

asian-mena Counsel

Volume 16 Issue 9, 2019



Plus: Foreign investment in China

A discussion on the new law and the development of template documents for counsel



On exporting UK law
Law Society's Stephen Denyer

Electronic hearings
The future of proceedings

Joko Widodo re-elected
How will it affect doing business in Indonesia?



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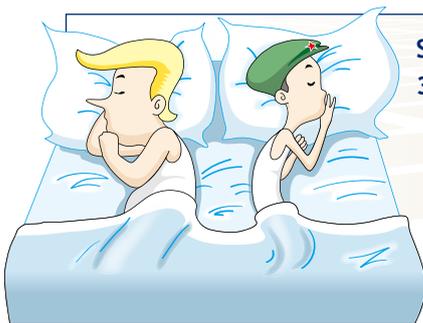


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AFRICA



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Guinea emerging from the shadows

Recent reports from three respected international organisations sketch a relatively upbeat picture of economic prospects in the west African state of Guinea. This might be surprising to an uninformed outsider as Guinea has been a notorious case-study in governance and economic failure for more than half a century.

The country — sometimes known as Guinea-Conakry — is still one of the poorest in Africa and continues to face big developmental challenges, but the World Bank, the African Development Bank and the US Commerce Department all see glimmers of hope on the horizon.

A World Bank country overview in May 2019 highlights “robust growth” of 10 percent in 2016 and 2017 and 5.8 percent in 2018 — off a low base — driven by foreign direct investment in the mining sector. It adds that “investment in infrastructure and the expansion of the primary and tertiary sectors” remains strong.

The ADB says this growth is “bolstered by reforms aimed at improving the business climate, access to electricity, and investment in the agro-food sector” and predicts that real GDP will grow by 6 percent in 2019 and 2020.

“Guinea has exceptional mining potential, including two-thirds of the world’s known bauxite reserves, as well as gold, iron and diamonds,” says the ADB.

The US Commerce Department informs potential American investors in Guinea: “The return of political stability and the inauguration of a democratically elected president in 2010 facilitated international engagement” in the former French colony.

Anyone with Africa’s interests at heart will hope these words herald a new beginning for a country epitomising the continent’s malaise of underdevelopment, conflict and poverty.

From independence in 1958 onward, Guineans suffered under the rule of ruthless dictators and calamitous socialist policies.

The first democratic elections in 2010 saw long-time persecuted opposition leader Alpha Conde take control and a new dawn beckoning. However, the outbreak of Ebola in 2014 was a crippling blow, while conflict in neighbouring Sierra Leone and Liberia saw hundreds of thousands of refugees further straining Guinea’s struggling economy.

Internal political rumblings have also sapped optimism, with elections due in 2019 being postponed to 2020 and Conde intimating he wants to change the constitution to give himself a presidential third term — something he was once strongly against and which has inflamed the opposition.

Nonetheless, some of the world’s top economists see Guinea’s general trend as being upwards.

At present, mineral exports make up more than 90 percent of exports. The bauxite deposits are a glittering prize for bold investors. High-grade iron ore is already being exploited, though legal issues and falling global commodity prices have put a brake on the sector’s progress. Gold, diamonds and undetermined amounts of uranium and oil contribute to Guinea being one of the mineral-wealthiest places in Africa.

The US Commerce Department flags “great potential for companies which can contribute to Guinea’s infrastructure development” — in other words, build roads, railways and ports to facilitate activities.

It also points potential investors to opportunities in hydroelectric power, with numerous rivers and abundant rainfall suggesting Guinea could be a sub-regional power hub of note.

All this has the World Bank saying “natural conditions are favourable for growth”. But it cautions: “Guinea must improve its governance if it hopes to fully realise this potential and step up the structural transformation process.”

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INDONESIA



By Vincent Ariesta Lie, Yohanes Masengi, Hilda Leswara

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Joko Widodo re-elected: How will it affect doing business in Indonesia?

The presidential election is over and the incumbent president of Indonesia, Joko Widodo, known familiarly as 'Jokowi', has officially been re-elected for the 2019-2024 term.

In his election campaign, Jokowi declared nine missions, from which we know that his second-term administration's target in the rule-of-law area for the next five years is to ensure a corruption/illegal levies-free, dignified and reliable legal system, through among other measures, continuing the reform of the legal system and law enforcement, and making sure that there is no conflict between the laws and regulations as well as deregulating certain areas as necessary.

Boosting investment and simplifying bureaucracy

Through his previous term's programme, Jokowi was determined to improve the investment climate and ease of doing business in Indonesia by simplifying regulations related to investment. In 2017, Jokowi issued Presidential Regulation No. 91 of 2017 on The Acceleration of Business Implementation (PR 91/2017) through which he introduced the Online Single Submission (OSS) licensing system. Later, Government Regulation No. 24 of 2018 (GR 24/2018) on Integrated Electronic Licensing Services for Business was issued as the implementing regulation of PR 91/2017.

The OSS system was a breakthrough online based programme, aimed at unifying the licensing system through an online one-stop service. Previously, investors had to manually hand deliver applications to different institutions or ministries for their business licences and it could take weeks or even longer. Now, through the OSS system, it is expected that investors can obtain a licence within two hours of submitting the application online. Therefore, investors can now save time and money when starting up a business. The OSS system should also help to minimise corruption by reducing bureaucracy. For these reasons, the OSS

system is expected to boost both domestic and foreign direct investment in Indonesia.

Although investors have welcomed the OSS system, some practical problems have occurred in its implementation. One of the biggest problems is that central and regional government licensing has not been integrated fully and some licensing which was transferred to the OSS system under GR 24/2018 is still considered to be under the regional government's authority under Law Number 23 of 2014 on Regional Governments (Law 23/2014), which has caused conflict or "disharmony" between regulations. Recently, the Minister of Law and Human Rights (MOLHR) issued Regulation Number 2 of 2019 on The Resolution of Non-Harmonised Regulations through Mediation (Regulation 2/2019), allowing individuals and groups of individuals, institutions/agencies/ministries/non-ministerial government agencies/regional governments and public/private legal entities to submit requests to the MOLHR to resolve any lack of harmony between regulations through mediation. The regulations that may be reviewed are limited to ministerial regulations, non-ministerial government agency regulations, non-structural agency regulations and regional regulations. The outcome of the mediation may be either an agreement between the parties or a recommendation if no agreement can be reached. We expect to see further developments and more coordination in this area in the future.

In addition to improving the licensing process, the government is currently preparing a new draft negative list of investment to replace Presidential Regulation No 44 of 2016 on The Investment Negative List (PR 44/2016). Although this new draft has yet to be released, according to the Economic Policy Package of the Coordinating Ministry of the Economy for the third week of November 2018, the proposed new negative list will increase Indonesia's attractiveness and competitiveness, which can be a selling point for expanding new

sources of investment and developing economic activities. Apparently, under the new negative list the number of restricted business fields will be reduced.

Infrastructure, infrastructure, infrastructure

Jokowi is also determined to boost economic growth by developing major infrastructure, which he is known to be focused on.

To meet the infrastructure development financing needs, in 2017, through the National Development Planning Board (Bappenas), the government introduced Non-Government Budget Investment Financing as an alternative financing scheme for infrastructure projects.

What to expect?

On July 14 2019, as the elected president, Jokowi delivered a speech on Indonesia's vision for the next five years. Jokowi's speech has several main points, including the continuation of infrastructure development, the elimination of investment barriers and reform of the bureaucracy. In his speech, Jokowi stated that besides continuing to build new infrastructure, he is also determined to integrate new and existing infrastructure. Clearly, attracting investment seems to be Jokowi's main target as he kept repeating it in his speech. He stated that investment is a key to making new jobs available to Indonesian citizens. The president seems committed to "fight" all investment barriers, illegal levies and speeding up the licensing process. In addition, Jokowi emphasised reform of the bureaucracy, promising to check and control the licensing process himself and to close any unhelpful or problematic institution.

What we can expect now that Jokowi has been re-elected as the president of the Republic of Indonesia is first, that the investment service will grow in sync with the previous programme and regulations; second, despite the snags in the full implementation the OSS system, the government will continue to make every effort to continually improve the OSS system until it can operate fully as planned; and third, Jokowi will continue pushing the construction of infrastructure to achieve equitable economic development.



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Legal Director, Greater China | 14+ yrs pqe | Shanghai REF: 15274/AC

This US-listed chemical company seeks an accomplished regional counsel to cover operations in the PRC, Macau and Taiwan. You will be responsible for structuring and negotiating commercial agreements, managing disputes and litigation matters efficiently and monitoring legal risk and ethical compliance as an all-round business counsellor alongside external counsel. You must be PRC qualified with a minimum of 8-12 years' PQE of corporate and commercial law with a top-tier law firm and/or a manufacturing/industrial MNC. As the role reports into senior figures in both China and the US, an LLM from a US school and/or experience gained from US law firm or US Corporation are highly desirable. Fluent Mandarin and English skills are required.

Corporate Counsel | 12 yrs pqe | Hong Kong REF: 15008/AC

This leading TMT MNC seeks a corporate transactional lawyer to join its well-established legal team in Hong Kong. The role will involve managing a range of corporate projects and strategic legal and corporate affairs including M&A transactions, joint ventures, equity and debt financing, restructuring and assisting on improving best practice and efficiency within the region. The ideal candidate will have at least 12 years' PQE having trained within a leading law firm or an MNC. Strong drafting and negotiating skills, with fluency in English and Cantonese and ability to read write and review Chinese documents are essential, while fluency in Mandarin would be highly desirable. To succeed in this role, you must have strong communication and influencing skills – having the EQ to interact with a range of stakeholders will be vital together with the desire to work in a fast-paced, growing and exciting environment.

Legal Counsel, Data Privacy | 8+ yrs pqe | Hong Kong REF: 15293/AC

This leading Hong Kong-listed conglomerate with a significant interest in blue-chip commercial real estate investment, is seeking a Data Privacy Counsel to join their legal team. The role will involve strengthening and enhancing the data privacy policy and control framework for the group (especially concerning CRM and HR data), designing and managing training programmes on data privacy ordinances and also being able to react effectively in the event of a data breach. You will also provide legal support on employment-related matters for the Greater China region. The successful candidate will have over 8 years' PQE and must be hands-on, proactive and able to work in a fast paced environment with the ability to confidently interact with senior stakeholders and effectively liaise with different departments. Excellent communication and interpersonal skills are required along with strong drafting, reviewing, and negotiating skills. Written Chinese with fluency in English, Cantonese and Mandarin is a pre-requisite.

Senior Legal Counsel | 8+ yrs pqe | Shanghai REF: 15276/AC

Excellent opportunity for a PRC-qualified lawyer with 8+ PQE to join this Fortune 500 healthcare/medical company supporting business partners on strategic projects in China. The role requires a pro-active lawyer with the initiative to identify and drive new business opportunities and the ability to draft and structure new legal processes and templates. You must have solid legal experience of negotiating and managing complex business transactions from start to finish, including handling any litigation issues which may arise. A JD or LLM from an overseas law school and knowledge of the healthcare/medical industry are highly desirable. You must have excellent English and Mandarin for the role.

Private Practice

Corporate Partner | 15+ yrs pqe | Shanghai REF: 15282/AC

This top 50 US law firm seeks a Corporate Partner for its Shanghai office. With a worldwide reputation in corporate, disputes, regulatory and international trade practices, the firm has a roster of US clients, including both Fortune 500 and SME and startups. Your work will focus on providing legal advice on general corporate, FDI, and labor/employment matters to their US clients who have business in China. The right incumbent must have no less than 12 years' experience in general corporate and commercial issues. A US qualified lawyer with native-level Mandarin skills is required and the ability to build ties to the Chinese business community is preferred. Fluency in written and oral English is required.

DR Special Counsel | 8-10 yrs pqe | Hong Kong REF: 14877/AC

This global law firm is looking for a Counsel level hire to augment their successful dispute resolution practice in Hong Kong. The team handles a broad range of commercial disputes and the incoming candidate's experience of cross-border matters will be key. Hong Kong qualification with around 8-10 years' PQE in general commercial litigation are requirements for this role, as are fluent English and Mandarin skills. Promotion to partnership is envisaged for a successful incoming lawyer.

Senior Associate, M&A | 6+ yrs pqe | Hong Kong REF: 15279/AC

This international law firm is seeking a high caliber M&A lawyer to join its market-leading team in Hong Kong. You must be Hong Kong qualified and well-versed in Hong Kong company law, corporate administration, and compliance matters. You will also be required to manage a team of paralegals. An HKICS/ICSA member along with excellent English drafting and interpersonal skills, is preferred. Fluency in English is essential, and Mandarin skills are a plus.

Senior Associate | 5+ yrs pqe | Shanghai REF: 15280/AC

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The POGO problem: Harmonising immigration, gaming and gambling

It is highly illegal to gamble in China save for a few state-run lotteries. To avoid this prohibition, gambling companies operate offshore so that they may continue catering to Chinese nationals who play casino and e-games online. These companies took a sharp interest in expanding their businesses to the Philippines, which led to the rise of the Philippine Offshore Gaming Operators (POGOs). A POGO is an entity which offers and participates in offshore gaming services by providing an online platform where players may gamble with others over the internet.

