our Chinese clients have the greatest chance for successful ventures in Thailand.

Endnotes:

1. *Deputy Prime Minister, H.E. Somkid Jatusripitak's presentation on Thailand Investment Year : Transforming Challenges into Opportunities in a seminar "Thailand Investment Year What's New?" held by the Board of Investment of Thailand on March 4, 2019.*
2. *"Growing interest from China in Thailand's EEC", September 3, 2018 by Suwatchai Songwanich, Chief Executive Officer, Bangkok Bank (China).*
3. *Jetion Solar, a subsidiary of China National Building Material Group Co, Ltd. (CNBM) a Chinese Stated-Owned Enterprise is a leading manufacturer of high efficiency crystalline silicon solar cells and high-performance solar components development and production. They have expanded their business internationally in the U.K., Italy and Thailand. Mr Sun shares considerable praise for Mayuree Sapsutthiporn: "She truly understands what I, as a client, need and what is best for me as her client. She is a real problem solver and takes mission impossible assignments and pulls something extraordinary together." He also adds that "She has strong tactical knowledge and knows her stuff, especially with regards to how to close deals and is commercially proficient. She is really solution-driven and what is most important is that she puts herself in our shoes when providing advice."*
4. *"Democracy Blooms? - Thailand's legal market" - excerpt from cover story January 23, 2019 in the Asia Business Law Journal.*

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已获(BOI)批准的中资泰国投资按产业构成统计	2018年1 - 12月		2017年1 - 12月	
	项目数量	投资额 (百万泰铢)	项目数量	投资额 (百万泰铢)
农产品	7	722	9	1,388
矿业及陶瓷生产	4	3,132	4	838
轻工 / 纺织产品	3	529	4	2,944
金属制品与机械	27	17,944	16	1,296
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服务业	20	7,091	24	4,155
总计	**97**	**32,811**	**75**	**11,371**

资料来源：泰国投资促进委员会(BOI)

中国在泰国的立足点愈加稳固

中国将逐渐超越日本，成为泰国最大的外国投资来源国。 2018年，向泰国投资促进委员会(BOI) 提交申请并获批准的中国企业投资超过10亿美元，较2017年增长近两倍，而且其投资行业范围在不断快速拓展。

虽然金属产品和机械仍然是中国公司在泰国投资的主要行业，但其范围已扩大到包括化学品和纸张、电子产品以及服务（包括零售服务、酒店和公寓）在内的其他几个行业。而且呈现出逐年增长的趋势。

尽管日本仍然是泰国最大的投资来源国，但2018年中国（中国大陆）的增长比来自日本的增长更为强劲。泰国副总理颂琪（Deputy Prime Minister, H.E. Somkid Jatusripitak）在2019年3月4日出席BOI举办的研讨会上对这一事实作出了精辟的解释：

“凭藉地理和基础设施的优势，泰国已成为CLMVT区域的中心，同时泰国东部经济走廊（EEC）业已启动，其共同作用的结果是泰国的外国投资增加。特别是EEC地区，过去几年中外国投资增长了100%以上。鉴于中国“一带一路”的倡议鼓励中国企业开展境外投资，因此中国投资者将毫无疑问是我们最大的机会。”[1]

2015年，中华人民共和国商务部批准在泰国EEC地区设立中国罗勇工业区，目前仅在该地区经营的企业就超过100家。然而，越来越多的中国投资却出现在这一领域之外，而且涉及的行业超过了传统的以制造业为基础的行业。

在最近的举行的“第6届中泰投资与经济合作贸易联委会”上，泰国副总理阁下颂琪指出，中国投资者对泰国EEC地区内的新技术和创新行业甚感兴趣，而中国国务委员王勇也强调说，中国投资者对新一代汽车、智能物流、数字基础设施、教育、能源、旅游、卫星等项目十分感兴趣。[2]

现今，泰国BOI推出了泰国4.0项目。虽然许多项目和拟议的伙伴关系仍处于规划阶段，但其重点是发展以技术为基础的制造业和创新驱动的经济，特别是在生物燃料和生物化学品、数字经济、医疗中心、自动化和机器人以及航空和物流五个领域。家喻户晓的阿里巴巴对泰国做出了重大的长期投资计划，泰国显然已经做好了对中国企业开放的准备。

中国企业投资泰国面临的主要困难

尽管中国对泰国的投资整体大幅增长，但有些中国企业却未能抓住机遇，有几家企业甚至沦为投资失败的牺牲品。 Kudun & Partners律师事务所根据多年经验对中国企业归纳在泰国投资通常面临的主要问题：

