In-House Community

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iHC

In-House Community *Magazine*

IN-HOUSE INSIGHTS

In-house Insights with Amber Gupta of Aditya Birla Group

DISPUTE RESOLUTION

Singapore ready to become global arbitration hub

PHILIPPINES

No Vaccine, No Work?

iHC
In-House Community
Magazine

PUBLISHER
Rahul Prakash
+852 8170 2951
rahul.prakash@
inhousecommunity.com

LEAD DESIGNER
Ailar Arak

EDITOR
Nathan Smith

WRITER
Butch Bacaoco

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Feature contributors

Delphine Ho

As Registrar of SIAC, Delphine oversees the SIAC Secretariat in the provision of case management services. Delphine joins the SIAC with both private and public sector experience. She has spent a significant part of her career with leading Singapore law firms where she specialised in civil and commercial litigation and arbitration. She subsequently joined the Singapore Legal Service and served as an Assistant Registrar of the Singapore Supreme Court. Delphine is called to the Singapore Bar and is also admitted as a solicitor in England & Wales. She is a Fellow of both the Chartered Institute of Arbitrators (CIArb) and the Singapore Institute of Arbitrators (FSIArb), as well as an Associate Mediator of the Singapore Mediation Centre. Delphine speaks English, Mandarin and French.

Daryl Chew

Daryl Chew is a Partner in Shearman & Sterling's International Arbitration practice and Head of the Singapore Office. He is also Chairman of the Board of Maxwell Chambers.

Karen Gough

Karen Gough, Barrister of 39 Essex Chambers, a practising Attorney-at-law (Jamaica and Trinidad and Tobago), Chartered Arbitrator, a Certified International ADR Practitioner (FAiADR), and past President of the CIArb.

Prof Benjamin Hughes

Benjamin Hughes is an independent arbitrator with The Arbitration Chambers in Singapore, adjunct professor at National University of Singapore Faculty of Law, and member of the SIAC Court of Arbitration.

John Frederick E. Derije

John Frederick E. Derije is a Senior Associate of the Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW), Davao Branch.

Yvette Yu

Yvette is a litigator with extensive experience in advising and representing international clients on a broad range of disputes, including multi-jurisdictional corporate and commercial litigation, regulatory investigations and enforcement actions.

Nicole Wong

Nicole specializes in a broad spectrum of high stakes cross-border corporate and commercial disputes and works closely with many multinational corporations and high-networth individuals.

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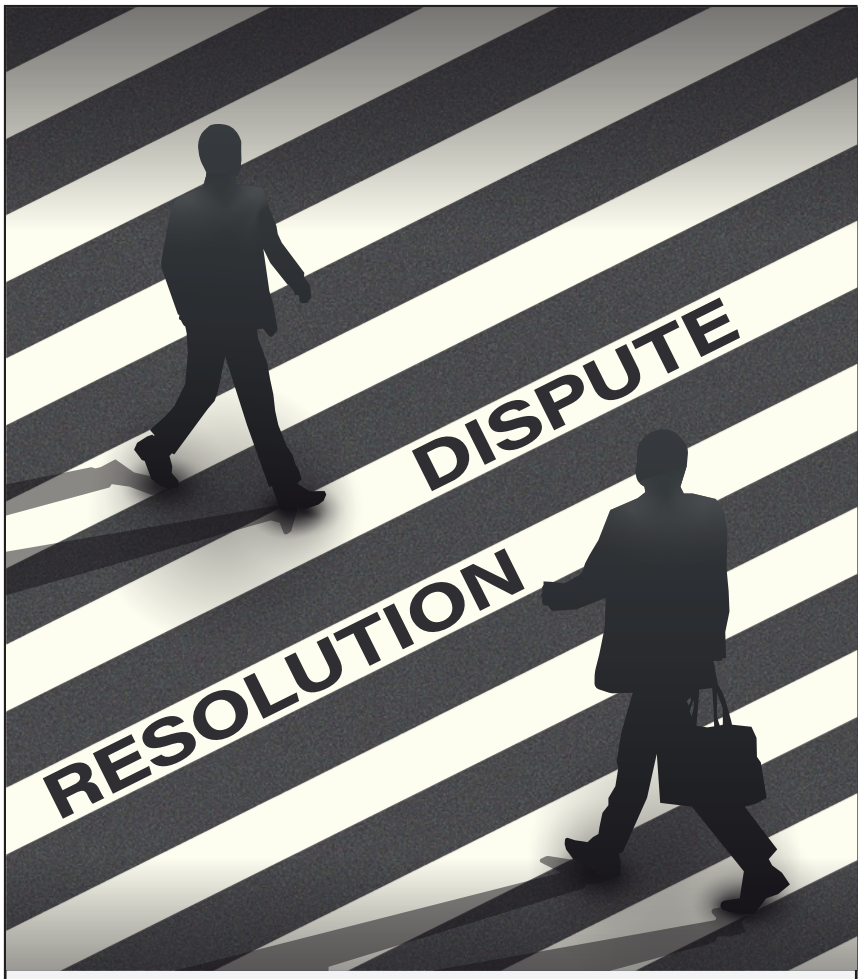

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No Vaccine, No Work?

BY NEPTALI B. SALVANERA

CNN in New York recently fired three employees who violated company policy by reporting for work unvaccinated against the Covid-19 virus[1].

CNN chief Jeff Zucker reportedly said the media outlet has a zero-tolerance policy on requiring employees reporting onsite to be vaccinated. In other news, United Airlines will also require its more than 67,000 US-based employees to be vaccinated by no later than October 25 of this year or risk termination[2].

Unlike gender or race, a person's vaccination status is not presently a legally-protected characteristic or classification under US Federal or State laws. Yet, the prevailing sentiment in the US is that employers can legally make employment decisions based on the vaccination status of their employees. The Equal Employment Opportunity Commission (EEOC) of the US has, in fact, issued guidelines providing that businesses generally may require workers who report onsite to be vaccinated without running afoul of the country's anti-discrimination laws.

However, due consideration and reasonable accommodations must be afforded to employees who refuse a vaccine for religious or medical reasons. To address this conundrum, some States have already proposed legislation prohibiting discrimination in the workplace and elsewhere based on vaccination status.

In contrast, the Philippine government, through the Department of Labour and Employment (DoLE), issued on March 12, Labour Advisory No. 03, Series of 2021 (Guidelines on the Administration of Covid-19 Vaccines in the Workplaces) proscribing the adoption and implementation of a "no vaccine, no work" policy.

In the advisory, "covered establishments and employers shall endeavour to encourage their employees to get vaccinated. However, any employee refusing or failing to be vaccinated shall not be discriminated against in terms of tenure, promotion, training, pay and other

[1] https://www.theguardian.com/media/2021/aug/05/cnn-fires-employees-covid-unvaccinated-office
[2] https://www.cnbc.com/2021/08/06/united-airlines-vaccine-mandate-employees.hml

benefits, among others, or terminated from employment." Furthermore, under Republic Act No. 11525, "the vaccine card shall not be considered as an additional mandatory requirement for educational, employment and other similar government transaction processes."

The intent of the DoLE advisory and RA 11525 to prohibit discrimination is laudable. By virtue of the advisory and the law, vaccination status may arguably now be considered a legally protected characteristic or classification, along with gender (Articles 133-135, Labour Code), age (RA 10911; DoLE DO 170, Series of 2017), disability (RA 7277), medical conditions (RA 11166 — HIV/AIDS), civil status (RA 8972), race or tribe (RA 8371) and mental health (RA 11036).

So, unlike in the US where employers can discriminate in the absence of a specific law classifying vaccination status as a legally-protected characteristic, employees in the Philippines can cite the DoLE advisory and law in parrying any attempt by an employer to implement a policy discriminating against unvaccinated employees.

But is this absolute?

Note that even under the above-cited laws prohibiting discrimination, there are exceptions. For example, an employer may discriminate as to age or physical disability if it is a bona fide occupational qualification (BFOQ). Case law allows discrimination as to the body weight of flight attendants because it is a reasonable BFOQ in the airline industry (*Yrasuegi vs. PAL*, G.R. No. 168081, 17 October, 2008).

To justify a BFOQ, the Supreme Court held that the employer must prove two things: 1) the employment qualification is reasonably related to the essential operation of the job involved and 2) there is factual basis for believing all or substantially all persons meeting the qualification would be unable to properly perform the duties of the job (*Star Paper Corp. vs. Simbol*, G.R. No. 164774, 12 April, 2006).

It is unclear how this concept of BFOQ fits into the issue of vaccination discrimination. A case can probably be made for hospitals and other medical institutions to argue that vaccination is reasonably related to the essential operation of these workplaces, but this may not be so for other industries.

A case can probably be made for hospitals and other medical institutions to argue that vaccination is reasonably related to the essential operation of these workplaces, but this may not be so for other industries.

Perhaps, given that Advisory No. 03 is couched in general terms, employers may want to clarify with the DoLE about the nature and extent of the prohibition against discrimination.

For example, while there should be no discrimination in terms of training, is it discriminatory to segregate the employees and schedule separate training days for the vaccinated and unvaccinated? Or, while everybody

is allowed to report for work onsite regardless of vaccination status, can an employer say all vaccinated employees should occupy the ground floor and the unvaccinated the second floor? Or is the employer allowed to assign a separate shuttle bus for the unvaccinated employees?

Medically speaking there may not be a difference given that even vaccinated individuals can also be infected by Covid-19 and can infect others so there is no substantial basis to distinguish between the two groups of employees. However, the unvaccinated employees are not being deprived of their right to go to work, attend training or avail of the shuttle service. It is just that they exercise and enjoy these rights under a different set-up or location. Sure, there may be emotional or psychological distress at being left out or separated, but is this a sufficient basis to hold the employer liable for discrimination? How about the "right" of vaccinated employees to feel secure or comfortable?

On another point, are employees who do not want the jab due to unfounded conspiracy theories to be treated differently from those who refuse to be vaccinated on religious and medical grounds? Bluntly, can different logical reasoning be a basis to make a substantial distinction? How I wish it was that easy.

Beyond the employment setting, discrimination against unvaccinated individuals is also a lingering issue. Recently, to address vaccine hesitancy, the Philippine President allegedly remarked that he will order the arrest of people refusing to get the jab and that they will be ineligible for the "*ayuda*" during the ECQ Part III (enhanced community quarantine, the strictest quaran-tine level). This reportedly forced people to go in droves to vaccination sites in Manila and Las Piñas resulting in chaos and cancellation of inoculations.

Fake news or not, these unfortunate incidents — which may be considered super-spreader events — emphasise the need to come up with an enabling law to implement the general welfare clause in the Constitution, bearing in mind its equal protection clause. Hopefully, this enabling law will also clarify and answer the questions posed above on discrimination in the workplace.

This article 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 information and educational purposes, and not offered as, and does not constitute, legal advice or legal opinion.

Neptali B. Salvanera
nbsalvanera@accralaw.com
Atty. Neptali B. Salvanera is a Partner and Monitor of the Labor and Employment Department of the Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW).

