A GC to bank on
AIIB’s legal architect shares his plans

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Building ties

Projects keep the region’s lifeblood flowing

Welcome to the third issue of Asia Business Law Journal and first of all may I wish you all the best for the festive season! The year has passed quickly, it seems, and since our launch in July we have been working hard to provide you with the best legal intelligence in the region.

In keeping with this philosophy, our Cover Story is one that I’m sure will be most enlightening for in-house counsel, and also for law firms and others with an interest in the region’s continuing development. We spoke exclusively with Gerard Sanders, the general counsel for the newly formed and fully operational Asian Infrastructure Investment Bank (AIIB). Sanders gives some wonderful insights into building his own legal team for Asia’s newest financial institution and also on helping to develop the wider strategies of the bank as it pursues its developmental goals within the region. The views and opinions of one of the top corporate counsel in this sector make fascinating reading. Of particular interest is his advice for counsel working for government departments, multinationals or other project masters who might be looking to approach the AIIB for project funding in future.

Coupled with this exclusive interview is an overview of infrastructure activity in the region. On track looks at which countries are busiest with projects right now and why. We also explore regulatory developments in these jurisdictions that are helping or hindering legal teams as they deal with often complex frameworks in individual countries. At times when economies are not firing on all cylinders, infrastructure is a buzzword and that time is now in many parts of the region.

In our Country Focus for this issue, we look at Singapore and why this tiny city-state manages to punch above its weight in just about every area of endeavour, the legal fraternity included. Total control talks to a wide cross-section of big and boutique, domestic and international law firms, as well as leading in-house counsel, about how aggressive policymaking and staunch support from the legal community have resulted in big plans for Fintech, restructuring and insolvency, and other areas to keep Singapore leading the region despite a tepid economy.

We also take a look at Brexit and the possible impacts for this region. The twists and turns in the political plot for Britain’s exit from the EU read like Machiavellian theatre, but Brakes on Brexit? gives some clarity to what counsel should be preparing for while waiting for a clearer picture to emerge.

Finally, with the World Health Organization’s November anti-tobacco conference as a backdrop, we look at the two opposing forces. A recent article written for our sister publication, India Business Law Journal, Japan Tobacco International’s Idil Yasa provides some compelling arguments for brand protection. In our Counterpoint, former GC for the Australian Medical Association, Sarah Byrne, tells us why plain packaging laws are effective and innovative. Which side of the debate convinces you?

Merry Christmas to all our readers and here’s hoping your yuletide contractual arrangements include a Santa clause – and a Happy New Year!

Best wishes,

John Church
Editor, Asia Business Law Journal
Editor-in-chief, Vantage Asia
In a world where law firm resources are increasingly stretched to the limit, Baker & McKenzie has led the way with an alternative work strategy it hopes will keep staff happier, more productive and less inclined to go elsewhere.

The firm has adopted what it refers to as “agile working” across its global network, which means flexible work hours for its employees.

The change affects the firm’s 77 offices, with 4,607 lawyers including 1,580 partners as well as other staff, and includes alternative working hours, remote working, and regular working time outside of the office.

The new regime is the brainchild of Peter May, chief talent officer at the firm, and global executive committee member Claudia Prado.

Prado told Asia Business Law Journal that agile or flexible working at Baker & McKenzie had informally been around for a while in many of the firm’s offices.

“After conducting an engagement satisfaction survey, flexible working came out as something our people felt strongly about,” she said. “As a result we have formalized our policies and developed one holistic approach to be rolled out globally to all employees.”

Prado said the new programme had four dimensions: remote working; reduced working hours; alternative hours; and time out of office.

“In terms of how this impacts on current work practice – implementing an agile working policy will increase and improve productivity and efficiency from the workforce, reduce absenteeism, improve the health and wellbeing of our people, reduce turnover, and improve morale – the benefits are long lasting,” she said.

In September 2015, the firm ran an internal engagement survey, called BakerYou. Results showed that lawyers and other staff regarded flexible working arrangements as a key priority.

“We wanted to act fast, innovate and demonstrate to our people that their opinions and needs matter to the firm and we will continuously strive to make sure working at Baker & McKenzie is a fulfilling and enjoyable experience,” said Prado.

The policy is in place now and will be fully implemented over the next 18 months across all of the firm’s offices, and be available to all staff.

“We want to take a holistic approach to our flexible working policy; our regional offices will work with HR and talent teams to find solutions that work best for

Peter May, Baker & McKenzie’s chief talent officer

BAKER ADOPTS ‘AGILE’ APPROACH ACROSS THE BOARD
Restructuring expert launches firm for distressed companies

A new consultancy for the region focused on leadership for distressed or restructured companies was launched recently led by the former senior restructuring partner for Asia at Reed Smith.

The independent advisory firm, Catalyst Advisory, will focus on director appointments to companies that are being restructured or are in turnaround situations across the Asia-Pacific region. The firm will be headquartered in Singapore.

The launch of Catalyst Advisory comes at a time of rising distressed activity in the Asia-Pacific region and increasing demand for experienced directors to guide an outcome. The firm will work with restructuring advisory firms, financial institutions and funds in need of a high calibre director appointment during a turnaround project, or to monitor an investment that has evolved into a distressed situation.

Catalyst will be led by a veteran in the legal restructuring industry, Troy Doyle, who has led global and Asia-wide restructuring practices in magic circle and top US law firms. During his 18 years of advising across the Asia-Pacific region, he has been involved in most of the major restructurings in the region.

All appointments will have the requisite technical experience and sector expertise to ensure they are transformative during their tenure. Catalyst will also provide such professionals direct to companies across the Asia-Pacific region, including Indonesia, China, Singapore and Australia.

“The rise in distressed activity across the Asia-Pacific has increased the need for specialized director positions within companies being restructured,” said Doyle, rated as a leading restructuring lawyer in the region in Chambers Asia-Pacific, Legal 500 and International Financial Law Review 1000.

“Our platform provides the comfort to such professionals to undertake these roles, knowing they are fully supported throughout the duration of the posting by a focused team employing market leading risk mitigation strategies, and products designed by experienced restructuring professionals with local knowledge, to minimise their exposure.

“Equally, the firm ensures that its appointees have the competencies required, both from an experience and sector expertise perspective to be transformational in an organization.”

THAILAND APPROVES DRAFT BILL ON COMPETITION

After years of debate, Thailand’s cabinet has approved the draft Trade Competition bill to overhaul the existing Trade Competition Act enacted in 1999.

Major changes include the spin-off of the Office of the Trade Competition Commission (OTCC) from a division under the Department of Internal Trade, the Ministry of Commerce, into an independent state organization, and the inclusion of a fine of 10% of the total income of the fiscal year before the year an offence is committed for cartel cases, in addition to the existing criminal penalty. It is hoped the spin-off will eliminate past enforcement issues attributed to political influence, and provide more management flexibility.

Mergers and acquisitions that fall within the criteria set out by the Trade Competition Commission must be reported to the OTCC within seven days post-completion of the transaction (instead of pre-merger clearance). The draft bill will have to be approved by the National Legislative Assembly before it can be passed into law.
Despite being unpopular with authorities, there were advantages to listings of micro-credit companies, said a lawyer who worked on Quanzhou Huixin Micro-credit’s IPO on the main board of the Hong Kong Stock Exchange (HKEx), only the second such listing. “Micro-credit companies are neither the mainstream for listing in Hong Kong nor welcomed by HKEx and the Securities and Futures Commission,” Allen Shyu, a Beijing-based partner at Troutman Sanders and a lead partner in the listing, told Asia Business Law Journal. “In fact, micro-credit companies are relatively popular among investors, as their business model is quite simple – that is, making profit by loans,” said Shyu.

At present, only two micro-credit companies have listed in Hong Kong, namely Zuoli Kechuang Micro-finance and Huixin Micro-credit. Huixin globally offered 180 million H-shares in the IPO, which is expected to raise between HK$279 million (US$36 million) and HK$315 million. “One unique feature of micro-credit companies is the limitation of their geographical coverage, so risks for such companies are not as high as people may think,” said Shyu.

“Within a certain region, every company and individual is familiar with each other – for example, Huixin is located in Quanzhou city and Zuoli in Deqing county – therefore micro-credit companies have some ability to control the risk when offering loans.” Shyu said risks such as bad debt were common in the finance industry, but that the bad debt rates of Zuoli and Huixin were actually very low. “Besides, according to China’s law, the upper limit for micro-credit companies’ annual loan interest is 24%, by which investors can still achieve a respectable income.”

In order to expand their business, micro-credit companies must have enough capital available for lending, and that capital comes mainly from shareholders and financial institutions. If listed in Hong Kong, micro-credit companies can raise more capital through public offerings.

Shyu points to research by the firm finding that through IPOs micro-credit companies can not only obtain funds but also broaden the channels of capital markets. When necessary, micro-credit companies can also conduct multiple rounds of financing.

Compared with bank financing, the cost of financing by issuing shares or bonds is lower. Therefore, with an expanding capital base, micro-credit companies can offer sufficient loans to attract more clients while providing itself with more stable income and cash flow.

Huixin Micro-credit, the largest licensed micro-credit company in Fujian province, is primarily dedicated to providing local entrepreneurial individuals, small and medium-sized enterprises, and micro-enterprises, with practical and flexible short-term financing solutions, accounting for about 7.2% of Quanzhou City’s micro-finance market.

Legal counsel: Troutman Sanders advised Huixin, with its team led by Allen Shyu and Hong Kong partner Rossana Chu.
Some of the most complex financing structures in the world were currently being put in place to pave the way for the development of Hinkley Point C (HPC), a headline-making Chinese-funded nuclear power investment project in the UK, said a lawyer involved in the project.

“The financial viability of HPC is underpinned by a contract-for-differences [CFD] structure, pursuant to which the UK government has agreed on a minimum price for the power that HPC generates so that if prices fall below that level, the project company will receive a top up, which will in effect be funded by all UK users of electricity,” Alex Doughty, a partner at Eversheds in London and one of the team leaders in the project, told Asia Business Law Journal.

Doughty said HPC was one of the world’s most complex project financings currently underway, and the challenging piece of work involves the development of innovative financing structures. The contract-for-differences will last for 35 years.

HPC, being built by France with major Chinese investment, will be constructed near the existing Hinkley Point B station, in Somerset, and is scheduled for completion in 2023. It is expected to provide 7% of the UK’s electricity needs and operate for 60 years.

“The CFD mechanism required a ‘state aid’ clearance from the EU Competition Department,” said Doughty. “With the entry of China General Nuclear Corporation [CGN] into HPC as a strategic long-term investor, China Development Bank [CDB] mobilized its team to support its longstanding client CGN ... As the overall funding structure for HPC was further developed, CDB’s team was able to provide CGN with innovative and creative solutions to facilitate CGN’s invest into HPC.”

For example, Doughty said the financing structure included a complex multi-billion-pound structured credit instrument “which is both unique and innovative.”

“CDB will be continuing its support of CGN during the ongoing implementation of HPC and its financing structure,” he said. “As the first new nuclear power plant being implemented in the UK, HPC is currently one of the largest and most complex projects being implemented in Europe.”

**Legal counsel:** Eversheds advised a consortium of Chinese banks, led by CDB, on key aspects of the financing of the £16 billion (US$20 billion) HPC project. The Eversheds team was led by partners Alex Doughty in London, Jay Ze in Beijing, and Samuel Chau in Hong Kong.
The Postal Savings Bank of China’s (PSBC) US$7.4 billion initial public offering on the Hong Kong Stock Exchange (HKEX) made a crucial breakthrough on the listing rules, according to a legal expert involved.

Tim Wang, China co-managing partner of Clifford Chance, told Asia Business Law Journal that more than 50% of the PSBC’s securities in public hands at the time of listing were beneficially owned by the three largest public shareholders, which violated the listing rules of the HKEX. But the PSBC successfully got an exemption from the exchange.

“The size of its issuance is really huge,” said Wang. “Even if its three largest public shareholders own approximately 53% of securities in public hands, its public float was not seriously affected, as well as its liquidity.”

Wang said it was not surprising that the PSBC raised so much money, as the bank covers a wide range of clients, has a lot of branches, and has a relatively low non-performing loan ratio.

The PSBC’s Hong Kong listing marks the world’s largest IPO this year. It’s also the world’s largest new listing since Alibaba’s US listing in 2014, and Hong Kong’s largest IPO since 2010.

Established in 2007, the PSBC is the youngest large commercial bank in China. As of 31 March 2016, the PSBC’s total assets, total deposits and total loans ranked fifth, fifth and seventh, respectively, among PRC commercial banks. According to The Banker’s list of the “Top 1,000 World Banks”, the PSBC ranked 22nd in the world in terms of total assets as of 31 December 2015.

Legal counsel: Clifford Chance and King & Wood Mallesons acted for the underwriters. The Clifford Chance team was led by partners Tim Wang, Amy Lo and Fang Liu, while the KWM team was led by partners Zhou Ning, Liu Sijia and Su Zheng. Davis Polk & Wardwell, and Haiwen & Partners, acted for the PSBC.
EMERALD MEDIA BUYS INTO YUPPTV

Emerald Media, a pan-Asian platform established by private equity firm Kohlberg Kravis Roberts (KKR) to invest in the media and entertainment industries across Asia, has acquired a minority stake in YuppTV for US$50 million.

YuppTV is an over-the-top video platform for South Asian content offering live TV, catch-up TV and films on demand in 14 languages. KKR has committed US$300 million to Emerald Media, which is headed by Rajesh Kamat and Paul Aiello.

Emerald Media is primarily focused on providing growth capital to media, entertainment and digital media companies, and seeks to acquire control or significant minority positions in growing public and private media companies. It plans to spend US$15-75 million on each investment.

Legal counsel: Nishith Desai Associates advised Emerald Media on Indian aspects of the investment. O’Melveny & Myers was Emerald Media’s international counsel. Gibson Dunn & Crutcher represented YuppTV.

EVERSTONE, SUNRISE BPO ACQUIRE OUTSOURCER C3

Everstone Capital Partners III and Sunrise BPO have both agreed to acquire C³/CustomerContactChannels Holdings, a company that offers business process outsourcing for customer management solutions.

Based in the US and with operations in the Philippines and Guatemala, C³ serves industries such as travel and hospitality, healthcare and financial services. Its services include performance optimization, social media monitoring, technical support and customer acquisition.

The Everstone Group is an India and Southeast Asia-focused private equity and real estate investment firm with assets of US$3.3 billion under management. It has about 200 employees across offices in Mumbai, Delhi, Bengaluru, Singapore and Mauritius.

The transaction is expected to close by the end of the year, subject to customary closing conditions.

Legal counsel: Shearman & Sterling advised Everstone and Sunrise BPO. The team was led by partner Sidharth Bhasin with support from associates Gordon Palmquist, Paul Jun, Matthew Shearman and James Clayton-Payne.

The team also included partners Ken Laverriere, Larry Crouch, Richard Hsu, Michael Dorf and Jessica Delbaum, counsel Eileen O’Pray, Kelly Karapetyan and Sharon Lippett, and associates Francisco Cebada, Benjamin Petersen, Marc Elzweig and Emalie Sundale.

Kramer Levin Naftalis & Frankel, a firm with offices in New York, Silicon Valley and Paris, advised C³.
Edelweiss blooms with masala bonds

ECL Finance has completed its debut overseas issue of ₹5.02 billion (US$75 million) in 9.05% rupee-denominated US dollar-settled senior secured notes, known as masala bonds. The unrated bonds are proposed to be dual listed on the Singapore Exchange and the Stock Exchange of Mauritius.

ECL Finance is a subsidiary of Edelweiss Financial Services, a diversified financial services company in India providing a broad range of financial products and services. ECL Finance provides credit services and is registered as a non-banking financial company.

Legal counsel: A team from Baker & McKenzie in Singapore, led by debt capital markets principal Pallavi Gopinath Aney with assistance from senior associate Jitesh Shahani, advised the joint lead managers. Khaitan & Co represented ECL Finance as counsel on Indian law. The team comprised partners Sudhir Bassi, Nikhilesh Panchal and Manisha Shroff, principal associate Vaibhav Mittal and associate Hemant Kothari.

Hospitality platform created for Southeast Asia

Warburg Pincus, a leading global private equity firm focused on growth investing, and VinaCapital, the largest private equity firm in Vietnam, have announced that affiliates of the two firms and VinaCapital founder Don Lam have closed a partnership to create a fully integrated hospitality platform spanning development, acquisitions and operations across Southeast Asia.

The joint venture aims to become the pre-eminent hotel platform in Vietnam and expand into other hospitality markets in Southeast Asia. The long-term goal is capturing growth in tourist arrivals, especially from China, to the region in the next five to 10 years.

It will be seeded initially with about US$500 million of capital commitments from Warburg Pincus and VinaCapital and best-in-class hospitality assets including a 100% stake of Serenity Holding, as well as select resort and city hotels in Vietnam. Serenity is a leading domestic hotel management company focusing on developing and operating specialized boutique resorts and upscale city hotels in Vietnam under its Fusion brands.

Legal counsel: Latham & Watkins represented Warburg Pincus in the transaction with a Hong Kong-based deal team led by partner Amy Beckingham and associates Douglas Abernethy and Edward Tang. Singapore-based associate Marcus Lee provided Singapore law support. Advice was also provided on finance matters by Hong Kong-based partner Gary Hamp and associate Trinh Hoang and on tax matters by London-based partner Sean Finn and associate Robert Thomas.

Chinese companies buy ACR Capital

Two Chinese state-owned investment companies – Shenzhen Qianhai Financial Holdings and Shenzhen Investment Holdings – have acquired ACR Capital Holdings, the owner of Singapore’s largest reinsurance company.

ACR’s owners include London-based private equity firm 3i Group, the Malaysian state investor Khazanah Nasional, the Singapore state investor Temasek Holdings and the Japanese trading house Marubeni Corp.

Legal counsel: Allen & Overy was the lead counsel on the deal, led by Singapore partner Chris Moore. Trilegal advised ACR on the Indian aspects of the US$1 billion transaction. The team comprised partner Yogesh Singh, senior associate Ramya Suresh and associate Nimisha Mund. Kadir Andri & Partners was Malaysian counsel on the deal, ASAR Legal handled Bahrain law issues, Kim & Chang was the Korean counsel, and Lee & Li advised on Taiwanese law. Clyde & Co, led by partner Ian Stewart, advised the two Chinese companies.
Redback Technologies, an Australian cloud-based alternative energy company, has sold off a stake to major energy provider EnergyAustralia, which is owned by CLP.

The deal, valued at A$9.3 million (US$6.9 million), will enable EnergyAustralia to offer customers access to Redback’s smart solar inverter with its cloud-based software that enables smart energy usage. The investment will support Redback’s development and release of new products.

Redback is focused on the development of advanced, low-cost solar solutions for residential and commercial users. Its cloud-based system offers the ability to analyze and control energy generation and consumption in real time, affording consumers the ability to reduce energy costs. The technology makes rooftop solar and battery storage more economic and more attractive to new electricity customers.