1. **投资者对泰国是否是其投资的最佳目的地心存疑虑。**由于泰国与东南亚乃至全球许多潜在的投资目的地存在激烈的竞争，因而他们不确定如何能确保免税、外汇和资本管制、转让定价和物流（以及其它）等一系列问题的结合，使泰国成为最适合的投资目的地。我们的客户表示，他们更愿意找一个他们信赖的单点法律联系人，来协调必要的资源（无论是在我们的律师事务所内部还是外部）。就这些问题我们会向他们提供全方位的建议。
2. **无法找到了解中国文化及其独特业务需求的泰国律师。**在泰国进行大量投资的中建材浚鑫科技(泰国)有限公司首席执行官[3] 评论道：“很难找到能够跨越泰国与中国两国文化差异的律师，而仅依靠翻译的泰国法律文件由于语言理解问题存在极大的风险。虽然身在泰国的一些中国律师可以满足我们的一些需求，但是毕竟不熟悉泰国法律。我们希望找到一位既具有专业素养有丰富经验的律师而且能够从中泰两国思维角度去解决法律问题，并真正考虑到我们客户的最大利益。林小丁律师利用中英泰三语优势，以及深谙中泰两国的处理思维方式已成功为多家大型中资企业在泰投

资保驾护航！

3. **中国律师无法在诉讼案件中，在泰国法庭代表中国客户进行诉讼。** Siam ADR的执行合伙人丹尼尔 • 切尔诺夫（Daniel Chernov）[4] 说:“《律师法》将律师定义为在法庭上为案件辩护的人，而不是作为‘律师’或法律顾问与律师打交道的人。无论如何，泰国的‘工作许可证’制度禁止外国律师在泰国从事法律业务。外国律师可以代表其客户出席在泰国进行的仲裁程序，但前提是此类仲裁程序不涉及泰国法律，且仲裁裁决也不会在泰国执行。”
4. **缺乏对所需合同保护机制的理解。**中国客户在投资结构和保护其在泰国投资所需的协议方面尚未得到充分和适当的建议，这种疏忽导致了过去许多投资案例的失败。最近，一家知名的中国房地产公司与泰国的当地合作伙伴建立了合资企业。由于双方最初有良好的关系，他们没有签订股东协议，因此各方的所有权利和义务都没有得到适当和明确的确定。因此，一旦双方关系恶化，他们就无法解决因缺乏对所需合同保护机制的理解而产生的所有争端和分歧。
5. **泰国律师对中国政府有关海外投资的规定（包括税收、资本控制、转让定价和备案要求等）缺乏了解。**我们的客户曾抱怨说，尽管他们已经找到了精通中文的泰国律师，但他们通常对泰国的合规要求并没有透彻的理解。

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有关Kudun & Partners律师事务所如何应对上述每个典型挑战的进一步说明，欢迎您随时垂询林小丁（Ms. Mayuree）律师。

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林小丁（英文名：Ms. Mayuree Sapsutthiporn）现任泰国 Kudun & Partners 律师事务所中国区事务主任、合伙人、律师。

林小丁律师出生在中国，十岁随父母移居泰国，现是泰国公民。她精通中文、英语、泰语三国语言。先后以优异成绩毕业于泰国朱拉隆功大学法学系（LL.B）、美国南加州大学古尔德法学院（LL.M），拥有法学硕士学位。林律师在10多年的律师执业工作中积累了丰富的经验，在为客户提供泰国海外投资、监管和许可要求、合资企业和战略联盟的形成以及商业合同和协议谈判方面拥有独特优势。此外，她还积极参与为房地产开发商提供谘询和构建替代金融工具，包括房地产投资信托（REITs）和基础设施基金等方面的法律服务。

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资料来源：

1. 泰国副总理颂奇 • 贾杜斯皮塔（Deputy Prime Minister, HE Somkid Jatusripitak）阁下在“泰国投资促进委员会”2019年3月19日举办的“泰国投资年：化挑战为机遇”研讨会上的讲话，题目是：“泰国投资年有哪些新动向？”
2. “中国投资者对泰国EEC的兴趣日益浓厚”，2018年9月3日，曼谷银行（中国）首席执行官Suwatchai Songwanich的讲话。
3. 中建材浚鑫科技有限公司是一家中国国有企业的子公司，是高效晶矽太阳能电池和高性能太阳能组件开发生产的领先制造商。他们已在英国、意大利和泰国拓展了国际业务。中建材浚鑫科技有限公司首席执行官对林小丁律师大加赞赏：“作为客户，她真正了解我们需要什么；作为她的客户，对我们来说她是最佳选择。她是一个真正的问题解决者，她接受不可能完成的任务，并把一些不寻常的事情整合在一起，最终达到成功。”他还补充说，“她有很强的战术知识，知道最好的处理方式，尤其是在如何达成交易方面，而且精通商业。她是真正的解决方案驱动者，最重要的是，她在提供建议时能设身处地地为我们著想。”
4. “民主绽放？ - 泰国的法律市场”- 摘自2019年1月23日“亚洲商业法杂志”的封面故事。