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SCIA International Arbitration Tower, One Excellence T1, 5033 Menghai Blvd, Qianhai, Shenzhen, P.R.China

Office Address: 41/F, West Square of Shenzhen Stock Exchange, 2012 Shennan Blvd., Futian Distict, Shenzhen, P.R.China

Office Address of GBA International Arbitration Center Exchange and Cooperation Platform: 16/F, Tower 1, Chang Fu Center (CFC), 2 Shihua Road, Futian District, Shenzhen, P.R. China

Office Address of SCIA North America Hearing Centre: 35 N. Lake Ave, Suite 730, Pasadena, CA 91101, USA

SCIA Wechat Official Account

SCIA

Telephone: 86-755-83501700 E-mail: info@scia.com.cn Website: www.scia.com.cn

Upon Further Reflection: Privy Council Judgment Further Clarifies Scope of the Reflective Loss Rule

BY JEREMY LIGHTFOOT
XIA LI
YI YANG

In the recent case of *Primeo Fund v Bank of Bermuda (Cayman) Ltd & Anor (Cayman Islands)* [2021] UKPC 22, the Judicial Committee of the Privy Council (the "**Board**") further clarified the scope of the reflective loss rule. This is the rule that exists under both English and Cayman Islands law which operates to prevent a shareholder recovering loss which reflects loss suffered by the company in which they are invested. The rule has long been the source of controversy and confusion. This decision of the Board provides some welcome clarification on two aspects of the rules, being the relevant time for determining whether the reflective loss rule should apply (the "**Timing Issue**") and the definition of a 'common wrongdoer' for the purposes of the reflective loss rule (the "**Common Wrongdoer Issue**").

Primeo Fund (the appellant) was a Cayman Islands company in official liquidation. It made claims against its two former professional service providers R1 and R2 in relation to loss suffered by its direct investments into BLMIS, the vehicle by which Bernard Madoff carried out his Ponzi scheme. The appeal to the Privy Council from the Court of Appeal of the Cayman Islands concerned the operation of the reflective loss rule in company law. The parties were agreed that Cayman Islands law in this aspect was the same as English law.

NATURE OF THE REFLECTIVE LOSS RULE

The Board considered the UK Supreme Court's recent majority judgment in *Marex Financial Ltd v Sevilleja (All Party Parliamentary Group on Fair Business Banking intervening)* [2020] UKSC 31 as a starting point. It restated the law in Marex that the reflective loss rule is a rule of substantive company law, not a principle for the avoidance of double recovery. It therefore does not matter whether the company brings a claim of its own or decides not to claim. The key test for the application of the reflective loss rule is whether the damage is separate and distinct from the damage suffered by the company in the eyes of the law. The rule would not apply to losses suffered by a shareholder which were distinct from the company's loss or to situations where the company had no cause of action. The scope of the rule is limited to where damage is suffered though the mechanism of a wrong done to the company which then has a knock-on effect on the value of the shares held by the shareholder.

THE TIMING ISSUE

In the Board's view, since the rule is substantive rather than procedural in character, the relevant time to assess whether it is applicable is when the loss which is said by the claimant to be recoverable in law is suffered by it.[1] Otherwise, to test the

[1] *Primeo Fund v Bank of Bermuda (Cayman) Ltd & Anor (Cayman Islands)* [2021] UKPC 22 at para.59

application of the reflective loss rule at the time when proceedings are brought rather than when the loss is suffered would undermine the intended effect of the rule and the certainty that the rule is intended to achieve, as a bright line rule of law.[2]

The Board then held in this case that the reflective loss rule did not bar Primeo from claiming in respect of the losses it suffered each time it made a direct investment in BLMIS, nor from claiming in respect of the losses it suffered as a result of the loss of the chance to redeem its BLMIS investments.[3] In the Board's view, those losses were not suffered by Primeo "in its capacity as shareholder" of the company ("**Herald**"), as at the time Primeo suffered such losses it was not a shareholder in Herald.

Furthermore, in the Board's view, the "follow the fortunes" bargain which arises from membership of a company is forward-looking, not backward-looking. This meant that although Primeo later transferred its direct BLMIS investments to Herald in consideration for its shares, Primeo was not barred from claiming its loss before it became a shareholder in Herald as a result. Extending the reflective loss rule to preclude a new shareholder from enforcing rights of action which had already accrued to it before becoming a member of the company would be an unwarranted extension of the rule.[4]

THE COMMON WRONGDOER ISSUE

The Board also found that the Court of Appeal erred in holding that, since pursuant to the contractual arrangements between them, R1 would have a corresponding onward claim against R2 in respect of R1's liability to Primeo as administrator, R2 was to be treated as a common wrongdoer as regards Herald and Primeo for the purposes of the application of the reflective loss rule. The Board found that to apply the reflective loss rule in these circumstances would amount to a significant extension of the rule beyond its current boundary and would ignore the relevance of the separate legal personality of the administrators and custodians involved in favour of an ill-defined test based on the potential economic effects of a series of inter-locking contracts.[5] Such an extension, the Board held, would result in injustice, because a person who becomes a shareholder in a company is not on notice that by doing so, claims against third parties potentially available to them according to ordinary principles of law might be rendered valueless by virtue of such indefinite onward chains of liability.[6]

In conclusion, the Privy Council's decision in Primeo is particularly instructive by clarifying both the Timing Issue and the Common Wrongdoer Issue. The judgment provides more certainty in this area of law and sends a reassuring message to shareholders who wants to pursue personal claims against wrongdoers but are cautious of being caught under the reflective loss rule.

[2] ibid at para. 63
[3] ibid at para. 53
[4] ibid at para. 67
[5] ibid at para. 77
[6] ibid at para. 79

CAREY OLSEN

Jeremy Lightfoot
jeremy.lightfoot@careyolsen.com
+852 3628 9016

Jeremy Lightfoot is the head of Carey Olsen's litigation team in Hong Kong. He focuses on commercial and corporate litigation, insolvency and restructuring under the laws of Bermuda, the BVI and the Cayman Islands.

Xia Li
xia.li@careyolsen.com
+852 3628 9009

Xia Li is a counsel in Carey Olsen's Dispute Resolution and Litigation practice, based in Hong Kong. She has worked in multiple major legal and financial centres, including the Cayman Islands, the BVI, London, New York, Beijing, Singapore and Hong Kong.

Yi Yang
yi.yang@careyolsen.com
+852 3628 9026

Yi has a wide range of experience assisting in cross-border commercial litigation, including shareholder disputes, derivative actions, contentious insolvency and appraisal actions involving offshore companies.

NEWS

Two new members for Baker McKenzie's Global Executive Committee


Baker McKenzie has elected London-based Kirsty Wilson and Buenos Aires-based Gustavo Boruchowicz to its Global Executive Committee.

Wilson is a partner and chairwoman of the Global Reorganisations Group. She joins both the Committee and the firm's EMEA Regional Council and handles a broad range of corporate and commercial transactions, including corporate general advice and general English company law advice, and spent two years in the Palo Alto office between 1996 and 1998.

She is joined on the Committee by Gustavo Boruchowicz, M&A partner and former managing partner of Baker McKenzie's Buenos Aires office. Boruchowicz will also take the role of Latin America chairman.

The two will assume their roles in October after Baker McKenzie's AGM. They are replacing Constanze Ulmer-Eilfort and Jaime Trujillo, who will both be concluding their four-year terms.

Baker McKenzie global chairman Milton Cheng said Wilson and Boruchowicz are "outstanding leaders" with a strong track record of collaborating across multiple jurisdictions and various practices.

"I'd also like to thank Constanze and Jaime on behalf of the entire firm for their leadership, hard work and invaluable contributions during their terms and their tireless efforts over the past year and a half as we have navigated the pandemic," Cheng said.

A Baker McKenzie spokesperson said the aftermath of the pandemic will be a key focus for the Committee as many of the firm's clients switch from resilience to business recovery.

The firm will also concentrate on improving its sustainability credentials by reducing its global carbon emissions by 92% by 2030 along with reaching a diversity target of 40% women, 40% men and 20% flexible (women, men or non-binary persons) by 2025.

The spokesperson said the pandemic forced the firm to re-think its ways of working, particularly in terms of allowing associates to work remotely. An important lesson of the pandemic was that productivity could remain high even while teams were working from home.

The Committee will also find ways to make the firm more agile, understanding and able to adapt to fast moving trends.

In the firm's Asia Pacific branches, Taipei-based M&A partner Michael Wong continues his term as Asia Pacific chairman, while Hong Kong IP partner Shih Yann Loo remains an Executive Committee member.

Baker McKenzie's Global Executive Committee includes partner representatives covering all regions, with responsibility for developing and implementing global strategy and managing the firm's day-to-day business across 77 offices in 46 countries.

NEWS

Anjie and Broad & Bright announce merger

Beijing-based law firms Anjie and Broad & Bright have merged following a successful agreement between both sets of partners.

The new law firm will be named Anjie & BB Law with offices in seven Chinese cities (Beijing, Shanghai, Shenzhen, Guangzhou, Hongkong, Haikou and Nanjing). It will also employ over 500 legal professionals and support staff, including 60 in Hong Kong.

This strategic merger bolsters the strengths in both firms regarding antitrust, dispute resolution, M&A, capital markets, IPOs, PE&VC, financial regulation, intellectual property, employment, data protection, funds, trust and compliance in onshore and cross-border areas.

The new entity will focus on insurance, life science, IT, digital entertainment, energy & infrastructure, fintech, maritime and other sectors.

Founded in Beijing in 2012, Anjie Law has offices in Beijing, Shanghai, Shenzhen, Hong Kong, Haikou and Nanjing. It has been in association with Hauzen LLP to offer both onshore and Hong Kong legal services to clients.

Broad & Bright was founded in Beijing in 2004 and has about 100 lawyers in Beijing, Shanghai, Guangzhou and Hong Kong. Broad & Bright has been in association with CFN Lawyers offering seamless services to clients in cross-border transactions.

Broad & Bright managing partner Philips Ding said the merger integrates and multiplies their expertise and pools financial resources

so the two firms can create a more sophisticated service.

"We expect to quickly scale after our full integration and develop new legal services models. Our merger will inspire us to stay true to the shared values of both firms and foster a consensus-based culture and maintain our constant commitment to diversity and inclusiveness," he said.

Anjie Law chairman Zhan Hao said the merger takes the two firms' practice "to the next level" in terms of the diversity of practices, expansion of established areas and its human resources.

"We can now respond to the strong momentum of the Chinese legal services market. The road ahead is long and never stops. We have committed ourselves to be self-motivated and keep pressing ahead," Zhan said.

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33B United Centre,
95 Queensway,
Admiralty,
Hong Kong

Tel: +852 2525 7525
Fax: +852 2525 7526
hilldickinsonhk@hilldickinson.com

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- Corporate Finance
- Employment / Employee Fraud

Damien Laracy
Partner, Head of Hong Kong Office
(Admitted in Hong Kong, England, Wales and NZ)
Business Litigation and Arbitration, International trade
damien.laracy@hilldickinson.com

YK Chan
Partner
(Admitted in Hong Kong)
Corporate Finance, IPO/ECM
yk.chan@hilldickinson.com

Kelly Kim
Counsel
(Admitted in Hong Kong)
Arbitration, Korea Practice, Banking, Intellectual Property
kelly.kim@hilldickinson.com

Antony Cowie
Partner
(Admitted in Hong Kong, England and Wales)
Corporate / Commercial, M&A
antony.cowie@hilldickinson.com

Richard Lyons
Partner
(Admitted in Hong Kong)
Business Litigation and Arbitration, Construction
richard.lyons@hilldickinson.com

Alex May
(Admitted in New York)
Corporate, Commercial and Data Privacy
alex.may@hilldickinson.com

Bryan O'Hare
Partner
(Admitted in Hong Kong and Scotland)
Business Litigation and Arbitration, Insolvency
bryan.ohare@hilldickinson.com

Nicole Wong
Associate
(Admitted in Hong Kong)
Business Litigation and Arbitration, Insolvency, Employment
nicole.wong@hilldickinson.com

Yvette Yu
Partner
(Admitted in Hong Kong)
Business Litigation, Competition Law, Regulatory Investigations
yvette.yu@hilldickinson.com

Maggie Lee
Associate
(Admitted in Hong Kong)
Business Litigation and Arbitration, International Trade
maggie.lee@hilldickinson.com

Edward Liu
Partner of Hill Dickinson LLP (UK)
Solicitor of England & Wales
Hong Kong Registered Foreign Lawyer (P.R. China qualified)
edward.liu@hilldickinson.com

MOVES

FenXun Partners has added **Ada Hu** as a financial services practice partner in the Beijing office. She will collaborate with lawyers in the Shanghai, Shenzhen and Hainan offices, as well as lawyers in the financial services group of Baker McKenzie, through the Baker McKenzie FenXun Joint Operation platform, to serve domestic and international insurance companies and their asset managers in both contentious and non-contentious matters.