The emergence of these industries led to a surge of foreign nationals coming to the Philippines for work, and prompted concerns over the latter's disadvantageous effect on the supposed priority given to Filipino workers. Seeking to streamline immigration procedures and impose tighter restrictions on this matter, the Bureau of Immigration (BI) issued BI Operations Order No. JHM-2019-008 on June 27, 2019. This outlines the implementing rules and regulations (IRR) on the issuance of Special and Provisional Work Permits to foreign nationals. The said IRR, which makes effective the joint guidelines of the Department of Labor and Employment, the Department of Justice, the Bureau of Internal Revenue and the BI, aims to "clarify and harmonise existing rules and regulations" affecting foreign workers and "establish systems for the joint monitoring thereof".

The guidelines ensure that work permits are issued only to foreign nationals whose jobs cannot be performed by a Filipino. Following the mandate of the Labor Code of the Philippines, local

“The emergence of these industries led to a surge of foreign nationals coming to the Philippines for work, and prompted concerns over the latter’s disadvantageous effect on the supposed priority given to Filipino workers.”

companies may engage alien workers only after a determination that there is no Filipino who is competent, able and willing to perform the services for which the alien is desired.

By way of a background, a Special Work Permit (SWP) is a document that allows an alien to work in the Philippines while on a temporary visitor (9[a]) visa. The Provisional Work Permit (PWP), on the other hand, is a document that enables a foreign national to work in the country while his application for an Alien Employment Permit (AEP) or a work visa is pending. Both the SWP and PWP are valid for a period of three months, and extendible only once for the same period.

Under the new guidelines, the SWP will be available only to foreign nationals who are working outside of an employment arrangement with a Philippine company. These aliens include, among others, those who are working as consultants, specialists or service suppliers who do not receive

any remuneration from a Philippine source. Unlike the previous rules where there is no such distinction, foreign workers who are actually employed by Philippine companies will now have to secure an AEP and the appropriate work visa, regardless of the duration of their employment.

As foreign employees are now required to secure an AEP and the appropriate work visa, which takes several months to complete, those who only have short-term contracts such as probationary employees may be faced with a situation where their visa applications have yet to be approved even though their contracts have already lapsed.

Moreover, it is noteworthy that the BI now requires SWP applicants to secure a personal Tax Identification Number (TIN) before an application is filed. While the TIN has always been a requirement for AEP, PWP and work visa applications, the new guidelines guarantee that even short-term assignees and consultants will be properly paying their taxes for the income they have derived from sources within the Philippines.

Is there light at the end of the tunnel? Only through an effective implementation of the IRR will the BI achieve its desired objectives, and we can only wait and see how these guidelines may impact the regulation of foreign workers in the country.

This first appeared in Business World, a newspaper of general circulation in the Philippines. The views and opinions expressed in this article are those of the author. This article is for general informational and educational purposes and not offered as, nor does not constitute, legal advice or legal opinion.

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In-House

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New Changes in Korean Labour Law

Many foreign employers find Korean labour law to be a challenging obstacle to running a business in Korea, due to its complexity and the intensity of the regulations. Since the beginning of the year, there have been a series of major changes in Korean labour laws, including the enforcement of a 52-hour work week in government organisations, state-run entities and other companies with more than 300 employees, which became effective in April. Smaller businesses were given an extended grace period up to July, 2021 before the law applies to them. Employers that fail to follow the law are now subject to penalties of up to two years in prison or a fine of up to W20 million (US\$18,000).

Other new changes to Korean labour laws that became effective in July 2019 include measures to prevent workplace harassment (effective July 16, 2019). The amended Labor Standards Act mandates employers to investigate workplace harassment and take disciplinary actions against the harasser. The employers are also required to take remedial measures and are prohibited from inflicting secondary harm. It should also be noted that employers must include measures to prevent workplace harassment as well as disciplinary measures in their employment rules. Failure to abide by these obligations may result in up to three years in prison or a fine of up to W30 million.

Pursuant to the amended Labor Standards Act, "workplace harassment" means any act inflicting physical or mental harm on, or creating a hostile work environment for, a co-worker using one's position or relationship at work. The Ministry of Employment and Labor published a detailed manual earlier this year for employers, explaining and enumerating potential examples to help them understand the new measures and to

"Employers may not request an applicant's personal information, including his/her appearance, height, place of origin, marital status or wealth in the hiring process"

determine harassment cases.

According to the manual, the range of forms of workplace harassment is quite extensive. Harassers may be employers or other employees. All employees are protected by the law, regardless of the types and forms of their employment and the period of employment. The locations of harassment subject to protection are also vastly inclusive. Harassment taking place outside of the office, such as during a business trip, at a company dinner/party, or even in private places, may be subject to the rule. It should also be noted that harassment taking place in online spaces such as involving internal messaging or SNS are included, according to the manual. Examples of workplace harassment include both verbal and physical harassment. Indirect acts of harassment, such as pressuring an employee not to use paid leave, repetitively and constantly directing a victim to do petty chores or not assigning any work at all, are also deemed to be workplace harassment. The manual also suggests that making disparaging remarks to the victim in front of co-workers, spreading rumours regarding a victim's private life,

forcing or peer-pressuring a victim to drink alcohol, smoke cigarettes or participate in a company dinner, may also be considered acts of workplace harassment.

Additional key changes to Korean labour laws taking effect beginning July 17, 2019 are in the amendment in the Fair Hiring Procedure Act. The amended Act applies to workplaces with 30 or more employees. Under the amendment, employers may not request an applicant's personal information, including his/her appearance, height, place of origin, marital status or wealth in the hiring process, unless such information is necessary for evaluating the applicant's suitability for the position. Asking for private information of the family members of the applicant, such as their education, occupation or wealth, is also prohibited. Requesting such information has been customary in Korean business practices and most resumes or job application templates included such information. However, with the enforcement of the amendment, employers must not collect such private information from applicants or they may face fines up to W5 million. Notwithstanding the amendment, employers still are permitted to request applicants to submit their photos as part of the hiring procedures.

Korean labour laws tend to change frequently and they are highly restrictive with many regulations. Businesses are required to promptly adapt to the changes and failure to do so comes with a high cost. The newly adopted Labor Standards Act requires employers to prevent workplace harassment, but the definition of workplace harassment is still quite abstract and there is substantial room for interpretation. Legal compliance with the amended laws, including determining whether a workplace harassment event has actually occurred may be challenging for foreign employers and consulting with legal practitioners is highly recommended.

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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)

Head of Legal

Hong Kong 7+ PQE

Interesting newly created position with an international asset manager that is looking to hire a head of legal to support their expanding Hong Kong business. Lawyers with good experience of advising investment management businesses and with China experience sought. Fluency in Mandarin is important for this role. (IHC 17879)

Employment

Shanghai/Beijing 7+ PQE

High tech MNC has a vacancy for a senior China employment specialist to support its substantial China business. You will be the sole employment counsel responsible for China. Based out of either their Shanghai or Beijing offices you must be prepared to travel to support the business. (IHC 17826)

Entertainment / Hospitality Lawyer

Hong Kong 7+ PQE

Senior lawyer is sought by this well-known entertainment company to support the events and hospitality team. This is an exciting opportunity for a lawyer with relevant experience to handle an interesting workload. Commercial mindset with a "can do" approach is important. (IHC 17843)

IT/Personal Data Lawyer

Hong Kong 7+ PQE

A new role for a senior IT lawyer with personal data experience to join the legal team of an entertainment company. As the counsel responsible for all IT issues for the group you will need to have enjoyed good experience drafting and reviewing a range of contracts from an IT perspective. (IHC 17842)

Commercial Litigation

Hong Kong 4-8 PQE

A rare opportunity for a litigator to move in-house with this international consulting business. Work involves a mix of regulatory, data privacy and HR issues. General commercial litigators will be considered for this role. Fluency in Mandarin is important. (IHC 17792)

Commercial

Hong Kong 4-8 PQE

Leading international investment manager is looking for a legal counsel to join their team. The role involves a broad range of legal work. You will also have exposure to company secretarial and derivatives work. The position will have a broad regional remit across Asia and Australia. (IHC17814)

Senior Manager

Hong Kong 2-3 PQE

An international insurance company seeks a candidate from a legal background to undertake a role that would look at compliance. Prior in-house legal or compliance experience in the financial services sector is required. Knowledge of insurance regulatory requirements preferred. (IHC 17824)

Senior Counsel

Hong Kong / Hangzhou 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)

Senior Legal Counsel

Singapore 8-12 PQE

Global US listed corporate in the technology sector seeks a Senior Legal Counsel to join its team. The ideal lawyer should be Singapore qualified with experience in corporate work gained working in-house in a similar dynamic environment or in private practice at a reputable law firm. Due to the nature of the work, some proficiency in Mandarin is preferred. (IHC 17863)

Senior Legal Counsel

Singapore 8-12 PQE

Global consulting company seeks 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)

Shipping Legal Counsel

Singapore 5-10 PQE

One of the world's largest ship charterers seeks a legal counsel to provide support to their business across the regions. The ideal candidate should be qualified in a common law jurisdiction and have experience in shipping and disputes work gained in private practice or in-house with a shipping company or P&I club. (IHC 17861)

Dispute Resolution

Beijing 8+ PQE

A well-known private company in China is looking for an experienced dispute resolution lawyer to lead its litigation team to handle a range of commercial disputes. Candidates should possess good communication and management skills. PRC Bar is essential. (IHC 16145)

Trademark

Hong Kong / Hangzhou 6+ PQE

Global asset management house is looking for a junior lawyer to be based in Singapore. The ideal candidate should be a common law or PRC qualified lawyer with asset management or general corporate background. Due to the nature of their business, proficiency in Mandarin is required. (IHC 17670)

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

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New guidance on forex management to FDI enterprises

In mid-2019, the State Bank of Vietnam issued Circular No. 06/2019/TT-NHNN dated June 26, 2019 (Circular 06) to provide guidance on foreign exchange management for foreign direct investment in Vietnam. This Circular shall take effect from September 6, 2019 and replace Circular No. 19/2014/TT-NHNN dated August 11, 2014 (Circular 19).

Direct investment and Capital Account

One of the noteworthy points under Circular 06 is that it clearly determines and construes foreign-invested enterprises, which are required to open the Direct Investment Capital Account (DICA), including (i) enterprises being established in the investment form of economic organisations, in which foreign investors are members or shareholders and must carry out the procedures to obtain Investment Registration Certificate (IRC) in accordance with the investment law, (ii) enterprises not subject to IRC and having 51 percent or more of the charter capital owned by foreign investors, for example enterprises having the foreign investors to contribute capital, purchase shares or portion of capital contribution to such enterprise which result in the foreign investors owning 51 percent or more of the charter capital of such enterprises (in this case the foreign investors obtained the notification on satisfaction of the conditions for capital contribution and share purchase (M&A Approval) and (iii) enterprises established by the foreign investors to implement PPP projects in accordance with the investment law (hereafter referred to DICA Enterprise).

The enterprises under (ii) and (iii) above are required to close DICA in the following cases: (i) after completing the transfer of shares,

contribution capital or issuing the additional shares in order to increase the charter capital in such enterprises, the percentage of shares and contribution capital owned by the foreign investors at such enterprises is below 51 percent; or (ii) after such enterprises having become the listed enterprises with their shares listed or registered for trading on the Stock Exchange. In such cases, the non-resident foreign investors who own the shares, capital contribution in such enterprise must open the Indirect Investment Capital Account (IICA) in order to implement their revenue and expenditure transactions.

“Before Circular 06, it is arguable that offshore payment for transfer price in the DICA Enterprises is allowed or it must be implemented through DICA”

Capital contributions

One more notable point is that the foreign and domestic investors are allowed to contribute capital in Vietnamese dong or foreign currencies as provided in IRC, the establishment and operation licence under the specialised regulations (for the foreign-invested enterprises established and operated under the specialised regulations), M&A Approval, the PPP Contract signed with the competent state authorities and other evidence. This point will support the

remittance banks to clarify the supporting documents provided by the foreign investor in order to allow the fund transfer without IRC requirement as usually did in the past. Thus, it being understood that in case the local enterprise which was incorporated by Vietnamese investors and then acquired by the foreign investors leading to such foreign investors owning 51 percent or more of the charter capital of such enterprise, the foreign investors should firstly obtain M&A Approval and then such enterprise opens DICA. Then the foreign investors implement the fund transfer through DICA and such enterprise will implement the procedures to recognise the foreign investors as the members/shareholders of such enterprise.

Circular 06 regulates more clearly the payment route regarding M&A transactions involving DICA Enterprise as follows: (i) the payment of transfer price between a resident investor and a non-resident investor must be implemented through DICA and in Vietnamese dong; (ii) the payment of transfer price between two non-resident investors is allowed to implement in foreign currency or Vietnamese dong and the payment of transfer price between two resident investors must be in Vietnamese dong, however, they both are not required to implement through DICA. Having said that, it seems to allow foreign investors to implement the offshore payment in foreign currency thanks to Circular 06. Before Circular 06, it is arguable that offshore payment for transfer price in the DICA Enterprises is allowed or it must be implemented through DICA.

Conclusion

In summary, Circular 06 has some significant improvements regarding capital transactions and M&A pertaining to foreign-invested enterprises in Vietnam.