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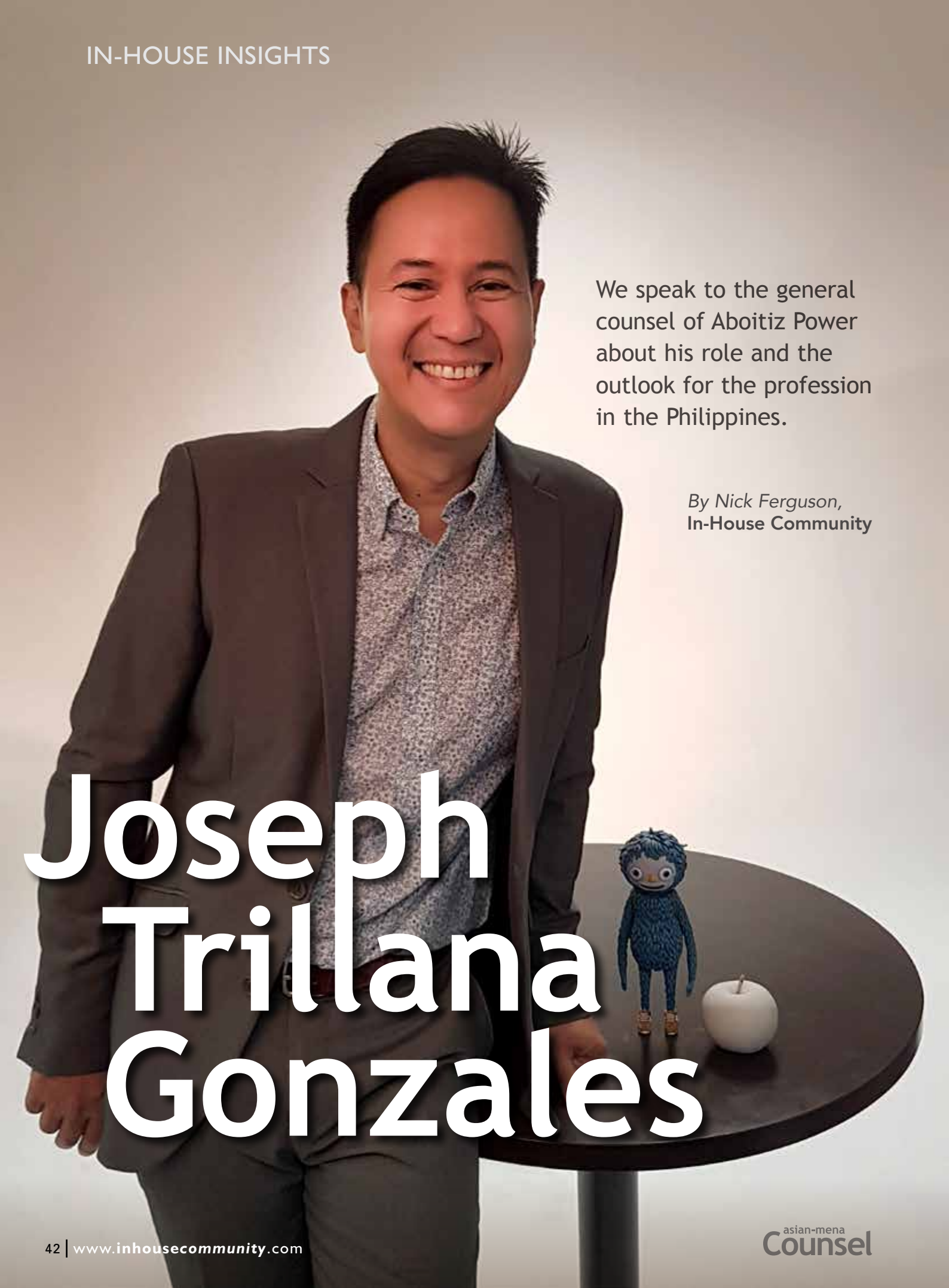


Joseph Trillana Gonzales

We speak to the general counsel of Aboitiz Power about his role and the outlook for the profession in the Philippines.

By Nick Ferguson,
In-House Community

Can you describe your professional background and your current role?
I'm primarily a lawyer by profession, but I have dabbled in both writing — opinion column and lifestyle articles — and teaching at law school at the University of the Philippines and San Carlos.

My current role is to lead the legal team of the Aboitiz Power conglomerate, with about 50-plus subsidiaries. I also have compliance oversight over the compliance officers across the group.

How big is the team you manage and how is it structured?
The legal team has 16 lawyers: six lawyers with a direct line and 10 dotted line. The compliance team has 13 compliance officers, some of whom are also lawyers in the legal team members above.

What are the biggest challenges you face in this role?
The energy industry is very dynamic, with regulations changing on a daily basis. Keeping up is an enormous challenge.

Meanwhile, we are challenged by the owner to expand the business — which means not only staying focused on getting things to run smoothly, but having the capacity to absorb even more responsibilities.

I had the task of creating a legal team focused on energy law from scratch. Over the past four years, I think I've assembled a team that has the potential to be formidable. In fact, the team has won both local and international awards, and we plan to keep on raking them in. Keeping the team motivated is also a challenge, as there's hardly any time to rest on our laurels.

What are the most important qualities of a good general counsel?
General counsel can't just rely on legal skills. There has to be the ability to see beyond the legal implications of a decision, and vice versa, to incorporate the legal dimension in any commercial decision.

Knowledge of blind spots is crucial. Which project should I outsource, and which should I keep internal? That means the ability to marry skillsets with the task at hand is important.