Joining from Tian Yuan Law Firm, Hu brings a wealth of experience, having advised leading insurance and asset management companies on regulatory compliance, policy review, policy translation and localisation, capital fundraising and insurance company restructuring.

She has also advised insurance and non-insurance funds on funds formation and their investments in debt and equity investment plans, trusts and private equity. In addition, Hu has represented clients in complex commercial disputes and litigation cases.

FenXun Partners has also added **Stella Hu** as senior counsel in the capital markets team. She is based in Beijing and will be collaborating with the firm's team throughout China, as well as with lawyers in the capital markets group of Baker McKenzie, through the Baker McKenzie FenXun Joint Operation platform, to advise Chinese companies on cross-border equity and debt securities offerings, as well as US-listed companies on regulatory compliance matters. Hu has strong experience in Hong Kong capital markets work. Over the years, she has assisted many Chinese issuers in the biotech, healthcare, technology, media and telecom, and consumer goods sectors with their IPOs in Hong Kong. In addition, Hu has advised listed companies on their compliance with listing rules and other regulatory matters, particularly in relation to US securities law. Prior to joining the firm, she has worked in a number of law firms, including Baker McKenzie's Beijing office, Shearman & Sterling, Paul Hastings and, most recently, Tian Yuan Law Firm. Hu graduated from East China University of Political Science and Law with a Bachelor's degree in law, and she obtained her Master's degree in law from New York University School of Law. Hu is admitted to practice in China and the State of New York in the US.

MOVES

King & Wood Mallesons has added partner **Nicola Yeomans** to be based in its Singapore office. Having built a market-leading reputation for technical and commercial excellence, Yeomans joins from Herbert Smith Freehills, where she spearheaded the private capital practice in Asia. She will take up her appointment early in the New Year.

Hogan Lovells has added capital markets partner **Biswajit Chatterjee** into its corporate and finance practice in Singapore. Chatterjee joins from Squire Patton Boggs, where he served as co-chairman of the firm's India practice and heads the Southeast Asia corporate practice. Qualified in both New York and India, Chatterjee's focus is on capital markets, M&A and private equity transactions. He has advised on some of the largest equity and debt offerings in India and Southeast Asia.

L&L Partners welcomes back **Subhash Bhutoria**, who joins the intellectual property practice as partner designate. An IPR Honours graduate from the National Law University Jodhpur, he is a 2015-17 alumnus of the firm. Bhutoria was instrumental in setting up the IP and art law practice at Krida Legal where he started private practice and grew into a seasoned IP and art lawyer, advising close to 200 clients. His team has filed about 2000 trademarks and 200 oppositions. A member of the International Trademark Association and the European Community Trademark Association, Bhutoria is an empanelled neutral with the Court of Arbitration for Art in the Netherlands, Hyderabad Arbitration Centre and SAMA Arbitration in Bangalore.

Ashurst has added **Dion Alfadya** as a partner in the corporate practice with its associated firm Oentoeng Suria & Partners (OSP) in Jakarta. Joining from Allen & Overy, Alfadya has 15 years' experience in M&As, joint ventures, fundraisings, strategic collaborations and investments, as well as private equity and venture capital transactions, in telecommunication, healthcare and pharmaceuticals, fintech, digital and technology start-ups, data centres, logistics, real estate and downstream oil and gas sectors. He has a focus in the Indonesian and Southeast Asian markets, and is admitted in Indonesia.

Conyers' Hong Kong office has added senior partner **Mark Yeadon** to bolster its disputes and restructuring offering in Asia. Yeadon brings 40 years' of experience advising on commercial litigation, investigations, compliance and regulatory matters in both Hong Kong and London. Prior to joining the firm, he was a partner at Eversheds Sutherland and head of Asia litigation and dispute management. He was also a partner and head of the Hong Kong litigation practice at Slaughter and May until 2010. Yeadon specialises in the resolution of commercial disputes by arbitration, court proceedings and mediation. He has advised on matters arising out of complex financial transactions, including derivatives, breaches of commercial contract, breaches of directors' and employees' duties, fraud, negligence and shareholder disputes.

MOVES

Pinsent Masons has added renewable energy partner **William Stroll** to its Singapore office. Specialising in renewable energy transactions in Southeast Asia, Stroll advises developers, investment funds, independent power producers and oil and gas majors in cross-border acquisitions and disposals, regulatory matters, joint ventures and M&A structuring. He joins from Herbert Smith Freehills where he advised on complex energy transactions across Asia. His recent clients included Blue Leaf Energy on its development of 1.25 GW of solar projects in the Philippines; Mitsubishi, through its subsidiary Diamond Generating Asia, on its investment into a 600MW cross-border wind farm being developed in Laos; and Kansai Electric Power on its Indonesian gas-fired power plant joint venture with Medco Power Indonesia.

Tiang & Partners has added intellectual property lawyer **Chiang Ling Li** to lead its IP practice. Chiang has more than 25 years' experience in Chinese IP and pharmaceutical law. She advises clients on their litigation and transactions involving patents, trade secrets, copyright, unfair competition, 3-D marks and well-known marks. Chiang has been appointed as an arbitrator by CIETAC, HKIAC, ADNDRC and the WIPO Arbitration and Mediation Centre. Joining from Jones Day, she brings a strong technical background to complement her deep experience advocating for clients in a variety of complex patents and trade secrets disputes and brand protection mandates involving multinational companies and Chinese companies in the life sciences and healthcare sectors.

Ashurst has added **Robert Child** as a partner in the restructuring, insolvency and special situations practice in Singapore. Joining from Clifford Chance, Child has advised on complex multi-jurisdictional restructurings and insolvencies in Europe and Asia. He has represented a wide range of stakeholders, including corporate debtors, syndicated lender groups, bondholders, distressed investor funds, insolvency officeholders, agents and trustees. Child has also advised on the restructurings of the Noble Group, Mongolian Mining Corporation and Jindal Steel & Power. He is qualified in England, Wales and Hong Kong.

Stephenson Harwood has added partner **Chris Bailey**, who joins from King and Spalding. Bailey will initially be based in the London office, but he will relocate to Singapore in due course. He has 20 years' of leading private practice experience, along with extensive regional experience, from practicing in multiple jurisdictions across the Asia Pacific. He represents clients in complex high-value cross-border commercial disputes and regulatory investigations. Bailey's practice regularly includes claims for more than US$1 billion and predominantly arise out of the energy, resource, transport, infrastructure, financial services, media and IT sectors, with expertise in oil and gas, construction and investment treaty cases.

Baker McKenzie helps seal largest E-sports merger in history

Baker McKenzie has advised Swedish E-sports company Ninjas in Pyjamas (NIP) on its merger with Chinese E-sports group ESV5 – the first M&A in the expanding world of E-sports.

The merger establishes NIP Group, a organisation that will field teams in all the major E-sports titles. NIP chief executive Hicham Chahine said the deal allows the team to take a "gigantic step" towards becoming truly global.

The Baker McKenzie team was led by partner Tracy Wut (M&A, Hong Kong), with support from partners Joakim Falkner (capital markets, Stockholm), Anna Orlander (M&A, Stockholm), Linnea Back (tax, Stockholm), Adam Farlow (capital markets, London), associate Erik Holmgren in Stockhom and counsel Lei Ye of FenXun Partners in Shanghai.

Chahine, who will adopt a co-CEO position, said NIP Group will continue to look for growth opportunities both organically and with acquisitions, as well as equity capital raising opportunities.

"We came across Victory Five more than a year ago. Initial meetings were positive, and we soon came to realise that both parties' views on the industry were strongly aligned and that there was serious potential for something much bigger," he said.

Formed in the year 2000, NIP is best known for its Counter-Strike teams, and it has fielded rosters across multiple titles including VALORANT, Rainbow Six: Siege and FIFA.

ESV5 is a joint venture by Chinese E-sports programs eStar Gaming and Victory Five and is backed by Chinese video live streaming service DouYu and Chinese anti-virus firm Qihoo 360.

Mario Ho (son of the late Macau casino magnate Stanley Ho) is an investor and chief executive of ESV5 Group and will become the co-CEO of NIP Group.

After the merger, NIP will re-enter the competitive League of Legends (LoL) play in 2022 with Victory Five — owned by the ESV5 group — to be rebranded as Ninjas in Pyjamas and continue competing in the League of Legends Pro League (LPL), the premiere Chinese League of Legends competitions.

If the merged entity were to be listed on NASDAQ it would be the first publicly-traded E-sports team in the US with a combined revenue of more than US$61.70 million for 2021.

China is the world's largest gaming market and some of the world's top video-games companies such as Tencent and NetEase are based there.

China had 388 million E-sports viewers in 2020, up 21.3% a year prior, according to video games consultancy Niko Partners.

In-house Insights with Amber Gupta of Aditya Birla Group

Amber Gupta

TELL US A LITTLE ABOUT YOUR PROFESSIONAL BACKGROUND AND HOW YOU CAME TO BE IN YOUR CURRENT ROLE?

I have more than 20 years' of work experience as an in-house counsel and corporate secretary specialising in financial services, Corporate & Securities Laws, Insurance, Banking & NBFC Regulations, IPR Laws, IT Laws, Dispute Resolution, Contract Management and Transaction Advisory.

I am working with Financial Services - Aditya Birla Group since June 2008. Starting with Aditya Birla Money as Head- Legal, Compliance and Secretarial and thereafter as Head Legal & Company Secretary with Aditya Birla Sun Life Insurance in Feb 2014. In March 2021, I joined as Head Corporate Legal, Company Secretary & Compliance Officer - Aditya Birla Capital Limited. Aditya Birla Capital Limited is the holding company for the financial services businesses of the Aditya Birla Group.

Key highlights of my career so far include the hands-on operating experience of multiple lines of business, working on different issues, dealing with regulations, problem solving, implementing best practices and developing the best in-house corporate legal and secretarial teams.

HOW BIG IS YOUR TEAM AND HOW IS IT STRUCTURED?

Like most in-house teams, it is a midsized corporate compliance and legal team catering to all kinds of regulatory matters and providing transactional advisory support to business.

WHAT ARE THE BIGGEST CHALLENGES FACING IN-HOUSE LAWYERS TODAY?

The role of in-house lawyers is always challenging. With a plethora of regulations and an ever-changing regulatory landscape, these challenges are only increasing. One must stay fully updated on what is happening at all times and keep abreast of emerging laws to provide sound professional advice. On top of this, another challenge is the digitisation and automation in legal departments which is leading to new ways of optimising resources. All this while continuing to provide value and keeping costs low.

WHAT ARE YOUR OWN BIGGEST CHALLENGES? HOW DID YOU/YOUR TEAM OVERCOME THESE?

Each of my roles in the financial services industry over the past 20 years came with its own challenges. I found that adaptability, agility and acumen were three great pillars I used to deal with obstacles. Other factors include developing my skills as a good team leader with a collaborative approach, building partnerships and concentrating on being well versed on my subject matter.

DID YOU HAVE A MENTOR EARLY IN YOUR CAREER? IS MENTORSHIP IMPORTANT?

Absolutely. I was quite lucky to work with learned seniors and mentors during my formative years and during my career so far. Mentorship is important because it shapes your 'mental and emotional

state' and adds to overall experience both soft skills and technical skills, which helps in the long run. But my peer group has been also a great source of mentorship. I constantly seek feedback from my team members to help me improve.

WHAT ARE THE BIGGEST CHALLENGES SPECIFIC TO YOUR INDUSTRY?