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



By Joanne Collett, Timothy Haynes and Callum McNeil



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Onshore restructuring vulnerable to offshore SPV insolvency proceedings

In the prevailing economic climate, an increasing number of large corporate groups have occasion to consider restructuring their affairs, including business operations and debt obligations in order to meet the challenges of the day. Whilst the onshore mechanisms to achieve restructuring are well known, there are offshore actions which can be taken by creditors which need to be addressed as part of an overall restructuring strategy.

It is commonplace for conglomerates to raise finance and working capital by using special purpose vehicles (SPVs) to issue bonds to foreign investors from tax neutral jurisdictions, both onshore and offshore. This can cause problems if not addressed as part of an overall strategy as part of an onshore restructuring because the SPVs may be vulnerable to hostile insolvency proceedings, including, potentially, by bondholders directly. In such proceedings, creditors might succeed in appointing liquidators offshore who may then seek recognition onshore in competition with actions being taken by management or other foreign office holders in the group, who may in turn seek to enforce claims in relation to assets within the group. This may frustrate any onshore restructuring proceedings and potentially derail the same entirely. The potential for such action may then cause considerable difficulty for corporate groups which include offshore entities as they endeavour to carry their group through the restructuring process.

A stay of proceedings and execution sought and obtained in the jurisdictions in which the group has creditors and/or assets will be an essential protection for any company seeking to negoti-

ate a compromise with its creditors and reorganise its business if there is a risk of adverse creditor action. Where offshore SPVs are left out of the onshore tactical planning for restructuring, bondholders have been able to appoint liquidators to the SPVs to usurp the powers of the directors to act to act for and on behalf of the SPV (for example to propose a Scheme of Arrangement). They may also frustrate recognition of a management led process in other jurisdictions (including the US) by seeking rival recognition of the offshore insolvency proceedings. Recent examples of creditors commencing litigation offshore to frustrate onshore restructurings have included proceedings in the US bankruptcy courts. This is relevant for Asia and Mena region general counsel because large corporate groups, no matter where they are based, may have dollar assets and bank accounts in the US.

Returning value to the group's stakeholders can be greatly assisted via the continued business operations of the group and its companies. The interference caused to the orderly onshore restructuring by having rival foreign offshore proceedings competing for recognition in the US can and has caused long and expensive delays in carrying a wider restructuring plan through to a successful global outcome. Such difficulties can be averted at an early stage by taking proactive action offshore in order to also obtain the offshore courts' assistance with the onshore process.

SPVs incorporated in Bermuda, the BVI and the Cayman Islands all have courts that can and will assist the onshore restructuring by imposing a local moratorium on claims against the SPV by bondholders. To do so, the offshore Courts may

appoint provisional liquidators (PLs) to the SPVs for the purposes of carrying out a soft or light touch provisional liquidation in order to preserve the status quo and to allow the SPV (by its management and the PLs) to work together with the onshore process.

By making use of the offshore processes as part of the broader restructuring, offshore appointees can be informed of and participate in returning value to offshore bondholders and otherwise achieving the group's restructuring objectives which may include proposing a scheme of arrangement for an offshore SPV, together with recognition of the scheme in the US court to effectively compromise the debt. Where the offshore jurisdiction is left out of the broader plan, any offshore appointee (via creditor action) may have no knowledge of the broader picture and might be duty bound to take such steps as might be open to them in order to seek to return value to bondholders. This can create a competition for control of the SPV between an offshore appointee and management of the group overall, which can frustrate the restructuring process.

In taking steps early on to include the offshore SPVs in the broader strategy, including making use of protective measures which are available offshore, general counsel can avail the group of the offshore restructuring tools which are well developed, tried and tested in order to carry their group through the sometimes difficult restructuring process. In doing so, companies will find a mature offshore process with courts that are ready, willing, and able to assist with the restructuring of the group as a whole with a view to maximising value for stakeholders.

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MOVES

The latest senior legal appointments around Asia and the Middle East

 AUSTRALIA

Baker McKenzie has added **Raymond Lou** as a partner in the projects group, working from the Sydney office. Lou is a specialist in the corporate, infrastructure, energy and resources sectors, with a China and cross border focus. He has significant experience in public and private sector M&A, with a particular focus on infrastructure and energy. He joins from Norton Rose Fulbright in Sydney, where he led the China M&A team, and has worked on some of the largest cross-border transactions in Australia.



Raymond Lou

 HONG KONG

Allen & Overy has further bolstered its restructuring and recovery group in Asia with the appointment of **Ian Chapman** as partner in its Asia Pacific restructuring and recovery group. Regarded as one of the region's finest distressed debt lawyers, he brings over three decades of frontline experience advising on many of the most complex and high-profile restructurings and insolvencies in Asia. Chapman has an enviable track record of restructuring publicly owned and private companies across the region, successfully managing disparate stakeholders to build consensus and allow the rescue of multi-national debtor groups. He will be based in the firm's Hong Kong office and will support the team throughout the region.



Ian Chapman

Shearman & Sterling has added **Max Hua** as a partner in the firm's Hong Kong office. Hua's practice focuses on public takeovers, private equity, M&A, capital markets, including IPOs in Hong Kong, and general corporate regulatory and compliance matters. He previously worked for two leading international law firms in Hong Kong for 11 years, and helped to set up the Hong Kong law practice of a major Chinese law firm. A native Mandarin speaker, Hua is also fluent in English and Cantonese.



Max Hua

Stephenson Harwood has strengthened its global energy group with the addition of **Marco Pocci**, who joins the firm as a partner in Hong Kong. Pocci's practice focuses on energy and infrastructure, advising clients on a wide range of matters, including regulatory, contract negotiations, finance and construction. He has particular experience in the renewables space, advising on the development and acquisition of solar and wind farms. His energy sector clients include utilities, independent power producers, energy cooperatives, project developers, financiers, power purchasers, manufacturers, investors and governments. Pocci is qualified in the UK



Marco Pocci

and Italy. He is a registered foreign lawyer in Hong Kong and joins from Winston & Strawn.

 INDIA

J Sagar Associates has added **Manish Mishra** as a partner in its Gurgaon office, effective August 8, 2019. A lawyer and a cost accountant, with an MBA in finance, Mishra has more than 20 years of experience in indirect taxation. Prior to joining the firm, he led the indirect tax practice for BDO in the National Capital Region and North India.

 SINGAPORE

Clyde & Co has significantly boosted to its Southeast Asia construction team with the appointment of **Jon Howes** as joint head of APAC infrastructure and **Sean Hardy** as a partner of Clyde & Co Clasis Singapore. Howes has huge depth of experience in dispute resolution in the construction and engineering sectors. He specialises in domestic and international arbitrations, mediation, adjudication and expert determination. He also has considerable experience in professional negligence actions in the construction industry. On the other hand, Hardy is an arbitration specialist with a focus on the infrastructure, construction and energy sectors. He has advised on major projects in the Asia Pacific region, including power stations, jack-up rigs, pipelines, ports, petrochemical and water treatment plants, tunnels, railways, roads and airports.

YKVN has added **Hyun Kim** as a partner to be based in its Singapore office, effective August 19, 2019. Kim is a US lawyer specialising in capital markets and cross border M&A. He joined Clifford Chance in 2009 in Hong Kong, became partner in 2011, and Korea managing partner in 2012, when the firm launched its Korean practice in Seoul. Previously, he practised at Davis Polk & Wardwell and Skadden, Arps, Slate, Meagher & Flom.



Hyun Kim

 VIETNAM

Duane Morris has added **Nguyen Thi Lang** as a partner in the corporate practice group of the firm's Ho Chi Minh City office. Joining as a partner from Frasers Law, Lang is one of the first Vietnamese nationals to be named partner in a foreign law firm. For the past 20 years, she has been focusing on all aspects of corporate and commercial matters, with an emphasis on M&A, cross-border investment, real estate, pharmaceutical, commercial and infrastructure projects. She has advised a wide variety of multinational businesses from all parts of the world, counselling many leading foreign and local investors in Vietnam. Lang has lectured on a wide range of subjects, including corporate governance, investment, commercial, competition and anti-corruption law. She has written extensively on foreign investment in Vietnam and, in particular, on BOT contracts.



Nguyen Thi Lang



Asian-mena Counsel Deal of the Month

Agrifood startup targets sustainable protein

Investors are betting that the stagnating supply of fishmeal could be replaced by fly larvae.

A Singapore agrifood startup has secured series-A funding to develop a commercial-scale insect protein production facility.

Nutrition Technologies will use the money — which comes from a consortium of investors led by Openspace Ventures and SEEDS Capital, the investment arm of Enterprise Singapore — to build a factory in Southeast Asia that can produce more than 18,000 tonnes of insect-based feed ingredients and organic fertilisers every year.

The project is supported under Startup SG Equity, a scheme that encourages private sector investment for startups through government equity co-investment.

The company produces protein from black soldier fly larvae as a sustainable alternative to fishmeal, a commonly used ingredient in animal feed. However, the supply of fishmeal has failed to

keep pace with the growing demand for livestock and seafood, resulting in substitution with plant-based feed derived from soy and other crops.

Insects may offer an alternative that combines the high-quality protein characteristics of fishmeal with the sustainable, scalable qualities of plant feeds.

“The key to be successful in this sector is being able to produce a consistently high-quality product at an affordable price for feed manufacturers without

charging a sustainability premium,” said Nick Piggott, co-founder and chief executive of Nutrition Technologies.

A significant portion of the funds raised will also go to the continuation of research of into the genetics and biology of the black soldier fly.

With more than 89% of the world’s aquaculture occurring in Asia, along with the farming of 33% of chickens and 65% of pigs, it is fitting that the region is funding solutions to improve the industry’s sustainability.

This round of investment is the first since SEEDS Capital appointed seven co-investment partners in January 2019 to catalyse over S\$90 million (US\$65 million) worth of investments to develop Singapore-based agrifood tech startups.

WongPartnership acted for **Openspace Ventures**. Partner **Kyle Lee** led the firm’s team in the transaction.



Other recent transactions from around the region:

Assegaf Hamzah & Partners, a member firm of Rajah & Tann Asia, has acted for **Indonesia Infrastructure Guarantee Fund**, as the state-backed guarantor, on the Rp8.2 trillion (US\$585.6m) Makassar-Parepare Railway Project, which involved the development of a 142-km railway under the PPP funding scheme. This project is part of the National Strategic Projects launched by the Indonesian government, which aims to develop infrastructure in East-Indonesia and decentralise the development from the island of Java to other islands in Indonesia. Partners **Ibrahim Sjarief Assegaf** and **Kanya Satwika** led the firm’s team in the transaction.

AZB & Partners has advised **Larsen & Toubro** on its Rs107 billion (US\$1.5b) acquisition of approximately 66 percent of Mindtree. Managing partner **Zia Mody**, senior partner **Ashwath Rau**, head of competition practice partner **Samir Gandhi** and partners **Dhruv Singhal** and **Medha Marathe** led the firm’s team in the transaction, which was completed on July 2, 2019.

Davis Polk has advised Nasdaq-listed **DouYu International Holdings** on its SEC-registered IPO, for total proceeds of approxi-

mately US\$775 million, if the underwriters do not exercise their over-allotment option. The underwriters have an option to purchase up to an approximately additional 6.74 million ADSs from DouYu and 3.37 million ADSs from the selling shareholders. The firm also advised the selling shareholders as to US law. Headquartered in Wuhan, China, DouYu is a leading game-centric live streaming platform in China. Partner **Li He** led the firm’s team in the transaction.

Paul Hastings and **Simpson Thacher** advised on the definitive agreement by **Shanghai Fosun Pharmaceutical** (Fosun Pharma) to sell its stake in United Family Healthcare (UFH), valued at US\$523.15 million, to **New Frontier Corporation** (NFC). Upon closing of the transaction, Fosun Pharma will subscribe to approximately 6.6 percent equity stake in NFC for approximately US\$94 million. Shanghai corporate partners **Jia Yan** and **David Wang** led the firm’s team in the transaction. **Simpson Thacher** advised **New Frontier**, with partners **Patrick Naughton**, **Yang Wang**, **Robert Holo** and **Larry Moss** leading the firm’s team in the transaction.



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

Head of Legal – Asset Management

7+ yrs PQE, Hong Kong

Interesting newly created position with an international asset manager that is looking to hire a head of legal to support their expanding Hong Kong business. Lawyers with good experience of advising investment management businesses and with China experience sought. Fluency in Mandarin is important for this role. [Ref: IHC 17879]

Contact: Andrew Skinner

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Greater China Legal Director – Chemicals

14+ yrs PQE, Shanghai

This US-listed chemical company is seeking an accomplished regional counsel to cover operations in the PRC, Macau and Taiwan. You will be responsible for structuring and negotiating commercial agreements, managing disputes and litigation matters efficiently and monitoring legal risk and ethical compliance as an all-round business counsellor alongside external counsel. You must be PRC qualified with a minimum of 8-12 years' PQE of corporate and commercial law with a top-tier law firm and/or a manufacturing/industrial MNC. As the role reports into senior figures in both China and the US, an LLM from a US school and/or experience gained from US law firm or US corporation are highly desirable. You must have fluent Mandarin and English for the role. [Ref: 15274/AC]

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Real Estate Associate – Private Practice

3-5 yrs PQE, Hong Kong

A Magic Circle firm in Hong Kong is looking to hire a mid-level associate to join its leading real estate team. The role will offer the opportunity to work on an interesting mix of real estate matters including property development, investment acquisitions and sales (including commercial and residential property leasing as well as landlord and tenant) together with property litigation matters. Successful candidates must be Hong Kong qualified and have native Cantonese language skills. [Ref: AC8050]

Contact: Sam Edwards

Tel: (852) 2537 7630

Email: sedwards@lewissanders.com

SEA Legal Counsel – Consumer Products

8-10 yrs PQE, Singapore

This company is operating within the consumer products sector and, as a result of the decision to insource legal activities, is currently seeking a SEA legal counsel help set up the Legal team in Singapore.