Which law firm will work best for which transaction? Which internal lawyer should I pick to do this task? Everybody runs to the general counsel for instant answers in the most inconvenient setting, but the GC sometimes has to be honest enough to admit: 'I don't know the answer to this question.' Set the ego aside and focus on getting the right answer.

Patience is a must, although I'm in short supply of that.

How is technology changing the way you work?
It's probably making it easier. We can research faster and check on facts at the press of a button. Are we being made redundant? Not yet. At least for now.

How has the in-house legal function changed during your career?
There was a tendency to view in-house careers as less demanding. It's actually not. Now, the sheer variety of options for in-house work can exhaust the whole spectrum.

What about the way you work with external firms and other providers of legal services — have you seen significant changes there?
So far, it's been the same, although with international providers coming in and trying to take up space within the domestic market, we might see dramatic changes.

Looking forward, what changes do you foresee in the way that legal services will be provided in the future?
Here in the Philippines there's a possibility that accountancy and other providers might try to bundle services and muscle in on law firms, especially if the constitution is amended to allow professions to be exercised by non-citizens.

What advice can you give to young lawyers starting out in their careers today?
Take on as much variety of work as possible. There are strands of work that you'll suddenly realise become useful when dealing with another project, and as you mature these strands get woven into an even clearer picture of the entire deal.

Don't look down on certain types of work as not exciting, or unglamorous or useless. The skillsets one can learn will come in handy later — guaranteed!

What skills should they aim to acquire and what are the most promising areas of practice to focus on?
Writing and presenting. It's not just enough to be smart, they have to be able to communicate that they're smart.

What are your interests outside of the legal profession?
I've been fascinated by art ever since, and I've been collaborating with a local gallery to curate shows of emerging artists. Maybe that's going to be my retirement goal, if I don't end up in the judiciary. I've also got this strong streak of supporting charitable organisations, so I just might hike off to a charity in a far-flung province, and just volunteer to work with non-demanding and much more appreciative orphans.

"The energy industry is very dynamic, with regulations changing on a daily basis — keeping up is an enormous challenge"