The unique challenges in financial services include digital disruption, the emer-gence of fintech companies, data privacy, cybersecurity, the rising need for customised client solutions in a competitive environment and a tight regulatory framework.

IS TECHNOLOGY CHANGING THE WAY YOU WORK? IF SO, HOW?

Technology is transforming how in-house legal functions manage their work. Whether that's for litigation and contract management or for due-diligence and document discovery – or even regulatory compliance. I look at it this in two parts. Firstly, there is a rapid adoption of technology for managing compliance and day-to-day monitoring, research work and repos-itory which is boosting operating efficiency. The second revolution is in data analytics, machine learning and artificial intelligence (AI) letting legal departments more quickly devise suitable strategies for legal risk mitiga-tion. Having said that, nothing can replace the human capital and ignited legal minds for creating customised advice and unique solutions.

WHAT DO YOU MOST LOOK FOR IN A LAW FIRM WHEN OUTSOURCING WORK?

A law firm should be a trusted partner for an in-house team. It is an extended arm bringing specialisation and different views to the table backed by research and industry experience. When choosing a partner, various factors must be considered that depend on the nature of the work and the specific problem. An ability to quickly understand the issue, deep industry knowledge and the ability to offer practical solutions in a client's interest (rather a theoretical analysis) are also critical factors.

OTHER THAN LAW FIRMS, WHAT SERVICE PROVIDERS AND TOOLS HELP YOUR LEGAL DEPARTMENT THE MOST?

The most essential tools for legal departments today include technology to help manage day-to-day compliance, along with systems for managing contracts, and litigation and vendor billing.

WHAT ASPECTS OF YOUR IN-HOUSE ROLE DO YOU MOST ENJOY?

The most exciting part of being an in-house lawyer is dealing with issues across multiple facets of regulation each day and problem solving within the applicable regulatory frameworks. You ought to know every bit of law that applies to business such as the contract act, civil or criminal procedures, intellectual property rights (IPR), technology law, labour and employ-ment laws, securities laws, foreign exchange, corporate governance and even taxation. Every in-house

counsel must master these to become a trusted advisor.

WHAT CHANGES DO YOU FORESEE IN THE NEXT FEW YEARS IN HOW LEGAL SERVICES WILL BE PROVIDED?

Certainly the direction is towards increased impetus on specialisation and a renewed focus on legal risk mitigation and its integration with governance, risk and compliance. Other trends include a greater adoption of technology, more digitisation and automation solutions and the increased use of AI and machine learning for higher efficiencies, reducing TATs, effective monitoring and reporting, allowing productive time for better decision making and enhancing business acumen.

WHAT ADVICE WOULD YOU GIVE TO YOUNG LAWYERS STARTING OUT IN THEIR CAREERS?

I most important aspect for every in-house counsel is to first deeply understand your business, key process and the associated problem statement thoroughly. You must strive to act as business enablers with the correct application of law and must be solution orientated. Build collaboration, be well-networked, avoid short-cuts, develop an eye for detail and be vocal with your righteous opinion, so long as it is backed by solid research. Your ability to adapt and provide sound advice during difficult times will help your career immensely. Most impor-tantly, stay grounded and humble. And keep upgrading yourself with knowledge and skills.

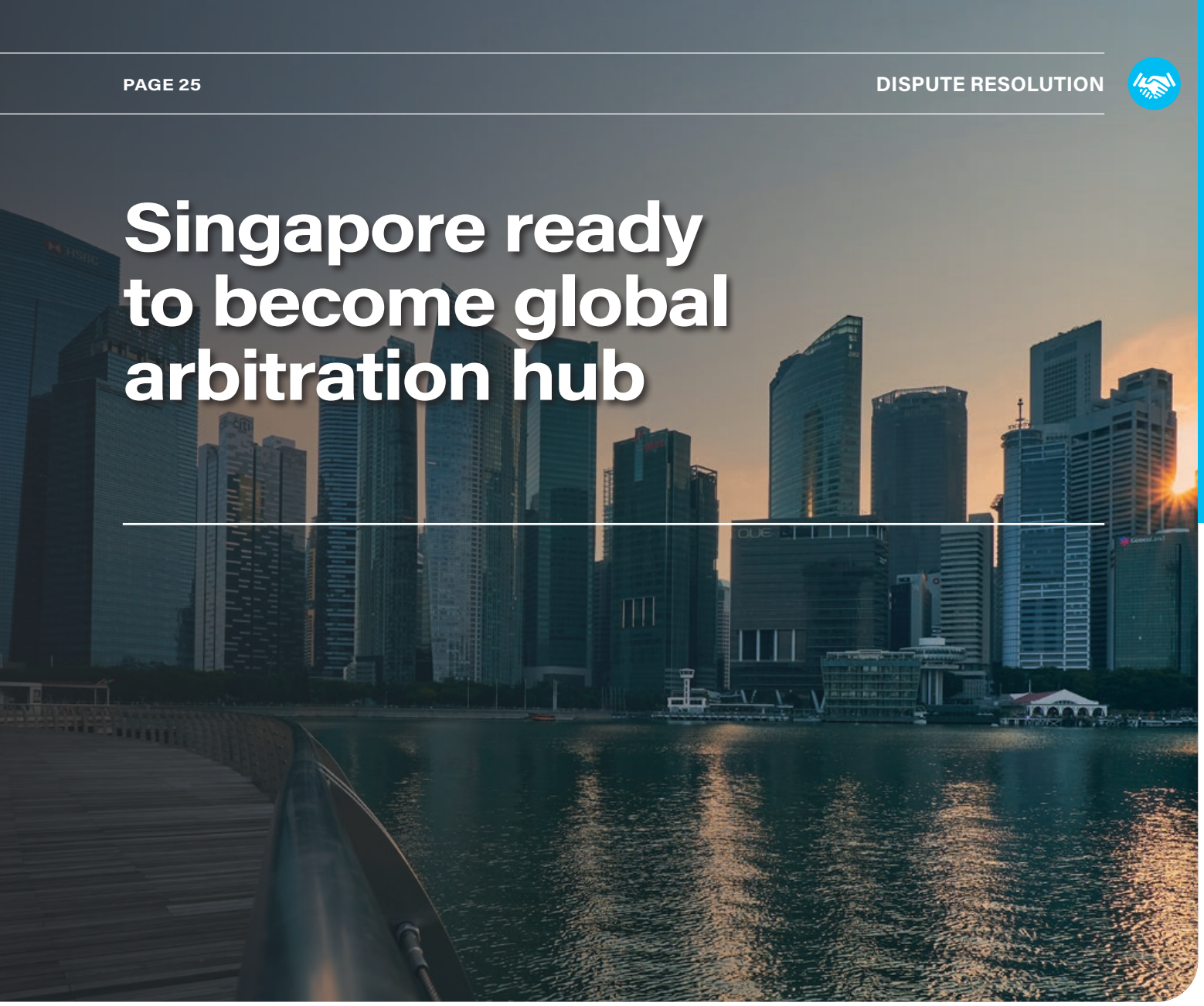
WHAT DO YOU MOST LIKE TO DO AWAY FROM WORK?

I enjoy cooking, reading and listening to music. Every weekend I take up cooking which is now almost a ritual over the last three years. This is a great rejuvenation as it gives me a satisfaction of being creative in my own little way, coupled with blogging about the history of the food. I enjoy listening to music of different genres as well. Music charges me. I also love writing, and I wish I could spend more time doing that.

Disclaimer:

All views are personal and do not reflect that of the organisation. The views shared are not intended for any legal advice and are for general information and education purposes only.

Singapore ready to become global arbitration hub



Singapore has overtaken London as the "global upstart" of international arbitration and is well-placed to deal with the emerging technology trends in dispute resolution, according to observers.

In the latest White & Case and Queen Mary University of London 2021 International Arbitration Survey, Singapore tied with London as the most popular seat of arbitration, ahead of Hong Kong, Paris and Geneva.

Given that the Singapore International Arbitration Centre (SIAC) has only existed for 30 years, its meteoric rise is an "amazing achievement," said 39 Essex Chambers barrister Karen Gough.

"London has been a hub for international trade for centuries and a global centre for arbitration. But while London has an excellent reputation – not least because of its legal infrastructure and facilities to accommodate arbitration hearings – there have been no new

As Singapore's arbitration environment continues to upgrade both its technological and procedural systems, it will be in a good spot to fix some lagging inefficiencies in arbitration.

National University of Singapore Faculty of Law adjunct professor Benjamin Hughes said when he started practicing as an arbitration lawyer, the in-house counsel tended to hand matters to their external lawyers and then wait for the result. Today, that assumption has flipped.

"The best thing in-house counsel can do is to stay involved throughout the entire process, from constitution of the Tribunal to the final award. Ask to be copied on all correspondence with the Tribunal and the opposing counsel, as though you are part of the legal time running the case – which in many ways you are.

"The cynical view is that by doing this, you are keeping the external law firm honest. But in my experience, most external arbitration counsel are trying to work efficiently to get the best possible result for their clients," Hughes said.

When it comes to the nitty-gritty of legal work, plenty of little processes also need a lot of cleaning up, Hughes said.

While both document production and witness or expert testimony can be useful tools in an arbitration, they can be a headache-inducing source of pointless wasted time and costs as well.

"In-house counsel can play a vital role in reducing waste in both areas by helping to identify the truly relevant documents for the dispute and the witnesses who can assist the Tribunal with actual first-hand knowledge of what transpired," Hughes said.

39 Essex Chambers barrister Karen Gough added that overall, in-house counsel should work hard to understand their own cases so they can provide effective support for external counsel and the Tribunal.

More importantly, active participation by in-house counsel ensures that the legal and commercial interests of the company are kept front and center in all strategic decision-making. This can encourage a more pragmatic, cost-effective and commercially sensible approach to arbitration and in settlement negotiations.

"Also, new legal technologies make it easier than ever to clean up prolix statements of case or defense which fail to focus on the real issues in dispute. Inefficient document assembly and management are often issues and speak to a lack of attention and preparation.

"Failure to adhere to timetables and deliberately obstructive tactics towards opposing parties do nothing to advance their clients' case," she warned.

developments lately to encourage arbitration in London," she said.

London's institutional rules were formed a long time ago. For example, the London Court of International Arbitration (LCIA) was established in 1982 while the International Chamber of Commerce (ICC) began in 1919 and its rules first published in 1922.

On the other hand, SIAC's arbitration rules were produced in 1991 and are now in their sixth edition.

These rules are, as with all things Singaporean, leading the way with an inclusion of provisions embracing recent legal developments and the practice of international commercial arbitration. The Singaporean courts are also well equipped to deal with arbitration matters, Gough said.

National University of Singapore Faculty of Law adjunct professor Benjamin Hughes added that he expects to see Singapore soon surpass London as the quintessential global seat of arbitration.

"It is in a unique position in terms of its location, physical and virtual infrastructure, languages spoken and cultural affinities, neutrality, diversity, legal framework and arbitration talent – including the world-class hearing facilities at Maxwell Chambers.

"It is in a unique position in terms of its location, physical and virtual infrastructure, languages spoken and cultural affinities, neutrality, diversity, legal framework and arbitration talent – including the world-class hearing facilities at Maxwell Chambers.

"Singapore is set to take advantage of Asia's rise as the centre of world commerce. SIAC will only go from strength to strength, with an ever-increasing case load and the expansion of its global footprint with offices around the world. It is an exciting time to be in Singapore," Hughes said.

In a world characterised by Covid-19 concerns, a more volatile geopolitical landscape and increased polarisation, businesses want their disputes to be resolved in a place that offers security, stability and sustainability said Maxwell Chambers chairman Daryl Chew who identified Singapore as a natural choice.

"Singapore has a track record of successfully containing the Covid-19 pandemic, modern legal infrastructure backed by clear and effective laws and a stable business environment, offering a unique blend of predictability and neutrality.