Redback legal adviser Norton Rose Fulbright’s team leader and corporate partner, Shane Bilardi, said that while large corporates have a strong interest in the emerging disrupters in their industry, the cultural differences often make transactions between the two difficult to complete. “It was exciting to see how well Redback and EnergyAustralia bridged that divide, Redback embracing the process to become investment ready and EnergyAustralia being flexible enough to accommodate a dynamic technology company. I think that bodes well for the future of their partnership,” said Bilardi.

Legal counsel: Norton Rose Fulbright advised Redback Technologies on the sale. The firm drafted the share subscription and distribution agreements and was involved in negotiations with EnergyAustralia. Shane Bilardi led the deal and was assisted by senior associate Amelia Clarke.
BANPU IPO THE BIGGEST IN THAILAND THIS YEAR

Banpu Power Public Company completed its initial public offering of ordinary shares on The Stock Exchange of Thailand (SET) setting the bar as the biggest offering for the country this year, and one of the few sizable IPOs in Southeast Asia. The IPO included a public offering in Thailand, a rule 144A/regulation S international offering, an offering to cornerstone investors and an entitlement shares offering to shareholders of Banpu Power’s parent company, Banpu Public Company. Priced at 21 Thai baht (59 US cents) per share, the offering raised THB13.6 billion. Banpu Power is one of Asia’s leading energy companies and operates conventional and renewable power businesses across Asia including Thailand, Laos, China and Japan.

Legal counsel: Latham & Watkins represented Banpu Power Public Company. The Latham & Watkins capital markets team was co-led by Hong Kong partner Posit Laohaphan and Singapore partner Michael Sturrock, with Hong Kong associates Eric Yiu and Diana Dizon. Credit Suisse, CIMB and The Quant Group acted as international lead managers, and Bualuang Securities, Thanachart Securities and Kasikorn Securities acted as domestic lead managers.

Nitto enters licence agreement with Bristol-Myers

Japanese industrial and technology conglomerate Nitto Denko Corporation and Bristol-Myers Squibb (BMS) have entered into an agreement granting the latter exclusive worldwide rights for the development and commercialization of Nitto technological research.

Nitto’s investigational siRNA molecules target heat shock protein 47 (HSP47) in vitamin A containing formulations, which includes Nitto’s lead asset, ND-L02-s0201, currently being studied for the treatment of advanced liver fibrosis.

The agreement grants BMS the option to receive exclusive licences to Nitto’s siRNA therapy for the treatment of lung fibrosis and other organ fibrosis. The agreement is subject to clearance under the Hart-Scott-Rodino Antitrust Improvements Act. As part of the arrangement, BMS will pay US$100 million to Nitto. Nitto will also be eligible to receive subsequent clinical and regulatory milestone payments, royalties, sales-based milestone payments, as well as option exercise payments.

Established in 1918, Nitto is expanding its businesses as a global market leader across several industries including electronics, automotive, housing, infrastructure, environmental and medical sectors, operating through more than 100 companies worldwide with over 30,000 employees.

Legal counsel: The Orrick team advising Nitto was led by M&A and private equity partner Hiroshi Sarumida and IP partner Antony Pfeffer, and included assistance by Richard DeLucia and King Milling. In October, an Orrick team led by Hiroshi advised Nitto on its acquisition of two US biopharmaceutical companies, Irvine Pharmaceuticals and Avrio Biopharmaceuticals.
After more than a year of weighing up a possible relationship, Hogan Lovells lawyers say, the firm has finally tied the knot and launched an association with Fujian Fidelity Law Firm in the Shanghai Free Trade Zone (FTZ).

“Various factors have been considered in the decision, including level of commitment, the likelihood of being able to obtain partner buy-in for the association within a reasonable timetable, potential conflicts of interest and business conflict issues, the quality of legal services provided, reputation in the market, recognition of firm values, management structure, and the outcome of financial due diligence and management interactions,” Andrew McGinty, a partner of Hogan Lovells in Shanghai, told Asia Business Law Journal.

McGinty acclaimed Fidelity as a high-quality and innovative law firm, and an excellent match for Hogan Lovells. “We have been delighted with the energy and commitment that Fidelity has put into the association throughout the process and that was a key factor in allowing us to get one of the first few approvals for an association since the rules allowing the creation of associations between qualifying Chinese and foreign law firms were issued at the end of 2014,” he said.

McGinty and Katie Feng, another Shanghai partner of Hogan Lovells, will lead the relationship with Fidelity. Fidelity has a good track record in corporate and M&A, insolvency and liquidation, financial securities, real estate and construction, and arbitration and litigation work.

“Based on the development plan for the association, the scope of matters which will be worked on by the association will essentially be client-driven and hence will focus initially on China matters which fall within the expertise of Fidelity generally and the lawyers assigned by Fidelity to the association, such as intellectual property litigation, securitization, anti-monopoly law, insolvency and regulatory advice,” said Feng. “Expansion to other areas will follow based on client needs, for example; we are seeing some demand on the banking and insurance side at present.”

Hogan Lovells is the third international law firm to enter into an association in the Shanghai FTZ following tie-ups between Baker & McKenzie and FenXun Partners, as well as Holman Fenwick Willan and Wintell & Co.

“In general terms, and as provided under the relevant rules governing associations in the Shanghai FTZ, the association will operate with Chinese lawyers that the Fidelity FTZ office has assigned to it, plus foreign lawyers Hogan Lovells has assigned to it,” said Feng.

“It has started operations with an initial staff of two intellectual property lawyers and two members of support staff. We expect an additional four Chinese lawyers to join the association by the end of 2016.”
AnJie recruits 3 partners for Beijing office

AnJie Law Firm recently appointed three new partners to join its Beijing office, including an intellectual property (IP) veteran and two private equity and venture capital (PE/VC) experts.

James Ma is experienced in patents, trade secrets, trademarks and unfair competition disputes and other IP issues, as well as complicated commercial disputes in China. He has worked for many multinationals and domestic companies in protecting their IP rights and handling disputes.

Xie Yongtao focuses on PE/VC, initial public offerings (IPOs), competition law, outbound investment and corporate matters. He has advised clients on offshore and onshore IPO transactions.

Echo Zhao is experienced in PE/VC, cross-border M&A and private wealth management, and served as both general counsel and Asia-Pacific general counsel of multiple multinationals. She has handled major contract negotiations throughout China, Southeast Asia, Australia and New Zealand.

A senior executive of Beijing-headquartered AnJie recently told Asia Business Law Journal that the firm’s newly launched Shenzhen office begins an expansion that may see the firm target western China next.

KWM expands Hong Kong IPO team

King & Wood Mallesons’ (KWM) Hong Kong office has hired John Baptist Chan as a partner in its corporate and securities practice. Chan specializes in corporate finance, capital markets and mergers and acquisitions law, and his clients include Hong Kong, mainland Chinese and multinational companies, investment banks and financial institutions.

Prior to joining KWM, Chan worked for other leading international law firms including Clifford Chance and Linklaters.

Arbitration expert joins HSF

Arbitration expert Kathryn Sanger has joined Herbert Smith Freehills’ (HSF) international arbitration team as a partner based in Hong Kong. Sanger has nearly 25 years’ experience of arbitration and litigation proceedings in Asia, particular in financial services, energy and China-related matters. Sanger will be HSF’s 12th dedicated arbitration partner in Asia as part of the region’s largest disputes practice, with 20 partners and 80 lawyers.

Australia’s first woman chief justice

Susan Mary Kiefel has been appointed to leadership of the High Court of Australia, taking over from Robert French as Chief Justice when he retires from the bench in January. Kiefel will be the first woman in the court’s 113-year history to hold the position. Kiefel became the first woman in the state of Queensland to take silk in 1987. She was appointed to the Queensland Supreme Court in 1993 and the Federal Court of Australia in 1994, and has served a tenure as president of the Queensland Bar Association.

Norton opens PNG office

Norton Rose Fulbright has opened an office in Papua New Guinea to service a broad range of growing sectors and industries as part of an expanded Asia-Pacific network.

Located in Port Moresby, the new office will advise client on deals and disputes relating to energy, mining, infrastructure and tele-communications. It will also advise local government on the development of legislation, as well as on power, ports, roads, oil and gas and financial services. The firm hired former Kumul Minerals general counsel Karol Lelai to run the new office as its local principal for Papua New Guinea.

SGP law society elects new president

The Law Society of Singapore has chosen vice president Gregory Vijayendran to take over as president, replacing senior counsel Thio Shen Yi. Vijayendran, 48, is the first non-senior counsel to be elected president in more than a decade. A partner at Rajah & Tann, Vijayendran earned the Law Society’s inaugural Pro Bono Ambassador award in 2009 and was chosen as the recipient of Washington-based Advocates International’s Good Samaritan award in 2008.

A&O hires bank GC in Thailand

Standard Chartered Bank Thailand’s former head of legal and compliance Nithi Laophulsuk is joining Allen & Overy as a partner. Laophulsuk was with Standard Chartered Bank Thailand.
CAREY OLESEN OPENS DOORS IN HONG KONG

Carey Olsen has opened for business in Hong Kong as part of its network expansion in Asia. The Hong Kong practice has a dispute resolution and insolvency focus, with partner Michael Makridakis having relocated to Hong Kong from the firm’s Cayman Islands office, where he established and led its dispute resolution and insolvency team.

The opening of the Hong Kong office in November follows the successful launch of the firm’s Singapore office by lead Asia partner Linda Lee in October last year. Carey Olsen recently expanded its corporate legal practice in Singapore with the relocation of partner Anthony McKenzie from the firm’s Cayman office.

The new office in Hong Kong will advise on the full spectrum of contentious, semi-contentious and offshore advisory work, which will include domestic and international restructuring and insolvency, corporate and commercial disputes, banking and financial services litigation, and trusts litigation, as well as fraud, asset tracking and regulatory disputes.

“The growth in demand for offshore legal services in Asia has created a parallel demand for offshore litigation services and we have an increasing number of clients requiring advice in relation to disputes and insolvency matters in the region,” said Makridakis.

for nearly seven years in-house. At A&O he will focus on transactions, contentious and non-contentious work in regulated markets. Prior to joining StanChart, Nithi was in private practice with Hunton & Williams in Thailand.

ENTERTAINMENT LAWYER JOINS LATHAM & WATKINS

Experienced private practice and studio lawyer Lex Kuo has joined Latham & Watkins’ entertainment, sports and media practice to serve the Greater China region. He advises clients on cross-border financing, development, production, and distribution of media and entertainment projects. Kuo joined the firm in Hong Kong but expects to return to Beijing to join Latham’s office there in 2017.

SAL CONTINUES INSEAD COURSE

The Singapore Academy of Law (SAL) and INSEAD business school are organizing a second run of the SAL-INSEAD Law Firm Leadership Programme (SILLP) following the success of last year’s inaugural course. The SILLP is a three-day intensive management programme designed for law firm partners. The programme applies business school methodologies to address business challenges faced by law firm partners including strategic planning, improving organizational alignment, managing growth and change, and motivating people and teams. The course is scheduled for 23-25 March 2017 at INSEAD’s Asia campus in Singapore.

FORMER JUDGE AT DLA IN TOKYO

DLA Piper has hired Takahiro Nonaka to the firm’s Tokyo office as a member of the litigation and regulatory practice group. Nonaka formerly served as a judge in both district and family courts in different cities in Japan for almost 10 years. He also served as a diplomat at the Embassy of Japan in Washington DC, where he advised on issues relating to export controls, FCPA enforcement and competition laws affecting companies in Japan.

ASIA DISPUTES TEAM JOINS SIDLEY IN HK

Sidley Austin has added a team of arbitration, litigation and regulatory lawyers in Hong Kong led by prominent partner Friven Yeoh, with Desmond Ang and Yan Zhang joining the firm as counsel. Thomas Albrecht, managing partner for Sidley, Asia Pacific, said: “The combination of more cross-border disputes and heightened regulatory scrutiny has increased demand among our regionally based and multinational clients for lawyers who are well-versed in international arbitration, cross-border litigation and regulatory and enforcement matters.”

MARKET PULSE

MARKET PULSE

SIDLEY IN HK

TEAM JOINS

SQUIRE TOKYO

Squire Patton Boggs has appointed international arbitration counsel Haig Oghigian to lead its international arbitration practice. He will be based in Tokyo.

Oghigian was previously Tokyo head of commercial disputes at K&L Gates, and prior to that was co-chairman of Baker & McKenzie’s litigation and dispute resolution practice.
Haynes and Boone, LLP is one of the American Lawyer top 100 law firms, with more than 600 lawyers in 15 offices and 40 major legal practices. We are among the largest firms headquartered in the United States with significant operations in China. Our growth has been driven by our client service strengths, especially our problem-solving acumen and our ability to collaborate with clients.

It is our mission to continue to be a preeminent law firm that serves clients globally on sophisticated legal matters while maintaining a special culture founded on teamwork, a healthy work environment, and a strong work ethic.

We focus on teamwork, an environment of mutual respect, and a long-term view that supports investing in the future and the success of our clients.
On 11 September 2016, the Australian government introduced the Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2016 (No. 1), which makes important changes to chapter 4 of the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1).

**The amendment:**
1. Allows reporting entities to now collect know your customer (KYC) information “about” a customer, rather than requiring KYC information to be collected “from” a customer; and
2. Eases the KYC headaches many have been facing in relation to electronic-based safe harbour provisions and the requirement to verify name, address and date of birth (or transaction history) against two separate data sources.

**Broadening ID verification**
The rules set out the minimum requirements in relation to customer identification and verification. Historically, chapter 4 of the rules required reporting entities to
collect KYC information directly “from” a customer. The amendment means that the rules now permit reporting entities to collect KYC information “about” a customer rather than “from” a customer. This wording change has been applied universally across chapter 4 (meaning you can collect information “about” each customer type).

From a practical perspective, this change means that reporting entities can choose whether to collect information “from” a customer or “about” a customer (i.e., from a source other than the customer). Reporting entities have greater flexibility and discretion as a result. Reporting entities must ensure that they still apply a risk-based approach to the development of any new procedures, and that they still adhere with the remainder of the chapter 4 requirements and privacy law requirements.

The government noted that financial institutions estimate this change will reduce manual data entry time by about four minutes per customer and will reduce the time it takes the average new customer to complete an application form by about 12.5 minutes (representing an estimated annual saving of US$7.2 million to financial institutions and US$7.9 million to individual customers).

This change will also prove a relief for KYC headaches associated with having information about a customer that is reliable, but that did not come “from” the customer.

**Safe harbour provisions**

Following the amendment, electronic-based safe harbour provisions for the verification of individual customers require reporting entities to verify:

- The customer’s name against two separate data sources; and
- Either the customer’s residential address, or date of birth, or that the customer has a transaction history for at least the past three years against two separate data sources.

The change is a relief for those in the industry who constantly come up against reliable data sources that only verify against name and date of birth (but not address) or vice-versa.
THAI LEGISLATION TO ASSIST E-KYC

The Bank of Thailand (BOT) has introduced a new regulation to facilitate the know your customer (KYC) process by using an electronic means (e-KYC) for account opening for deposit acceptance or fund acceptance from the public. KYC is one of the required processes imposed on financial institutions and certain types of reporting entities under the anti-money laundering law (AML law). Financial institutions need to comply with both the KYC process under AML law and the criteria issued by the BOT as the supervising regulator.

The BOT issued notification No. 7/2559 re Criteria in Taking Deposits or Taking Money from the Public, which became effective on 3 August 2016. Key requirements are summarized below.

Concept. e-KYC procedures must have the same standards as the KYC procedures usually conducted where the relationship is established face-to-face. Account opening for deposit acceptance or fund acceptance from the public via electronic means can only be available for “individual customers”. Electronic means include: (1) financial institutions’ electronic devices; and (2) customers’ electronic devices installed with the financial institution’s application.

Since account opening for deposit acceptance or fund acceptance from the public via an electronic means is considered to be a use of new technologies in the provision of banking services, financial institutions must obtain a prior approval from the BOT.

Permissible method/technology. For account opening via electronic means, financial institutions must use the method that can replace face-to-face interaction. The financial institution must ensure that its staff can interview and observe the customer’s behaviour on a real-time basis. Currently, only video-conference systems are specified as a permissible method/technology.

Electronic document and electronic signature. Financial institutions can accept KYC documents in the form of electronic data under the law on electronic transactions. Electronic signatures under the law on electronic transactions are also acceptable as customers’ signatures.

Verification of customer information and identification documents. For account opening via financial institutions’ electronic devices, the verification must be done by using either: (1) a smart-card reader (with supplemental verification through the system of relevant government authority that verifies information and ID cards, or a system that verifies fingerprints); or (2) the system of relevant government authority that verifies information and ID cards along with the system that verifies fingerprints. Where customers’ electronic devices and financial institutions’ applications are used, the verification must be done by approach (2) above.

Other methods/technologies used for verification require specific BOT approval on a case-by-case basis.

Record keeping. Financial institutions must keep information and KYC documents or their copies, as well as images, sound recordings and transaction logs, in accordance with the record keeping period under the AML law.

KYC/CDD Reporting entities including financial institutions must also comply with KYC and customer due diligence (CDD) requirements under the AML law. Regardless of whether or not transactions are related to account opening for deposit acceptance or fund acceptance from the public, for any transactions or relationships that are initiated via electronic means, financial institutions must also comply with certain requirements applicable to non-face-to-face KYC processes and other requirements generally applicable for KYC/CDD processes under AML law.
In a recent Singapore High Court case, *Qingdao Bohai Construction Group and others v Goh Teck Beng and another* (2016), the plaintiffs failed to prove defamation mainly because they could not establish that the defendants had published allegedly defamatory online articles.

While restating the trite legal principles of defamation in Singapore, this case highlights the importance of obtaining electronic evidence to identify defendants, and to show that third parties have downloaded and read such defamatory online publications.

The five plaintiffs, three companies and two senior executives, sued two Singaporean defendants for defamation and conspiracy. The plaintiffs claimed that the two defendants – directors of HuanYu (Qingdao) Development, which was then involved in multiple legal disputes with the Qingjian Group’s construction projects in China – had a motive to take revenge on the Qingjian Group of companies.

The relevant publications involved 12 online articles on various websites based in mainland China, Hong Kong and the US, and two newspaper articles that the plaintiffs claimed contained untrue and defamatory statements about them, and that this resulted in damage to the plaintiffs’ reputation.

The plaintiffs claimed that the defendants published these articles, and tendered the following evidence as proof of such publication: video and audio recordings as evidence of the second defendant’s alleged admission to the publication; circumstantial evidence including the sign-off containing the second defendant’s name on the online articles; and the defendants’ filing of a report to the Central Commission for Discipline Inspection (CCDI) of the Communist Party of the People's Republic of China.

However, the plaintiffs did not adduce any electronic evidence to prove that the defendants had published the online articles. In contrast, the defendants denied that they had published the online articles, that publication occurred in Singapore,
and alternatively that the meanings of the online articles pleaded by the plaintiffs were true in substance and in fact.