Reporting to the managing director for the Southeast Asia business and dotted line reporting to the general counsel seated in the global HQ, you will help set up the legal function for the SEA region. You will be responsible for providing legal support and advice to achieve corporate objectives while minimising legal risks. This includes drafting, reviewing and negotiating sales, procurement, manufacturing contracts, compliance (investigation and training) and supporting the group on M&A activities / litigation support should such events arise.

Ideally you have at least 8-10 years PQE, preferably with prior in-house (with some manufacturing) experience. You have strong experience advising businesses and driving risk mitigation and compliance. Prior experience in the SEA markets will also be a big plus. Some travels, approximately 15-20% will be required.

[Ref: JO-1904-170728]

Contact: Michelle Koh

Tel: (65) 6956 6583

Email: michellekoh@puresearch.com

APAC Regional Legal Counsel – Social Media

6+ yrs PQE, Singapore

An exciting opportunity to be first lawyer in the Asia-Pacific HQ of a US-based company that owns a number of global online social apps. You will provide legal support to one of their key brands that is growing internationally and in APAC. This includes covering marketing and technology agreements including sponsorship, branded content production and promotion, advertising and media agreements, SaaS and general operations agreements. You will also support roll-out and localisation of new product features and initiatives, working closing with marketing and business teams. This role requires experience with marketing law, data protection, IP, digital media, internet industry and telecommunications partnerships in APAC countries. Top law firm and in-house legal department experience preferred. Prior-tech company experience is a bonus. [Ref: HZ1901]

Contact: Jessica Deery

Tel: (65) 6808 6635

Email: jessica.deery@horizon-recruit.com



Nicholas Wilson
eHearings Lead Consultant
nicholas.wilson@lawinorder.com

A Lawyer's Future is Looking Sharp with Electronic Hearings

The benefits of running an efficient collection and forensic process extends all the way to the hearings room. The right digital forensics processes up-front can make for a significantly more efficient eHearing. This article explores the new eHearing technologies that close the circle of an efficiently run matter.

While the legal industry has especially struggled to keep up with the technological advances of the digital era, our eHearings team is swiftly transforming this perspective. The future is looking smarter, faster and sharper for lawyers who embrace the cutting-edge technology and services now available via our eHearings team.

Benefits for Document Management

New technologies enable simple creation of tender bundles for hearings, providing efficient ways to create and order evidence in bundles, with automatic indexes available online and offline. Also, documents in an eHearings system are now searchable on almost any criteria, including words or phrases as well as metadata behind the document. This contrasts the traditional digital file where a name or date is needed to search. This digital document platform is a valuable asset for time poor counsel.

Benefits for Evidence Presentation

Digging through folders every time a document is referenced wastes precious minutes. With an offline, coded document system, an experienced hearing operator can retrieve documents in seconds and display them on monitors across the hearing for the judge, parties and witness to view simultaneously. Adding real-time transcription allows everyone to monitor every word said during proceedings and review them later when the transcript is uploaded to the shared workspace. Hyperlinked indices of every document

can be prepared in a hearing book, made to design specifications, that allow parties or the judge to quickly find documents and their metadata, describing date, origin and other details, and open that document with a single click.

Digital Jury Books

The jury must view evidence alongside counsel and not draw premature conclusions. Juries also need to easily move between documents in the confines of the jury box when given cumbersome evidence binders. A digital jury book significantly simplifies evidence management by using password-protected tiers of evidence that give the judge and parties control over which evidence is viewed and when. Everyone in proceedings can annotate the documents and move between unlocked documents, allowing jurors to access documents quickly. In-built security procedures lockdown all networks and outputs from the devices; ensuring document security.

Webcast Hearings to the Public

Many people who wish to attend public proceedings are unable to due to issues surrounding location, work, mobility and transport. This can limit the transparency of proceedings. Web-casting technology removes these barriers and truly makes hearings public. Our experienced videographers and legal technologists can webcast a hearing at broadcast quality. A polished production can be streamed online and archived for future reference.

Streamlining the Proceedings

From the pre-hearing phase, to the commencement of the hearing and the conclusion of the matter, our eHearings Consultants will be ready to facilitate the smooth operation of your matter and assist with evolving requirements.

We can reduce the sheer complexity of the hearing processes and document management, and facilitate an effortless experience, allowing professionals to focus on the practice of law. It sounds almost idyllic – a completely streamlined process, but with the integration of eHearings services, high-quality purpose-designed solutions and the support of our highly trained eHearings team, this convenience and efficiency is now a reality.

Custom Made Solutions

Our eHearings team prides itself in creating high-quality solutions to make your legal processes easier. If you have further requirements, we enjoy innovating purpose-built solutions. We can modify our integrative technologies and innovate solutions to expediate court processes and law procedures. Our experienced team of legal technologists will design the most appropriate eHearings solution. We have diverse experience assisting law firms, in-house counsel and government departments with our digital technologies and know how to devise solutions that can expediate the operation of proceedings.

eHearings can reduce costs, increase efficiency and give everyone more time to focus on the content of the case. The future of proceedings is eHearings – and the technology is available today.

Law In Order is the premier provider for eHearing Services in Asia, located within Maxwell Chambers Suites Singapore and close to the Hong Kong Arbitration Centre. Supporting our service offering to hearings, Law In Order has fully equipped service bureaus in Sydney, Melbourne, Brisbane, Perth and Singapore and is the only Australian provider to offer complete end to end services in electronic evidence and hard copy processing.



Keeping track of sanctions

Ever-changing and broadening sanctions give rise to formidable challenges for legal teams, but Asian arbitration centres might stand to benefit, writes *Nick Ferguson*.

Governments around the world are increasingly using economic sanctions and embargoes as a foreign policy tool. Staying abreast of this proliferation of programmes can be a headache for legal teams.

For example, the Office of Foreign Assets Control (Ofac), an agency of the US Treasury Department, lists 31 separate sanctions programmes, more than half of which have been updated during the past year. They include broad narrative sanctions programmes related to foreign interference in US elections, the trading of diamonds and transnational criminal organisations, as well as country-specific programmes targeted at Cuba, Iran and Venezuela, among many others.

In addition, Ofac's specially designated nationals and blocked persons list includes roughly 6,300 names connected with sanctions targets.

And this is just the US Treasury. Other agencies of the US government have separate programmes, as does the EU, UN and numerous other governments around the world, and the regulatory approach may differ from one jurisdiction to another.

US sanctions in particular are wide and extra-territorial in scope, and failure to comply can have serious consequences, including severe penalties, legal actions, reputational

damage, forfeiture of goods or profits, and difficulty in obtaining financing or other services.

And as the Ofac example demonstrates, sanctions can be targeted in a number of different ways – against particular persons, groups or organisations, or vessels and aircraft, or against a specific sector of a country's business, or against an entire country or state.

"The sanctions environment continues to tighten globally as a result of ever-changing local political situations and relationships among countries," says Paul Fredrick, general counsel for East Asia and Japan at Schneider Electric. "Schneider Electric has commercial operations in over 100 countries, thus our legal department must remain educated and vigilant about evolving sanctions laws and their possible impact on our business."

The most significant recent developments that in-house counsel need to be aware of so far in 2019 include the evolving range of sanctions that are applied to entities, persons and activities in Iran and Russia, the extension of EU sanctions to target those responsible for cyber-attacks and the development of UK autonomous sanctions in anticipation of Brexit.

Screening

Clearly, this environment is challenging for legal teams within large and complex



businesses. Counsel can't be involved in vetting every single transaction the business engages in.

"The ever-changing and broadening sanctions give rise to formidable challenges on sanctions screening," says Joyce Chan, a partner at Clyde & Co in Hong Kong. "Organisations may consider adopting a risk-based approach whereby they identify, assess and understand the sanctions risks to which they are exposed and design a sanctions screening process which is aligned to the organisation's risk appetite."

Chan says that factors to take into account in conducting the risk assessment include the territorial presence of the organisation, customer base, products and services offered by the organisation, any cross-border transactions, volume of transactions, suppliers and distribution channels, location of property or asset, and payment.

"Organisations should determine which sanctions lists are relevant for screening," says Chan. "For organisations which conduct cross-border transactions or carry on business in sectors which are subject to high sanctions risks such as financial institutions and the oil, gas, energy and defence sectors, they should conduct rigorous list management and screening. Financial institutions may go beyond what the law requires and maintain internal

lists of individuals and entities which may present a financial crime risk to them identified through their internal procedures or intelligence. On the other hand, domestic transactions are less prone to sanctions risk and real-time sanctions screening may be unnecessary if a 'know your customer' process has been undertaken when on-boarding the relevant customer. Having said that, where a red flag appears or there is any activity suspected of violating the sanctions regulations, organisations should conduct further due diligence to ensure sanctions compliance."

At Schneider Electric, the company operates a global export control centre that works closely with the legal team and local customs and trade compliance teams to stay updated on all US, European and other international sanction laws and regulations applicable to the countries in which Schneider Electric does business.

"My legal team and I also monitor and review current trade alerts on various topics, including licensing policies and procedures related to exports of controlled items for the 15 countries in the Asia-Pacific region for which we are responsible," says Fredrick. "Schneider Electric places great value on ensuring that all of the products and services we provide to customers are in full compliance with all



Paul Fredrick

“The sanctions environment continues to tighten globally as a result of ever-changing local political situations and relationships among countries”

sanctions laws and other applicable regulations. Contractual provisions require both parties to comply with applicable laws; thus anything less than that can have liability and indemnity ramifications. Careful recordkeeping is also important in case of a customs audit that can arise without advance notice.”

Technology solutions are also being deployed to scan data and payments to reduce the amount of time and resources required to undertake sanctions checks.

“These platforms allow for detailed analysis of millions of transactions simultaneously and reduce the need for human involvement,” says Avryl Lattin, a corporate regulatory partner at Clyde & Co in Sydney. “This type of technology is extremely beneficial when dealing with repetitive transactions, and allows for greater human focus on the real grey areas. Another area where technology is being used is network analytics. This technology allows sophisticated analysis to be undertaken of complex corporate structures to identify relationships with entities or persons to whom sanctions apply.”

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Arbitration

The increasingly complicated sanctions environment has effects that go beyond trade and can also affect international arbitration in various ways.

“Parties from a sanctioned state may find it difficult to pay for advance on costs due to restrictions on access to the banking system and asset freezes imposed by sanctions,” says Simon McConnell, managing partner of Clyde & Co in Hong Kong. “Further, arbitrators and legal counsel who have connections with sanctioned states or entities may not be able to act on the dispute, thus resulting in the reduction of the pool of available arbitrators and counsel.”

Other restrictions imposed by sanctions such as travel bans can also cause practical difficulties in securing the attendance of parties or key witnesses at hearings.



Left:
Joyce Chan

Centre:
Avryl Lattin

Right:
*Simon
McConnell*

“Additionally, sanctions may affect the substantive merits of a dispute. It can be a ground of frustration, which discharges parties from performance of their contractual obligations. However, it is noted that recent case law has shown that the courts will not lightly treat sanctions as a ground of frustration where a licence that would enable parties to continue performance of the contract could be sought from the relevant authority.

“The enforceability of arbitral awards may also be affected by sanctions. An award which disregards sanctions may be unenforceable in the sanctioning country on the ground of public policy. Conversely, a sanctioned state may refuse to enforce an award which gives effect to sanctions against the state.”

For example, the UK’s defence ministry lost an arbitration with Iran at the Paris-based International Chamber of Commerce (ICC) in 2001 over a 1976 arms deal that was cancelled due to the overthrow of the shah in 1979. After years of further challenges, the UK eventually claimed to be unable to pay the £400 million (US\$500m) settlement because of EU sanctions against Iran. A British court ruled in July that the ministry was also not liable to pay interest on the settlement as long as sanctions have applied.

Asia

As global geopolitical tensions ratchet up, countries that stand outside the US-EU axis and are not subject to sanctions themselves may have some advantages as arbitral jurisdictions – and this applies to Hong Kong and Singapore in particular.

“Given the potentially wide-ranging effects that sanctions have on arbitrations, parties from sanctioned countries have more incentive to use Asian arbitration institutions in place of US or European institutions such as the ICC, SCC [Stockholm Chamber of Commerce] and LCIA [London Court of International Arbitration],” says McConnell.

Indeed, it was announced in April that the Hong Kong International Arbitration Centre (HKIAC) would be appointed as the first foreign arbitral institution permitted to administer disputes in Russia. One of the factors leading to the appointment was that HKIAC “operates primarily from a jurisdiction that has not imposed sanctions against Russia”. As a result of the appointment, HKIAC will be able to provide dispute resolution services to a broad range of Russia-related disputes.

“This is a case in point demonstrating how Asian arbitral institutions can gain an edge over their counterparts in US or Europe by being outside of the US/EU sanctions orbit,” says McConnell.