"And from a sustainability perspective, Singapore embraces innovation and works hard to meet the needs of dispute resolution users. This confluence of factors has contributed to Singapore's emergence as a leading arbitration hub," said Chew, who is also the Managing Partner of Shearman & Sterling's Singapore office.

Commenting on developments at Maxwell Chambers, Chew noted that "the Maxwell team adopts a similar 'client-centric' mentality and prioritises regular engagement with tenants and users, to better meet their evolving needs and preferences. These conversations have led to innovative ideas to create new collaborations and synergies that benefit the ecosystem and community of alternative dispute resolution (ADR) users."

At its 30-year anniversary, SIAC registrar Delphine Ho said the centre has much to be proud about and plenty to prepare for.

First on the list is a review of its SIAC Arbitration Rules. The revision will consider recent developments in international arbitration practice and procedure to better serve the needs of businesses, financial institutions and governments using SIAC.

"A number of SIAC overseas offices are also operating now, including in Mumbai, Seoul, Shanghai and Gujarat. Last year, we opened a New York office as well to expand SIAC's presence in the Americas. Being in these jurisdictions helps us promote international

arbitration, raise awareness of SIAC and to foster ties with the local business and legal communities," Ho said.

Singapore will need this strong foundation to tackle the coming challenges in dispute resolution, particularly the general sense of global uncertainty and new technologies.

Gough said over the past 18 months, Covid-19 disruptions have interrupted cashflow and processes in a drastic way. The wider legal sector is also dealing with labour supply issues along with questions from companies about whether they can claim, negotiate and, if so, how, in what forum and with what strategy?

"The profile of mediation is increasing, perhaps due to the Singapore Convention, but more likely to reflect the sensibilities of the parties in these uncertain times," Gough said.

"Many now realise that compromise is the way to achieve both payment or relief from liability and to enable projects to reach a satisfactory conclusion even if it's not the one either the Contractor or the Employer would have hoped for."

Another key uncertainty factor is new forms of virtual arbitration technology.

The adoption of new technologies to improve arbitration efficiency has been top-of-mind for years, but the pandemic intensified the conversation, Chew said.

"In Asia, I see a rising preference and flexibility favouring less-confrontational modes of dispute resolution, recognising that protracted legal proceedings take a toll on businesses in terms of time, cost and management bandwidth.

"I expect an increasing number of users to actively explore and adopt mediation, neutral evaluation and other more collaborative forms of dispute resolution in the coming years, much of which can now be facilitated virtually," Chew said.

In an ideal world, Hughes added, it would still be preferable to conduct arbitration hearings in person since there is no substitute for getting everyone in one room.

"Virtual hearings aren't all bad, though. The most common fear is that a witness may be coached during a virtual hearing, but this issue can be easily addressed and has not been a problem in any of the virtual hearings I have held," Hughes said.

Gough said the management of witnesses and expert testimony does need to be carefully planned and supervised to ensure testimony free from external influence or assistance. But she said it is time to prepare for a post-pandemic arbitration world that will be radically different.

Live hearings will likely one day return if they are cost-efficient, said Hughes, but he expects to see many more "hybrid" hearings with both witnesses and experts testifying remotely.

For instance, it will be increasingly difficult to justify moving people and documents across the globe for short hearings, so virtual meetings that may have been an exception 18 months ago will likely become the norm for many hearings.

Live hearings will likely one day return if they are cost-efficient, said Hughes, but he expects to see many more "hybrid" hearings with both witnesses and experts testifying remotely.

"We have seen how well these hearings can be conducted over video conferencing platforms and it is no longer necessarily that a hearing must be postponed if participants can't make it to a physical location. I think this is a positive development.

"For example, Maxwell Chambers partners with local and international service providers to support virtual hearings, including videoconferencing, document platforms, interpretation and real-time transcription services. The system works incredibly well," Hughes said.

"So, although it is difficult to travel anywhere today, Singapore remains one of the best places in the world to conduct an arbitration – no matter where the parties, their counsel or the arbitrators are located."

Chew is optimistic about Singapore's future and believes the city-state is well placed to continue serving as a global dispute resolution hub near to the economic growth engines of China, India and Southeast Asia.

But its continued success remains contingent on many variables, not all of which are within its control, so it is important for Singapore to continue to work hard and adapt to the changing landscape, Chew said.

"The legal community in Singapore — including the government, the courts, practitioners and in-house lawyers — have always carried that attitude and outlook with them, and that will place us in good stead going forward."

MAXWELL CHAMBERS

Daryl Chew
daryl.chew@shearman.com
Daryl Chew is a Partner in Shearman & Sterling's International Arbitration practice and Head of the Singapore Office. He is also Chairman of the Board of Maxwell Chambers.

Karen Gough
karen.gough@39essex.com
Karen Gough, Barrister of 39 Essex Chambers, a practising Attorney-at-law (Jamaica and Trinidad and Tobago), Chartered Arbitrator, a Certified International ADR Practitioner (FAiADR), and past President of the CIArb.

Prof Benjamin Hughes
benjamin@hughesarbitration.com
Benjamin Hughes is an independent arbitrator with The Arbitration Chambers in Singapore, adjunct professor at National University of Singapore Faculty of Law, and member of the SIAC Court of Arbitration.

Delphine Ho
delphineho@siac.org.sg
As Registrar of SIAC, Delphine oversees the SIAC Secretariat in the provision of case management services. Delphine joins the SIAC with both private and public sector experience. She has spent a significant part of her career with leading Singapore law firms where she specialised in civil and commercial litigation and arbitration. She subsequently joined the Singapore Legal Service and served as an Assistant Registrar of the Singapore Supreme Court. Delphine is called to the Singapore Bar and is also admitted as a solicitor in England & Wales. She is a Fellow of both the Chartered Institute of Arbitrators (CIArb) and the Singapore Institute of Arbitrators (FSIArb), as well as an Associate Mediator of the Singapore Mediation Centre. Delphine speaks English, Mandarin and French.

Institutionalising Arbitration of Intra-Corporate Disputes

BY JOHN FREDERICK E. DERIJE

Republic Act No. 11232, otherwise known as the Revised Corporation Code of the Philippines (RCC), came into force on 23 February, 2019.

One of its salient features is the provision on institutionalising arbitration of intra-corporate disputes – conflicts arising from intra-corporate relations, relationships between or among stockholders of the same corporation, or relationships between the stockholders and the corporation.

A significant portion of the cases clogging the Philippine courts are intra-corporate in nature. Intra-corporate disputes are under the jurisdiction of the Regional Trial Courts (RTC). But even if such cases are usually handled by courts designated by the Supreme Court as Special Commercial Court, by their sheer number alone, even regular RTCs are made to handle them.

It is good that Section 181 of the RCC now allows an Arbitration Agreement to be provided in the articles of incorporation or bylaws of a corporation to enable the parties to refer to arbitration the disputes between the corporation, its stockholders or members arising from the implementation of the articles of incorporation or bylaws, or from intra-corporate relations.

The institutionalisation of arbitration of intra-corporate disputes gives life to the State policy to encourage and actively promote the use of Alternative Dispute Resolution (ADR) to achieve speedy and impartial justice and to declog court dockets. The RCC says an Arbitration Agreement in the company's articles of incorporation or bylaws shall be binding on the corporation, its directors, trustees, officers and executives or managers.

ENFORCEABILITY AND ENFORCEMENT OF THE ARBITRATION AGREEMENT

To be enforceable, the Arbitration Agreement should 1) indicate the number of arbitrators, 2)

indicate the procedure for the appointment of the arbitrator/s and 3) designate a third-party with the power to appoint the arbitrator/s forming the arbitral tribunal.

Under the RCC, the court in which an intra-corporate dispute is filed is empowered to dismiss the case before the termination of the pretrial conference, if it determines that an Arbitration Agreement is written in the company's articles of incorporation, bylaws or in a separate agreement.

On the other hand, the Philippine Securities and Exchange Commission (SEC) has the power to appoint the arbitrator/s, upon request of the parties to the arbitration, should the designated third-party fail to appoint the arbitrators in the manner and within the period specified in the Arbitration Agreement. The RCC also requires that the arbitrator/s must be accredited or belong to organisations accredited for the purpose of arbitration.

The law also empowers the arbitral tribunal to grant interim measures necessary to ensure enforcement of the decision or award, prevent a miscarriage of justice or protect the rights of the parties.

ESSENTIAL ELEMENTS OF AN ARBITRATION AGREEMENT

In crafting an Arbitration Agreement, corporations should consider that the agreement will be most responsive at resolving intra-corporate disputes amicably, cost-efficient for the corporation and its stakeholders and provide solutions or procedures that are less time-consuming, less tedious, less confrontational and more productive of goodwill and lasting relationships within the corporation.

a. **Scope**. The Arbitration Agreement should be broad enough to cover not only intra-corporate disputes but also matters which may be directly, or indirectly but intimately, related to the intra-corporate dispute itself. This would ensure a wide array of disputes within the corporation shall remain subject to arbitration and eliminate or at least substantially reduce possible court cases between the corporation and its stakeholders.

b. **Choosing the right arbitration mechanism/procedure and selecting an arbitration body**. Arbitration in the Philippines can be *ad hoc* or *institutional*. In an *ad hoc* Arbitration, the proceeding is administered by an arbitrator or the parties. An arbitration administered by an institution shall be regarded as an ad hoc arbitration if such an institution is not a permanent or regular arbitration institution in the Philippines. An Institutional Arbitration is arbitration administered by an entity, which is registered as a domestic corporation with the SEC and engaged in arbitration of disputes in the Philippines on a regular and permanent basis.

- **Ad hoc Arbitration**. If the corporation chooses an *ad hoc* Arbitration, the general provisions of the Arbitration Law and Department of Justice Circular No. 98 (DOJ Circular No. 98) or the Implementing Rules and Regulations of the Alternative Dispute Resolution Act of 2004 will generally apply in the absence of an in-house arbitration rule/procedure to govern intra-corporate disputes. The corporation can also adopt the arbitration rules and procedures of the United Nations Commission on International Trade Law (UNCITRAL) Model Law or those governing Institutional Arbitration through the Philippine Dispute Resolution Center

(PDRCI) and the Philippine International Center for Conflict Resolution (PICCR). To further strengthen party autonomy however the corporation may adopt its own in-house arbitration rules and procedures.

- **Institutional Arbitration**. If the corporation chooses an nstitutional Arbitration under either PDRCI or PICCR, each arbitration body is governed by its own established rules, with trained and experienced arbitrators.

c. **Rules of evidence**. The rules of evidence in arbitration should be more flexible than those in civil cases. The corporation may opt to incorporate in the Arbitration Agreement that any evidence a reasonable mind could accept as adequate to support a conclusion should be admitted as evidence.

d. **Arbiter/Arbitral Body selection**. The corporation should decide the number of arbitrators, the qualifications of the arbitrators, method of selection and other conditions the corporation deems necessary. When the corporation adopts the institutional arbitration rules and procedures, the provisions related to the selection of arbiters may be modified accordingly by the Arbitration Agreement.

e. **Venue of the arbitration**. The corporation should choose a venue generally convenient for the parties and the most cost-efficient for the corporation. The most common venue chosen for arbitration would be the corporation's principal place of business.

f. **Time Frame/Periods**. The corporation should set out the most expeditious, but realistic and reasonable, time frame for the conduct of the entire proceedings, from commencement to hearing, up to the period for rendering the decision.

g. **Governing Law**. The corporation should indicate Philippine law as the governing law since both the situs (venue) of the arbitration and the place of enforcement of the decision will be the Philippines.

h. **Limitations on damages and allocation of fees and costs**. It is prudent to incorporate in the Arbitration Agreement a cap on the amount of other damages which may be awarded, apart from actual/compensatory damages, which may be akin to a provision on liquidated damages, and a specific amount to cover interests, when applicable. Further, a delineation of the costs and fees which may be shared equally by the parties and those other costs/fees which each party should solely bear. Such limitations shall enable the possible parties to have more control over, and/or opportunity to manage, the shared and independent amounts to be expended for the arbitration proceedings. The costs of arbitration are usually borne by the unsuccessful party.

i. **Enforcement**. While the RCC indicates the Arbitration Agreement shall be binding on the corporation, its directors, trustees, officers and executives or managers, the corporation should ensure the enforcement of the decision or award is done with ease, regardless of who receives the more favorable verdict.

j. **Confidentiality**. Although the arbiters and the parties are generally subject to an obligation of confidentiality and the arbitral proceedings are in most cases held in private, the corporation can incorporate a provision reinforcing confidentiality in the Arbitration Agreement, along with a remedy for violation of the confidentiality requirement, such as injunction, damages or annulment of award.