The law on defamation
The court reiterated the three legal requirements for defamation:

1. The defendants must publish material to a third party;
2. The material must make reference to the plaintiffs; and
3. The material must be defamatory to the plaintiffs.

To prove defamation, a corporate plaintiff must also prove it has a reputation in the jurisdiction at the time of publication as a prerequisite for pursuing defamation.

Here, the court held that the first plaintiff, a China-incorporated company, had no such international reputation and failed to show a trading or business reputation. The court held that the mere fact that the first plaintiff had a wholly owned Singaporean subsidiary was insufficient to prove the first plaintiff’s trading or business reputation in Singapore.

To satisfy the publication requirement in the context of internet defamation, a plaintiff must generally establish, on the balance of probabilities, that the defendant as the internet user had uploaded or posted the material on the internet. The plaintiff also needs to prove, on the balance of probabilities, that at least one third-party reader has downloaded the material in Singapore.

Merely uploading or posting the material on the internet does not satisfy the publication requirement, even if the defendant makes the offending material available to a third party. The plaintiffs failed to prove that the defendants were responsible for the publication of the online articles in Singapore.

Internet users are often protected by a wall of anonymity and the burden of proof of publication is therefore particularly challenging with online publications. Where a party claiming defamation fails to take decisive steps to show the electronic trail, or adduce other objective electronic proof to identify the publisher of the allegedly defamatory content, the circumstantial evidence tendered needs to be very strong.

It is clear that with our digital environment, even a person’s sign-off or personal details on an article may be insufficient to show that the person has written and published that article. Overall, electronic evidence is objective and remains the “most obvious way” to prove publication by defendants. As such, any person initiating a defamation suit should be taking proactive steps to ensure that such evidence is quickly and efficiently gathered.
HOW CIRCULAR 31 TEST RULES AFFECT INSURERS

On 30 August 2016, Indonesia’s Financial Services Authority (OJK) issued circular No. 31 on Fit and Proper Test (FPT) for Financial Services Institutions (FSI) Primary Parties, which took effect on the same date. Circular No. 31 further implements OJK regulation No. 27 on FPT for FSI Primary Parties.

All FPT applications for insurance primary parties must be made in accordance with circular No. 31. As circular No. 31 requires a substantially different set of application forms and supporting documents, insurance companies that are in the midst of preparing FPT applications will need to restart them.

Noteworthy provisions
Circular No. 31 now clarifies that a controller of an insurance company means:

1. An individual and/or legal entity that holds shares in an insurance company and meets the criteria of a controlling shareholder;
2. An individual and/or legal entity that does not hold shares in an insurance company, but is assigned as a controller by the insurance company; and/or
3. An individual and/or legal entity that does not hold shares in an insurance company, but is assigned as a controller by the OJK.

Circular No. 31 also defines a controlling shareholder as an individual, legal entity and/or group of companies that:

1. Owns 25% or more of the issued shares with voting rights; or
2. Owns less than 25% of the issued shares with voting rights, but has direct or indirect control.

This means that circular No. 31 now clarifies that a controlling shareholder (as controller) is also subject to an FPT.

FPT procedures
The following parties must submit an application, with the required forms
and supporting documents stipulated in circular No. 31, to the OJK:

1. The prospective owner, founder or board of directors (BOD) members of the insurance company, if the application is submitted in relation to obtaining an insurance business licence on establishment; or
2. The BOD members of the insurance company, if the application is submitted after obtaining an insurance business licence.

The nomination and remuneration committee of an insurance company must first conduct a self-assessment on the other primary parties using a specific form stipulated under circular No. 31. The completed self-assessment form then must be submitted together with the FPT application to the OJK.

A self-assessment does not need to be carried out for a controlling shareholder or for a controller.

**FPT assessment**

The controlling shareholder or the controller must undergo the following assessments as part of the FPT:

1. An administrative assessment (to assess integrity requirements, financial reputation requirements or financial soundness requirements and/or competency requirements); and
2. A presentation by the controlling shareholder or the controller, if deemed necessary by the OJK, on: (i) a proposed development plan for the insurance company for the next three years; and (ii) a proposed strategy if the insurance company is encountering financial difficulties.

The other primary party must undergo the following assessments as part of the FPT:

1. An administrative assessment; and
2. Provide clarifications if: (i) the OJK has negative information about the candidate; (ii) the candidate does not have any experience related to his/her intended position in an insurance company; and/or (iii) the candidate has previously failed an FPT.

The FPT written decision will be issued to the insurance company within 30 working days after the OJK receives a complete application. If the FPT decision is affirmative, then:

1. The controlling shareholder or the controller is permitted to acquire the insurance company’s shares; and
2. The other primary party is permitted to assume the intended position and his/her effective date of appointment must be no later than three months after the FPT decision date.

If the FPT decision is negative, then:

1. The proposed controlling shareholder is prohibited from acquiring the insurance company’s shares; and
2. The proposed controller is prohibited from taking control over the insurance company (i.e., it must not directly or indirectly influence the management and/or the policy of the insurance company); and
3. The proposed other primary party is prohibited from being appointed to hold the intended position.

If the FPT decision is negative, and the controlling shareholder already holds the insurance company’s shares, then:

1. It must transfer its shares in the insurance company within one year after the FPT decision date, such that it will no longer be a controlling shareholder. However, it is prohibited to transfer shares to its affiliated parties; and
2. It will not be able to exercise its shareholder rights over the newly acquired insurance company’s shares.

Failure to transfer the insurance company’s shares will mean that the controlling shareholder will not be able to exercise its shareholder rights over all of its shares in the insurance company.

If the FPT decision is negative and the controlling shareholder already controls the insurance company, then it must release its control.

If the FPT decision is negative and the other primary party has already been appointed to the intended position, then his/her appointment must be cancelled no later than three months from the FPT decision date.
KICA WORKSHOP WITH TRADITIONAL TWIST

The Korea In-house Counsel Association (KICA) organized a two-day annual workshop for its members at Kyungwonjae, a Korean traditional house-style hotel in Songdo international business district from 26-27 November.

Highlights of the workshop include a special Korean traditional music performance by the National Gukak Centre, a special lecture by a famous scholar on Confucianism, panel discussions from successful in-house lawyers and, the association hopes, a lot of fun.

The KICA is the latest corporate counsel group to partner with Asia Business Law Journal. This professional association represents South Korean bar licensed attorneys who are working as in-house counsel at various companies and private/public institutions in South Korea. The KICA currently has about 1,600 members and is a fast growing organization due to the rapidly increasing number of in-house counsel in South Korea.

The KICA started off as informal lunch gatherings of in-house counsel working around the Yeouido area in Seoul in 2006, and evolved into the Yeouido In-house Counsel Association (YICA) in 2009. In 2011, the KICA was founded by merging with two other in-house counsel groups, the Gangnam and Gangbuk In-house Counsel Associations. KICA members invariably belong to different organizations but work to share values, vision, knowledge and human resources by enhancing professional and networking powers through academic and cultural events.

In addition to the steering committee, the association has five other committees: academic, culture, compliance, public interest committee and alternative dispute resolution (ADR).

KICA workshops are increasingly popular with members.

NEW MEMBERSHIP YEAR HAS HKCCA HARD AT WORK

The Hong Kong Corporate Counsel Association kicked off a new membership year commencing 1 September with an array of hot-topic seminars, with more similar events in the pipeline to see out the year.

Here’s a glimpse of the HKCCA’s final seminars, social events, industry roundtables and conferences for 2016:

- Big Data and Internet of Things, on 8 November, commissioned by Norton Rose Fulbright;
- The Hong Kong Fintech Landscape, on 17 November, sponsored by Hogan Lovells;
- FATCA, Asset Tracing and Shareholder Protection in the BVI, Bermuda and Cayman Courts, on 24 November, presented by Harneys;
- An update on the Hong Kong – Shenzhen Connect, on 30 November, sponsored and presented by Charltons Solicitors and Hong Kong Exchange and Clearings Limited; and
- The New Draft Foreign Investment Law of China – How it Revolutionizes China’s Foreign Investment Regime, on 7 December, with Miao & Co and Han Kun Law Offices.

The HKCCA will be offering members new seminars and roundtables as soon as 11 January, 2017, with an overview of the General Data Protection in Europe and its impact for Hong Kong organizations, by Lewis Silkin.

In mid-October, Troutman Sanders hosted two well-attended sessions of their presentation on Cross-Border Trade Litigation. Ronald Sum, a partner of Troutman Sanders specializing in dispute resolution, delivered an engaging presentation.

On newsworthy topics, Freshfields Bruckhaus Deringer’s Robert Ashworth, Richard Bird, John Choong, and Robert Kirkness held a panel discussion on the controversial Trans-Pacific Partnership Agreement (TPPA), including key developments. Of particular interest were the political implications and forces behind the rise of the competing Regional Comprehensive Economic Partnership (RCEP) and its differences with the TPPA.
Hundreds of Singapore’s in-house counsel donned their finery to attend the Singapore Corporate Counsel Association’s (SCCA) Black Tie Gala at The Capella Sentosa on 4 November to celebrate the association’s 14th anniversary.

The event featured special guests including Singapore’s Senior Minister of State for Law and Finance, Indranee Rajah.

SCCA president, Wong Taur-Jiun, spoke on the night about the changes occurring in the legal profession, including those with technology, and how the SCCA had revisited its raison d’être and decided “to be more than what we had been since our humble beginnings in 2002”.

As part of this philosophy, Wong said the SCCA had developed a “Competency Framework” for in-house counsel. The framework describes three categories of competency – legal, managerial and conduct – across three levels of seniority – individual contributor, head of department, and general counsel of an entire organization. This can be used as a reference point for hiring, training and career development.

“Work on the framework continues. We have received very positive feedback from selected senior in-house counsel in hiring positions, human resource practitioners and members of the labour movement,” Wong told more than 260 gathered guests.

He said the SCCA was developing and curating relevant courses within the framework. On the legal front, several professors from the Law Faculty of the Singapore Management University have agreed to help develop full or half-day courses, in collaboration with law firms and senior in-house counsel. “These courses will be rigorous academically, realistic commercially, and relevant to the in-house community,” he said. “We hope to introduce these courses from Q1 of 2017.”

Wong also announced that the SCCA had entered into an MOU with Nanyang Business School to develop a bespoke business leadership course for mid to senior in-house counsel. The six-day course will prepare participants to be effective at senior management levels. “We are looking at the government to provide training subsidies. We aim to open this course for enrolment some time in 2017.”

The SCCA is also working with TMS Academy, the training arm for Temasek Group of companies, to adapt its Global Leaders course for the SCCA’s most senior members. “Strategic vision will be the prime objective,” said Wong. “We hope to make the first run, also in 2017, subject to availability of training subsidies. So this is the SCCA vision of becoming a Centre of Competence for the practice of law in-house. Not only for Singapore, but over time, for the whole of Asia.”

Singapore’s Senior Minister of State for Law and Finance, Indranee Rajah (centre), is flanked by SCCA president Wong Taur-Jiun (left), vice president Dharmendra Yadav, and other guests.
COUNSEL DESCEND ON CANBERRA FOR ACC NATIONAL CONFERENCE

The Australian in-house counsel sector converged on the nation’s capital, Canberra, in November for ACC Australia’s National Conference & In-House Lawyer Awards. Attracting more than 300 in-house professionals, the specialized conference, which ran from 16-18 November, featured a programme covering a range of topics including cyber risks, legal leadership and global insights.

The programme was designed by in-house lawyers for in-house lawyers, and featured a number of the Asia-Pacific region’s top legal experts from leading organizations including AHPRA, AIA Australia, AMP Limited, Anheuser-Busch InBev, Australian Cyber Security Research Institute, Bauer Media, Brookfield, Coca-Cola, Carnival Australia, CSIRO, Macquarie Bank, McDonalds Australia, Novomodus, Peerpoint, Staples Australia, Thomson Reuters, Treasury Wine Estates, Westpac Group, and Xero.

Delegates created personalized programmes from over 25 tailored sessions from a range of keynotes, panel sessions and masterclasses, and gained new perspectives and valuable sector insights, along with a range of networking opportunities across the three days. A highlight of the event was the annual in-house lawyer awards dinner. This event celebrated the best of the Australian in-house legal profession and was the culmination of an annual awards programme that featured a number of categories including Government Lawyer of the Year, Corporate Lawyer of the Year, and Small Legal Team of the Year.

THREE-DAY ESCAPE LOOKS AT CC REFORMS

The Indian Corporate Counsel Association (ICCA) hosted its Sixth Annual International Summit – ICCA Congress 2016 from 25-27 August at the Taj Mahal Hotel in New Delhi. With a theme of Globalization of Legal Services, the summit was happy to have India’s Ministry of Commerce, the Services Export Promotion Council and the Ministry of Law and Justice as supporting partners.

The ICCA noted that India’s legal industry is maturing at a steady pace, and that it is in its best interests to observe, assimilate and absorb the know-how and best practices that have evolved across the world over the years.

The summit’s objective was to create opportunities for international law firm professionals and in-house counsel to interact over the course of three days, and participate in well moderated, structured panel discussions on relevant issues. There was also plenty of time for personal interaction on the conference sidelines.

Invited dignitaries included Suresh Chandra, the Indian government’s law secretary, Sudhagshu Pandey, joint secretary at the Department of Commerce, and Lalit Bhasin, the president of the Society of Indian law Firms.

HOT LINE-UP OF EVENTS FOR ICCA

The Indonesian Corporate Counsel Association’s (ICCA) frenetic pace of events continued into the last part of the year with successful workshops offering ICCA members and other participants a practical guide to specific legal topics, with insight from multiple perspectives.

To that end, a workshop on fraud investigation techniques, held in association with Dewi Negara Fachri & Partners (DNP), attracted a high degree of interest on 25 October.

The ICCA also sponsored the Indonesia & Southeast Asia 4th Annual International Arbitration Summit, held on 29 September 2016, and the Asian Legal Business In-House Summit 2016, held on 5 October 2016. Both events were held at Raffles Hotel Jakarta.

The association plans to continue on a theme of interesting events this year and into the next. On 15 September 2016, in response to member requests for a discussion on financial technology, the ICCA and KNK Advocates held a “Financial Technology 101” workshop.

And on 30 August 2016, the topic of logic for lawyers was up for debate at a workshop with one of Jakarta’s leading independent law firms, Adnan Kelana Haryanto & Hermanto (AK-HH Lawyers).
In its highly anticipated first decision concerning an investor-state arbitration, the Singapore Court of Appeal has held in Sanum Investments v Government of the Lao People’s Democratic Republic (2016) that a 1993 bilateral investment treaty (BIT) between the People’s Republic of China (PRC) and Laos applies to Macau in the wake of the former Portuguese territory’s handover to the PRC in 1999.

In 2012, a Macau-based investor, Sanum Investments, commenced United Nations Commission on International Trade Law (UNCITRAL) arbitration proceedings against Laos, bringing claims for expropriation of gaming investments under the PRC-Laos BIT. Following consultation with the parties, the tribunal designated Singapore as the place of arbitration.

After the tribunal ruled that it had jurisdiction to determine Sanum’s expropriation claims, Laos filed an appeal to the Singapore High Court and produced notes verbales exchanged in 2014 (after the tribunal’s ruling) between the Laotian Ministry of Foreign Affairs and the PRC Embassy in the Laotian capital, Vientiane, which stated that the PRC-Laos BIT was not applicable to Macau. Accepting the notes verbales into evidence, the High Court concluded that the tribunal lacked jurisdiction over Sanum’s claims. When Sanum appealed, Laos produced further notes verbales sent in 2015, by which the PRC Ministry of Foreign Affairs confirmed the authenticity of the note verbales from the PRC Embassy.

In September 2016, the Court of Appeal – sitting as a five-judge bench – restored the tribunal’s ruling, holding that the PRC-Laos BIT did apply to Macau under the rules of state succession and, further, that the tribunal had subject-matter jurisdiction over Sanum’s expropriation claims on a purposive interpretation of article 8(3) of the PRC-Laos BIT.

**SINGAPORE COURT RULES ON BILATERAL TREATY CLAIM**

**MOVING TREATY FRONTIERS RULE**

The court’s decision essentially turned on the moving treaty frontiers rule in customary international law, codified in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Succession of States in respect of Treaties. The rule provides presumptively that a treaty is binding in respect of the entire territory of a state, extending by default to any territory when it becomes part of that state. Thus, the PRC-Laos BIT would automatically apply to Macau upon restoration of Chinese sovereignty in 1999, unless Laos could prove that it was not intended to apply to Macau. The court found that
no such intention appeared from the PRC-Laos BIT, since the PRC and Laos did not exclude Macau from its scope at the time it was concluded in 1993, even though the handover of Macau was foreshadowed by the 1987 PRC-Portugal Joint Declaration. As the PRC and Laos must be taken to have been aware of the moving treaty frontiers rule, their silence favoured the presumption that the PRC-Laos BIT would apply to Macau.

The court went on to consider whether it was “otherwise established” that the PRC-Laos BIT did not apply to Macau by turning to the evidence raised by Laos, including the 1987 PRC-Portugal Joint Declaration, the purported analogy with Hong Kong, publications by the UN Secretariat and the World Trade Organization (which the court declined to rely on), and the notes verbales.

ONE COUNTRY, TWO SYSTEMS

Although Laos pointed to the 1987 PRC-Portugal Joint Declaration, which established a “one country, two systems”

CRITICAL DATE

Of particular interest is the court’s decision not to place any evidentiary weight on the 2014 and 2015 notes verbales produced by Laos, which stated the position that the PRC-Laos BIT did not apply to Macau. Referring to the “critical date” doctrine in international law, the court held that a party could not rely on self-serving evidence procured after the commencement of the arbitration to improve its position in the arbitration.

Despite Laos’ contention that the notes verbales merely “confirmed” the parties’ intention to exclude Macau from the PRC-Laos BIT all along, the court found that the notes verbales were being adduced to contradict the pre-critical date position (i.e., the PRC-Laos BIT applied to Macau by operation of the moving treaty frontiers rule).

While the court recognised that on the face of the notes verbales, the position taken was that the PRC-Laos BIT was not applicable to Macau, it rejected any suggestion that the notes verbales evidenced an expropriation claim to arbitration once the claim was referred to the national court.

In that context, the court rejected Laos’ interpretation that article 8(3) permitted recourse to arbitration where compensation was the only issue in dispute. The court was mindful that cases of direct expropriation, with only the issue of compensation in dispute, were becoming increasingly rare, and host states could simply deny that they had engaged in expropriatory acts.

As a result, such a narrow interpretation of article 8(3) would mean that the investor could never actually have access to arbitration, offending the effet utile (effective interpretation) principle. Consistent with the PRC-Laos BIT’s objective of protecting investments, the court preferred to interpret article 8(3) purposively, such that any claim including a dispute over the amount of compensation – as in Sanum’s case – could be arbitrated.