A crisis of compliance

How to respond effectively and recover from disruptive investigations, by *John Macpherson* and *Tung Jung Tan* of Control Risks.

Investigating allegations of compliance breaches is an expensive affair. Employee and third-party malfeasance remain a costly budget item on P&Ls across Asia, whether it is corruption or fraud; conflicts of interest; data breaches or IP theft; sanctions violations; or allegations of ethical and behavioural misconduct.

While companies account for direct costs – forensics and data analytics, legal and consultancy fees, in-house resources and time – for many, capturing the true cost of investigations remains unknown. Indirect costs, which can include interruption to customer relationships, disruption in the supply and distribution chain, loss of productivity, loss of market share and significant reputation damage, are often not realised until after the investigation. They are the costs of implementing investigation outcomes; of terminating employee contracts; of finding new third parties, of having to rebuild relationships with customers; or finding new ways of differentiating from competitors. The simple fact is, even investigations that do not end up getting an unexpected knock on the door from corporate regulators are a business disruption. In some cases,

they are an uncontained crisis – a potentially debilitating incident percolating under the surface of normal business operations.

Thankfully, borrowing from crisis management and business continuity methodologies when conducting investigations, can make indirect costs and reputation damage more controllable. The time it takes to recover and revert to normal business conditions is faster. This means your business becomes more resilient. The approach below, refined over many years of combining crisis management expertise with investigations teams, is how to achieve maximum resilience during your investigation.

Have clear objectives

A generic investigation plan would be something like: “Confirm the scope of the investigation; identify, collect and preserve evidence; review and analyse data and documents; conduct transaction testing and interviews; ascertain the veracity of the allegations being investigated.” But when you overlay this with broader risk-based objectives, such as “ensure continuity of business operations and conditions, protect key stakeholder relationships, assets and reputation”, you are compelled to take a holistic approach to a business-wide problem. Conducting the investigation becomes part of preparing for, and recovering from, a potentially costly business disruption.

“Scenario planning forecasts how the outcomes of the investigation might affect operations and reputation”



John Macpherson

Consider the case of investigating a key supplier for conflict of interest and fraud (a problem of increasing frequency across many parts of Asia), where there is a likelihood that you will move to terminate contracts of employees and the supplier at the conclusion of your investigation, taking the appropriate action against a grievous compliance breach, but also threatening the continuity of a critical supply chain.

By focusing on minimising operational risks to the business as a key objective (in addition to your investigation objectives), you initiate a plan to identify the impact of losing a key supplier, or key employees, and you identify alternative suppliers and plan for additional resources in your supplier management team – the outcome of which is, you reduce the risk of falling short and bounce back faster to “normal business operations”.

Have a robust process

Following process is something we’re all familiar with in an investigation – but when your objective includes business recovery, there are a few critical extra steps that help build resilience into your process. They are (i) scenario planning and (ii) risk assessment.

Scenario planning, conducted early in the investigative process, forecasts how the outcomes of the investigation might affect operations and reputation. For example, in an investigation of significant embezzlement by a senior executive,

one of your initial scenarios may be “disgruntled executive influences government officials to delay licensing approvals”. Early identification of this as a possibility allows you to implement preventive measures early on.

As you near the end of the investigation, scenario planning becomes formal risk assessment, where you can, with greater certainty, measure where the business might be vulnerable, assess the likelihood and impact of key critical scenarios, and ensure you are prepared to react.

“Clearly defined parameters, objectives (aligned to broader objectives) and reporting lines for each ‘work team’ is paramount”

Governance is important

Governance is always important in investigations and putting a clear governance structure in place for complex investigations is a critical step in risk prevention. In many of our complex investigations, particularly when they involve regulators, and even more so when those regulators operate in some of the more opaque regulatory environments throughout Asia, we are working with a project team that includes not only compliance and legal, but IT, HR, government relations, security, communications and media. It involves extensive liaison between local operations and headquarters,



Tung Jung Tan

not to mention coordinating the plethora of external advisers, forensics and data experts, and legal experts. Each function will have critical tasks to achieve to minimise business risk. Clearly defined parameters, objectives (aligned to broader objectives) and reporting lines for each “work team” is paramount; knowing who the ultimate decision maker is and what can be delegated is essential. Disciplined project management, control of information flows and operating in a secure environment are indispensable components of a well-run crisis-investigation team.

“What started as an anti-corruption campaign in China, targeting foreign companies in the healthcare and automotive sectors, is now a full-scale weaponisation of regulation”

Hope for the best; prepare for the worst

The risk of politicised regulatory enforcement across parts of Asia is high. What started as an anti-corruption campaign in China, targeting foreign companies in the healthcare and automotive sectors, is now a full-scale weaponisation of regulation across parts of the region. While “dawn raids” are part of the regulator toolkit the world over, the opaque nature of enforcement means that there are not always the same legal protections that we might

otherwise expect. So when a regulator comes knocking on your door, it can be a political issue just as much as it is a legal one.

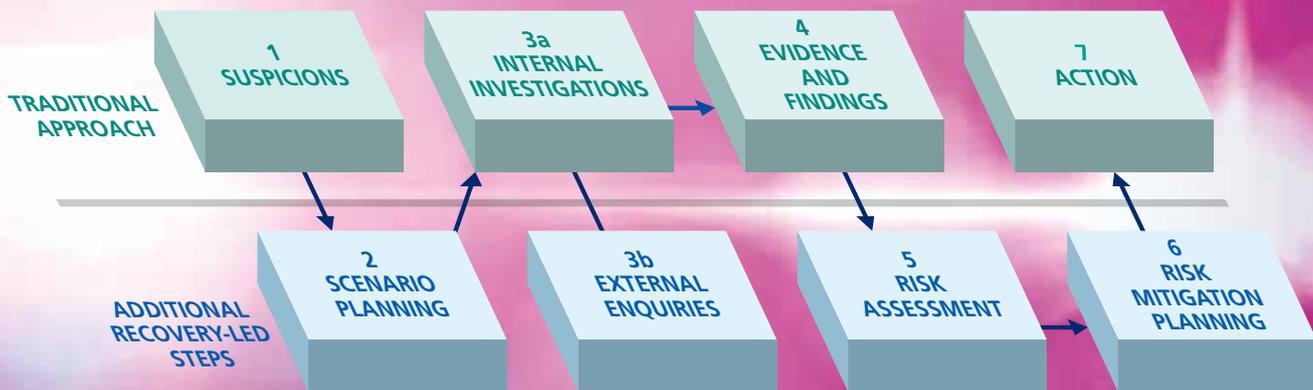
The aim of a regulator in a dawn raid is to catch you by surprise. Such raids are often designed to generate fear to ensure that you comply as quickly as possible. They can range from a small-scale raid on a local office, to be highly coordinated across multiple locations. Regulators may take evidence and documents – sometimes without warrants in place, image computers and servers, or interview and intimidate large numbers of employees. In a worst-case scenario, they may compromise your system, detain your management team, and your entire business grinds to a halt.

How you are prepared to respond in those first minutes, hours and days is a critical issue for companies. How you respond affects your ability to negotiate outcomes, protect your reputation and employees, and keep key business functions operating and ultimately ensure a quick path to recovery.

The top three things you can do to prepare for regulatory enforcement are:

- **Know your regulators**
Anti-corruption, anti-competition, environmental protection, food safety, tax evasion and data privacy have all been subject to aggressive regulatory enforcement. Establishing a nuanced understanding of

ADDITIONAL STEPS REQUIRED WHEN LEADING AN INVESTIGATION WITH RECOVERY IN MIND



regulators that are enforcing the rules in your sector, their goals and motivations and modus operandi and where decisions are made, is essential preparation.

- **Treat whistleblowers, disgruntled employees and third parties very seriously**

Whistleblowers and disgruntled parties are often a trigger for closer scrutiny by a regulator, but can be overlooked as a nuisance, having an agenda and an axe to grind. Many regulatory investigations in some key markets across Asia are initiated by whistleblower complaints. It is therefore important to look beyond the veracity of their claim at the broader risk to the business they might pose.

- **Have a plan**
The first hours are critical – who you are going to notify, how you need to escalate, how to secure documents and evidence, the team you need to form are all central issues that you need to prepare, plan and train for in advance of a real situation. Dawn raids are highly stressful situations for employees; it is essential to war-game your most likely and worst-case scenarios with those employees likely to be involved in a real-life raid situation.

Have an eye on the future

Finally, resilient leaders in crisis are always looking to, and planning for, the future. It is a key component of recovery. Here's a noteworthy

“Dawn raids are highly stressful situations for employees; it is essential to war-game your most likely and worst-case scenarios”

example: a company suffering through the early days of a highly politicised and extensive regulatory investigation into corrupt activities, whose operations had ground to a halt, whose market share was rapidly diminishing (in a high-growth market) and whose reputation was taking a severe beating, established, early on, a “recovery team”. Knowing they would come out of the investigation in 18 months needing a different business model, a more compliant way of operating, a new management team and a different proposition in the market, they began work on that immediately, thereby improving their recovery time by years, bouncing back after a critical incident, stronger, faster, better. That's resilience.

Control Risks

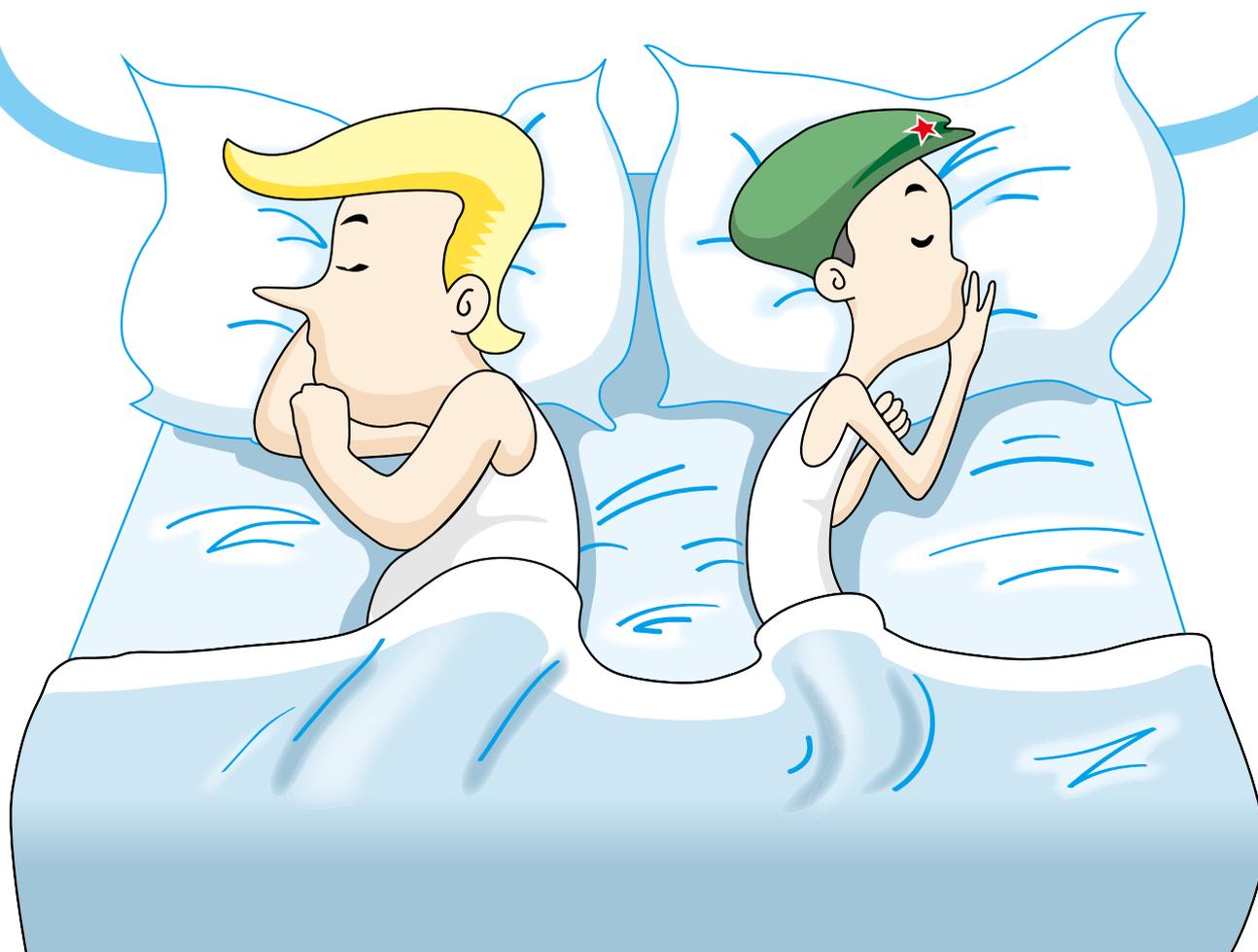
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A new bed – a shared dream?

A discussion of the new China Foreign Investment Law and the creation of an Expert Committee to produce template documents for in-house counsel. By *Robert Lewis* of *docQbot*, with an introduction by *Patrick Dransfield* of *In-House Community*.



INTRODUCTION

In July 1979, the People’s Republic of China promulgated the Equity Joint Venture Law (EJV Law). This was China’s first law on foreign investment, and was one of the earliest steps in China’s reform and opening up.