BENEFITS OF ARBITRATION OF

By enabling them to resolve their disputes amicably through arbitration, the parties provide solutions that are less time-consuming, less tedious, less confrontational and more productive of goodwill and lasting relationships.

(This article 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 only and not offered as and does not constitute legal advice or legal opinion.)

John Frederick E. Derije
(6382) 224-0996
jederije@accralaw.com
John Frederick E. Derije is a Senior Associate of the Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW), Davao Branch.

Catch them if you can: Post-judgment recognition and enforcement across jurisdictions

BY YVETTE YU
NICOLE WONG

Litigating to recover money is a long and burdensome process, and it gets worse if a win in court does not translate to getting your money back.

A good litigation strategy plans backwards from an ideal end game. In this article, we explore how judgments, arbitral awards and liquidation processes can be recognised and enforced against counterparties, particularly those with assets across jurisdictions.

RECOGNITION OF FOREIGN JUDGMENTS AND AWARDS

Foreign judgments and arbitral awards have no direct force in Hong Kong unless they are formally recognised as a local judgment.

Court Judgments

Hong Kong recognises final money judgments from the superior courts of Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, Netherlands, New Zealand, Singapore and Sri Lanka by way of registration under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap.319), or FJREO. A similar registration mechanism also exists between Hong Kong and Mainland China under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597), or MJREO.

Judgments outside the scope of the FJREO and the MJREO (e.g. Japan, UK, US) may be recognised in Hong Kong at common law by bringing a fresh action based upon the foreign judgment, in which case, the judgment debt awarded by the foreign court will form the cause of action of the Hong Kong action. The plaintiff (the judgment creditor of the foreign judgment) may then proceed to apply for a default judgment if the defendant/judgment debtor does not defend, or a summary judgment if the defendant/judgment debtor does not have an arguable defence based on the limited defences available to such an enforcement action.

Arbitral awards

Hong Kong is one of the 168 signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral

Awards (Convention) and is known for its pro-arbitration and pro-enforcement approach facilitating the arbitral process and assisting with enforcement of arbitral awards. The Arbitration Ordinance provides a mechanistic procedure to convert foreign and local arbitral awards into judgments, which are then enforceable in the same manner as a court judgment.

Enforcement of arbitral awards between Hong Kong and China is governed separately under the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and Hong Kong. In November 2020, the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards was signed bringing the Mainland-Hong Kong arrangement more in line with the Convention.

Major changes include: clarification that the arrangement covers both recognition and enforcement of arbitral awards; the possibility of applying to the courts for interim measures before and after the making of arbitral awards and; the permission of concurrent enforcement applications in the Hong Kong and Mainland courts. Hong Kong is the only seat of arbitration outside Mainland China where parties to arbitral proceedings administered by designated arbitral institutions may apply to the Mainland courts for interim measures (for example, to preserve assets pending the outcome of the arbitration).

ENFORCEMENT OF LOCAL JUDGMENTS

Once a foreign judgment or arbitral award is recognised, it can be enforced as if it were a Hong Kong court judgment. Below are a few examples of enforcement actions available in Hong Kong:

(a) Winding-up or bankruptcy proceedings against the debtor, followed by asset liquidation;
(b) Writs of execution to enlist the court bailiff to seize inventory on the debtor's premises, which can then be sold at a public auction;
(c) Charging orders and orders for sale of real estate property belonging to the debtor;
(d) Examination orders to examine the debtor in court for full disclosure of his assets;
(e) Garnishee proceedings to order a third party to directly pay the creditor any debt owed by the third party to the debtor;
(f) Prohibition orders to restrain the debtor from leaving Hong Kong to facilitate other enforcement efforts; and
(g) Committal proceedings to hold the debtor in contempt of court, which may result in the imprisonment of the debtor.

CROSS-BORDER INSOLVENCY PROCEEDINGS

Hong Kong and Mainland China are currently piloting a new arrangement for mutual recognition of and assistance to insolvency proceedings between the courts of Shanghai, Xiamen, Shenzhen and Hong Kong.

Under this new arrangement, liquidators and bankruptcy trustees from Hong Kong may apply to Mainland courts for the recognition of Hong Kong insolvency proceedings, and vice versa. The mechanism aims to bring efficiency and alignment of the insolvency processes in the two jurisdictions, which should promote better protection of the assets in the interests of the creditors as a whole and encourage co-ordinated debt restructuring efforts in both places and abroad.

For overseas insolvencies, Hong Kong courts have shown an increasing willingness to provide common law recognition and assistance for foreign insolvency proceedings that are collective in nature, including

non-common law jurisdictions which share a similar insolvency regime with Hong Kong. This is a welcome development as Hong Kong does not have a statutory cross-border insolvency framework and is not a party to the UNCITRAL Model Law on Cross-Border Insolvency.

BEFORE IT ALL BEGINS...

While it is impossible to avoid disputes altogether, careful contract drafting could narrow the scope of disagreement and offer an upper hand at managing any litigation and enforcement actions that ensue.

Dispute resolution clauses

Often overlooked as standard boilerplate provisions, dispute resolution clauses could significantly affect a position during a dispute.

Though foreign judgments and local/foreign arbitral awards could be recognised and enforced in Hong Kong, it is important to bear in mind that litigation and arbitration (as well as other forms of dispute resolution) are distinct processes. For example, arbitral proceedings are confidential in nature, whereas litigation and court judgments are matters of public record in the interest of open justice. The decision of an arbitrator is final and binding, as opposed to court proceedings where parties generally have a right to appeal to higher courts.

Multi-tiered escalation clauses and built-in alternative dispute resolution processes allow parties an opportunity to resolve their conflicts amicably before resorting to legal action. Liquidated damages clauses and shortened limitation periods for specific types of claims could also be included.

Where should the dispute be determined?

The Hong Kong courts generally respect the parties' choice of jurisdiction for hearing disputes. It is advisable to plan ahead and choose carefully, as one is bound by the choice at the time of contract for future disputes.

Lacking a properly drafted jurisdiction clause opens the door to potential costly and time-consuming preliminary battles in court to first determine where the substantive dispute should be heard, and the risk of parallel proceedings in multiple jurisdictions. The choice of jurisdiction should best position one's access to the most convenient and effective adjudication system, availability of interim and final remedies, and ease of enforcement against the counterparty. The location may also provide a strategic or psychological advantage, as one might have less appetite to fight legal proceedings in a foreign country, which would normally require a bigger investment on time and resources.

"Exclusive" and "non-exclusive" jurisdiction clauses do not only identify the choice and the degree of flexibility in the selection of forum but may ultimately affect the chance of recovery in certain circumstances. Asymmetric jurisdiction clauses allow a party to sue in any jurisdiction but restrict the other party to sue only in one jurisdiction. While an asymmetric jurisdiction clause is attractive on paper for those with stronger bargaining power, recent case law holds that such an asymmetric jurisdiction clause was not accepted for enforcement purposes under the MJREO.

Governing law is also an important consideration to provide certainty to the interpretation of hard negotiated contract terms. For arbitration clauses, the contract may also separately provide for the law governing the arbitration clause, the law of the seat of the arbitration, and the applicable procedural laws and rules of the arbitration.

There is no one size fits all. To avoid uncertainty and potential satellite disputes within

the substantive dispute, the governing law, jurisdiction and dispute resolution clauses to be adopted should always cater to specific business needs and accurately reflect one's preferred dispute resolution process.

WHY HONG KONG?

Hong Kong has long been regarded as the bridge between the global market and China, both in geographical proximity to Mainland markets and in its strength as an international financial centre.

With a mature legal system, a well-established body of case law under common law and a vast pool of legal professionals from around the world, Hong Kong is an ideal dispute resolution hub for international business disputes. The recent developments in the expansion of its cross-border recognition and enforcement regime reinforces Hong Kong's unique position to best serve the legal and dispute resolution needs of commercial parties.

HILL DICKINSON
HONG KONG
希德律師行 香港

Yvette Yu
+852 2525 7238
yvette.yu@hilldickinson.com

Yvette is a litigator with extensive experience in advising and representing international clients on a broad range of disputes, including multi-jurisdictional corporate and commercial litigation, regulatory investigations and enforcement actions.

Nicole Wong
+852 2525 7237
nicole.wong@hilldickinson.com

Nicole specializes in a broad spectrum of high stakes cross-border corporate and commercial disputes and works closely with many multinational corporations and high-net-worth individuals.

Shenzhen Introduces China's First Legislation on Arbitration

SCIA | 深圳国际仲裁院
Shenzhen Court of International Arbitration

On 26 August, 2020, the Standing Committee of the Sixth People's Congress of Shenzhen Municipality reviewed and approved *The Provisions on the Shenzhen Court of International Arbitration*, which came into force on 1 October, 2020. This made the Shenzhen Court of International Arbitration (SCIA) the first arbitration institution in China to be regulated by legislation approved by the local people's congress.

As the first arbitration institution in the world to implement the statutory body governance mechanism, the SCIA has carried out the statutory body reform since 2012 and established a Council-centered corporate governance structure, with an international Council standing as the decision body of the SCIA. The *Provisions* is intended to continuously promote institutional innovation under the framework of the *Arbitration Law of the People's Republic of China*, and is also an important measure taken by the SCIA to build an independent, impartial and innovative international arbitration institution.

The *Provisions* are divided into seven chapters. These include the General Provisions, the Council, the Executive Body, Rules and Panels, Management of Finance and Human Resources, Supervision Mechanism and Supplementary Provisions and comprise 37 articles in total. Major contents and institutional innovations include:

1. **Establishing a long-term corporate governance system:** the SCIA will adopt a council-based corporate governance system to achieve organic unity of decision-making, execution and supervision. This will eliminate the parties' doubts about local protection, administrative

Provisions on Shenzhen Court of International Arbitration was passed by Shenzhen's legislature and became effective on 1 Oct 2020.

intervention and insider control of the arbitration institution and other aspects.

2. **Promoting the structure of the Council and arbitrators in line with international standards:** at least one third of the Council members or the arbitrators engaged by the SCIA in the panels of arbitrators shall be from Hong Kong SAR, Macao SAR or other overseas jurisdictions, which is an important innovation to achieve international standards on the basis of the *Arbitration Law*.
3. **Strengthening the management of the executive body, finance and human resources:** it contains comprehensive rules on establishing executive body, personnel composition and formation methods, duly developing a financial and asset management system appropriate for a statutory body, adopting a market-driven staffing system, engaging with domestic and international professionals, etc., which fill in the blanks on the management of arbitral institutions in the *Arbitration Law*.
4. **Improving diversified dispute resolution mechanisms:** the SCIA may resolve disputes through arbitration, mediation, negotiation facilitation, expert review, etc., providing room for reform in exploring alternative dispute resolution methods and innovative rules.
5. **Establishing and improving the supervision system:** it establishes the internal and external supervision mechanism of the SCIA in terms of judicial review, supervision by the executive bodies under the Council, supervision by the special committees of the Council, supervision on finance and auditing, social supervision, etc., to ensure the independence and impartiality of arbitration work.
6. **Exploring E-Arbitration:** the SCIA shall pursue smart arbitration by fully utilising the internet, Big Data, artificial intelligence and other information technologies to provide efficient and convenient dispute resolution services to the parties, which provide institutional guarantees for exploring information technologies and strengthening the application of internet technologies.