Given the prominence generally accorded to Singapore jurisprudence on international arbitration, and the novelty of the

The court rejected Laos’ interpretation that article 8(3) permitted recourse to arbitration where compensation was the only issue in dispute. The court was mindful that ... host states could simply deny that they had engaged in expropriatory acts

regime over Macau, the court highlighted that the Joint Declaration was a bilateral arrangement that could not give non-contracting states, such as Laos, any rights or obligations under international law. Moreover, the Joint Declaration only concerned the PRC’s constitutional arrangements with regard to Macau. Given the principle that states may not rely on their internal laws to escape their treaty obligations, it would not have been open to the PRC – let alone Laos – to rely on the PRC’s domestic legal framework to avoid arbitration with an investor.

The court also noted that there was a dearth of evidence as to whether PRC treaties became applicable to Hong Kong after the handover from the UK in 1997. In any event, the court doubted if Hong Kong could be a “true analogue” for Macau.

a “subsequent agreement” or “subsequent practice” between the PRC and Laos. Highlighting concerns of fairness and due process, the court held that it would be “impermissible” to give effect to the notes verbales, thereby granting a retroactive amendment of the PRC-Laos BIT to the detriment of a third party investor who has already brought his claim in arbitration.

EFFECTIVE INTERPRETATION

To address the question of whether Sanum’s expropriation claims were covered by article 8(3) of the PRC-Laos BIT, which permitted arbitration of disputes “involving the amount of compensation for expropriation”, the court observed that the PRC-Laos BIT contained a “fork-in-the-road” clause that precluded an investor from bringing any aspect of issues involved in this case, one can expect the Court of Appeal’s decision to be cited and relied upon in future cases engaging similar issues.

In-house counsel advising on investor rights in situations where the host or home state has undergone a change of territory should be familiar with the operation of the moving treaty frontiers rule. For example, Macanese and possibly Hong Kong investors may potentially be able to enjoy the benefits and protections accorded under the PRC’s extensive BIT network.

ALVIN YEO is chairman and senior partner at WongPartnership in Singapore. Co-author KOH SWEE YEN is a partner at the firm.

ALVIN YEO
Arbitration has gained a higher level of acceptance and greater enforceability across Asia than we have ever seen before. It is very much a result of the trend that countries in the region are increasingly involved in international business and playing more important roles in various economic sectors.

Universally accepted standards, or international standards, usually help to improve the efficiency of business. Increasing cross-border business inevitably requires an increase in the demand for dispute resolution to meet international standards.

International arbitral tribunals are apparently better venues for such international standards to be applied than the local courts because of the lack of international exposure of the latter. The New York Convention is also an important factor. The more international transactions, the more disputes to arise, and the more demands for the enforcement of arbitral awards.

In light of the visible shift of economies from the West to Asia, Asian countries acknowledge the importance of enforcement of decisions over the disputes that they are involved in, and recognize the advantage of international arbitration in this regard.

Thanks to the economic achievements made by Asian countries in past years, the need for international arbitration has grown dramatically.

In this region, markets that traditionally favour arbitration have contributed to a steady growth in cases.

Furthermore, China, India, Indonesia, Singapore, Australia and some other economies, especially developing ones, have become key users of ICC arbitration in the region.

China will use ICC arbitration even more frequently in the near future, because its One Belt, One Road (OBOR) initiative is bringing more business opportunities for China and the countries along OBOR routes, which will inevitably see more arbitration. The PRC Supreme People’s Court (SPC) has also become friendlier towards arbitration, which will encourage Chinese parties to choose this method of resolving disputes in their transactions.

Emerging markets in Asia are growing more in favour of arbitration because they are increasingly involving themselves in international business and playing more important roles in a variety of economic sectors. India recently amended its Arbitration Act to bring it on a par with other
developed national legislation. Singapore emerged as the fourth-most-often-used seat for ICC arbitration in the world, while retaining its position as the top seat for ICC arbitration in Asia for a fifth consecutive year. ICC arbitration disputes in Australia also saw a steady increase in numbers.

Another important factor that contributes to the growth of arbitration in Asian markets is the international investment made to improve infrastructure, which has created a lot of demand for dispute resolution that meets international standards.

HIGH-PROFILE CASES
The Longlide case ruling by the SPC has been very much discussed in the past couple of years. It confirmed that an ICC arbitration agreement with a seat in mainland China is valid, which demonstrated the friendly attitude of the SPC towards international arbitration.

The Singapore High Court, in JVL v Agritrade International, set aside an arbitral award on the grounds that the arbitral tribunal – in deciding the case on the basis of an issue that the defendant had not advanced – had failed to grant the claimant a fair hearing. This ruling is a testament to the endorsement of the basic principles of natural justice by a sophisticated arbitration jurisdiction such as Singapore.

The well-known satellite arbitration, Devas v Antrix, saw two rounds of arbitration followed by Indian court litigation. Antrix, a commercial arm of the Indian Space Research Organization, first lost before an ICC tribunal on the ground that its repudiation of the contract with Devas was unlawful.

In investor-state arbitration, Devas lost again before a tribunal of the UN Commission on International Trade Law (UNCITRAL). This case provides a holistic view of the possibilities in a high-stakes arbitration, where the parties have resorted to commercial arbitration, bilateral investment treaty arbitration, local litigation, and now criminal proceedings have been initiated against the then management of Antrix.

For Asian parties involved in conducting arbitration proceedings, it is important to learn the international standards, not only in the field of business but also in legal practice. Due to the lack of international exposure and legal traditions of arbitration, some Asian countries may have legal practitioners with limited training in international arbitration to meet international standards, which in individual cases will probably lead to unsatisfactory outcomes of the arbitration advocacy. Asia needs a pool of arbitrators and lawyers, a better legal education, a drive to attend arbitration training and courses, and a committed interest in the field of arbitration. This is important for a sustainable development of international arbitration in the region.

FAN MINGCHAO is the North Asia director of ICC Arbitration and ADR, and ABHINAV BHUSHAN is the South Asia director of ICC Arbitration and ADR.
Building a major bank from scratch is a monumental exercise. Fundamental to construction, and more important than bricks and mortar, are the legal platforms and parameters that form the institution’s charter and instruct its day-to-day financial operation. Throw in the fact that the bank is dealing with multiple jurisdictions, and on projects with the potential to change the lives of millions, and you have a glimpse of the weight attached to the work of one of the region’s busiest general counsel. Gerard Sanders took on the job as general counsel with Asian Infrastructure Investment Bank (AIIB), and a change of scenery from Europe to Beijing, where he is now based, in August. The quietly spoken New Zealander saw the move as somewhat of a natural
progression – a new challenge, and perhaps even the pinnacle of a career that has stretched both his legal and leadership potential.

A younger Sanders gained early and broad-based commercial experience in a private-sector law firm, Simpson Grierson, in New Zealand. That was followed by litigation experience and work advising governments in Washington DC with Arnold & Porter, and then a stint with British petro giant BP for two years.

This private-sector and in-house experience laid the platform for a move to the European Bank for Reconstruction and Development (EBRD), followed by two years with the UN’s International Fund for Agricultural Development (IFAD).

“By the time I came to the AIIB I had this experience I could draw on, including many years in the field of financing development, and experience as a GC for an international organization,” he says. “That’s given me the confidence to be able to work in this institution, and it helps that the charter is familiar. The AIIB’s articles of agreements are modelled to a significant extent on the charters of the ADB and the EBRD.”

The big attraction of the job is that it is a start-up. “Here, everything is new, even the strategic direction over the next three or four years is something that has to be nailed down a bit more. So it’s fun to be part of an institution where you get to help shape policies, to staff the legal function the way you want, and you are able to try and determine the legal culture, the degree of legal risk taking you want to take, and so forth. That’s all part of the daily job.”

Sanders’ insights into this massive undertaking provide an illuminating picture of the internal machinations of a major lending institution in Asia from the point of view of a talented in-house counsel building a legal team from scratch. “Christmas day was the day the articles of agreement became effective, and in mid-January it became operational,” he says. “At that point there was a cadre of people associated with the secretariat who continued on to provide some short-term consultancy services, and some became staff.

“That was not the case in the legal division. I’m the first regular employee, and there are three other regular staff who have since joined, a German – a Briton and a Chinese national. So we have a good balance of people within and outside the region – remembering that New Zealand, where I am from, is part of what is understood as the Asian region at the bank.”

Sanders says the division was assisted through support from secondees, some lent to him by the World Bank, the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD) and others. “Of huge help was the work that was done by the lawyer Natalie Lichtenstein, who did a tremendous job in helping to craft the charter and steering it through successive negotiations,” he says. “So that’s the legal division; we’re currently putting together our budget for next year. Obviously we’ll grow quite a lot, but the idea is to have planned growth.”

For the institution as a whole, Sanders says there will probably be about 80 staff members by the end of this year. He says the organization began by trying to staff senior people first, who then shouldered the responsibility for putting together their different departments and divisions. “That’s now happened not only with the appointment of the president and the vice presidents, but also those at the D-G [director-general] level as well, apart from two or three open positions.”

FAST TRACKING

The bank has not bid its time and, considering an enormous amount of media scrutiny, has moved quickly to nail down its initial projects. “In June, at a board meeting, we approved the first four projects. Three of them are being co-financed with other institutions – one with the EBRD, one with the World Bank, one with the ADB, and one is being prepared by the AIIB itself.

“That’s important, first because co-financing sends a signal that we are collaborating with other institutions, which is something we are required to do in our charter, and it’s a little bit of a response to some of the critics who were concerned that we would be crowding out the field a bit. But, in fact, the infrastructure needs are so enormous that there’s plenty of space for everybody. That’s part of the reason.

“The other reason for co-financing with other multilaterals is that it was good to be able to benefit from all the preparatory work that these institutions had done. Obviously we still had to do our due diligence, but to be able to draw on the phenomenal amount of work that these institutions had done to bring in these projects to a particular point did help a lot, especially in expediting processing.

So, the big features of this institution in the early days have involved putting in place key officials and building up staff. Second has been ensuring that operations are being prepared both in terms of having real projects to present to the board, and also putting in place the different processes, structures and rules so that his team can prepare and complete projects. “That’s actually something the legal division has been quite involved in, as you can imagine,” says Sanders.

And one more thing. “Maybe third, just trying to position the bank a bit and to respond to others with understandable queries about what the perspectives and visions and ambitions of the institution are, and also to be candid and comfortable ourselves on what those are. Right now we don’t have a formal strategy and it is likely to be a while before one is adopted. So some of the meetings still have a slight existential feel as we grapple with how best we should fulfil our mandate.”

Under the charter, Sanders says the AIIB has a great deal of flexibility, and of course a great deal of capital. “So the question is not what can we and can’t we do, we have huge flexibility there; the question is what ought we to do, what is it we can do that is
The question is not what can we and can’t we do ... the question is what ought we to do, what is it we can do that is especially needed, how we can make our impact greatest, and especially how can we most support those countries which most need the support
especially needed, how can we make our impact greatest, and especially how can we most support those countries which most need the support."

GOING FORWARD
As 2016 draws to a close, and with it the AIIB’s first “baby” steps, Sanders and his legal team are not slowing down into 2017.

"For the remainder of this year we are settling in staff, and developing a staff plan for next year,” he says. "We’re probably looking to double the staffing next year. Although we will continue to draw on consultants and secondees for a while, they will fall away progressively.” Another thing he’ll be spending a lot of time on, especially in relation to private-sector operations, is a how best to use external lawyers. And apparently many of the big firms have already left calling cards.

“We’re trying to find the most rational way to interact with them,” says Sanders. “In terms of the operation’s investment activity, there will not be very much in China in the short term, as a result of the government indicating that for the next year or two they will not be looking to the bank to support projects in their own country. But all other developing countries in Asia could well host projects that the AIIB might finance.

“While external lawyers will be advising on private-sector transactions, we need lawyers to advise on local law when we are looking at the companies to which we will be lending, or the security that we might need to have."

“We will also need to rely on international firms, those who know more about different elements of infrastructure than we might, with our relatively small legal department for now. For example, when faced with financing a concession to build and operate a port, there is a certain amount of expertise that the market will have that we will not have internally for now, so we will be reliant on others. And there’s a certain amount of transactional support that would be needed as well given the sheer volume of activity and the intensity of project financings."

So how does Sanders plan to mesh external and internal teams? "My vision for the legal department lawyers is that they are key drivers in the shaping of the legal structuring of the projects, and they will be shepherding this through the internal processes of the institution; and when it comes to documenting our rights and obligations, I want them very much to have control of the core financing documents,” he says.

“But we will rely very much upon external counsel for security, work for the local due diligence, for documentation management, and as I said for some areas of infrastructural expertise that we have not yet built up ourselves.”

So for the remainder of this year and next year as well, work for Sanders’ team will involve developing a model for doing this kind of work, and finding a way in which law firms can register their interest with the AIIB in a coherent way, enabling his team to create a database that they can go to for identifying firms interested in various projects.

TIME FOR TEMPLATES
Another important element moving forward is ensuring consistency of approach, and that will involve setting minimum and high standards for the kind of legal agreements and legal processing that AIIB will do.

“We are preparing various template agreements and drafting and negotiating guidance notes; one would expect to see that, structurally, our private-sector loan agreements will all look broadly similar,” he says. “There will be variations of course, for example where the loans are syndicated. We’ll also be providing equity and investing in funds and so forth, and here there may be greater scope for different treatment as far as the documentation is concerned. But by and large for private-sector loans, the agreements should all look broadly similar even if there is a lot of variation in the terms.

“These templates and notes are being progressively developed, there are potentially an innumerable number, but there are certain core agreements that we need to see quickly. We already have in place general conditions for sovereign-backed operations, we
do have a template legal agreement for those kinds of operations, and in a way the sovereign ones are easier because it is easier to achieve a greater consistency – there's really only the governments as counterparties, there's no security, it's all public international law, etc.

“It's critical that we finance sovereign-backed operations given the nature of so many infrastructure projects but, from a legal drafting perspective, they are the low hanging fruit. The more difficult ones are the private-sector projects because of the infinite permutations in design, funding modalities and client needs. But there again I think it's important to have some consistency in approach, and here we are trying to develop a consistently coherent approach to term sheets, mandate letters, core loan agreements and so forth.

“Over time we will also prepare templates for other kinds of investments as well; we are able to make equity investments, we are able to participate in funds, however we don’t yet have the template agreements, but we will develop them and hopefully they will be in place before they are needed.”

Templates are important for consistency and efficiency. “If there are two similarly situated projects being loan financed by the AIIB, one ought to see legal documentation that looks broadly comparable. The efficiency element is that if one prepares a second project it shouldn’t take as much time as the first one,” says Sanders.

“You don’t just use the latest precedent but I think you need to add templates that reflect best practice, that reflect the needs of the institution, and that are responsive to the concerns of the country. There are times when you follow the market and others when you lead.

“So if you look at all that, the work we are doing and what has been done, a lot of it really turns on juggling the need to be responsive to the project demands – in particular those four projects that were approved in June and two further ones approved in September, including the first investment in the private sector – in Myanmar. Plus we have to be ready, for the great slew of projects that we expect in the future.”

Sanders says thinking about a consistent and predictable approach is a good exercise, because legal teams want templates that are easily accessible and understandable, and that are relatively easy to negotiate. So it forces counsel to be principled about what is included, encouraging critical thinking about what interests counsel are trying to protect.

“One thing all the templates need to look at, for example, is even though when projects are put together, and there's a lot of goodwill and high expectation, the reality is that projects often run into problems, and if they do, and disputes arise, how are they resolved? And how do you enforce your rights, particularly in environments where the legal system is not well developed? And also how does the institution ensure that it remains accountable as well, with all the contracts it freely enters into?

“All these things need to be regulated contractually, and what you don’t want to do is have a completely bespoke arrangement so that on every single contract one ends up negotiating everything from first principles. So when developing an AIIB practice, if we look at, say, finance agreements for making loans, we want to have a uniform or at least limited number of governing laws that could be applied. Equally, if disputes have to be resolved, we need a consistent way of doing that.

“For enforcement we will also want to have a consistent approach, and the likelihood is that the AIIB will place a lot of reliance on arbitration, although we ought to have the ability to go to court where needed. The templates force you to take some decisions of principle on these kinds of questions, so that then these can be rolled out in projects across all the countries.”

We will need external lawyers to advise on private-sector transactions. We need lawyers to advise on local law when we are looking at the companies to which we will be lending, or the security that we might need to have. We will also need to rely on international firms ... with our relatively small legal department, for now
**AIIB QUICK SIX**

Below are the bank’s first six projects approved in 2016

<table>
<thead>
<tr>
<th>Approved by the board of directors (BoD)</th>
<th>Pakistan: National Motorway M-4 Project (Shorkot-Khanewal section; co-financed with the ADB)</th>
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<tbody>
<tr>
<td><strong>24 June 2016</strong></td>
<td>The objective of this project is a better and safer corridor between Islamabad, Faisalabad and Multan, to ensure enhanced connectivity between the various parts of Pakistan. The project will construct 64km of four-lane, access controlled national motorway M-4 connecting Shorkot and Khanewal, in Punjab province. The total project cost is estimated at US$273 million. The AIIB will provide US$100 million of debt financing for the project.</td>
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<tr>
<th>Approved by the BoD on 24 June 2016</th>
<th>Tajikistan: Dushanbe-Uzbekistan Border Road Improvement Project (co-financed with the EBRD)</th>
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<tr>
<td><strong>24 June 2016</strong></td>
<td>The project will increase the connectivity and mobility along the Tajikistan section of the Central Asia Regional Economic Co-operation Corridor 3 by rehabilitating the 5km section of the road connecting Dushanbe to the border with Uzbekistan, from the Avicenna monument to the West Gate in Dushanbe. The project cost is estimated at US$105.9 million. The AIIB will provide US$27.5 million of debt financing for the project.</td>
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<th>Approved by the BoD on 24 June 2016</th>
<th>Bangladesh: Distribution System Upgrade and Expansion Project</th>
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<td><strong>24 June 2016</strong></td>
<td>The objectives of this project are to enhance distribution capacity and increase the number of rural and urban electricity consumers in Bangladesh. The project has two components: (1) provision of about 2.5 million service connections to rural consumers; and (2) upgrade of two grid substations and conversion of 85km of overhead distribution lines into underground cables in north Dhaka. The project is estimated to cost US$262.3 million inclusive of taxes, duties, interest and other charges on the loan during construction. The AIIB will provide US$165 million of debt financing for the project.</td>
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<th>Approved by the BoD on 24 June, 2016</th>
<th>Indonesia: National Slum Upgrading Project (co-financed with the World Bank)</th>
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<tr>
<td><strong>24 June, 2016</strong></td>
<td>The objective of this co-financed project is to improve access to urban infrastructure and services in targeted slums in Indonesia. The AIIB’s co-financing would support the government’s programme of urban slum infrastructure investments for 154 cities in the central and eastern parts of Indonesia. The total project cost is estimated at US$1,743 billion. The AIIB will provide US$216.5 million of debt financing for the project.</td>
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<th>Approved by the BoD on 27-28 September 2016</th>
<th>Pakistan: Tarbela 5 Hydropower Extension Project (co-financed with the World Bank)</th>
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<td><strong>27-28 September 2016</strong></td>
<td>This project will develop the existing Tunnel 5 at Tarbela Dam into a power generation source. The AIIB Loan will be used to jointly co-finance the components of (1) construction of a power house and modification to the existing Tunnel 5; and (2) supply and installation of power units and ancillary equipment for the power house on Tunnel 5 to generate power. The project is estimated to cost US$233.5 million including taxes, duties and financing charges during implementation. The AIIB will provide US$200 million of debt financing for the project.</td>
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<tr>
<th>Approved by BoD on 27-28 September, 2016</th>
<th>Myanmar: Myingyan 225MW Combined Cycle Gas Turbine Power Plant Project</th>
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<td><strong>27-28 September, 2016</strong></td>
<td>The AIIB will provide US$20 million of debt financing for the development, construction, and operation of a greenfield 225MW combined cycle gas turbine (CCGT) power plant in the Mandalay region of Myanmar. The AIIB financing will be in parallel with other lenders including the International Finance Corporation, the ADB and certain commercial lenders.</td>
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</table>
What about arbitration? What will be the bank’s direction? “The first question is whether we have arbitration as the exclusive means, or whether there is a possibility to go to courts in certain circumstanc-es, for example where there is no dispute but just a payment failure,” he says. “The second question is do you have arbitration ad hoc, or do you have reliance on an institution. These are primary questions that have to be answered and issues on which we are now reflecting. There is no shortage of arbitral institutions ready to offer views.”