The thing about ... Robert Lewis

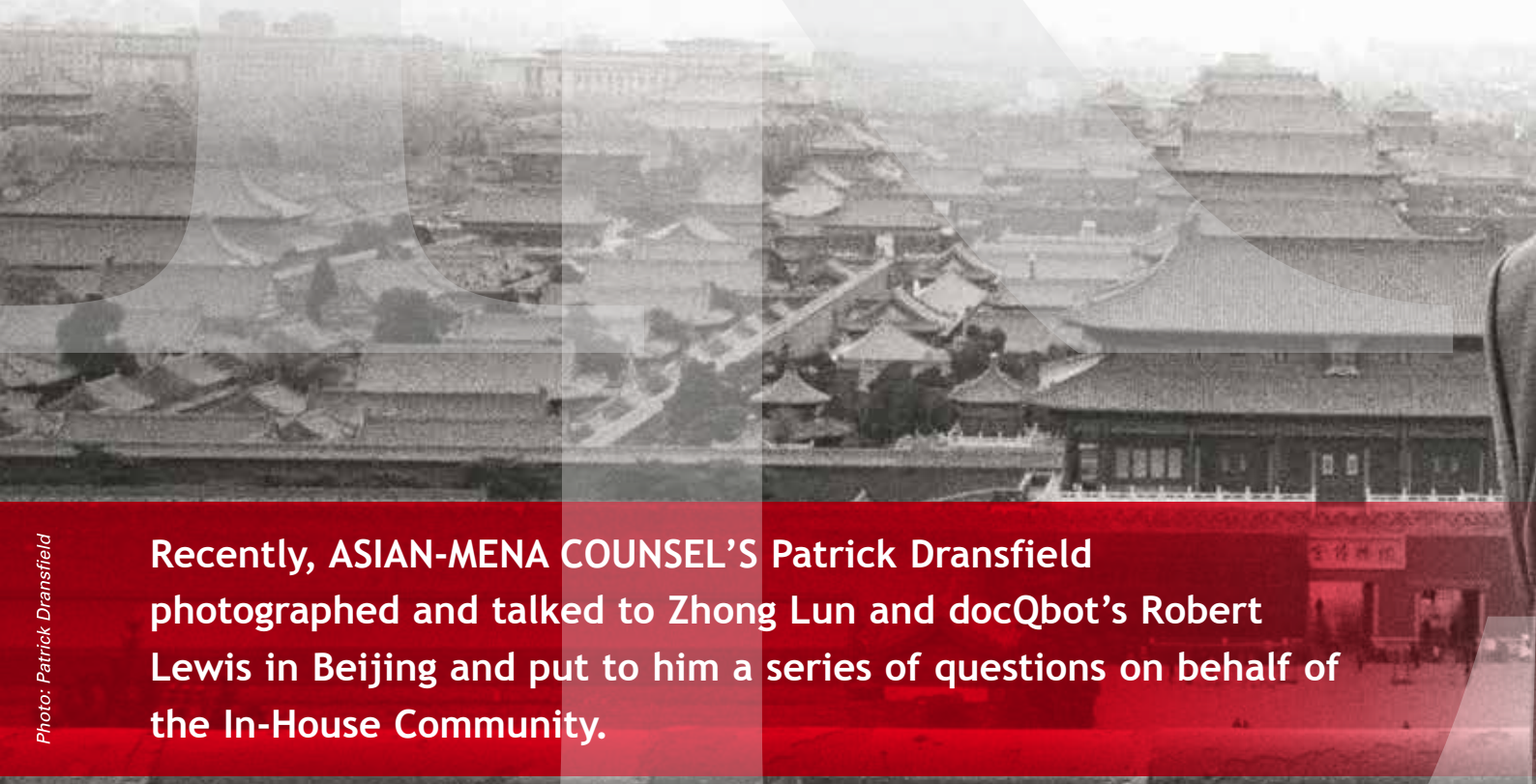


Photo: Patrick Dransfield

Recently, ASIAN-MENA COUNSEL'S Patrick Dransfield photographed and talked to Zhong Lun and docQbot's Robert Lewis in Beijing and put to him a series of questions on behalf of the In-House Community.

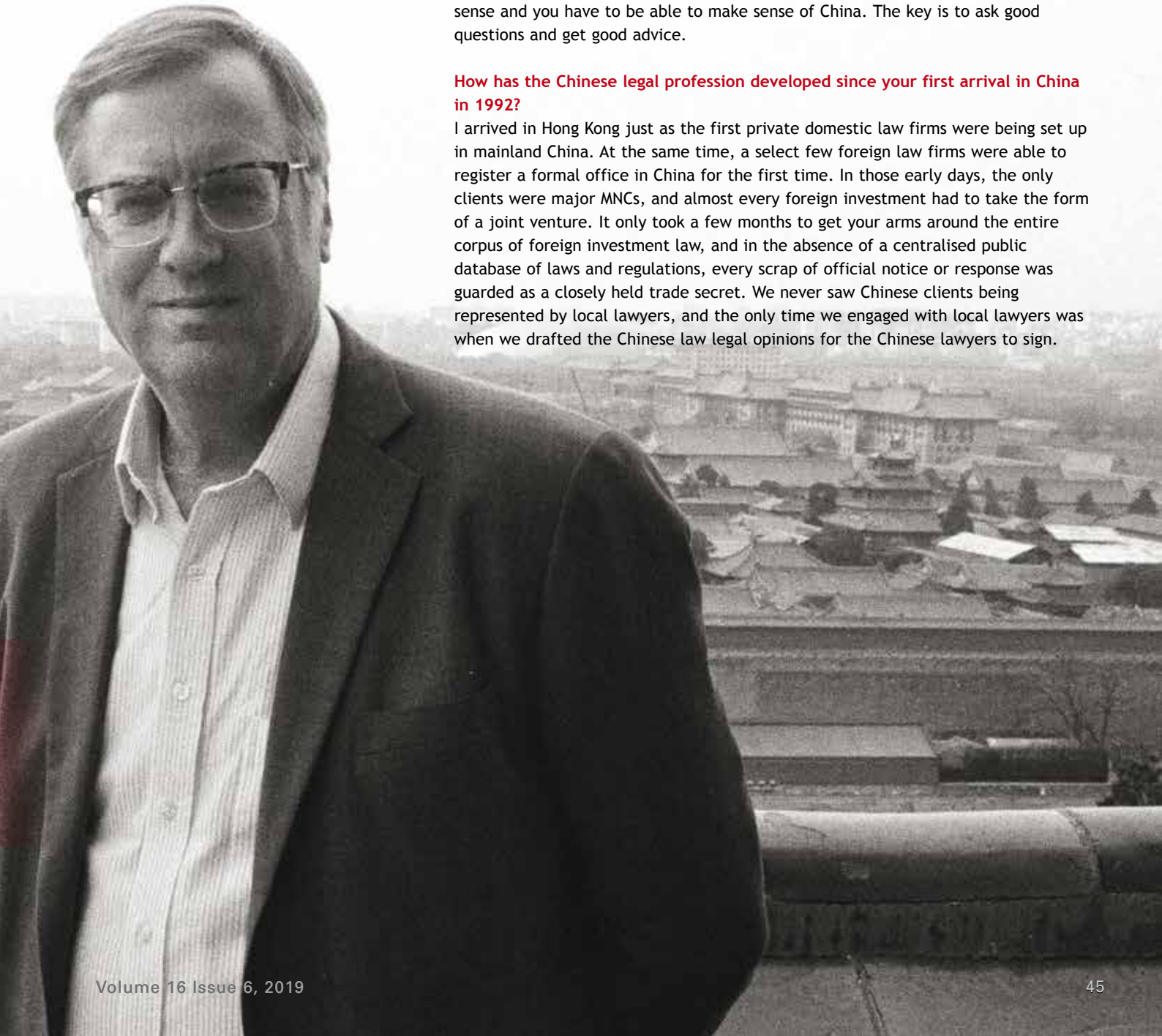
Having worked in top US, UK and China law firms, and also as Asia general counsel for Nortel, you are in an unique position to comment on the China market. How should foreigners approach investment in China?