INTERPRETATION OF KEY ARTICLES OF THE PROVISIONS

(I) Establish a long-term corporate governance system

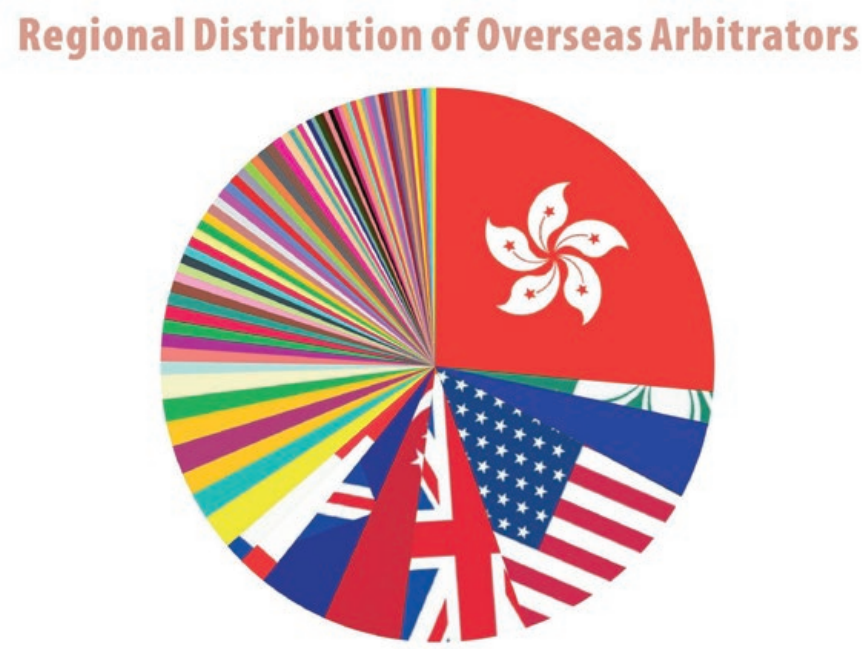
According to the *Arbitration Law* and international practice, the jurisdiction of commercial arbitration institutions comes from parties' agreement to submit the dispute to arbitration. The neutrality, impartiality and credibility of the arbitration institution are of key importance to parties. This requires that arbitration institutions shall have supervision mechanisms to prevent "insider control" or "self-seeking." The *Provisions* stipulate that *"the SCIA adopts a council-based corporate governance system to achieve organic unity of decision-making, execution and supervision,"* through improving the corporate governance structure to achieve self-discipline and self-development, the SCIA is prevented from local protection, administrative intervention and insider control. (see Article 3 of the *Provisions*)

(II) Promote the structure of the Council and Arbitrators in line with international standards

The *Provisions* also include that the SCIA shall establish a Council as its decision-making body. The Council should also consist of 11-15 members, including one chairperson and 2-4 vice chairpersons. The Council members shall be selected from renowned domestic and international professionals in the legal, business and other relevant sectors. At least one-third of the Council members shall be from Hong Kong SAR, Macao SAR or other

overseas jurisdictions. The SCIA shall set up panels of arbitrators and engage decent and qualified professionals as arbitrators, of which no less than one-third shall be from Hong Kong SAR, Macao SAR or other overseas jurisdictions.

These are significant breakthroughs under the *Arbitration Law* in line with international standards. Introducing international professionals in the legal, business and other relevant sectors to participate in the governance of the SCIA and arbitration services is an important step on the SCIA's path of international development and institutional reform. The *Provisions* also provide for the engagement for the Council members, duties of the Council, duties of the chairperson of the Council, manners for convening Council meetings, articles of association of the Council, special committees of the Council and other aspects. (see Chapter II, Article 21 of Chapter IV of the *Provisions*



(III) Strengthen the management of the executive body, finance and human resources

The *Arbitration Law* has no provisions on the composition of the executive body's personnel nor the financial operation system of the arbitration institution, etc. To fill this gap, the Provisions make pioneering exploration based on practical experience. For example:

1. **The Executive Body**. It is provided in the Provisions that *"The SCIA shall have one president and one or more vice presidents and may set up such internal bodies and branches as necessary. The president is the legal representative of the SCIA and shall be accountable to the Council and supervised by the Council. The vice president(s) shall assist the president in his/her work. [...] The president shall be nominated by the Council and the vice president(s) by the president, each to be appointed by the Municipal Government according to applicable administrative authority and procedures. The president shall be nominated from the Council members."* In addition, the *Provisions* also specify the duties to be performed by the president. The formulation of a series of systems provides important legal protection for the improvement of the internal management system and the building of a professional management service team. (see Articles 16, 17 and 18 of the *Provisions*)

2. **Financial and Human Resources Management.** The *Provisions* provide that the SCIA *"shall duly develop a financial and asset management system appropriate for a statutory body. [...] The SCIA shall adopt an internationally competitive, market-driven staffing system, and may set up positions as necessary and engage domestic and international professionals to establish a specialised management and service team for dispute resolution."* The *Provisions* also specify the funding sources, employment mechanism, fees and remuneration rules. These measures help to optimise the management system and the building of a team at the SCIA to better support the further improvement of the arbitration service. (see Article 27, Article 28, Article 29 and Article 30 of the *Provisions*)

(IV) Improve Diversified Dispute Resolution Mechanisms

The *Provisions* incorporate the diversified dispute resolution methods that the SCIA has actively explored in recent years and provides further room for reform in the ADR mechanisms and rules.

The *Provisions* provide that the SCIA *"may resolve contractual disputes and other disputes concerning property rights and interests between domestic and international individuals, legal entities, and other organizations through arbitration, mediation, negotiation facilitation, expert review or by such other means that organically connects with arbitration as agreed upon or requested by the parties. [...] The SCIA shall, in accordance with applicable national laws and regulations and the Provisions, formulate the rules for arbitration, mediation, negotiation facilitation, expert review and other forms of dispute resolution by reference to the modern rules of international arbitration and according to the basic principles of respecting the party autonomy and ensuring the independence of arbitration."* The *Provisions* also provide that the SCIA shall proactively explore arbitration mechanisms that help resolve international investment disputes, which is also mentioned in the SCIA Arbitration Rules Article 3: *"The SCIA accepts arbitration cases related to investment disputes between states and nationals of other states."* (see Articles 5 and 19 of the *Provisions*)

(V) Establish and improve the supervision system

An effective check and balance supervision mechanism is the basis for arbitration institutions to handle disputes in an independent, fair and impartial manner. Chapter VI of the *Provisions* establishes the internal and external supervision mechanism of the SCIA in terms of judicial review, supervision by the executive bodies under the Council, supervision by the special committees of the Council, supervision on finance and auditing, social supervision, etc.

On one hand, the Council supervises the execution of decisions made by the executive body, reviews and approves the annual work report, and evaluates the performance of the executive body. The Arbitrators Qualification and Ethics Examination Committee and the Financial Supervision and Remuneration Assessment Committee both belong to the Council and supervise the engagement and performance of arbitrators as well as the financial work of the SCIA respectively.

On the other hand, the SCIA shall accept financial and auditing supervision in accordance with the law. Through the above supervision mechanism, the independence and impartiality of arbitration work will be ensured. (see Chapter VI of the *Provisions*)

(VI) Explore E-Arbitration

E-arbitration or smart arbitration is an important direction for arbitration development. To enhance the application of information technology in arbitration, the *Provisions* provide that the SCIA *"shall pursue smart arbitration by fully utilising the internet, Big Data, artificial intelligence and other information technologies to provide efficient and convenient dispute resolution services to the parties."* These provide a legal guarantee for the SCIA to explore information technology and make more efforts in internet technology application. (see Article 7 of the *Provisions*)

ABOUT SCIA

Established in 1983 as the first arbitration institution in the Guangdong-Hong Kong-Macao Greater Bay Area, the Shenzhen Court of International Arbitration is an arbitration institution to resolve contract disputes, investment disputes and other property rights disputes among individuals, legal entities and other institutions from China and overseas.

CONTACT INFORMATION

SCIA Website: www.scia.com.cn
Email: info@scia.com.cn
Tel: 86 755 83501700

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CAMBODIA

MAR & Associates
Tel: (855) 23 964 876, (855) 23 987 876
Email: borana@mar-associates.com
Contact: MAR Samborana (Mr.)
Website: www.mar-associates.com
CMA · E · IP · RE · REG

CHINA

Broad & Bright
Tel: (86) 10 8513 1818
Email: broadbright@broadbright.com
Contact: Mr Jun Ji (Jun_ji@broadbright.com)
Website: www.broadbright.com
COM · CMA · ENR · LDR · TMT

East & Concord Partners
Tel: (86) 10 6590 6639
Email: Beijing@east-concord.com
Contact: Mr. Dajin Li
Website: www.east-concord.com
BF · CM · CMA · IP · LDR

Llinks Law Offices
Tel: (86) 21 31358666
Email: master@llinkslaw.com
Website: www.llinkslaw.com
BF · CM · CMA · INV · LDR

W. K. To & Co.
Tel: (86) 10 8587 5076
Email: wktoco@wktoco.com
Contact: Cindy Chen
Website: www.wktoco.com
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HONG KONG

Conyers Dill & Pearman
Tel: (852) 2524 7106
Email: hongkong@conyers.com
Contact: Christopher W.H. Bickley, Partner, Head of Hong Kong Office
Website: www.conyers.com
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Elvinger Hoss Prussen
Tel: (852) 2287 1900
Email: xavierlesourne_hk@elvingerhoss.lu
Contacts: Mr Xavier Le Sourne, Partner, Ms Charlotte Chen, Counsel
Website: www.elvingerhoss.lu
* Elvinger Hoss Prussen's Hong Kong office provides inbound and outbound legal services only under Luxembourg law
BF · CM · CMA · INV · TX

Vivien Teu & Co LLP
Tel: (852) 2969 5300
Email: Vivien.teu@vteu.co
Contact: Vivien Teu, Managing Partner
Website: www.vteu.co
BF · CM · CMA · INV · REG

W. K. To & Co.
Tel: (852) 3628 0000
Email: mail@wktoco.com
Contact: Vincent To
Website: www.wktoco.com
CMA · E · LDR · RE · REG

INDIA

Anand and Anand
Tel: (91) 120 4059300
Email: pravin@anandandanand.com
Contact: Pravin Anand - Managing Partner
Website: www.anandandanand.com
IP · LDR

Clasis Law
Tel: (91) 11 4213 0000, (91) 22 4910 0000
Email: info@clasislaw.com
Contacts: Vineet Aneja, Mustafa Motiwala
Website: www.clasislaw.com
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ABNR (Ali Budiardjo, Nugroho, Reksodiputro)
Tel: (62) 21 250 5125/5136
Email: info@abnrlaw.com
infosg@abnrlaw.com
Contacts: Emir Nurmansyah, enurmansyah@abnrlaw.com)
Nafis Adwani, nadwani@abnrlaw.com
Agus Ahadi Deradjat, aderadjat@abnrlaw.com
Website: www.abnrlaw.com
BF · CM · CMA · ENR · PF

Emir Pohan & Partners
Tel: (62) 21 2965 1251
Email: emir.pohan@eplaw.id
Contact: Emir Pohan
Website: www.eplaw.id
COM · E · LDR · RES