**OBOR AND NATURAL SELECTION**

An obvious question surrounds the temptation to align the AIIB with the One Belt, One Road (OBOR) initiative. That would be misleading, says Sanders. “The establishment of the AIIB was very much an initiative of China, and of course [OBOR] is Chinese as well,” he says. “But the institution is a multilateral one with many shareholders, and China is a minority one – the largest minority shareholder, but a minority shareholder nonetheless.

“’What I think will happen is that there will be projects that we finance that will be consistent with the national strategies of the host countries and which will also be complimentary to the OBOR initiative. So in some instances there could be a significant degree of complementarity, but the purpose of the institution is not to deliver on the national priority of any given country, but rather to pursue the collective goals of the membership as a whole.”

The establishment of AIIB was very much an initiative of China, and of course [OBOR] is Chinese as well. But the institution is a multilateral one with many shareholders, and China is a minority one - the largest minority shareholder, but a minority shareholder nonetheless.

By its nature, the AIIB will be getting involved with some countries that have little infrastructure in place, and possibly even less of a legal framework to support meaningful development. How does he see the bank’s role – and that of his legal team – in dealing with these developing nations?

“I think as a minimum the [AIIB] needs to do due diligence with respect to project proposals to ensure that loans or other investments can be made in a way that there is a high degree of confidence that we can achieve the purposes for which the loan is made, and that the capital of the institution can be protected,” he says.

“Venturing further ahead, what could be done is to provide some level of support to countries in improving their legal
environment, either by providing advice, sharing with them the institution’s experience, maybe drawing together the experience of other institutions and other investors, and sharing that with the country so they can learn and benefit from the advice.

“The institution could potentially go a step further and provide some technical assistance, for example providing help with improving laws that are designed to attract, say, both domestic and foreign investment into the infrastructure field and to support other productive sectors.

“One thing I think we will look at is whether we do these things at all, or a little bit, or a lot, or selectively, or when asked, or in relation to particular sectors, or particular countries. All this is something that is exercising the institution now, and we will see. Personally, as a lawyer and as one whose career has been in development, I would say it’s important to help countries that ask for help to improve their laws so that the legal institutions, the legal culture, is of a kind that is attractive to investors. There are different ways of doing that, of course, and the AIIB wouldn’t have a monopoly in this area.”

CREATING A NICHE
An important aspect of this bank’s creation is its place in the market, where it stands in respect to what it will finance and how it manoeuvres into position with big regional players like the ADB and the World Bank. Sanders sees these relationships as collaborative.

“I don’t really see competition here,” he says. “We all ultimately have more or less the same shareholders, so it wouldn’t be a good service to the institutions, and ultimately the taxpayers, if there were harmful competition, particularly given that none should be crowding out financing that comes from other sources. Also, given that the needs of the region are so great, there really is plenty to go around.

“I think it’s more of a question of developing a niche, where we feel that we can have a big impact, and where there is space that has been created by the other institutions. The World Bank, and to a large extent the ADB, have focused very heavily on sovereign-backed operations, and many infrastructure projects are sovereign backed. But I think the ability the AIIB has, and that could be deployed to good use for everybody, would be to focus also on the private sector. We will have the tools and the ability and the risk appetite to do that.”

Sanders says the AIIB is not likely to have an overemphasis on country orientation. There are no country offices, although regional hubs could be developed at some point given the vastness of the area covered by the bank. In the headquarters, he says the bank is focused on sectoral rather than country lines, so the position of having firm investment targets for each country, as with some other institutions, is unlikely.

“We want to take a more holistic approach and identify bankable projects that make a real difference in terms of improving interconnectivity in the region, enhancing the quality of infrastructure, which has an impact on people’s lives, and helps generate wealth, with an inclusive element to that wealth creation as well,” he says.

“That will be the prime driver, but an open question is whether we opportunistically finance projects that come along or do we try to develop projects?

“Opportunistically, we’re not likely to say no early on to good projects that are well prepared. But equally, there’s probably going to be an element of calculation as well. We have a special fund, with an initial contribution of US$50 million in it, which will enable us to support the poorest countries in preparing projects through AIIB grant financing. That implies we will have a view on what is actually needed in some countries. Will we become more demand or supply driven? We don’t have an answer for that yet.”

ADVICE FOR CORPORATE COUNSEL
Sanders has advice worth heeding for corporate counsel in the region who may be doing business with the AIIB in the future.

“In the short term, the preference for the AIIB will be to finance projects that are at a high level of readiness,” he says. “What would assist a lot is to have projects presented to us for financing where it’s clear that the legal work has already been done to a very high standard, where all the legal areas have been identified and addressed in a transparent way, where the legal risks are known and can be quantified for the institution. We can then price those risks. We also value a high degree of openness about the challenges that clients have had to face in preparing their projects, especially in addressing environmental and social issues given the importance the AIIB attaches to these matters.

“There are plenty of in-house counsel who can do a wonderful job preparing projects, and there are other instances where the in-house counsel will be managing external firms, and I think what is key is that in both instances the quality of the legal services should be very high.

“Where agreements are presented to the AIIB in support of a project, it makes it easier for the bank to provide finance if they are of a high legal standard. Project agreements need to address issues of concern not only to the parties but also the lender.”

Sanders gives the example of the AIIB being asked to finance
a concession project. When evaluating the concession agreement, it’s important to his team that not only does the agreement address all the issues important to the concessionaire, but that it also anticipates the needs of the financier in circumstances where the concessionaire is no longer able to meet its obligations under the concession. For example, if there are step-in rights that are needed for a lender, the concession should anticipate and provide for that.

Another example would be with a concession or a licence or right to build or develop. It is important that it be clearly demonstrated how that right was acquired. Sanders says the AIIB wants to be sure it is financing projects that meet high standards, and one way is ensuring that there is a transparent process that leads to the issuance of a concession, or a licence, or a right to develop.

“In-house lawyers or law firms assisting clients can be very useful for the AIIB in this. Anything that makes our legal due diligence easier means a faster time to process projects, and also gives [the bank] more confidence about the quality of its counterparty.”

**INNOVATIVE STRUCTURE**

Sanders points to two areas of note where the AIIB has been innovative in structure:

1. A non-resident board. The AIIB is the first of the multilateral development banks to do this. It keeps overheads down and can be achieved because the technology has reached a point where it is feasible;
2. The ability of the board to delegate to the president the power to approve projects. Normally projects are approved by a board of directors. But once the AIIB has concluded a number of projects successfully, it will look to ask the board to give the president the power to approve projects that fall within certain defined parameters.

“These innovations should have a beneficial impact on cost, which can then be passed on to the clients, and on the agility of the institution,” says Sanders. “Another innovation is that whereas a lot of GCs will be agonizing over whether the institution is permitted to do something or not, that’s much less of a concern at the AIIB because the charter is expressed very expansively.

“Most of the time when cases present themselves on the margin, the key question will be what kind of majority at the board of directors or, exceptionally, at the board of governors, is needed to support the proposal.

“For example, we can invest in projects outside of Asia if there’s a sufficient connection to pursuing the purposes of the institution. So if there’s a port project outside the region, where this will directly enhance interconnectivity within Asia, this is something we can look at.

“Another innovation is the voting structure. We have a number of shares given to the founding shareholders, to encourage countries that came in early, but then uniquely we have something called basic shares, a concept which somewhat follows the UN principle whereby irrespective of the size of an economy of a country, every member will receive the same number of basic shares. So it’s a way of ensuring that voice is given to countries with small economies or which otherwise wouldn’t be able to have their views known. The rest of the shares are based on the size of the economy, an important principle for the institution where good governance is highly prized.

Anything that makes our legal due diligence easier means a faster time to process projects, and also gives [the bank] more confidence about the quality of its counterparty

“Also, we have open procurement built into the charter. We can hire people from anywhere irrespective of whether they are nationals of member states. A further innovation is that if we find there is an element that hasn’t been captured by the articles then we don’t need to go back to the members [the parliaments] to amend the agreement. “We can go back just to the board of governors. Ordinarily there is a high majority that is needed to make an amendment and in a few instances unanimity.

“All these innovations collectively enable us to be a modern and nimble institution, accountable to our members for the use of our capital and responsive to clients who seek support for their projects. They mean that, together with the kind of culture we are trying to create, we can do more, be more effective and deliver value for our members. Critically, if we can build on these good foundations and manage things well, we will have the best chance of helping to realize the economic aspirations of people in the region for whom ultimately the institution was established.”

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ON TRACK

WITH THE ONE BELT ONE ROAD INITIATIVE AS AN IGNITION POINT, INFRASTRUCTURE INVESTMENT IS ON THE UPTICK AROUND THE REGION, AND WITH IT THE LEGAL CHALLENGES THAT ACCOMPANY THESE BIG PROJECTS. PENELOPE MACRAE INVESTIGATES
The Asian Development Bank calculates Asia needs US$750 billion a year to fund infrastructure capital through to 2020. The region has drawn strong interest from yield-hungry investors but stumbling blocks abound, from land acquisition and environmental hurdles to opaque regulation and corruption. “Key challenges remain a lack of familiarity with the local political and commercial scene – and identifying the right local partners can be a challenge,” notes Matthew Bubb, a partner at Ashurst in Tokyo. “For greenfield projects, structures and documentation, a high degree of patience, flexibility, cultural sensitivity and adaptability is important.”

Without a considerable investment step-up, the ADB estimates Asia’s infrastructure gap could hit US$8 trillion by 2020, crimping economic growth and demand.

On the upside, across Asia and around the world, law firms are eyeing rich opportunities from China’s ambitious One Belt, One Road (OBOR) initiative to boost trade with ASEAN, Central Asia and Europe through ports, railways, pipelines, power grids and highways. Heralded by Beijing as the new Silk Road, the financial architecture is underpinned by a US$50 billion Chinese state fund to finance projects and the US$100 billion capitalization of Asian Infrastructure Investment Bank (AIIB).

China Development Bank has also promised to plough about US$890 billion into more than 900 projects across 60-plus countries, although it has given no timeframe.

OBOR “is potentially the most significant foreign-policy initiative of China since its entry into the WTO in 2001 … and likely to reshape the global economy”, says David Olsson, China practice consultant for King & Wood Mallesons (KWM), based in Melbourne. Building the infrastructure will create a long list of work possibilities for law firms, from advising on legal, tax, commercial and cross-border issues, to dispute-resolution, project finance and the formation of joint ventures. And “it is not a one-year initiative, it will run for decades”, says Olsson.

But there are questions about how long it will take for Beijing’s bold development strategy to get into full swing, whether there will be a sufficient and credible pipeline of productive, bankable, investment-ready projects offering acceptable risk-adjusted returns, and crucially, whether longstanding political or commercial tensions could up-end some plans.

Still, OBOR offers multiple opportunities for law firms, says Shivanshu Thaplyal, a principal associate at Mumbai-based law firm Khaitan & Co. “The practice areas focusing on infrastructure...
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ASIA–SPECIFIC

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Corporate Network on behalf of Baker & McKenzie. But for all the lucrative possibilities, there are problems that pose potential legal, regulatory and sovereign risks – all of which require careful examination by investors and legal advisers.

"Dispute resolution can be a concern as each region prefers its own arbitration, sitting along with the domestic law," says Sujeet Karkala, an associate based in Phnom Penh at SokSiphana and Associates, a member of ZICOlaw. "OBOR, in order to be implemented, needs to keep this in consideration. It may not be easy, as the practice of law changes drastically over various regions."

Thaplyal observes: “It is important for the private investor to evaluate the risk and opportunities available under the bilateral investment treaties and several multilateral investment treaties covering the OBOR.”

Many countries are still developing so their legal and regulatory systems may not be sophisticated, may be incomplete and may not have been tested for large foreign investments, notes Vicky Ma, a senior associate at Clifford Chance in Hong Kong. “It’s crucial that before any investment decision is made, and before contracts are negotiated, that you identify the risks and work out how to address them,” says Ma.

Vital to more private involvement in public-sector infrastructure is a need for a credible pipeline of productive, bankable, investment-ready projects, says Olsson from KWM, adding that while OBOR represents clear opportunities, “the road ahead will require smart thinking around collaborations and partnerships”.

Olsson notes that OBOR crosses more than 50 separate bilateral investment treaties (BITs) and several multinational investment treaties (MITs) that provide a “robust source of potential investor protections”.

With the inclusion of Investor State Dispute Settlement (ISDS) mechanisms in these investment treaties, corporate and individual investors may be able to bring claims against OBOR governments for breaches of substantive investor rights contained in these treaties without recourse to the host state’s domestic legal system.

In the future, we see a clear trend towards infrastructure projects emphasizing municipal works, transport and environmental protection

[A lack of co-ordination among PPP regulators is] resulting in complications in the implementation of PPP projects and also causing problems for regulators in the course of the operation and oversight of PPP projects

Monica Sun
Partner
Herbert Smith Freehills

Sun Hui
Partner
Zhong Lun Law Firm
What may be the greatest challenges in getting private investors to become involved in OBOR and finding bankable, investment-ready projects with risk adjusted returns “are essentially much the same issues that confront investors in the infrastructure sector elsewhere, potentially compounded by scale, lead times and cross-border issues,” says Rentoul.

Apart from the enormity of the OBOR initiative, Monica Sun, a partner of Herbert Smith Freehills (HSF) in Beijing, says China has recently seen significant interest from private investors in two major areas – municipal works and energy infrastructure. “In the energy sector, LNG [liquefied natural gas] and gas projects in particular have garnered a lot of attention,” says Sun.

“In the future, we see a clear trend towards infrastructure projects emphasizing municipal works, transport and environmental protection,” she says. “Waste-water treatment and waste-to-energy plants, utilities for water, gas and heating supply, urban rail and metro projects are clear ‘hot’ sectors to look out for.”

Jiang Wei, a partner in the Beijing office of Guantao Law Firm, adds that in the past few years, the government has been pushing the public-private partnership (PPP) model for public infrastructure. The past two years have seen the emergence of investment in infrastructure in such sectors as smart cities, urban pipe gallery projects, urban flood prevention and drainage facilities.

Jiang Wei
Partner
Guantao Law Firm

To ensure the success of the PPP model, relevant laws and regulations need to be improved as soon as possible, so as to provide legal support

Huang Zaizai
Partner
Tian Yuan Law Firm

“These types of projects hold great significance for resolving urban development difficulties and realizing sustainable urban development,” he says.

Of some urgency though, lawyers say, is the unification and improvement of current legal systems. Sun Hui, a partner at Zhong Lun Law Firm in Beijing, says there is a lack of co-ordination among some of the PPP regulations issued by various authorities, “resulting in complications in the implementation of PPP projects and also causing problems for regulators in the course of the operation and oversight of PPP projects”.

Huang Zaizai, a partner at the Beijing office of Tian Yuan Law Firm, adds: “To ensure the success of the PPP model, relevant laws and regulations need to be improved as soon as possible, so as to provide legal support. Additionally, a sound PPP-related fiscal expenditure restraint mechanism needs to be established.”

The wider region is buzzing with infrastructure initiatives as governments turn to improvement projects to bolster economies and spur much needed growth. Bubb, from Ashurst in Tokyo, says power infrastructure remains active, with a substantial increase in activity in renewable energy projects in the past 12 months.

“Outside of power projects, there is a lot of activity in transport-related infrastructure – ports, airports, rail, road,” he notes. “We are starting to see a substantial number of international rail
Dispute resolution can be a concern as each region prefers its own arbitration, sitting along with the domestic law

Sujeet Karkala
Associate
SokSiphana and Associates

On the roads side, the highway modernization programme has been kick-started, which is being spearheaded by India’s most ambitious infrastructure project, the Delhi-Mumbai Industrial Corridor

Rabindra Jhunjhunwala
Partner
Khaitan & Co

and high-speed rail (HSR) infrastructure projects being proposed, for example, the Singapore-Kuala Lumpur and Thailand-China HSRS.”

Challenges for the development of cross-border infrastructure include “mismatches in legal and regulatory frameworks, differences in creditworthiness of procuring parties either side of the border, and in a similar vein, differing political and macroeconomic circumstances,” says Bubb. Japanese, Korean and Chinese investors remain particularly active on the international side, “but we also see domestic players being active in their home markets, for example in the Philippines”.

“In selective sectors, primarily power, we are seeing Singaporean and Malaysian interest in investment. For foreign investors, home-market demographics, a need for business diversification out of natural resources and increased availability of credit is supporting foreign investment.”

Indonesia’s President Joko Widodo has pledged to build ports, power generation, roads and railways to industrial estates to bump up growth. Rahayu Hoed, managing partner at Makarim & Taira S law firm in Jakarta, says the nation’s transport ministry has set ambitious targets to improve the infrastructure by 2019, including, among other things: mass rapid transport development in major cities; the development of ferry ports in 65 locations; building 3,258km of railway in Java, Sumatra, Sulawesi, Kalimantan and Papua; the development of 100 non-commercial ports; and the construction of 15 new airports.

Rahayu says that, according to the Indonesia Investment Co-ordinating Board (BKPM), China is “believed to be the biggest foreign investor in Indonesia, as Chinese investors often invest in countries through proxy companies based in [places] such as Singapore or Hong Kong”.

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Along with China, Japan is a key investor in Indonesia, drawn by the country’s huge development potential and massive consumer market and resources, notes Afriyan Rachmad, a partner at Roosdiono & Partners in Jakarta, which is part of the ZICOlaw network. Singapore is another important investor in Indonesia.

“To international investors, Indonesia is known for its notoriously lengthy land acquisition process, which causes construction delays,” says Rahayu. “The BKPM has launched a single platform for investors to apply for permits online, eliminating the past co-ordination problems between different ministries and institutions.”