When I first came to China more than 25 years ago, it was common for MNCs [multinational corporations] to think they had to set aside traditional western deal-structuring concepts in order to adapt to the "China way" of doing things, and a lot of internal and external business advisers worked hard to create a mysterious (and even in many cases an irrational) aura around the China market in order to preserve their own position as an indispensable adviser. An inordinate number of deals cratered as a result.

China deals need to make good business sense in the traditional western way while still being adapted to local market conditions. China has changed dramatically over the last two-plus decades, and while things are not quite as mysterious as they once were, there are still unique (and sometimes still not completely rational) characteristics. So the bottom line advice is be sensible — the deal has to make sense and you have to be able to make sense of China. The key is to ask good questions and get good advice.

How has the Chinese legal profession developed since your first arrival in China in 1992?

I arrived in Hong Kong just as the first private domestic law firms were being set up in mainland China. At the same time, a select few foreign law firms were able to register a formal office in China for the first time. In those early days, the only clients were major MNCs, and almost every foreign investment had to take the form of a joint venture. It only took a few months to get your arms around the entire corpus of foreign investment law, and in the absence of a centralised public database of laws and regulations, every scrap of official notice or response was guarded as a closely held trade secret. We never saw Chinese clients being represented by local lawyers, and the only time we engaged with local lawyers was when we drafted the Chinese law legal opinions for the Chinese lawyers to sign.



By 2000 the Chinese firms had already started to emerge to take more and more traditional FDI [foreign direct investment] work from MNC clients, but the foreign firms maintained a substantial advantage in terms of inbound M&A and higher end FDI work for MNCs. But that advantage has, in my opinion, long since eroded. In the aftermath of the global financial crisis, the foreign firms retrenched and have for the most part only maintained status quo in terms of scope and scale over the last decade, while the Chinese firms have experienced explosive growth.

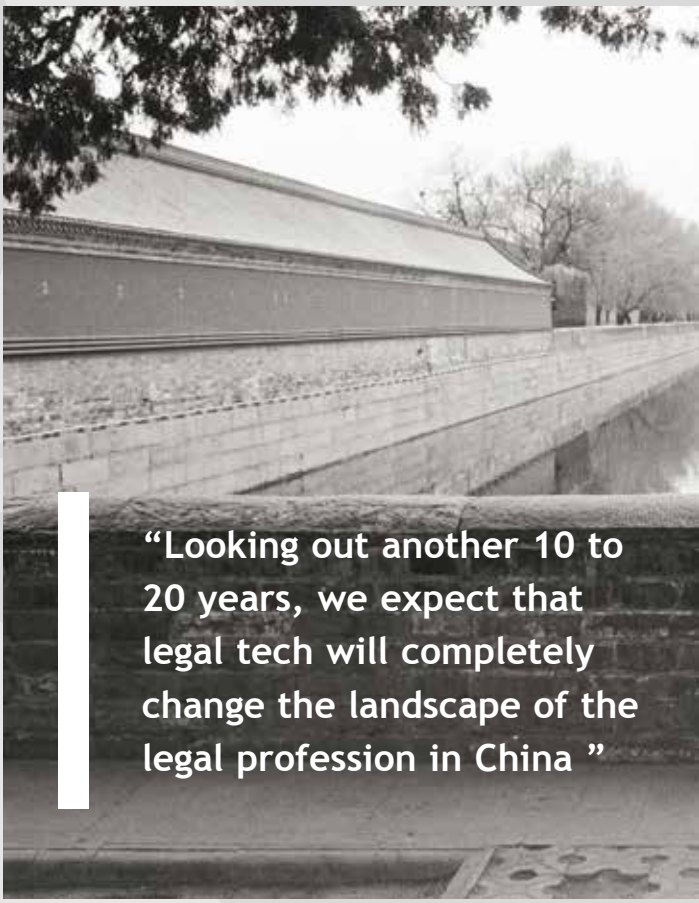
In 2010 I voted with my feet and became the first senior foreign lawyer to make the move from a major international law firm to join a leading Chinese firm. The only difference between the work I do now at Zhong Lun and what I did at my prior international law firms is that I have access to much broader and deeper expertise on my current platform.

You co-founded the China Going Global Think Tank (CGGT) and are a special adviser to the law and policy bureau of the State-owned Assets Supervision and Administration Commission — could you share with us the most common problems facing Chinese outbound investment?

I actually wrote a book about this, which was published in Chinese in late 2017. I focused on the 70% of the outbound deals that are low- or mid-cap deals, usually undertaken by private companies which are doing their first few deals outside of China. In the book I listed 30 common problems that many such Chinese companies encounter as they invest abroad, but if I had to select the top five it would probably include the following:

1. Chinese companies in this category are typically too opportunistic and insufficiently strategic in their approach;
2. they tend not to be sufficiently familiar with international deal structures;
3. they don't like to pay for professional advisers and then even when they do too often they do not want to take advice;
4. they often have too many naive assumptions, principally assuming that whatever worked inside China will work outside China; and
5. overall there are a myriad of communication and culture gaps with the other side, which often simply takes the form of not speaking the same deal language as their foreign counterparts.