Lubis Ganie Surowidjojo
Tel: (62) 21 831 5005, 831 5025
Email: lgs@lgslaw.co.id
Contacts: Dr. M. Idwan ('Kiki') Ganie
Website: www.lgslaw.co.id
CMA · COM · INS · LDR · PF

Makarim & Taira S.
Tel: (62) 21 5080 8300, 252 1272
Email: info@makarim.com
Contact: Lia Alizia
Website: www.makarim.com
BF · CMA · E · LDR · PF

Mochtar Karuwin Komar
Tel: (62) 21 5711130
Email: mail@mkklaw.net, ek@mkklaw.net
Contact: Emir Kusumaatmadja
Website: www.mkklaw.net
AV · CMA · ENR · LDR · PF

SSEK Legal Consultants
Tel: (62) 21 521 2038, 2953 2000
Email: ssek@ssek.com
Contact: Denny Rahmansyah - Managing Partner
Website: www.ssek.com
Twitter: @ssek_lawfirm
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MALAYSIA

Adnan Sundra & Low
Tel: (603) 2070 0466
Email: enquiry@adnansundralow.com
Contacts: Deepak Sadasivan, Rodney D'Cruz
Website: www.asl.com.my
BF · CM · CMA · IF · PF

Azmi & Associates
Tel: (603) 2118 5000
Email: general@azmilaw.com
Contact: Dato' Azmi Mohd Ali - Senior Partner
Website: www.azmilaw.com
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Trowers & Hamlins LLP
Tel: (601) 2615 0186
Email: nwhite@trowers.com
Contact: Nick White – Partner
Website: www.trowers.com
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PHILIPPINES

ACCRALAW (Angara Abello Concepcion Regala and Cruz Law Offices)
Tel: (632) 830 8000
Email: accra@accralaw.com
Contacts: Emerico O. De Guzman, Ana Lourdes Teresa A. Oracion, Neptali B. Salvanera
Website: www.accralaw.com
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DivinaLaw
Tel: (632) 822-0808
Email: info@divinalaw.com
Contact: Nilo T. Divina, Managing Partner
Website: www.divinalaw.com
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Morales & Justiniano
Tel: (632) 834 2551, (632) 832 7198, (632) 833 8534
Email: ramorales@primuslex.com
Contact: Mr. Rafael Morales - Managing Partner
Website: www.primuslex.com
BF · CM · CMA · IP · LDR

Ocampo & Suralvo Law Offices
Tel: (632) 625 0765,
Email: info@ocamposuralvo.com
Contact: Jude Ocampo
Website: www.ocamposuralvo.com
CMA · ENR · PF · TX · TMT

SyCip Salazar Hernandez & Gatmaitan
Tel: (632) 8982 3500, 3600, 3700
Email: sshg@syciplaw.com
Contact: Hector M. de Leon, Jr. - Managing Partner
Website: www.syciplaw.com
BF · CMA · E · ENR · PF

Villaraza & Angangco
Tel: (632) 9886088
Email: fm.acosta@thefirmva.com
Contact: Franchette M. Acosta
Website: www.thefirmva.com
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SINGAPORE

Joyce A. Tan & Partners
Tel: (65) 6333 6383
Email: joyce@joylaw.com
Contact: Joyce T. Tan - Managing Director
Website: www.joylaw.com
CMA · E · IP · LDR · TMT

SOUTH KOREA

Bae, Kim & Lee LLC
Tel: (82 2) 3404 0000
Email: bkl@bkl.co.kr
Contact: Kyong Sun Jung
Website: www.bkl.co.kr
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Kim & Chang
Tel: (82-2) 3703-1114
Email: lawkim@kimchang.com
Website: www.kimchang.com
COM · BF · CMA · IP · LDR

Yoon & Yang LLC
Tel: (82 2) 6003 7000
Email: yoonyang@yoonyang.com
Contacts: Jinsu Jeong, Junsang Lee, Myung Soo Lee
Website: www.yoonyang.com
COM · E · IP · LDR · TX

Yulchon LLC
Tel: (82-2) 528 5200
Website: www.yulchon.com
COM · CMA · IP · LDR · TX

TAIWAN

Deep & Far Attorneys-at-Law
Tel: (8862) 25856688
Email: email@deepnfar.com.tw
Contact: Mr. C. F. Tsai
Website: www.deepnfar.com.tw
COM · CM · E · IP · LDR

THAILAND

Chandler MHM Limited
Tel: (66) 2266 6485
Email: jessada.s@chandlermhm.com, satoshi.kawai@chandlermhm.com
Contacts: Jessada Sawatdipong, Satoshi Kawai
Website: www.chandlermhm.com
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Kudun & Partners Limited
Tel: (66) 2 838 1750
Email: info@kap.co.th
kudun.s@kap.co.th
chinawat.a@kap.co.th
pariyapol.k@kap.co.th
Contacts: Kudun Sukhumananda - Capital Markets, Corporate M&A, Banking & Finance
Chinawat Assavapokee - Tax, Corporate Restructuring, Insolvency
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Website: www.kap.co.th
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Pisut and Partners Co., Ltd.
Tel: (66) 202 66226, 202 66227
Email: info@pisutandpartners.com
Contacts: Mr. Pisut Rakwong
Website: www.pisutandpartners.com
CM · CMA · E · LDR · RE

Warot Business Consultant Ltd.
Tel: (66) 81802 5698
Email: warot@warotbusinessconsultant.com
Contact: Mr. Warot Wanakankowit
Website: www.warotbusinessconsultant.com
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Weerawong, Chinnavat & Partners Ltd.
Tel: (66) 2 264 8000
Email: Veeranuch.t@weerawongcp.com
Contacts: Veeranuch Thammavaranucupt - Senior Partner
Website: www.weerawongcp.com
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VIETNAM

Bizconsult Law Firm
Tel: (84) 24 3933 2129
Email: info-hn@bizconsult.vn
Contact: Mr. Nguyen Anh Tuan - (84) 24 3933 2129
Website: www.bizconsult.vn
CM · CMA · LDR · RE · RES

Global Vietnam Lawyers LLC
Tel: (84) 28 3622 3555
Email: info@gvlawyers.com.vn
Contacts: Nguyen Gia Huy Chuong
Website: www.gvlawyers.com.vn
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Indochine Counsel
Ho Chi Minh Office:
Tel: (84) 28 3823 9640
Email: duc.dang@indochinecounsel.com
Contact: Mr Dang The Duc
Hanoi Office:
Tel: (84) 24 3795 5261
Email: hanoi@indochinecounsel.com
Website: www.indochinecounsel.com
CM · CMA · PF

Russin & Vecchi
Ho Chi Minh Office:
Tel: (84) 28 3824-3026
Email: lawyers@russinvecchi.com.vn
Contacts: Sesto E Vecchi - Managing Partner
Nguyen Huu Minh Nhut – Partner
Nguyen Huu Hoai – Partner
Hanoi Office:
Tel: (84) 24 3825-1700
Email: lawyers@russinvecchi.com.vn
Contact: Mai Minh Hang – Partner
Website: www.russinvecchi.com.vn
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VILAF
Tel: (84) 28 3827 7300, (84) 24 3934 8530
Email: duyen@vilaf.com.vn, tung@vilaf.com.vn, anh@vilaf.com.vn
Contacts: Vo Ha Duyen, Ngo Thanh Tung, Dang Duong Anh
Website: www.vilaf.com.vn
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— Law Firms — MIDDLE EAST

BAHRAIN

Trowers & Hamlins
Tel: (973) 1 751 5600
Email: bahrain@trowers.com
Contact: Louise Edwards - Office Manager
Website: www.trowers.com
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OMAN

Trowers & Hamlins
Tel: (968) 2 468 2900
Email: oman@trowers.com
Contact: Louise Edwards - Office Manager
Website: www.trowers.com
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UAE

Afridi & Angell
Email: dubai@afridi-angell.com
Contact: Bashir Ahmed - Managing Partner
Website: www.afridi-angell.com
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AMERELLER
Tel: (971) 4 432.3671
Email: gunson@amereller.com
Contact: Christopher Gunson
Website: www.amereller.com
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Horizons & Co
Tel: (971) 4 354 4444
Email: info@horizlaw.ae
Contact: Adv. Ali Al Zarooni
Website: www.horizlaw.ae
CMA · E · LDR · PF · RE

Trowers & Hamlins LLP
Dubai office:
Tel: (971) 4 351 9201
Email: dubai@trowers.com
Contact: Jehan Selim - Office Manager
Abu Dhabi office:
Tel: (971) 2 410 7600
Email: abudhabi@trowers.com
Contact: Jehan Selim - Office Manager
Website: www.trowers.com
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CANADA

Fasken Martineau
Tel: (416) 366-8381
Email: mstinson@fasken.com
Contact: Mark Stinson
Website: www.fasken.com
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Meyer Unkovic Scott
Tel: (412) 456 2833
Email: du@muslaw.com
Contact: Dennis Unkovic
Website: www.muslaw.com
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JOHANNESBURG

Fasken Martineau
Tel: (27) 11 586 6000
Email: johannesburg@fasken.com
Contact: Blaize Vance - Regional Managing Partner
Website: www.fasken.com
CMA · E · ENR · LDR · PF

— Arbitration — Services

Beijing Arbitration Commission / Beijing International Arbitration Center (Concurrently use)
Tel: (86) 10 85659558
Email: xujie@bjac.org.cn
Contact: Mr. Terence Xu（許捷）
Website: www.bjac.org.cn

Hong Kong International Arbitration Centre
Tel: (852) 2525 2381
Email: adr@hkiac.org
Website: www.hkiac.org

Maxwell Chambers Pte Ltd
Tel: (65) 6595 9010
Email: info@maxwell-chambers.com
Website: maxwell-chambers.com

Shenzhen Court of International Arbitration (Shenzhen Arbitration commission)
Tel: (86) 755 83501700, (86) 755 25831662
Email: info@scia.com.cn
Website: www.scia.com.cn

Alternative Legal Service Providers

LOD - Lawyers On Demand
Tel: (65) 6326 0200
Email: singapore@lodlaw.com
Contact: Oliver Mould
Website: lodlaw.com

KorumLegal
Email: Titus.Rahiri@korumlegal.com
Contact: Titus Rahiri
Website: www.korumlegal.com

Vario from Pinsent Masons (HK) Ltd
Tel: (852) 2294 3454
Email: enquiries@pinsentmasonsvario.com
Website: https://pinsentmasonsvario.com

Risk, Investigation — and Legal — Support Services

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Tel: (65) 8118 1175
Contact: Michael Lew, Founder & CEO
Email: michael@legalcomet.com
Website: www.legalcomet.com

Mintz Group
Tel: (852) 3427 3717
Contacts: Jingyi Li Blank
Email: jblank@mintzgroup.com
Website: www.mintzgroup.com

— Legal — Recruitment

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Singapore (65) 6220 2722
Beijing (86) 10 6581 1781
Shanghai (86) 21 2206 1200
Email: hughes@hughes-castell.com.hk
Website: www.hughes-castell.com

ALS International
Tel: Hong Kong – (852) 2920 9100
Singapore – (65) 6557 4163
Beijing – (86) 10 6567 8729
Shanghai – (86) 10 6372 1098
Email: als@alsrecruit.com
Website: alsrecruit.com

Lewis Sanders
Tel: (852) 2537 7410
Email: recruit@lewissanders.com
Website: www.lewissanders.com

Horizon Recruitment
Tel: Singapore – (65) 6808 6635
Hong Kong – (852) 3978 1369
Email: Jessica.deery@horizon-recruit.com
Website: www.horizon-recruit.com

Jowers Vargas
Tel: (852) 5808-4137
Email: alexis@evanjowers.com
Website: https://www.evanjowers.com/

— Non-Legal — Recruitment

True Recruitment Asia
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WhatsApp: (852) 5325 9168
Email: kannan@truerecruitmentasia.com

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