The government has taken steps to clamp down on corruption and bribery, as well as red tape, updating legislation relating to PPPs to try to create a fair and transparent tender system. But while these efforts at streamlining rules are welcome, it’s still not enough, says Karen Mills, an international legal consultant with KarimSyah Law Firm in Jakarta.

“The disharmony between regulations is a key source of Indonesia’s bureaucracy issues that is still considered by many international investors as a barrier to investing in Indonesia,” she says.

Myanmar is booming after decades of inactivity and there is strong demand for better roads, railways, ports and airport facilities, with regional integration urgently requiring more land connectivity. This means huge investment is required to improve infrastructure quality and capacity.

The UN’s Economic and Social Commission for Asia and the Pacific (ESCAP) says lack of modern infrastructure is a major challenge to economic development and an impediment to the country’s competitiveness.

William Greenlee, deputy managing director and Myanmar head of China desk for DFDL, which specializes in regional legal, tax and investment advisory expertise focused on South and Southeast Asia, says important projects include the Myingyan gas-fired power project and the Hanthawaddy International Airport – both of which DFDL is working on.

Greenlee cautions on legal risks. “The legal environment continues to develop, however there are certain inconsistencies and bureaucratic challenges that result in certain legal risks.” He adds that “proper engagement with the relevant Myanmar ministries and careful contracting ameliorates such legal risks”.

India’s government is focused on overhauling creaky infrastructure to drive economic growth and create employment. The transport ministry has set a target of `25 trillion (US$375 billion) of investment in infrastructure over three years for developing industrial clusters, roads, railways, ports, urban infrastructure, airports and other projects.

The government wants to develop “world-class infrastructure”, says Rabindra Jhunjhunwala a partner at Khaitan & Co’s Mumbai office. “On the roads side, the highway modernization programme has been kick-started, which is being spearheaded by India’s most ambitious infrastructure project, the Delhi-Mumbai Industrial Corridor, that not only aims to build a roads network but also develop smart cities across the country,” says Jhunjhunwala.

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William Greenlee
Deputy Managing Director and Myanmar Head of China Desk
DFDL
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<thead>
<tr>
<th>COUNTRY</th>
<th>SECTOR</th>
<th>SUB-SECTOR</th>
<th>TRANSACTION SIZE (US$MILLION)</th>
<th>DESCRIPTION</th>
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<tr>
<td>South Korea</td>
<td>Transport</td>
<td>Rail</td>
<td>US$17,700</td>
<td>The Ministry of Land, Infrastructure and Transport (MOLIT) issues a plan to</td>
<td>HSF (Acquirer); Allen &amp; Overy (EPC Contractor); Herbert Smith Freehills (HSF) (Acquirer); Allen &amp; Overy (Structural Engineer)</td>
<td>Ashurst (Grantor); Herbert Smith Freehills (HSF) (Acquirer); Allen &amp; Overy (Structural Engineer); Cooley (Seller); Cooley (EPC Contractor)</td>
<td>Aherne, Lavelle, Smead &amp; Co v. City of New Orleans, 598 U.S. 411, 416</td>
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<tr>
<td>Transaction</td>
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<tr>
<td>WestConnex Stage 2</td>
<td>Australia (New South Wales)</td>
<td>Transport Roads</td>
<td>Government of New South Wales</td>
<td>WestConnex Stage 2 involves the duplication of the existing M5 East motorway from Beverly Hills to St. Peters. The entire project involves 19km of tunnels and 14km of surface roads</td>
<td>US$3,362.6</td>
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<tr>
<td>Alinta Energy Sale (2016)</td>
<td>Australia (New South Wales)</td>
<td>Power Energy Transmission</td>
<td>TPG Capital</td>
<td>TPG Capital is to launch a sale process for Alinta Energy. Alinta Energy has 800,000 gas and electricity customers mostly in Western Australia, electricity and gas transmission lines and electricity generation assets.</td>
<td>US$3,182.44</td>
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<tr>
<td>Central Java 2000MW Coal Fired Power Plant</td>
<td>Indonesia</td>
<td>Power Energy Generation</td>
<td>PT PLN (Indonesia)</td>
<td>A second expansion of the Tanjung Jati B coal-fired power plant in central Java province, Indonesia. The plant will be fired by two 1000MW ultra supercritical power generation units.</td>
<td>US$3,874.59</td>
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<tr>
<td>Bangkok – Rayong 219km High Speed Rail Line</td>
<td>Thailand</td>
<td>Transport Rail</td>
<td>Thailand Ministry of Transport PT PLN (Indonesia)</td>
<td>Development of the US$4 billion Bangkok to Rayong high speed rail line. The 219km route will link Bangkok’s airports and various stations. An extension line to Utapao International Airport is under consideration.</td>
<td>US$3,055.6</td>
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<tr>
<td>AdelINK Light Rail Network</td>
<td>Australia (South Australia)</td>
<td>Transport Light Rail</td>
<td>Project involves the development of a 35km light rail network in Adelaide running north, south, east and west.</td>
<td>US$3,745</td>
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<tr>
<td>Tangguh LNG Train 3 Project</td>
<td>Indonesia</td>
<td>Power Energy Transmission</td>
<td>PT PLN (Indonesia)</td>
<td>Expansion of the Tangguh LNG facility in Indonesia’s Papua Barat province with a third LNG train. The expansion includes two offshore platforms, 13 new production wells, an expanded LNG loading facility, and supporting infrastructure.</td>
<td>US$3,000</td>
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<tr>
<td>Bangkok MRT Orange Line (East Side)</td>
<td>Thailand</td>
<td>Transport Light Rail</td>
<td>Mass Rapid Transit Authority of Thailand</td>
<td>Development of the THB11.03 billion (US$3.36 billion) Bangkok MRT Orange line, a 39.5km route with a 9km, seven-station elevated portion and a 30.6km, 23-station underground portion.</td>
<td>US$3,362.6</td>
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<tr>
<td>Atimonan 1200MW Coal Fired Power Plant</td>
<td>Philippines</td>
<td>Power Energy Generation</td>
<td>Manila Electric Company</td>
<td>Development of a 1200MW coal-fired power plant in Atimonan, Quezon province. The plant will be powered by two 600MW generators using supercritical technology.</td>
<td>US$2,900</td>
<td></td>
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<tr>
<td>New Zealand Defence Estate Regeneration Plan</td>
<td>New Zealand</td>
<td>Social Defence</td>
<td>New Zealand Ministry of Defence</td>
<td>The New Zealand Ministry of Defence’s US$2.9 billion Defence Estate Regeneration Plan to update and rejuvenate 5,000 buildings on 810,000 hectares of land across New Zealand over a 15-year period. The buildings include barracks, aircraft hangers, ship loading docks, workshops and medical centres.</td>
<td>US$2,700</td>
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<tr>
<td>Bangkok – Huai Hin 209km High Speed Rail Line</td>
<td>Thailand</td>
<td>Transport Rail</td>
<td>Thailand Ministry of Transport</td>
<td>Development of the US$2.7 billion Bangkok to Huai Hin high speed rail line. The recommended speed for the 209km route is 300km/h.</td>
<td>US$2,700</td>
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中伦律师事务所拥有一支强劲的精于基础设施法律服务的专业律师团队, 在基础设施项目领域拥有丰富的实操经验和雄厚的专业实力。中伦的诸多合伙人不仅是业内知名法律专家, 还同时兼任仲裁机构的仲裁员，财政部，发改委 PPP 项目法律专家，多次受邀参与相关领域法律、法规的起草、修订工作。十多年来, 中伦为中外客户投资的境内外基础设施项目提供的项目服务, 涉及高速公路、火电厂、核电站、水电站、河道治理、石化、石油管道、天然气、水厂、污水处理、围海造地、各种铁路、地铁、桥梁、机场、港口、码头、河道治理、园林绿化、地下管网、体育场馆、市政、学校、医院、危险废物处置、城镇化项目、各种开发区、园区项目、保障房、大型综合娱乐设施等诸多领域，涉及中国境内数十个省市，境外涉及亚洲、欧洲、非洲、北美洲、南美洲等数十个国家，所涉投资额超万亿。秉承中伦为客户提供的体裁大师式贴身法律服务的传统, 中伦的服务涵盖项目的全程、全方位, 从交易架构设计, 到项目文件的起草、谈判和融资方案的构思, 中伦的服务伴随项目实施的全过程, 直至客户安全退出或实现资产证券化。中伦多年来恒久的勤勉工作态度、准确的法律判断能力, 和务实的法律解决方案, 深得客户认可；中伦的专业经验和服品质也同时获得多个专业评级机构连续多年的赞誉。

The Zhong Lun Law Firm infrastructure team possesses abundant practical knowledge. Many of our infrastructure partners are not only well-known legal experts but also act as arbitrators, advise the Ministry of Commerce and National Development and Reform Commission on PPP-related legal issues, and have been invited to participate in the drafting and amendment of related legislation.

For over a decade, Zhong Lun has advised Chinese and foreign clients alike on a wide spectrum of infrastructure projects related to expressways, power plants (coal-fired, nuclear, hydropower, etc.), river training, petrochemicals, natural gas, water works, sewage treatment, land reclamation, landscaping, subterranean pipes, railroads and subways, bridges, airports, ports and docks, river basin management, stadiums, administrative buildings, schools, hospitals, hazardous waste disposal, urbanization projects, development zones, parks, affordable housing, recreational facilities and other types of infrastructure in countless Chinese cities as well as large-scale projects in Asia, Europe, Africa, North America and South America.

Zhong Lun provides tailored and comprehensive legal services from transactional structure design to contract drafting and negotiation as well as financial planning, assisting throughout every stage of a project until a client either safely exits or assets are securitized. Clients have continuously given positive feedback on our unwavering and diligent work ethic, accurate assessments and practical legal solutions; Zhong Lun has also consistently received awards for many years from professional rating institutions due to its extensive experience and high quality services.
Rentoul adds: “The vast majority of foreign investment proposals are likely to be approved.”

Su Yi-jiun, a partner at Lee and Li Attorneys in Taipei, says renewable energy in the form of wind farms and solar power is a key infrastructure priority of the new Taiwanese government, which took office in May this year. The high importance attached to green projects is to “keep abreast of the trends of curbing global warming and to ensure the sufficiency of national reserved electricity capacity”, she says.

Su, who specializes in infrastructure, says restrictions on foreign investment in Taiwan have been substantially relaxed since the 1970s, though “as for investments from China, due to sensitive political issues that exist between Taiwan and China, they are subject to a more stringent approval process”. All foreign investors are required to obtain prior foreign investment approval (FIA) from the Investment Commission of the Ministry of Economic Affairs before making any investments.

“Before making investments in Taiwan, it is always advisable for investors to evaluate the feasibility of their projects by having a clear picture of the permits and/or licences that may be required for making the relevant investments, the legalities involved, and the local financial environment, so that they can establish a comprehensive business model that would suit their proposed projects,” she says.

The Philippines has been in the headlines over the antics of its president, Rodrigo Duterte, and Standard and Poor’s says the country is unlikely to get a rating upgrade because of its leader’s unpredictability. Still, the government has been consistent in stressing its commitment towards developing the country’s infrastructure.

“We expect a positive environment for the development of infrastructure projects,” says Eusebio Tan, a senior partner with Accralaw in Manila. Among the projects in the works are: an upgrade of Ninoy Aquino International Airport (NAIA), including additional terminals and runways; the upgrade and expansion of the Metro Manila railway network; construction of expressway roads leading to the NAIA; and deployment of a rapid bus transit system to facilitate traffic decongestion in Metro Manila.

India and South Korea appear to have made headway in the Philippines recently. In particular, the GMR Group of India partnered with Megawide Construction for development of the Mactan, Cebu, International Airport, and Korea Water Resources of South Korea but China is by no means the largest investor, with interest from the UK, the US, South Korea, Japan and Europe.

Still, there are investor concerns that can create legal work, Rentoul notes. Perceptions of restrictive and complex regulation relating to labour, tax and the environment, and protracted government approval processes are often cited as the main concerns of foreign investors.

Australia’s rules regulating foreign investment changed in March 2016 to allow greater regulation of critical infrastructure sales, and some transactions involving foreign government investors or sensitive/strategic assets will come under increased scrutiny. Subsequent to the March rule change, the Australian government blocked the foreign acquisition of Ausgrid, the New South Wales electricity infrastructure company. Having said that,
partnered with San Miguel in a successful bid for the Bulacan Bulk Water Supply Project, Tan notes.

Ramon Esguerra, managing partner at Esguerra & Blanco Law Offices in Makati City, says German companies have been very active in the public bidding of renewable energy projects. For road and rail development projects, Japanese, Chinese and Indian companies have been the primary awardees of government projects, while Singapore and Canadian companies have been active in public biddings.

Esguerra notes that the Philippines still has "strong policies restricting foreign ownership of land and investments in public infrastructures and exploitation of natural resources". As a result, foreign nationals or entities who wish to invest in the Philippines must forge a partnership or joint venture with Filipino nationals or entities to pursue an infrastructure project.

Salwah Abdul Shukor, partner and head of corporate at Zain & Co in Malaysia, says transport is a major area of infrastructure development in the country, including the Kuala Lumpur-Singapore HSR, a mass transit project around Kuala Lumpur and the west coast expressway from Taiping to Banting, and the Damasara-Shah Alam highway.

China has been the main investor in Malaysia, but faces competition from Japan, South Korea and France in efforts to secure the KL-Singapore rail project. "Doing business in Malaysia is relatively straightforward," says Salwah. "In recent years, liberalization measures have been progressively adopted by the government to remove restrictions on foreign direct investment."

But there are caveats to this observation. Regulation of foreign investment in Malaysia is carried out both through legislation as well as government policies. "There is [also] a need to be aware of the specific licences and permits required for the conduct of certain strategic activities, and equity participation requirements are sometimes imposed by the Malaysian regulatory authorities in granting these licences and permits," says Salwah. "In regulated sectors such as telecoms and petroleum, local partners are required. The challenge then is to select the right local partners who subscribe to the same business principle and have a similar vision for the business as a whole."

Kazakhstan watchers expect construction-sector growth to accelerate. Taking into consideration that the key industry for Kazakhstan’s economy is the extraction of natural resources, construction of new infrastructural facilities is aimed at supporting the extraction, their transportation, and production of goods with high added value, says Yerzhan Yessimkhanov, a partner and head of infrastructure at GRATA Law Firm in Almaty.

"It should be noted that implementation of a project by the Kazakhstani government does not mean that the government acts as a client in a construction contract, or as a financing party, says Yessimkhanov. The government normally delegates implementation of projects to so-called "national companies" owned by the government, which are working in various areas of the Kazakhstan economy," he says.

There are difficulties investing in Kazakhstan that include the limitation of foreign presence in certain industries (such as telecommunications), and the necessity for government approval for acquisition of projects in areas such as extraction of natural resources. On the upside, "the number of permits and authorizations relating to design and construction has been substantially decreased, and related procedures have been simplified", says Yessimkhanov.

While there’s a big focus on expanding mining in Mongolia, associated infrastructure has not kept up – transportation infrastructure remains a bottleneck, such as lack of railways and roads or insufficient energy supply to power the mines in remote parts of the country. Therefore, many investors, as well as the government of Mongolia, have been promoting associated infrastructure projects to make the natural resources industry competitive.

But for investors, there are many obstacles, says Enkhbat Batstukh, managing partner at MDS Khanlex in Ulaanbaatar. "Since the break-up of the Soviet Union and the consequent end of the socialist system in Mongolia over 20 years ago, the Mongolian parliament and government has rapidly introduced laws," he says. "The speed with which legislation has been drafted has resulted in legislation that in many instances has left key issues unresolved. The absence of definite interpretations of many of the provisions of these new laws, and the absence of a tradition in Mongolia of an independent judiciary makes application of laws sometimes uncertain."

The commitment of government officials and agencies to comply with legal obligations and negotiated agreements is sometimes unproved and there is a tendency for the authorities to take arbitrary action", adds Enkhbat. "Legal redress for breach and/or unlawful action may not be readily available, if at all, and/or may be subject to significant delays."
What is it about Singapore? Even when the city state is not doing well it gives off the impression that everything is just fine and every problem has been anticipated. As growth flounders in 2016, law firms are signalling tougher times ahead, while many actively pursue opportunities in the wider ASEAN region.

As is always the case with legal work, when one part of the economy is suffering other practice areas are doing well. But in Singapore the feeling is different. The dominance of one party in power for decades has to some degree added to stability and fuelled the rapid pace of reform. Policies that elsewhere in Asia would take an age are fast-tracked and realized in a political instant. Few, if any, in the region can match Singapore’s ambition.

Sriram Chakravarthi, the senior director and chief legal counsel at the Singapore Academy of Law (SAL), sums up the challenges ahead for the city state. “The present economic climate has contributed to an increase in cross-border insolvency and debt restructuring work,” he says. “Singapore is well placed to capture a share of this work.”
When economies go off the boil, law firms tend to provide the best bellwethers as to which sectors are cold and which are hot. "The present economic climate has contributed to an increase in cross-border insolvency and debt restructuring work," says Sriram Chakravarthi, Senior Director and Chief Legal Counsel, Singapore Academy of Law.

Asia Business Law Journal asked a cross section of them how they were faring.

Chia Kim Huat, regional head of corporate and transactional practice at Rajah & Tann, says capital markets have picked up this year, when compared to last year. "Is it sustainable? For the rest of the year a couple of listings are coming to market, but 2017 is a bit uncertain," he says. "In terms of sectors, those that are attractive to overseas investors, one is logistics. Because of the OBOR [one belt, one road] policy a lot of [these investors] are looking at setting up logistics chains across the region, so a logistics centre is very much in play. The other is infrastructure."

Chia says Singapore is going through an economic restructuring. "Our government has come up with the CFE, the Committee for the Future Economy, trying to reposition," he says.

K Murali Pany is managing partner at JTJB, which has four key practice areas: disputes (arbitration/litigation), shipping work, real estate and corporate. "The next 12 months is about battenning down the hatches and being prudent," he says. "There is a lot of uncertainty in terms of oil and commodity prices as well as the availability of finance. For Singapore, much will depend on external drivers, China and India primarily, which are both having their own issues."

Lisa Theng, managing partner at Colin Ng & Partners, says the mid-sized full service firm covers litigation, arbitration disputes and mediation, "and for these areas we have been very active, which is a sign of the market".

"Our lit-arb team has been busy for most of this year and continues to be busy," she says. "Singapore is building itself as an arbitration hub, so we have a fair bit of arbitration for foreign parties and again the disputes are very commercial in nature. Insolvency works and disputes have picked up as well."

"Our M&A is still active, especially for private M&A and private equity VCs. I suppose they are looking for interesting businesses to invest in, and with Singapore emphasizing the areas of innovation, tech, Fintech etc., we have quite a few VCs and funds coming in, and we help them invest. Singapore is transparent so they have some confidence in investing here."