All of this engenders misunderstandings and mistrust, which kills deals, since above all else sellers demand deal certainty, the one thing too many Chinese outbound investors cannot give. As a result, many foreign counterparties will decline to engage with many of these Chinese investors or if they do will do so only if the Chinese side offers a premium. Hence, the origins (at least in part) of the much discussed "China premium."



The problems are quite serious but ultimately all surmountable. As with the Japanese, who encountered many of the same problems in the early stages of their international expansion, it will take a generation. So the world is on notice — once the Chinese figure it out, they will be an even more dominant player on the international stage.

CGGT takes a multi-disciplinary approach to help solve issues relating to outbound investment — has this shaped the way that you see the practice of law developing as a team sport?

Part of the rationale for the multi-disciplinary nature of the CGGT was born of my frustration with getting the attention of decision makers in Chinese companies — if I talked about "legal risk" they would immediately switch off, thinking that legal issues were for the in-house lawyers and had nothing to do with them. On the one hand, I recognised that as a lawyer I had to be better about framing issues in commercial terms that business people would understand and not just talk as I would to other lawyers. This is reminiscent of the traditional Chinese proverb about

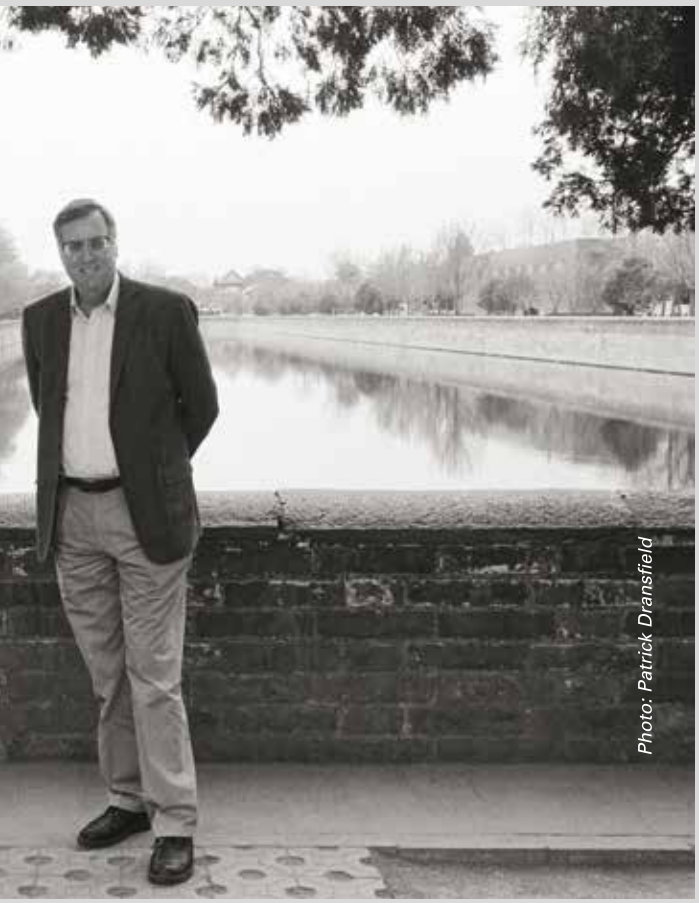


Photo: Patrick Dransfield

the rooster talking with the goose — they don't speak the same language. So we decided that we would be better served if we bundled our "legal risk" issues together with business strategy and finance and tax issues, which might more naturally attract the attention of the senior management team.

To a large extent, that vision has been realised — the CGGT has more than 35,000 followers on its public WeChat account, 80% of whom are senior business managers in Chinese companies, and recently we were named by the State Information Centre as a top 10 private thinktank for the Belt and Road Initiative. We also work with many top international and domestic investment banks, accounting firms, risk management consultants, law firms and other professional advisory firms across a wide range of specialisms.

The ironic thing is that it turns out that all of the other professional advisers felt the same need to be able to communicate their value proposition to senior management of Chinese companies in order to be able to be brought in earlier in the process so as to help avoid common problems. So in some respects we are all in the same boat.

As a co-founder in the legal tech platform docQbot, could you please comment on how you see technology shaping the legal industry in China, and beyond? What do you see as some of the benefits — and also some of the risks?

We are at an important inflection point in the legal profession in terms of adoption of technology. We are among the last of the professions to hold on to the more traditional labour-intensive ways of doing things. Part of that is because the technology was not quite ready but perhaps it was more the case that we as lawyers have not been ready to embrace change. The western hourly rate model provides few incentives to improve efficiencies, but because the China legal market for the most part works on a fixed-fee basis, Chinese lawyers should be the earliest and most enthusiastic adopters of legal tech. The rationale is quite simple — when the client pays hourly rates, the risk of lawyer inefficiency is on the client (hence the critical role of in-house counsel to monitor outside counsel closely), but when the client pays on a fixed-fee basis, the risk of inefficiency falls squarely on the outside lawyer.