This was followed by the adoption of the Wholly Foreign-Owned Enterprise Law (WFOE Law) in 1986 and the Cooperative Joint Venture Law (CJV Law) in 1988.

Today, there are estimated to be more than 500,000 foreign investment enterprises (FIEs) in China – nearly 375,000 WFOEs and 125,000 Sino-foreign joint ventures, with EJVs outnumbering CJVs by more than 10-fold.

In March of this year, almost 40 years after the adoption of the EJV Law, China passed the new Foreign Investment Law (FIL), which will take effect on January 1, 2020, replacing the EJV Law, the CJV Law and the WFOE Law, all of which will be repealed as of the end of this year.

While the FIL was in large part passed to address several key issues in the context of the continuing Sino-US trade negotiations, for in-house counsel in foreign multinational companies with subsidiaries in China (as well as in-house counsel in domestic Chinese companies that have investments in Sino-foreign joint ventures) the most important legacy of the FIL will be that it represents a fundamental change in the legal basis for FIEs in China.

Going forward all new FIEs will be set up under and governed by the Company Law, and all 500,000-plus existing FIEs will need to convert into limited liability companies (LLCs) or other entities under the Company Law by the end of 2024. This will introduce a dramatic shift in the corporate governance for FIEs, creating both new opportunities and new challenges.

It is therefore no exaggeration to claim that when the new Foreign Investment Law takes effect on January 1, 2020, this will be an historic landmark in terms of China’s relationship with the rest of the world.

On a personal note, the adoption of the original joint venture agreements coincided with my own professional working life relating to China. In 1985 and 1986, I was living in Northern China and ended up with a teaching job at Beijing Normal University and also Newsweek. The best American burgers – the only American burgers – available in Beijing at the time

could be found at the Jianguo Hotel. Copied in perfect detail from the Sheraton Palo Alto, the Jianguo Hotel was also one of the first JV contracts put together on China’s opening up to the world – by Vivian Bath, I believe, in 1982. The first JVs were cobbled together using German law and American precedents and emerged ad hoc – Levi Strauss and Dow Chemicals being some of the first protagonists.

One book brought many of these early practitioners together – *Life & Death of a Joint Venture*, published by Asia Law & Practice in 1994 (full disclosure, I ended up running this company for Euromoney from 1998 to 2000). The book was a legal guide in the form of a novel, which began at the conception and ended at the death of a JV agreement. It helped create the careers of a generation of American lawyers – and as a consequence quite a few legal fees. Despite the title, an optimism reigns through the book. While there are definitely local difficulties between AmWij Inc (the American party) and Shanghai Number One Widget Factory – the theoretical parties involved in this fictional legal saga – the book does not question the economic needs for the transaction per se. However, the publicity associated with the book used the phrase: “Same Bed, Different Dreams”: “Tong Chuang yi meng”.

It is to be hoped that with the introduction of the FIL, foreign investors and their Chinese counterparts will now experience shared dreams in a new bed, but challenges will undoubtedly remain.

In order to address some of the challenges presented by the new FIL, the In-House Community and Robert Lewis of legal-tech start-up docQbot have cooperated to form an Expert Committee of leading lawyers from the law departments of leading State Owned Enterprises and Multinational Companies as well as both international and domestic law firms.

Working under Robert’s direction, the Expert Committee has undertaken to prepare a suite of new sample base templates for FIEs in China that comply with the requirements of the Company Law. Drawing upon commentary from the members of the Expert Committee, Robert describes below some of the key practical implications of the FIL for FIEs in China and introduces the work of the Expert Committee.



Patrick Dransfield





Robert Lewis

When the EJV Law was passed in 1979, Deng Xiaoping was reported to have stated that it was more “a statement of political intent, rather than a piece of legislation”. That was a fitting description given that the EJV Law in its original form consisted of a mere 16 articles.

So what can we say about the new Foreign Investment Law passed in March of this year? It was longer than the original EJV Law but still quite brief – it was less than a quarter of the length of the original 2015

draft of the FIL. It was also passed in record time – while the 2015 draft of the FIL had lain dormant for almost four years, the new version was adopted in under three months after the most recent revised drafts had initially been circulated for comment.

As such, it was apparent to most commentators that the new FIL was adopted primarily to address several points which were (and remain) under negotiation as part of the Sino-US trade negotiations, including strengthening of intellectual property rights (IPR) protections, elimination of non-tariff trade barriers, discontinuance of mandatory transfers of technology in exchange for market access, etc.

The FIL also enshrines the principle of national treatment into law. When coupled with the negative list system presaged in the 2015 draft of the FIL and separately implemented in 2017, this sets out a system of pre-establishment national treatment, which means that unless specifically restricted on the negative list, all other sectors are open to foreign investment subject only to record filing requirements. This also conforms to international practice in bilateral investment treaties.

USHERING IN A NEW ERA FOR FOREIGN INVESTMENT IN CHINA

All of these trade and investment negotiation points in the FIL (and many others which are beyond the scope of this article) are of significant importance, but these have not been the primary focus of lawyers engaged in foreign direct investment (FDI) work in China.

The key provisions of the FIL for this group comprised only a few brief lines at the end of the

already very brief FIL. Specifically:

- The EJV Law, the CJV Law and the WFOE Law (collectively, the Three FIE Laws) are to be repealed at the end of this year.
- Once the FIL takes effect on January 1, 2020, all new FIEs will be subject to the provisions of the Company Law going forward.
- More significantly, the FIL also provides that by the end of 2024 all 500,000-plus existing FIEs will be required to restructure to conform to the requirements of the Company Law.

The FIL thus will usher in a new era for foreign investment in China, overturning the old legal system which has governed FDI in China for 40 years. Both the corporate governance and the corporate documentation for FIEs will need to change under the Company Law.

This will be good news in many respects. The corporate governance provisions under the Company Law, while not yet fully up to international standards in all respects, are in general superior to the rules under the Three FIE Laws.

The Company Law provides that the highest authority in the company is the shareholders meeting, while the EJV Law does not provide for a shareholders meeting and designates the board of directors as the highest authority in the joint venture company. In the context of a Sino-foreign joint venture, which typically has a limited number of investors, this likely will be a matter of form over substance, and most FIEs (like most of their domestic non-listed LLC counterparts) will conduct the business of the shareholders meeting on paper only without holding an actual meeting.

However, in addition, the Company Law provides super-majority shareholders with a higher level of control than permitted under the EJV Law. For example, certain matters which now require unanimous board approval under the EJV Law, now will only require two-thirds majority approval at the shareholders meeting level. In addition, there are scores of other changes that will need to ripple through the various clauses of the joint venture documentation. This change in governance provisions alone will present significant challenges to both Chinese and foreign investors in joint ventures in China.

Under the Company Law, the nature of the corporate documentation for FIEs will also change dramatically, more especially for joint ventures. The joint venture contracts which have been in use since the opening up of China to foreign investment had been drafted to reflect the requirements set out in the EJV Law, many of which reflected government policies, administrative procedures and market conditions which no longer apply.

Under the Company Law, domestic LLCs commonly adopt a simpler set of articles of association (AoA) and then separately enter into a shareholders' agreement (SHA) as appropriate. Sino-foreign joint ventures are now expected to follow suit and as such will no longer be required to use the traditional legacy joint venture contract and will now have greater flexibility to adopt an SHA or a joint venture agreement (JVA) that is more consistent with international practice. (See box below.)

Expert commentary on the implications of the FIL

"During the five-year transition period from January 1, 2020, Sino-foreign joint ventures are required to reform their corporate governance structures" (including decision-making mechanism, voting, quorum, management nomination and share transfer) in order to comply with the PRC Company Law requirements. This would likely open the gate for re-negotiation between the joint venture partners and have a major impact on the dynamics of their relationship. Joint venture partners should weigh their positions in the joint venture and get themselves ready for the changing landscape." **Nanda Lau**, partner, Herbert Smith Freehills, Shanghai.

"We expect foreign investors will welcome many of the innovations of the FIL, including establishment of foreign-invested enterprises under the structure and governance provisions of the Company Law instead of under separate laws, as well as the FIL's enumeration of certain rights, protections, and access to be enjoyed by foreign-invested entities, including equal opportunity to participate in the formulation of standards (Article 15), equal treatment in government procurement for their products which are produced within China (Article 16), access according to law to China's capital markets (Article 17), IP protection (Article 22), and others. Undoubtedly, there will be great interest among foreign investors in seeing how such provisions will be given full effect as China continues to work to promote foreign investment and "create a stable, transparent, and foreseeable investment environment" (Article 3)." **Walker Wallace**, managing partner, O'Melveny & Myers, Shanghai

"Sino-foreign joint ventures will become a much more attractive option under the FIL, allowing foreign investors to tap into the burgeoning Chinese market by partnering with well-established Chinese partners. Thanks to removal of many prior rigid restrictions, foreign investors will be able to use more sophisticated offshore joint venture terms and techniques which they are familiar (and comfortable) with." **Jin Xiong**, international partner, King & Wood Mallesons, Beijing

"In addition to an improved corporate governance framework under the Company Law, the transition from the old FDI laws will also do away with the current "thin capital" rules and should also open up downstream investments by FIEs which have continued to be artificially constrained as a practical matter under the legacy legal regime. This will allow a significant opportunity for foreign investors to regularise their capital and corporate structures for their entities in China." **Scott Yu**, partner, Zhong Lun, Beijing



Nanda Lau



Walker Wallace



Jin Xiong



Scott Yu

MAPPING OUT THE ROAD AHEAD

Up to this point, the EJV Law has provided a structure for Sino-foreign joint venture contracts, and most joint venture contract forms in China all have derived from a common original base developed in the earlier stages of FDI in China, so there has been a common touchstone for the market. However, the Company Law imposes much fewer requirements on the form of an SHA or JVA, and since these foundational documents will no longer be subject to government review and approval, the parties will now have a broad scope to agree both the form and content of these agreements.

This threatens to create a vacuum in the market, which could result in the creation of a proliferation of multiple competing forms, some excellent, some substandard, and all mutually inconsistent. This in turn would engender a battle of the forms each time the parties undertook a new foreign investment project and – perhaps even more daunting – each time an existing Sino-foreign joint venture was to convert to an LLC under the Company Law. This would inevitably result in an excessive misallocation of time and money.

As I and some colleagues presented these issues at a workshop at the Beijing In-House Congress event at the end of March of this year just after the formal

adoption of the FIL, I suggested that a working group of senior lawyers from leading domestic and international law firms, as well as law departments in major Chinese and international corporations, be formed to create a new set of FIE templates to reflect the pending legal changes. I underscored that as part of any such initiative it would be necessary to discard certain legacy provisions in old-style joint venture contracts, import all of the Company Law corporate governance provisions and incorporate international best practices so as to take proper advantage of this unique opportunity to set a new standard template for common reference and use. This proposal received enthusiastic support from the attendees.

I approached the *In-House Community* shortly after the event to discuss how we might work together on this proposed template project. The *In-House Community* was keen to support this initiative as they saw that this would make an important contribution to their members working in corporations with investment activities in China. (See box below.) We set an ambitious target to complete the principal drafting for the set of templates by the end of August 2019, so that the templates could be finalised for presentation and discussion at the In-House Congress events in Hong Kong on (October 3) and in Shanghai on (October 30, 2019).

Empowering in-house counsel through thought leadership

“When Robert Lewis invited the In-House Community to be a part of the Foreign Investment Law Expert Committee, we immediately agreed as it felt very much a part of our DNA and fitted the platform we deliver. The mission of the In-House Community is to empower in-house counsel and to strengthen legal and ethical compliance for the benefit of all. It is a community of practice and what better way to manifest that than by helping to assemble a group of expert lawyers and business people from diverse backgrounds and perspectives to create a dynamic thinktank to provide input regarding the drafting of this new and crucial law that will fundamentally change Chinese-foreign relations positively – and also to provide the oxygen of discussion through the In-House Congresses in Hong Kong (October 3) and Shanghai (October 30, 2019).” *Patrick Dransfield, co-director, In-House Community*

FORMING THE EXPERT COMMITTEE

Since the objective of the proposed initiative was to produce an authoritative set of high-quality base standard templates for the China legal market, it was critical that we assemble a top-shelf team of legal experts to form the drafting committee. This could not be the product of a single lawyer or even a single law firm – it was imperative that this be a group effort involving experienced lawyers from multiple law firms

and corporate law departments in order to produce templates which would set the new standard for the entire China legal market.

Patrick Dransfield, co-director of the In-House Community, coordinated the efforts to extend invitations to a select group of leading lawyers. We were very pleased with the quick affirmative responses to the invitations extended and with the final composition of the Expert Committee. (See box.)