Edmund Kronenburg is managing partner at Braddell Brothers, a boutique litigation and arbitration outfit that picks up work that would otherwise go to big firms – referred work from international players as well as big Singapore firms. "I can't say anything is on the rise because the economy looks rather tentative in 2017," he says. "Disputes is probably the safest practice area to be in. There's a lot of competition in the corporate arena, not only from Singapore firms but also from international firms, which have been granted licences to do work in Singapore. IP is still very strong."

According to Wiyatno Mursjid, a senior associate at Gateway Law Corporation, a mid-sized firm with 10 lawyers, an office in Malaysia, one about to open in the Philippines, and plans to expand in Vietnam, "you can't avoid the economic downturn."

"Singapore has experienced the headwinds and if I'm not wrong we are technically in a recession," he says. "This represents a good time to take stock and refocus. As an IP firm we have diversified into other work and now provide general corporate commercial and litigation. We have a wide network of associate firms in the region and because of that we have a lot of instructions from other countries, more so than locally."

Stephanie Keen, managing partner at Hogan Lovells Lee & Lee, says most of the firm's practices have had a solid year. "It's been a difficult market. I think the M&A market has been quite soft this year, but we've had our fare share of the deals in the market," she says. "From a corporate perspective, we do a lot of work with PE; for international firms it's an easier target for us than trying to identify Singapore corporates who are doing transactions – many of them have relationships with Singapore firms."

This factor tends to play to the strengths of the firm's ASEAN hub. "For example, one deal we instructed on was a BVI company with its headquarters in Macau and its businesses based in the US, Germany, China and Vietnam, and a sell-side adviser based in Singapore, and the sellers were German. That played to our strengths because other than Macau and BVI, which no international law firm can cover, we could cover the rest of it completely in-house."

On the banking side Keen says deals are being done in India and Indonesia. "On the bond side, we're seeing a lot of the work is in distressed bonds, and we do a lot of work for the trustee, so that's been pretty busy," she says.

Barry Stimpson, Singapore managing partner at ReedSmith in alliance with Singapore law practice ResourceLaw, says it's well publicized that shipping has been in a downturn for a number of years. "What tends to happen in the shipping and commodities sphere is the type of work changes depending on what the market is doing," he says.

"It's not a case of being less busy, it's just that the kind of work..."
you're handling is different. When that market went into crisis in the wake of the challenging conditions faced following the financial crisis, we saw major disputes and arbitrations. But over the past couple of years it’s evolved into slightly different types of disputes – a lot of restructuring work, a lot of defaults.”

Stimpson says in commodities it’s been more volatile. “We’re seeing a number of trade finance deals. There’s been a bit of a change of players in that sphere, where regulation has forced banks to scale back their activities, and other players, whether it’s private equity or the commodities houses themselves, have stepped into that space.”

Asset finance has been the most consistent performer of the past 12 months for Vitus Law, in partnership with Stephenson Harwood (SH). “Despite the pretty bad shape of the shipping industry, there’s been a lot of restructuring and financing,” says managing partner Daryll Ng. “The corporate law side has been quite challenging. But fortunately we have wide expertise, and we work together with the Hong Kong and Dubai offices of SH to give us a bit more leverage in the market.

“So I think corporate is performing alright given the market, but it is a very challenging market, there are a lot of low rates out there; it’s high competition,” he says. “I know that very large Singaporean firms put very very low, some would say unrealistic, prices in order to get some work in. So there is effectively a price war when it comes to M&A and corporate work.”

For Japanese firm Nagashima Ohno & Tsunematsu, a core portion of its niche work relates to manufacturing and trading houses. “In other Asian jurisdictions we are seeing interest in e-commerce companies in the region generally,” says Rashmi Grover, the firm’s attorney for India. “Some cases use Singapore as a hub, for example if they want to invest in India, Singapore is a better jurisdiction to invest through because of tax considerations. Even in terms of disputes they find Singapore to be the most neutral jurisdiction. Japanese companies are very familiar with SIAC [Singapore International Arbitration Centre] rules and what that offers.”

While the firms wrestle with economic malaise and adjust their practices accordingly to accommodate upticks in areas like restructuring, insolvency and arbitration and litigation, the in-house community is focusing on other areas.

“In-house counsel are one of the pillars of Singapore’s legal services,” says Singapore Corporate Counsel Association (SCCA) president Wong Taur-Jiun. “For Singapore to become a full legal services hub for the region, it has to have a large enough talent pool – not only in-house counsel who bridge the commercial requirements to private legal practice, but in-house counsel who bridge any MNC based in Singapore into the region. The Singapore Corporate Counsel Association aims to help develop such a talent pool. And we’ll do it for every lawyer who works in Singapore, regardless of nationality. We’re developing a national competency framework to help in-house lawyers think about why they need to train, what they need to train for, and how they can be trained.”

Wong says Brexit is among the items at the top of the agenda for many in-house counsel in Singapore. “How will Brexi-
it change the way our businesses are set up, or do business? How will it affect our existing contracts? Insolvency will probably also remain on the agenda for next year,” he says.

Gladys Chun is head of legal and compliance for Lazada, which has a local presence in Indonesia, Malaysia, the Philippines, Thailand, Singapore, Vietnam and Hong Kong. “A technology business that is expanding as rapidly as Lazada Group is fraught with challenges that derive from the novelities of the business model, its pace of growth and the regulatory complexities and risks of operating in jurisdictions across a region as diverse and heterogeneous as Southeast Asia,” she says.

“To name a few of the key challenges, local laws are unclear, business practices are not transparent, local cultural nuances play a big factor in the decision making process, awareness levels are low in a fast-paced environment, a lack of talent and resources including technological support to scale legal and compliance initiatives on a group-wide basis, and the list goes on.

“Singapore will play a critical role in this region, being at the forefront of the legislative changes and driving innovation in terms of a legal framework including a dispute resolution forum,” says Chun. “For example, the launch of Singapore International Commercial Court [SICC] positions Singapore as a leading city where international commercial disputes can be heard in a court of law, where mediation has been exhausted or where arbitration is not preferred. Further, Singapore has been aggressively promoting the use of legal analytics as a form of dispute prevention mechanism by leveraging on technology and big data – this will change the way disputes are being managed and resolved moving forward.”

Regional desirability is a primary factor for Singapore law into initiate research projects and serve as a forum for collaboration between judges, lawyers, businessmen, academics and policymakers in the region.”

Just as the work of in-house counsel in Singapore is increasingly reaching across borders, so too have law firms seized on the trend of regional expansion since the creation of the ASEAN Economic Community at the end of 2015. After all, it’s only natural for this city, which has served as a conduit for trade and business in the region for many centuries.

“I think because of ASEAN, the forum set up last year for free trade within the region, a number of firms are saying Singapore has good access to ASEAN,” says Daniel Poh, a partner at Marks & Clerk. “Definitely, the government is encouraging people to branch out in the region.”

And firms are following the lead. “With our property experience this year with a JV in Laos, we have an opportunity with a client who has the concession right to an economic zone,” says Theng at Colin Ng & Partners. “The legal system in Laos is not so developed, especially for foreign investors. So we have the opportunity to work with business and with the relevant government agency to develop the law of the land, so our real estate has given us the opportunity to grow beyond Singapore to a foreign jurisdiction like Laos.”

It’s an interesting development, and one that in some ASEAN jurisdictions would seem tailor-made for Singapore firms. “Cambodia would be next,” says Theng. “We don’t have a presence there but we have started working with local Cambodian funds and bringing clients in. So we see Indochina, although still emerging and new, with a fair bit of uncertainty, but that seems to be the area of interest, and that’s where growth is happening. And that’s where we are going.”

For Singapore to become a full legal services hub for the region, it has to have a large enough talent pool of in-house counsel

Wong Taur-Jiun
President
Singapore Corporate Counsel Association (SCCA)

the future. “ASEAN is a significant market,” says Chakravarthi from the SAL. “It is projected to be among the largest economies in the world over the next few decades. With growth and greater economic integration, there will be more opportunities for law firms operating in Singapore and the ASEAN region.”

Chakravarthi believes the setting up of both the Singapore International Commercial Court (SICC) and the Singapore International Mediation Centre (SIMC) to support cross-border business transactions add to Singapore’s growing capabilities as a legal hub in the region. “In 2016, the SAL launched the Asian Business Law Institute (ABLJ), an initiative intended to be part of the solution to the biggest challenge cited by business leaders in the region – lack of consistent legal standards within Asia,” he says. “The ABLJ will

Soh Kar Liang, managing director at Ella Cheong, says ASEAN is rising as an important commercial region. “The only challenge is that much of ASEAN is third world,” he says. “Singapore has had the chance to take a position of leadership, especially in terms of IP. Singapore was chairing a governmental group of ASEAN in the development of IP. An IP masterplan was created last year and looks at Southeast Asia for the next 10 years.”

Abdul Jabbar bin Karam Din, head of Rajah & Tann’s corporate and transactional practice, says the firm has seen a lot of foreign investment from investors using Singapore as a conduit to the region. “We finish our ASEAN footprint with addition of a Philippine office from 1 January. A good sized firm, C&G [Gatmaytan Yap Patacsil Gutierrez & Protacio] is joining us,” he says.
With wider regional ambitions, dominant roles in growth areas such as restructuring and Fintech are essential, especially with futuristic Fintech, where the distant tremors from Brexit may well have a resounding impact on the future of Singapore’s industry.

“The way it looks, the UK will not get the benefit of mutual recognition and passporting in the EU, which is fundamental to the financial services industry,” observes Jake Robson, a partner at Morrison Foerster. “Without that, a lot of the pull factor for London as the global centre for Fintech may disappear for some start-ups. If that happens, and [the UK] has a hard Brexit, I think we may find a significant portion of the industry, the very early stage start-ups, coming to Singapore and using this as an environment to flourish in.”

Robson says regulation lags behind the UK, but policymakers have said they are looking at the UK as a good guide for a regulatory regime for Fintech. “A lot of the ideas from the UK have been introduced by the ‘regulatory sandbox’, which is a mini testing ground for these kinds of products. The MAS [Monetary Authority of Singapore] has come out and said it will introduce a similar regulatory sandbox, with new payment regulations that are fundamental to updating regulation to meet the requirements of the Fintech industry.

“All of the steps are in the right direction. That combined with Brexit will mean that in the next five years or so Singapore will go through the roof as far as Fintech’s concerned, with start-ups, and you may see the odd unicorn coming in as well.”

Nicholas Hanna, a partner at K&L Gates, says Fintech currently consists of a segment of the technology start-up scene that is using software and technology to make the provision of financial services more efficient. “In the process, Fintech companies are disrupting incumbent financial systems and challenging traditional corporations which can be less adaptable and/or reliant on software.”

Some of the sectors already being impacted by Fintech include: payments (e.g., digital wallets and peer-to-peer payments); investments/fundraising (equity crowdfunding and peer-to-peer lending); financing (crowdfunding, micro-loans and credit facilities); insurance (risk management); advisory (big data analytics and predictive modeling); and infrastructure (security).

“Fintech start-ups will of course require different types of legal advice depending on what stage of the Fintech lifecycle they are in,” says Hanna. The five stages of a typical Fintech lifecycle are structuring, regulatory, early fundraising, commercialization, and growth/exit.

“The Fintech eco-system is rapidly growing in Singapore with the support of recent initiatives by the MAS and the deputy prime minister’s announcement to review the regulatory process for venture capital managers,” he says. “Singapore houses over 300 Fintech start-ups already and is known for being a hub to commerce. The government and regulatory authorities have indicated they will review and introduce further incentives for Fintech companies in 2017.”

One thing that is clear about Singapore is that each initiative to improve or expand, be it in tech, e-commerce, restructuring, arbitration, the courts or elsewhere, is accompanied by a clear and aggressive policy direction stamped by government.

Take Fintech, and e-commerce in general. “Incubators are being set up and the government is encouraging this,” says Robson. “Singapore’s history of attracting business has been extremely good when it turns its mind politically to do something, wheth-
er it was shipping 30 years ago, aviation, infrastructure, now R&D.”

With each policy directive there is a direct or indirect impact on the legal profession. “Over the past 10-15 years, the Singapore government made a decision to promote Singapore as a service hub for Asia,” says Oon Thian Seng, founding partner at Oon & Bazul. “The profession has been opened up. The hope was that with the opening up you would have more business and the pie would get bigger.

“What has happened now, with international firms coming in, is that the nature and quality of business is very different from what we used to have. Previously it was all domestic, now most of our business is international. So we are one of the firms that have benefited from the government’s efforts.”

The evidence is everywhere. “As a firm we are looking at technology, it’s an area that we cannot afford not to go into,” says Edmund Kronenburg, managing partner at Braddell Brothers, says: “The choice of court convention does help, provided other players in the region sign on to it. The EU is in, and now Singapore will rush out and do a lot of reciprocal agreements to make sure that the nature of business is very different from what we

Among the standout initiatives for this city state, the Singapore International Commercial Court is a prime example of forward thinking.

“I believe the SICC as a concept has gained remarkable mindshare amongst the legal community in the two years of its existence,” says Sriram Chakravarthi, the senior director and chief legal counsel at the Singapore Academy of Law. “Almost every lawyer I speak to recognizes the possibility of using the SICC as an additional dispute resolution option. The fact that there are more than 70 foreign lawyers registered with the SICC, and that the SICC has been busy issuing judgments this year, augurs well for its reputation and gradual acceptance as a destination of choice for parties to resolve their cross-border commerical disputes.”

Daryll Ng, managing partner at Vitus Law, says: “The question was always: is a decision of the SICC going to have enforcement possibilities in other jurisdictions? Arbitration? We have the NYC, that’s easy. Courts, we have the Reciprocal Enforcement of Commonwealth Jurisdictions Act, which allows us to enforce our judgments in all commonwealth jurisdictions, and in Hong Kong. The ICC had specific reciprocity treaties with the EU and the US this year. So the concept of having a court decision that is cross-applicable through treaties is an exciting one which makes Singapore much more viable.

“Regionally, it’s more a case of the internal court systems. Are they going to support your rights? And you never know. For some jurisdictions such certainty may take years.”

Jonathan Howes, joint head of office at Pinsent Masons MPillay, says he believes the court will “take off” despite uncertainties over enforcement. “I think Singapore will rush out and do a lot of reciprocal agreements to make sure that it can enforce Singapore judgments in other jurisdictions,” he says.

“My guess is that within ASEAN, with Singapore being Singapore and having the seat at the table it’s got, it will not do too badly in getting these reciprocal enforcement agreements.”

There is a need for the SICC to succeed. “Disputes are very busy, and Singapore courts are rammed to the point where getting court time is quite difficult,” says Howes. “We had a matter which was adjourned in March part heard, and we had to wait until October to get the remaining three days. Which is quite something for Singapore, which prides itself on a quick and efficient court system.

“You’ve got this thing of Singapore as a hub for arbitration, and we’ve got disputes in places like Indonesia, Australia, Vietnam and Thailand using Singapore as the seat for arbitration. Basically Singapore throws out its own fair share of disputes as well.”

Singapore’s success in establishing itself as an arbitration hub is also aggravating the enforcement issue for the SICC. “Banks still like litigation,” says Kronenburg.

“The construction sector loves arbitration. Infrastructure disputes, oil and gas disputes, the big numbers are all in arbitration. And for another reason – enforceability. The banks tend to work within the jurisdiction. Infrastructure projects, many of the engineering companies are Japanese or Korean or Chinese, and there you need the ability to enforce, and as things stand now you need an arbitration award to get enforcement in China or Japan or Indonesia, etc.”

SICC offers the way forward
Theng. "So we have a technology practice, and we have developed a media and entertainment practice, and we are looking at sports, as Singapore attempts to become a sports and entertainment hub. In terms of our position as a Singapore law firm and Singapore law, the government is helping us to market Singapore law as the law of choice in the region for foreign investors."

Soh, at Ella Cheong, points to IP securitization. “It’s always uncertain, especially with valuations, where there is no market precedent,” he says. “The government here has created financial products with three banks, and these effectively lead to loan space on security of IP rights, and with the government underwriting 50% of them. It’s quite novel and shows the commitment of the Singapore government.”

Stimpson observes: “The government does have a long-term plan, you just have to look at what they’re doing with development of the port at the moment, or the airport. It’s an incredibly business-friendly government, and when they need to pass a piece of legislation, or when they perceive there’s a problem, or they can improve something, they do it very quickly.

“The big talk for the past 12 months has been the TPP [Trans-Pacific Partnership], the new trade deal. It’s not ratified, and I don’t think with Singapore it’s exclusive. The government has shown that it wants to include as many trade deals as it can – regionally and internationally. The talk these past 12 months has focused on the TPP. While not formally ratified the government and business community in Singapore has been completely supportive of the deal and is likely to continue to work to put into effect its terms.

“Singapore has been extremely strategic over the past 10 years, building an extensive network of trade and tax agreements around the region and the world, which has made it a true business capital. Everything that Singapore is doing is really with that in mind, whether it be establishing itself as the dispute resolution centre of Asia, through the SIAC and also more recently the SICC, or ratification of the Hague Convention to make Singapore judgments from that court easier to enforce globally. These decisions are taken to strengthen Singapore’s offering.”

Policy direction is perhaps more visible form the point of view of corporate counsel dealing with impacts on business first-hand. “While our regional office is in Singapore and we have assets and facilities here, and generate our largest revenue here through an arrangement, most of the focus of our legal team’s activities is in the APAC markets (China, India, ASEAN, Australia, Japan and South Korea),” says Gigi-Anne Hoh, regional legal counsel with Syngenta Asia-Pacific. "Singapore has one of the most stable legal regimes and the authorities have been very transparent and open in working with us to date, and we have no issues.

“I would consider the plans to strengthen Singapore’s position as an international debt restructuring centre as pragmatic and far-sighted. These plans include: enhancing the legal framework for restructurings by creating bespoke rules and procedures; deepening the bench with specialist insolvency judges; increasing the use of ADR processes; creating a restructuring friendly ecosystem through increased availability of rescue financing; strengthening the insolvency profession in Singapore; raising international awareness of Singapore’s restructuring capabilities, with increased involvement in international insolvency organizations; and/or providing thought leadership through research.”

Hoh says these plans also align with the Judicial Insolvency Network (JIN) initiative that Singapore is promoting. “The JIN is intended to promote sustained and continuous engagement between representative judges from the participating insolvency courts on issues concerning co-ordination and co-operation in cross-border insolvencies, and the recognition of insolvency judgments,” she says.

Chun, from Lazada, says in-house counsel will play an increasing role in shaping the legislative framework. “To come up with an effective piece of legislation, it needs to take into account all perspectives including the businesses,” she says. “Hence, in-house counsel play an important role in providing constructive feedback in developing a legislative framework that works in the commercial world, and is easy to implement.

“Also, as the Singapore economy transforms to become more innovation-driven and knowledge-based, the legal profession, including in-house counsel, will have to step up to increasingly address issues of legal and judicial innovation to push boundaries and to move up the legal value chain.”

Wong, from the SCCA, agrees. “Singapore has embarked on several initiatives to position itself as the hub for legal services in the region,” he says. “The establishment of the [SICC] in January 2015, together with Singapore’s ratification in June 2016, coming into force in October 2016, of the Hague Convention on Choice of Courts Agreements, marks Singapore’s ambition to be a truly international dispute resolution centre. Recognizing the prevalence of cross-border insolvencies, the Singapore government also announced measures to become a regional insolvency centre.”