The outside lawyer obviously benefits from improved efficiencies in such a fixed-fee environment, but the in-house counsel does as well because he or she can ask for a reduced fixed-fee to share in the cost savings arising from the technology-assisted efficiencies. So in-house counsel should be requiring outside firms to adopt more legal tech solutions in order to provide better quality work product at a more competitive price.

But the benefits of the in-house applications of legal tech are perhaps even more compelling as legal tech solutions will free up in-house counsel from a tremendous amount of mind-numbing repetitive lower-end legal work so that they can focus more on higher-end strategic work. This will raise satisfaction levels on both the part of the in-house legal counsel and on the part of the in-house clients, who will more readily recognise the contributions of the in-house legal team.

At docQbot we are focusing on two fundamental and complementary legal tech tools — automated bilingual contract generation (using HotDocs) and automated English-language contract review (using LegalSifter). Our automated contract drafting tool was originally designed with the Chinese outbound investor in mind, but it works equally as well for FDI and even domestic transactions for foreign-invested enterprises [FIEs] in China, all of which need English and Chinese contracts.

One thing we have learned is that legal tech tools need both strong tech and strong knowhow content. We work with leading technology partners and we bring the content that meets international standards while still conforming to local best practices in China. We are still at the pre-launch stage but already have users all across China.

We think this will help accelerate the pace of change in legal tech adoption in China, and looking out another 10 to 20 years, we expect that legal tech will completely change the landscape of the legal profession in China. It is an exciting time.

You said at the Beijing In-House Congress in March that the new Foreign Investment law potentially ushers in a second golden age for FDI work over the next decade. Please share your vision.

The immediate catalyst for the recently adopted Foreign Investment Law (FIL) is the US-China trade talks. The new FIL is essentially a high-level statement of policy in order to codify commitments by the Chinese side to open up further, to strengthen the legal regime, principally in terms of IP protection and finally (and perhaps most importantly) to provide national treatment for foreign companies in China.

Before the new FIL takes effect on January 1 2020, quite a few additional steps will need to be taken, including not only the adoption of implementation regulations to fill in the not insignificant gaps in the FIL, but also the issuance of a new negative list specifying industry sectors that will be newly opened to increased foreign investment. Much of the focus in this regard in correctly placed on the services sector, and two areas within the services sector which in my opinion are ripe for further opening up are internet-related business and legal services. The market position of the domestic players in these two subsectors are already essentially unassailable, so further opening will not change the overall market dynamics but will give welcome new opportunities for foreign players.

However, this alone would not be enough to ignite a second wave of heightened FDI. The key driver will be the implementation of the principle of national treatment. Although not yet announced, it is my personal assessment that as part of the new sets of rules, the thin-capital rules and restrictions on use of forex capital contributions for downstream investments, which apply only to FIEs and not to domestic companies, will also need to be repealed. These two changes will open up a massive restructuring of foreign investments in China to allow a much more level playing field in China.

The final factor is the pending changes in corporate governance for FIEs. These have always been subject to the now almost archaic laws that were set up 30 years ago when China was just emerging from a planned-economy system. These old-style investment vehicles have proved to be stable and sustainable for the most part, but are still much too cumbersome in terms of actual operation. Upon the effectiveness of the new FIL, these old laws will be repealed and all FIEs will fall under the Company Law,

> **"The new FIL will eventually trigger a massive renegotiation of the joint venture contracts for 120,000-plus joint ventures all across China"**

which provides significant additional flexibility in terms of corporate governance, principally in terms of reduced levels of minority shareholder protections.

The one element of the new FIL that is not getting sufficient attention in my view is the requirement that within five years after the effectiveness of the new law, all FIEs will be required to convert into LLCs under the Company Law. For wholly-owned subsidiaries of foreign companies (referred to as WFOEs in China), this should be a relatively straightforward administrative exercise (so far as any administrative matter in China can be considered straightforward!), but for Sino-foreign joint ventures, this will entail a complete reworking of the constitutional documents. The old-style equity joint venture contracts were drafted to meet the soon-to-be defunct and often quirky requirements of the equity joint venture law, so those will all be consigned to the dustbin, to be replaced by a more international style shareholders agreement, which will of necessity need to be amended to reflect the changed corporate governance provisions that will now apply under the Company Law.

As we all know, once you start to make some changes to a document, the flood gates are opened and every irritant from the prior years of operation will all surface, begging to be addressed. So this will be a headache for in-house counsel and a boon for outside counsel as the new FIL eventually triggers a massive renegotiation of the joint venture contracts for 120,000-plus joint ventures all across China over a five-year period.

All of these points taken together should, I think, qualify as a basis for a second golden age of FDI in China!

What is your hinterland?

I was born and raised in suburban California and always had an unreasonable fear of urban environments growing up, so it is still surprising to me that I am now most content if you were to drop me in the middle of any big city in China or indeed almost anywhere in the world and just let me wander the streets, taking in the rhythm and pace of city life in all its varieties and complexities. Each city is in many respects a living museum, a tableau of everyday life of real people. I find it to be a never-ending delight.

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