Key members of the Expert Committee

CO-SPONSORS

docQbot: Robert Lewis (*chief expert*), Adam Channer (*VP product development*), Sara Yu (*VP product development & strategic partnerships*), Zhou Zimin (*senior manager product development*)

In-House Community: Patrick Dransfield (*co-director*)

LAW FIRM PARTICIPANTS

Herbert Smith Freehills: Nanda Lau (*partner*), Angela Zhao (*senior associate*), Alizee Zheng (*senior associate*)

King & Wood Mallesons: Jin Xiong (*international partner*), Luo Hai (*foreign legal consultant*)

Latham & Watkins: Frank Sun (*partner*)

O'Melveny & Myers: Walker Wallace (*managing partner, Shanghai office*)

Zhong Lun Law Firm: Scott Yu (*partner*), Scott Guan (*partner*), Rachel Li (*partner*), Aaron Yu (*partner*)

LAW DEPT PARTICIPANTS

Accenture, Greater China: Andy See (*former managing director, Asia Pacific*), Zhiyong Yan (*senior counsel, Greater China*)

Bayer (China): Max Zhang (*head of law corporate*), Xi Zhang (*head of LPC (VP)*)

China Resources: Li Ge (*deputy group general counsel*), Yvonne Yao (*senior group legal counsel*)

Sinopec Group: Li Chi (*legal counsel, contract management division*)

All of the core members of the Expert Committee are highly experienced in both inbound and outbound investment projects. Collectively, the members of the group have worked on literally thousands of joint venture and WFOE projects in China over the last three decades. Our work also benefited greatly from the fact that we have had a good balance between Chinese and foreign lawyers, in-house lawyers and law firm lawyers.

The in-house members of the working group played a particularly important role. **Li Ge**, *deputy group general counsel for China Resources*, had the most unusual backstory in connection with his participation on the new FIL templates initiative. Not long after the Expert Committee commenced its work, I was invited to make a presentation to a group of in-house counsel from all of the first-tier subsidiaries of China Resources, and as part of my presentation I mentioned the work we were doing on this new FIL forms project. After my presentation Li Ge sought me out to ask how China Resources could join the Expert Committee, explaining that since China Resources is headquartered in Hong Kong, all of its entities in China are WFOEs or joint ventures. Moreover, he had a personal interest in this initiative since he had previously worked for the Ministry of Commerce and had been responsible in the

early days for review and approval of joint venture contracts, so he was keen to participate in the development of the new templates for this new era of FDI in China. Obviously, I was happy to confirm the participation of China Resources on the spot, and Li Ge assigned one of his top lieutenants, *senior group legal counsel*, **Yvonne Yao**, to join him on the Expert Committee. They jointly made very valuable comments on how to address issues involving SOEs in the templates.

Andy See, *managing director of the Accenture Asia Pacific law department*, learned of the work of the Expert Committee when he attended a presentation I made at another In-House Community event in Shenzhen. He similarly accepted the invitation to contribute to the initiative without hesitation. (See *box below*.) Andy and his colleagues not only invested substantial time to contributing to the new FIL templates, but Andy also took a keen interest in the broader docQbot ecosystem into which the new templates would be integrated. (Andy left Accenture at the end of August 2019, but because the core work of the Expert Committee had concluded by that point, Andy is still listed above in his former capacity at Accenture, where he was during the applicable periods of time.)



Li Ge



Yvonne Yao



Andy See



Li Chi



Max Zhang



Angela Zhao



Scott Guan



Walker Wallace

Going back in time

“For me, participating on this new FIL templates project was like going back in time to when I was at Clifford Chance in Hong Kong doing a lot of FDI work in the mid 90’s. At that time, we actually used the Shareholders Agreement template from Clifford Chance’s London office to convert it into a Sino-Foreign Equity Joint Venture Contract based on the law at the time as well as the very short template from the then Ministry of Foreign Trade and Economic Cooperation. I am confident that the work of the Expert Committee will spearhead the standardisation of the JVA template and Articles of Association so that all the players (whether foreign investors, local Chinese JV partners, international law firms or local Chinese law firms) will have access to international quality templates that are FIL-compliant, that set out the rights and obligations of the JV parties clearly, comprehensive and fairly. This will drive up the quality whilst driving down the costs and time for all.” **Andy See**, former managing director, Accenture Asia Pacific Geography Compliance, Operations, Regulatory & Ethics

We also asked the in-house counsel members of the committee for their views on the value proposition of this new FIL templates initiative, as this would help inform the focus and direction of the work of the Expert Committee. **Li Chi**, legal counsel in the contract management division of the law department of Sinopec Group, commented that having access to new bilingual joint venture templates that conform to the Company Law while also incorporating international best practices will be extremely valuable in connection with new Sino-foreign joint ventures as

well as with conversion of existing joint ventures. He expressed the hope that these templates would achieve a high level of acceptance in the market in order to reduce time and costs.

Similarly, **Max Zhang**, head of law corporate of Bayer China, emphasised how critical it will be to have all of the Company Law corporate governance provisions already integrated into the base bilingual templates as that would then provide a roadmap for amendment of joint venture contracts and articles of association for existing FIEs.

Perspectives of the law firm participants

The law firm participants similarly found great value in participating in this initiative.

Angela Zhao, senior associate with Herbert Smith Freehills in Shanghai, noted: “The FIL will have a profound impact on foreign investors in China. Many of our clients are already preparing for this change. We believe that what the Expert Committee has been able to produce will prove to be extremely useful for the entire legal community in China. It is a great honour and privilege to be part of this important initiative.”

Scott Guan, a partner in the Shanghai office of Zhong Lun, similarly commented: “We have had an unprecedented number of responses from clients to our updates on the new FIL, and many have already instructed us to help guide them through the practical implications. We anticipate that once the FIL implementation regulations are issued, there will be another significant uptick in requests from our clients for FIL-related guidance. This is a major reason that we were so keen to join this initiative. We wanted to be on the cutting edge of all the practical aspects of this new change in law.”

All of the participants also saw the value proposition this initiative in broader market terms. **Walker Wallace**, managing partner of the Shanghai office of O’Melveny & Myers, expressed similar sentiments as follows: “This has been a very worthwhile project. I think that the work of the Expert Committee will result in a product that is truly valuable to the Chinese legal community on many different levels. We were pleased to be invited and happy to make a contribution.”

THE WORK PROCESS AND THE WORK PRODUCT

This FIL templates project was ambitious in its scope and as such demanded a substantial investment of time over a period of three months. In all, more than 1,000 hours of professional time have been invested by the members of the Expert Committee, principally by the docQbot team, which took the labouring oar.

This was a multi-stage process. The initial joint venture template drafts were developed on an international base incorporating best practices drawn from more than a dozen publicly available templates from multiple jurisdictions around the world.

We then identified various legacy provisions which were required under the EJV Law but which were no longer required under the Company Law, were not consistent with international best practices and, in the opinion of the Expert Committee, no longer served a legitimate purpose. These were intentionally omitted.

We then layered in the corporate governance provisions required under the Company Law. This was a pains-taking exercise as scores of related changes had to be made throughout the base template. This exercise was central to the overall initiative and is hoped will prove to be a valuable guide for FDI practitioners and investors inside and outside China.

Members of the Expert Committee then compared these international templates against best practices in connection with both legacy Sino-foreign joint venture contracts as well as representative shareholder agreement templates for domestic Chinese companies in order to ensure that these new JV templates are consistent with local market expectations as well. Accordingly, the sample templates are intended to reflect the best of both international and domestic best practices.

The group determined that it would not be feasible to create a set of base templates that would be suitable for use in connection with the full range of common FDI transactions. Accordingly, the decision was taken to prepare sample templates to reflect the terms of representative hypothetical base case scenarios.

The templates then passed through multiple rounds of drafts and comments in order to achieve, where possible, a consensus view of the Expert Committee members. In the early rounds it became apparent that there were divergent views on various key topics. To be able to reflect the range of views of the members of the Expert Committee, it was decided that we also produce annotations to the sample templates.

This added a significant amount of work to what was already a major undertaking. However, this also provided a very valuable and unique platform on

which we could present different views of the group as well as alternative approaches that ultimately were not incorporated into the sample templates.

Moreover, for the corporate governance provisions required under the Company Law, we have provided references in the annotations to the specific articles of the Company Law for ease of reference. However, the annotations cover not only points of law but also related practical considerations to be taken into account as the templates are used. We are of the view that these annotations, and particularly those which set out the divergent views of the group, form another key part of the overall value proposition of this initiative. (See box below.)

The value proposition of the annotations

Zhiyong Yan, senior counsel for Accenture Greater China, who was particularly active in reviewing and commenting on the draft templates, had a very expansive view of the value proposition of this template project generally and the annotations specifically. He noted that “The detailed annotations to the templates can be used as a valuable reference guide to the applicable provisions of the Company Law, while at the same time also provide practical guidance on alternative clauses. We will be able to use these annotations as a guide for possible alternative positions we can take in negotiations.”

The initial intention was to produce only English versions of the templates since the primary membership of the In-House Community are in-house counsel in foreign multinational companies. The base drafts were created from international precedents, which were in English, the initial drafts were prepared in English and the working language for the group was also English. This also reflects the typical practice for parties to a Sino-foreign joint venture to negotiate first off of the English drafts and then to prepare Chinese versions only once the English version is settled so as to reduce related transaction costs.

However, early on this this process, *Xi Zhang, VP and head of LPC for Bayer China*, expressed the hope that these templates could be presented to various government departments and lawyers associations for consideration as a semi-official or at least recommended set of templates. Once she help set our sights on this more lofty objective, it became clear that we would also need to produce Chinese versions.



Zhiyong Yan



Xi Zhang

Preparation of high-standard Chinese versions thus became another key objective of the group. Our objective was to ensure that the Chinese version read as though it was drafted originally in Chinese as the base draft and not simply as a translation from the English base. In order to achieve this high standard, we started with a “plain English” drafting style for the base, which in structure and presentation would lend itself more easily to producing a Chinese version which would read more naturally,

Consequently, the final set of deliverables produced by the Expert Committee are now to consist of the following:

Sample Joint Venture Agreement (JVA) (EN & CH)
Sample Articles of Association for Sino-foreign Joint Venture (JV AoA) (EN & CH)
Annotations to JVA and JV AoA (EN & CH)
Sample WFOE Articles of Association (WFOE AoA) (EN & CH)
Annotation to WFOE AoA (EN & CH)

In all, the Expert Committee will produce a total of approximately 250 pages of templates and annotations in English and Chinese.

THE WAY FORWARD

In order to facilitate broader circulation of the new FIL sample templates and annotations, we are working with Law Press China to publish these materials and other related content in book form prior to year end. This will be published in English and Chinese so will be a useful reference for both Chinese and foreign legal professionals and investors.

However, we recognise that while producing static templates on a printed page has significant reference value, it has limited practical value. Consequently,

electronic copies of the sample templates in English and Chinese will be made available on the In-House Community and docQbot websites in the coming weeks. Access to and use of these sample templates will be subject to standard conditions. Details to come!

And, of course, as noted above, the sample templates will be presented and discussed at the In-House Congress events to be held in Hong Kong on October 3 and in Shanghai on October 30, 2019.

Separately, fully automated versions of these and other related FIL-compliant bilingual templates will be available to subscribers on the docQbot website starting from early October. These automated templates will incorporate almost all of the alternative clauses which are referenced in the annotations but not included in the sample templates. These new FIL-compliant templates are the most complex of any we have produced on the docQbot platform, and yet a junior lawyer will be able to go online, answer some basic questions, and in 15 minutes or less produce a highly customised bilingual draft JVA and AoA. One base template will be able to produce trillions of unique iterations just based on the user’s online responses. And all of these FIL-compliant templates will be fully integrated with the existing docQbot ecosystem of fully automated bilingual FDI templates. This is where legal-tech meets the new legal regime in China!

The implementation regulations for the new FIL are expected to be issued prior to the end of the year, ahead of the FIL taking effect. The Expert Committee will update the materials to reflect the new guidance to be included in the implementation regulations.

We wish to thank the *In-House Community* for their leadership on this new FIL sample templates initiative, and we welcome the input from all the members on the platform. Working together we can create a valuable shared foundation to move forward in this new era of FDI in China.

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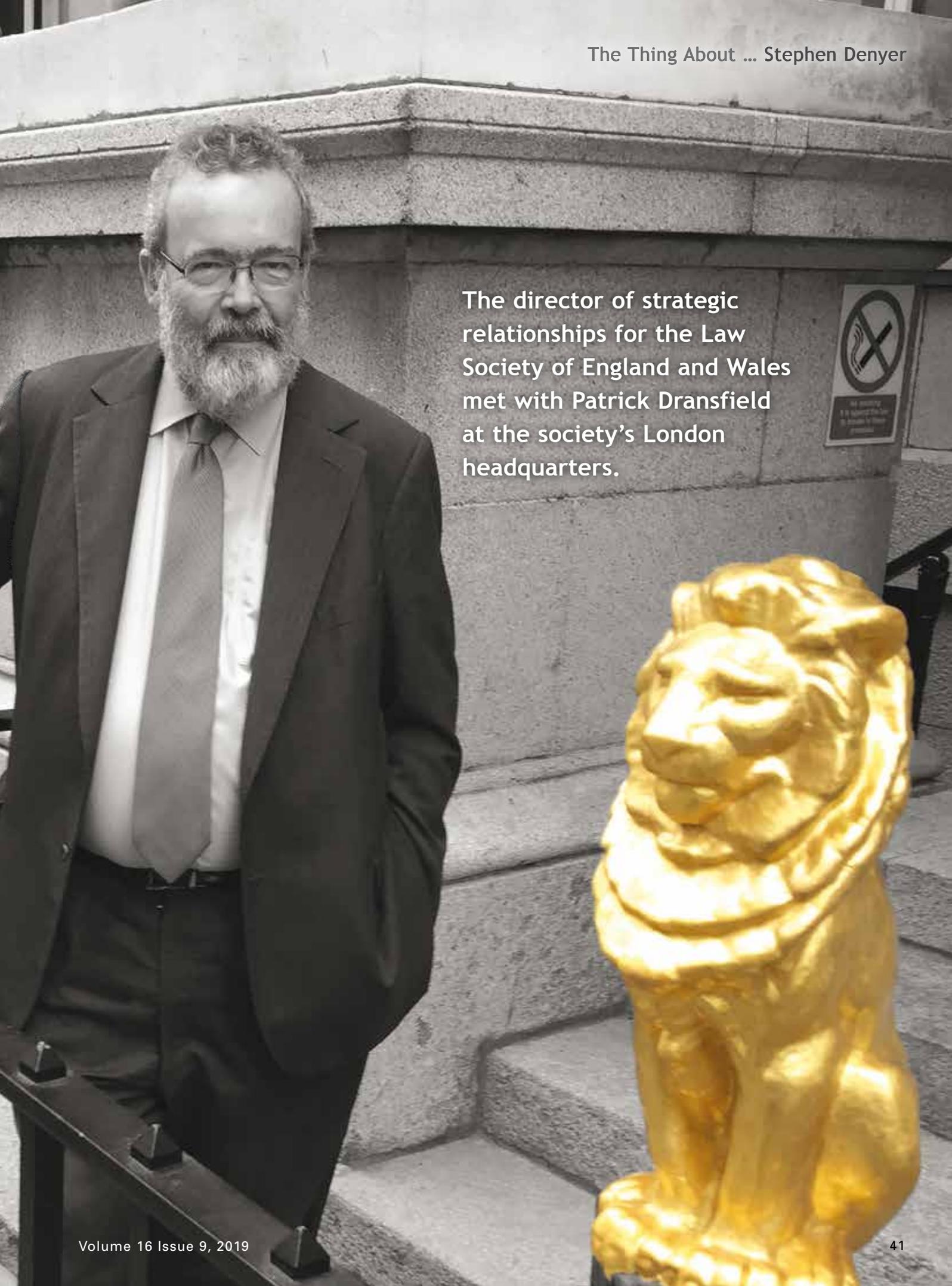
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The thing about ...

Stephen Denyer

Photo: Patrick Dransfield



The director of strategic relationships for the Law Society of England and Wales met with Patrick Dransfield at the society's London headquarters.



Your private practice career – from trainee solicitor at Allen & Overy in 1978 to global markets partner in 2014 – parallels the expansion of international legal services and the growth of English Law and UK-based law firms. What are your observations about that period?

Globalisation of the market for legal services and the global expansion of major business law firms occurred during my career at Allen & Overy and I was fortunate enough to be able to participate very

actively in that process. For me, two major events occurred in close proximity – one being the creation of a single legal services market in the EU and the other being the collapse of communism in Central and Eastern Europe. Those two events presented an opportunity for my firm to expand rapidly across the whole of Europe and diversify from being a firm which only practised English law to one which offered a substantial range of capabilities in many major systems of law. That development of a strong

pan-European practice, combined with A&O's traditional strengths in banking and capital markets, provided the engine which drove A&O's wider development and expansion in Asia, North America and beyond.

A&O's international growth during my time with the firm was largely organic, requiring a painstaking process of office opening and lateral hiring. This presented many challenges, but also gave us an opportunity to create a very solid foundation for the continuing success of the firm. In my experience, the key element was always achieving the best cultural fit and ensuring that the people that came on board shared fundamental values and perspectives.

Contrary to popular belief, a firm like A&O is not constantly seeking opportunities to open new offices and expand geographically. There are many costs and potential risks associated with each market entry, whether that involves the establishment of a new office in a new jurisdiction or a merger with a firm based in another jurisdiction. For this reason, I am just as proud of the work I undertook for A&O in developing its network of relationship law firms around the world as with our achievements in adding additional jurisdictional capabilities of our own.

Tim Harford, the Undercover Economist, warns us not to project future growth on present and past performance. Do you think this applies to partnership law firms?

The traditional "one global firm" lockstep partnership model much favoured by London's magic circle has many strengths, creating shared common interests amongst the partners and encouraging everyone to work together as a team for the collective benefit of the organisation. However, these firms have generally been pyramid structures dependent on steady growth at the bottom through the hiring of large numbers of able and enthusiastic young lawyers who can come up through the ranks to become the partners of tomorrow. In mature markets, it is becoming increasingly challenging to maintain that model whilst at the same time maintaining and increasing profitability. This is not only encouraging firms to evolve their structure and strategic priorities, but also encouraging younger lawyers to consider their career in different phases, often involving moving from one employer to another in a strategically planned way. That presents some challenges, but also offers many opportunities for more varied, tailor-made careers.

In my opinion in-house careers are becoming

increasingly attractive for the brightest and the best. I am sure that a growing proportion of the leading lawyers of tomorrow will have spent part, or even the whole, of their career in-house. Law firms will need to fundamentally rethink how they manage and develop key client relationships if they are to maintain their success and in this context the ability to adopt a collaborative approach to law tech and innovation will be key. The development of the CLO [chief legal officer] role as a key component of many in-house functions is giving a welcome boost to this evolution.

"I am sure that a growing proportion of the leading lawyers of tomorrow will have spent part, or even the whole, of their career in-house"

The late, great management guru Peter Drucker once said that "culture will have strategy for breakfast". Do you agree? What has been the best – and the worst – cultural aspects relating to the practice of law that you have seen?

There are many great lawyers and great law firms in this world. The difference between individual and collective success and failure lies in the ability (or otherwise) of law firm leaders to match the culture and values of each individual lawyer to that of the firm. In my career I have experienced a number of cases where brilliant, hard-working and high billing partners were behaving in a way which demonstrated values and culture that were radically different from those espoused by the firm as a whole. In every case when we gripped the problem and moved the lawyer who was out of tune with the organisation out of the firm, the long term benefits in terms of improved performance by the wider team massively exceeded the short term challenges connected with the departure of a 'big hitter'. We normally ended up asking ourselves why we hadn't done it sooner, or better still not hired our former colleague in the first place!

I have seen particularly good examples of the value of a collegiate and supportive culture when I was responsible for creating new greenfield operations in emerging markets in Central and Eastern Europe. In those cases, when we started frequently there was no local lawyer with the relevant knowledge and expertise in the local market to allow us simply to hire lawyers who were already recognised experts in some of the fields of

law that were most important to A&O. As a result our success depended on the active engagement and support of leading specialists based in mature A&O offices who freely gave time to support the transfer of knowledge to, and practice development in, the new jurisdictions. I always found those worldwide team efforts particularly inspiring and energising, creating the feeling that we really had a special culture and values.

“International competition in the market for legal services does not damage the domestic profession, on the contrary it greatly encourages and supports its development and success”

It has been more than a decade since the Legal Services Act introduced the alternative business structure for legal services and carved out the regulation and disciplinary actions of legal providers to the Consumer Panel and the Solicitors’ Regulation Authority. How has the Law Society evolved post-2007 and what is its present and future mission?

The Law Society today is a professional body that is wholly focused on representing, promoting and supporting the solicitors’ profession not only in England and Wales, but also internationally. Much of the work we do is particularly relevant for large law firms operating on a multi-jurisdictional basis and large in-house legal departments and we regard those two constituencies as of vital importance to us. England and Wales has the largest legal services market in Europe, second only to the US globally. Home to more than 200 foreign law firms from around 40 jurisdictions, employing over 10,000 people, it is the preeminent global legal centre. London has firmly established its position as a world-leading legal and financial centre. The co-location and clustering of banking, insurance, fund management and other financial services underpins the capital’s position as a major centre for international legal services and the natural destination to conduct international business. As business becomes increasingly global, companies have a wide choice of laws, procedures and legal systems. The Law Society plays a wider role in highlighting the many benefits of choosing England and Wales as a jurisdiction, from English law and our court system, to our world-leading profession and arbitration system. We seek to ensure that all

relevant stakeholders realise that the legal sector of England and Wales is one of the UK’s greatest exports and our jurisdiction is home to some of the best law firms in the world, globally renowned courts and a wealth of legal talent.

Our work in influencing the development of law and the approach of governments and regulators around the world is recognised internationally and domestically as of vital importance and we are very proud of it. However, we also have much to do at home, representing, promoting and supporting a solicitors’ profession which comprises a large and diverse range of lawyers. There are many things that all solicitors have in common relating to areas such as the rule of law and access to justice. The modern Law Society is of course rightly proud of its achievements in those areas too.

I think we can all agree that, with reference to the most prominent but not the only examples of Brexit and the deteriorating US-China relationship, it does appear that the international zeitgeist has changed from open trade to protectionism. Are their circumstances where a country’s legal industry requires protection, in your view? What is the role of the Law Society in this context?

My jurisdiction is the most open in the world and in my opinion has benefited massively from that. International competition in the market for legal services does not damage the domestic profession, on the contrary it greatly encourages and supports its development and success. You only have to look at the growth and success of the legal services sector in those markets that have liberalised and opened in the last 30 years to see how those long-term benefits play out. Of course, the opening of legal markets that have previously been closed is best undertaken in a structured and controlled way, often involving a number of phases. The Law Society has unparalleled knowledge and expertise in these areas. We spend a lot of time and effort explaining how this is best handled for the benefit of all and are actively involved in discussions with relevant bodies around the world to support the opening of markets that are currently closed and to encourage and ensure the continuing openness of markets that are in danger of closing

The growth of technology can be seen as a hell or a heaven. What do you consider to be the role of the Law Society in preparing the profession, and society at large, for the challenges presented by, among other things, cryptocurrencies, cybercrimes and money laundering?

The Law Society has been at the forefront of the development of legal tech in the UK and has led discussions in this area involving a wide range of stakeholders, including the British government. We have thought long and hard about how legal tech can best be supported and developed and have made concrete recommendations in that regard. We have used our convening power to bring together many experts and prominent stakeholders to help with these efforts. However, this is not just about business success, we have also done important work relating to the impact of artificial intelligence and the use of algorithms on the justice system. We are uniquely well placed to be a leading voice in these important areas.

As regards the more challenging aspects of cross-border regulation in areas such as cybercrime, corruption and money laundering, we seek to balance our engagement domestically in the UK with relevant government and other agencies with our wider involvement with relevant bodies around the world. As in so many other areas, in a digital world things don't stop at national borders so the international perspective and influence of the Law Society is vital.

“Those trained only to re-heat pre-cooked hamburgers are unlikely to become master-chefs,” according to Andreas Schleider, the OECD’s director of education. What pressures do you see on the next generation of lawyers and how do you think the profession as a whole, and the law schools in particular, can better equip the next generation of legal professionals?

It is obvious that lawyers of the future require really strong tech skills and that both the profession and law schools play an important part in ensuring that those are developed in a collaborative fashion, breaking down traditional barriers between those sectors. Business skills are also important and it is good to see the growth in collaboration between law schools and business schools in an academic setting.

More generally, it will be extremely important that our profession becomes ever more diverse and inclusive. There is overwhelming evidence that diversity supports better decision making and that inclusiveness encourages greater productivity so these are not just ‘soft’ areas, but are also business critical.

Lawyers today are under unparalleled and relentless pressure from many different directions. Mental health and wellbeing has to be a top priority for the profession and part of our continuing efforts around training and development have to be focused on that necessity.

Overall, I am very optimistic about the profession and the future of young lawyers entering it, but current leaders in the legal sector have a heavy responsibility to create an environment in which the brightest and best young people are not only attracted to the sector, but also thrive in it and make a contribution.

What is your hinterland?

I am from the first generation of my family to study at university and am a product of the state education system in the UK. As a dyslexic, I found the study and practice of the law challenging, but very rewarding. Having continued to battle with dyslexia throughout my life I feel that dealing with this challenge has greatly added to my resilience, stamina and long-term success.

I am very much an internationalist and a strong believer in cultural diversity and inclusiveness. Married to a German wife, I have four bilingual children all of whom have studied and worked in various locations around the world. Twelve years living and working in Germany, while at A&O, has been an important and indeed defining part of my life.

Today, Stephen Denyer has a wide-ranging role with the Law Society of England and Wales focused particularly on the engagement of the Law Society with large law firms, large in-house legal departments and key international stakeholders. In addition to his Law Society position he is also a member of the Management Board of the International Bar Association and is on the Council of the American Bar Association Section of International Law. Stephen has had a lifelong interest in many aspects of learning and development and now sits on the advisory board of two law schools, both with very international reach and perspectives. Prior to joining the Law Society Stephen spent 36 years at Allen & Overy and, as a partner, made a significant personal contribution to the international expansion of that firm, by overseeing both the opening of 11 new offices of that firm and also the development of its relationships with law firms in jurisdictions where it did not have a physical presence.

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AV Aviation

BF Banking & Finance

CM Capital Markets

REG Compliance / Regulatory

CMA Corporate & M&A

E Employment

ENR Energy & Natural Resources

ENV Environment

FT FinTech

INS Insurance

IP Intellectual Property

IA International Arbitration

IF Islamic Finance

LS Life Sciences / Healthcare

LDR Litigation & Dispute Resolution

MS Maritime & Shipping

PF Projects & Project Finance
(inc. Infrastructure)

RE Real Estate / Construction

RES Restructuring & Insolvency

TX Taxation

TMT Telecoms, Media & Technology

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