In terms of human capital, Singapore’s legal community is also undergoing reform. More law schools have led to an oversupply
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of new lawyers, the ASEAN Economic Community has lured local firms into merging or partnering to gain access to other markets, while an influx of international firms has led to plummeting fees and a great deal of merger activity to enable them to practise Singapore law with their local tie-up. Kim, from Rajah & Tann, says in addition to a huge oversupply of new lawyers due to two new law schools, there are a lot more people going overseas to study law, and coming home to practice. “From our point of view, the challenge is in the middle, we are using those numbers for in-house counsel, for alternative options like private banking. So, that part we are short of – people who will stay on long enough after training.”

Ng, from Vitus Law, sums up the situation. “The number of graduates doubled overnight about two years ago,” he says. “That’s compounded by the fact that the industry is going through quite a bit of difficulty. There’s not a lot of work out there; the general economy is bad.

“Second is international firms coming in. If Singapore wants to attract major players in the finance market it needs to allow firms in that it is familiar with – the Clifford Chances, the American firms, it needs those names – otherwise foreign companies won’t do business here.

“And in many ways the Singapore legal market was a bit of an incestuous community. We didn’t get much competition from outside, and the idea was by bringing in international firms we would have to raise our standards. It’s difficult. Local lawyers don’t like it. International players don’t like it because there is a rates war out there, and for all aspects of the industry. I think it is something all of us have to adapt to. I think what’s important in the Singapore market right now, the tie-ups and alliances that we have, are the way forward because it gives local firms the ability to have an international audience. That international exposure in the Singapore market will make the difference.”

Some disagree. “I’m skeptical of tie-ups because they look nice optically, but what does that really mean for the Singapore firm in question?” asks Kronenburg from Braddell Brothers. “Is there a real benefit? Perhaps there’s a temporary benefit, but does the tie-up actually promote that Singapore firm or does it just kill the firm in the long term and expand the international reach of a foreign practice instead? Rajah & Tann has gone a different way and set up its own network in the region. That is a model to be explored and a model that we are interested in looking at. The bottom line is that Singapore firms have to adapt to the situation and find which model suits them best in terms of survival in times of change.”

Keen, from Hogan Lovells Lee & Lee, the oldest joint legal venture in Singapore, points out that in Singapore one can only practise Singapore law if one has a Qualified Foreign Law Practice licence. “There are seven of them. They are hard to get but they require you to hit a number of quotas and if you don’t they will take the licence away,” she says. “For us, that’s important. Increasingly, more and more of the law being practised in this region is governed by Singapore law, which again is a change from the past when it would have been English or New York law. I think it also shows some stability.”

Theng also points to a decision earlier this year to allow non-lawyers to have an equity stake in a law firm. “Unlike Australia, where they do full service with accounting firms and legal services, in Singapore this was not allowed until recently, when it went up to 25%. Prior to that law firms needed to be 100% owned by lawyers. So this is a change to the legal landscape and we have not yet seen the legal firms doing that. But accounting firms have started their own practice law firms.”
The Fintech wave may have started in the US and been refined in Europe, but it is in Asia where its true potential is becoming evident. The authors see the next wave of growth in the Fintech space being driven by Asia – both in existing financial centres in the region, which have increasing levels of sophistication, and in countries across the region with low levels of financial inclusion but high growth prospects.

**FINTECH WAVE: WHY SINGAPORE IS LEADING CHANGE**

**CHALLENGES IN PARTNERSHIPS**

In more developed markets or market segments, Fintech technology is a substitute to existing financial services or products. Here, Fintech has a transformative effect on the way that financial services are delivered to consumers and on a business-to-business basis. However, due primarily to fragmented regulation and the resulting challenges of running financial services businesses in each jurisdiction, scaling these products to serve customers in multiple Asian jurisdictions – a prerequisite for the profitability of many Fintech solutions – remains difficult.

The authors believe that due to particular challenges in Asia, the main developments in the Fintech market segment are likely to take the form of strategic commercial partnerships between financial services providers and Fintech innovators.

**FINTECH GROWTH COMPANIES**

The lack of financial inclusion in developing countries across Asia leaves room for significant innovation, which would not find success in over-banked and heavily entrenched economies such as Europe and the US. The combination of sizeable populations and growing GDP levels, together with Fintech innovation, means the conditions are right for widespread disruption from new Fintech players. For emerging Fintech companies, the need for multi-jurisdictional expansion comes quickly on the heels of a successful proof of concept. A competitive advantage will only be retained as long as there is a rapid launch across multiple jurisdictions. This may involve a combination of venture capital, strategic partnerships, licensing deals, or even a franchise-style model.

Singapore’s strong and transparent financial services sector, a buoyant venture capital industry and a forward looking regulator help to make Singapore a destination in its own right on a regional and global level. For Fintech growth companies, rapid expansion coupled with the need for regulatory compliance requires both expertise and capital. Fintech companies will gravitate to the key financial centres in the region in order to source their funding, as well as to seek talent to execute their expansion plans.

Singapore stands out as being strategically placed to serve these needs in the region, and increasingly as a destination for European and US capital.

**TOOLS FOR DEAL MAKERS**

Regional expansion and capital needs, plus high-growth potential of Fintech companies in Asia, provide a key opportunity for investment by existing financial services providers, and also for other strategic players and venture capital investors.

Successful deal making in this specialist area, whether through commercial partnerships or direct investment, needs specialist guidance from lawyers with experience in venture capital investments, and M&A and regulation.

Alongside corporate due diligence, legal due diligence on a Fintech deal normally requires an emphasis on regulatory matters, especially: systems and controls relating to financial services licensing; anti-money laundering; and the way customers are acquired and served. A focused due diligence exercise performed by an experienced team can go a long way to de-risking an investment or partnership. IP and IT matters including data privacy and ownership of customer data will also require review and evaluation.

Experienced advisers in new Fintech technologies and financial services are invaluable in matching these technical drivers for valuation of a target with the underlying regulatory and licensing regime in countries where the target operates.

**INVESTOR-SIDE CONSIDERATIONS**

Acquiring a controlling stake or a minority equity investment in a Fintech company must be approached with care. Investing in a target that already has some level of venture capital funding must be done in a way that seeks to enhance working relationships between the investor and the target company. Similarly, investing into a target with financial services licences requires analysis in respect of regulatory change of control issues with these licences.

Shareholder agreements must be negotiated with skill, as the challenge is to protect the investor’s investment over a long growth period for a FinTech target, while giving the target the flexibility it needs to grow, and also being mindful of the strategic aims of other shareholders. In the next five years, the FinTech wave is likely to touch, directly or indirectly, on nearly every aspect of business in Asia. An experienced law firm can assist its clients to navigate this highly complex and regulated area, maximizing commercial potential.

Jake Robson is a partner at Morrison & Foerster in Singapore. Nicholas Davies is a senior associate at the firm.
AGAINST THE BACKDROP OF THE WORLD HEALTH ORGANIZATION’S ANTI-TOBACCO CONFERENCE IN NOVEMBER, WE SHOWCASE THE VIEWS OF TWO OPPOSING FORCES. IN AN ARTICLE ORIGINALLY WRITTEN FOR OUR SISTER PUBLICATION INDIA BUSINESS LAW JOURNAL, JAPAN TOBACCO INTERNATIONAL’S IDIL YASA ADVOCATES STRONGER IP PROTECTION FOR BRANDS. AS A COUNTERPOINT, A FORMER GC TO THE AUSTRALIAN MEDICAL ASSOCIATION, SARAH BYRNE, OUTLINES WHY SHE BELIEVES HER COUNTRY’S TOBACCO PLAIN PACKAGING LAWS ARE NOT ONLY RIGHT, BUT ALSO INNOVATIVE AND EFFECTIVE.
AT THE END OF 2012, Australia introduced one of the most restrictive and extreme regulations ever proposed for fast-moving consumer goods: plain packaging for tobacco products.

Trademarks, logos, non-prescribed colours and graphics have been banned with only the use of the brand name permitted in a standard font and size. Graphic health warnings now cover 90% of the back of packs and 75% of the front.

Put simply, the measure is a branding ban; manufacturers of a legal product are no longer allowed to use branding on the packaging of their products.

Trademarks represent a bond of trust between manufacturer and consumer; a reassurance of quality. They ensure consumers can make informed choices and buy with confidence. Understandably, following many years of investment, tobacco trademarks are extremely valuable, running into billions of dollars.

Protection of intellectual property (IP) is an essential element of an open, free and dynamic economy. Investors, both domestic and international, can only commit to projects with confidence if they can be sure that their IP is protected. Strong IP protection makes it clear that a country is open for business. This is supported by a number of studies that have shown a clear link between a country’s economic performance and its level of IP protection.

It was with a complete misunderstanding of the role and value of brands and trademarks that Australia decided to introduce its branding ban. Quite simply, packaging is not advertising and cigarette packaging does not prompt people to start smoking. Years of research into the causes of smoking uptake support this.

Australia’s branding ban has been a complete failure. After more than three years, we have seen no change in the rate of decline in smoking.

Before the branding ban was introduced, supporters of the measure claimed it would have an instant effect but, after this failed to materialize, policymakers shifted the goal posts. It was later claimed that the branding ban was never meant to prevent current smokers from smoking, but would instead have an effect in the long-term. The Australian government has been desperately trying to present the policy as a success out of fear of international embarrassment over its failure.

The attack on branding is a direct attack on the principle of quality. With key quality signals removed from tobacco packs, there has been a corresponding impact on the margins that premium price tobacco products deliver for manufacturers, wholesalers and retailers. Furthermore, in a heavily commoditized environment, smaller share products are being withdrawn from the market, resulting in a loss of choice for consumers.

An increasing number of countries around the world are opposed to branding bans, often citing the lack of evidence and the worrying impact on IP rights. Indonesia, the Dominican Republic, Honduras and Cuba are challenging Australia’s branding ban at the World Trade Organization (WTO), and a WTO panel ruling is expected to be published in 2017.

The four countries, and others supporting them, claim that the branding ban is a violation of two agreements administered by the WTO, namely, the Agreement on Trade-Related Aspects of Intellectual Property Rights, and the Agreement on Technical Barriers to Trade. They

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IT WAS WITH a profound and somewhat depressing sense of déjà vu that I perused the defence of the tobacco industry in the article unsurprisingly written by a tobacco industry in-house counsel. Here are some of the statements made, and just some of what is wrong with them:

“It was with a complete misunderstanding of the role and value of brands and trademarks that Australia decided to introduce its branding ban.” On the contrary, it was with a sophisticated understanding, both of the true nature of intellectual property (IP) rights, and of the likely impact of branding restrictions, that Australia introduced the Tobacco Plain Packaging (TPP) Act 2011.

First there is no “ban” on branding. Companies can still use their brand name, and identify the tobacco variant on a cigarette pack, as per paragraph 20(3)(a) of the TPP Act. The use of logos, colours and “embellishments” is restricted, but brand names are expressly allowed. As for an understanding of the impact of the restrictions, research from the University of Bath shows that 78% of public communications and 88% of research opposing the UK’s proposals for plain packaging come from tobacco-affiliated sources, suggesting that there is little concern outside of “Big Tobacco” about loss of trademark protection. Industry in general fully appreciates that plain packaging is not an “attack on branding” but a public health measure, and no threat to ordinary commerce.

Second, of course Australia understands the role and value of brands – this is precisely why this legislation is such an effective and innovative approach to the wicked problem of tobacco control. The way in which tobacco companies brand their products is a huge part of their marketing and recruitment of new smokers, which is exactly why tobacco companies are whinging so loudly about these restrictions.

Third, Australia understands that IP rights are negative rights. Ownership of a trademark does not automatically confer upon the owner the right to use the trademark; it only confers a right to prevent someone else from using it (and sometimes not even that). Censorship and defamation laws are not an infringement of copyright; laws restricting the sale of weapons or the import of pharmaceuticals do not infringe upon patents, and the imposition of “single-desk” government grain brokers is not a breach of plant breeders’ rights. This is not news to most lawyers.

Tobacco manufacturers often make much of the claim that their product is a “legal” one. This status ought to be examined in context, however. Lawyers and policymakers trained in other countries often do not have a full appreciation of the nature of Australia’s federated government. I have heard smokers say that tobacco can’t be that dangerous, or our government would have banned it. Unfortunately, that is not the case, and Australian governments of various ideologies have long been concerned with ways of minimizing the significant harm the use of tobacco causes.

Australia is made up of a federation of states, and our constitution provides that the commonwealth (federal) government can make legislation under certain specific heads of power, and only in relation to those heads of power, some of which are shared with the states, and some of which are exclusive to the commonwealth. As nothing has yet been found in those heads of power that would give the commonwealth the direct ability to ban the sale or manufacture of tobacco, it has approached the problem laterally.

The commonwealth has used its taxation and excise power to make tobacco expensive. It has used its power over broadcasting to regulate tobacco advertising. It has used its corporations power to require consumer warnings on cigarette boxes. It has also used its social security power to increase subsidies for therapeutic aids to quit smoking. So it makes perfect sense that it would use the power over

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argue that the legislation violates the rights of trademark owners and unjustifiably encumbers the use of trademarks in the course of trade, and that the legislation is more trade restrictive than necessary to fulfil its purported objective. Still, some European countries are following Australia’s example and will introduce branding bans this year or the next. The governments of some Asian countries have also shown an interest in considering the policy, including Singapore, which recently held a consultation.

The WTO could potentially rule that brand owners have a right to use their trademarks, and that Australia’s branding ban is illegal. However, if Australia’s legislation is upheld, a worrying precedent will be set for other industries. Already we have seen a UK parliamentary committee consider the introduction of plain packaging for alcoholic beverages, and Indonesia has threatened to retaliate against Australia with plain packaging for wine.

So what is the main driver of this extreme regulation? Calls for branding bans are being spearheaded by the World Health Organization (WHO), which is putting increasing pressure on governments around the world to ignore the failure of the policy in Australia and introduce copycat legislation. One of the main ways it does this is via its international treaty on tobacco control. The WHO’s Framework Convention on Tobacco Control (FCTC) provides a comprehensive policy framework on tobacco control for its 180 parties.

In 2008, the FCTC conference of the parties (COP) adopted two sets of non-binding guidelines recommending that parties to the FCTC consider introducing plain packaging. At the time of the adoption of these guidelines, no country had implemented the measure. The guidelines were based neither on scientific evidence nor on existing best practices.

Since 2008, several more sessions of the FCTC COP have taken place, each with an increasing lack of transparency, integrity and accountability. Exclusion of the public and media, a selective approach to the accreditation of observers, failure to engage in meaningful consultations on the key substantive issues, and distortion of the COP’s rules mean increasing questions are being raised about the legitimacy of the decisions taken at these events.

Even though Australia’s branding ban legislation is under challenge at the WTO, there is a possibility that the branding ban could resurface at the next FCTC COP. There could be efforts to establish work streams aimed at embedding branding bans within the FCTC, for example via amendments to the guidelines or the treaty itself.

Any efforts to do this would show a complete lack of respect for the WTO dispute settlement process. Indeed, political pressure on countries to introduce branding bans before the WTO gives a definitive ruling undermine the spirit of co-operation that the COP has itself called for.

On top of its push for global branding bans, the WHO is calling for “tobacco-style” regulations to be introduced for alcohol, sugary drinks and fatty food. It is encouraging countries to look at measures such as taxes, labelling restrictions and advertising bans in an effort to tackle non-communicable diseases – illnesses linked to lifestyle choices such as drinking, smoking, diet and lack of exercise.

The push for a new global agreement to regulate unhealthy lifestyles has been highlighted by the UN special rapporteur on the right to food, Olivier De Schutter, who said: “Unhealthy diets are now a greater threat to global health than tobacco. Just as the world came together to regulate the risks of tobacco, a bold framework convention on adequate diets must now be agreed.”

Many regulators have argued that the health risks of smoking make tobacco unique; all rules about the need for evidence, proportionality and justifiability can be thrown out of the regulator’s window. When concerns have been raised that a branding ban on tobacco could set a precedent.
That tobacco use continues to decline consistently is an indication of the success of plain packaging ... which is why so many countries are interested in following Australia’s lead.
The slippery slope of tobacco regulation being used as a blueprint for other goods has already begun. In France we have seen advertising bans for alcoholic beverages and sponsorship bans for beer brands.

In Ireland, the government is considering plans to introduce health labels, minimum pricing and advertising restrictions for alcoholic drinks. Graphic and text warnings on alcohol are now mandatory in Turkey and similar proposals have been made in Thailand. Mexico has introduced taxes on sugary drinks while Hungary has brought in taxes on foods with high fat, salt and sugar content. In India, the Kerala state government has proposed a 14.5% "fat tax" on burgers, pizzas and other junk food served in "branded" restaurants.

All eyes will be on India as November’s FCTC COP convenes. It is vital that there is an open and honest debate about what constitutes effective and proportionate regulation. The potential benefits and consequences of any proposed regulation must be weighed against each other. All stakeholders should have the chance to share their views without fear of exclusion and intimidation. Discussions with such a wide-reaching impact must be transparent, and the public must be allowed to observe proceedings in New Delhi to ensure that decision makers are held to account for their policies.

Knee-jerk measures such as branding bans are not a long-term, effective, sustainable solution. Everyone who values brands, trademarks and good governance, and understands the implications of misguided regulations, should make their voice heard against these proposals.

A colour or logo provides no new information about the quality of tobacco or anything other than the ‘image’ smoking is supposed to project.

The existence of, unbranded (illegal) tobacco. So drawing so much attention to it seems to be a bit of an own goal by the tobacco industry.

"... are an important source of funding for terrorist and criminal organizations..."

This claim has absolutely no credible source. While there is evidence that some funds from illicit tobacco sales in other countries may have been diverted to terrorist organizations, there is nothing to show this is the case in Australia, or indeed in the US, where a 2015 State Department report found that, "there is also no systematic evidence of sustained links between the global illicit tobacco trade and terrorism".

"The attack on branding is a direct attack on the principle of quality."

Leaving aside how ridiculous it is to discuss "quality" in the context of a product that has no safe level of consumption, this argument is inherently flawed in both theory and practice. If branding is an indication of quality, then McDonalds is the highest quality food on earth. And "quality" – whatever that might mean in the context of tobacco – has never been much of a feature in tobacco marketing.

One brand is portrayed as rugged, another is feminine, a third is cool, a fourth sophisticated. Moreover, there is apparently not even agreement within the industry, nor amongst users, as to what constitutes “quality” tobacco.

Even if there were accepted indicators of quality, the claim remains a red herring because, as already stated, the TPP Act allows tobacco manufacturers to put their brand name, and the product variant, on the packaging. A colour or logo provides no new information about the quality of tobacco or anything other than the “image” smoking is supposed to project.

These are only some of the claims made in the article that cannot withstand scrutiny. It is a great shame that instead of devoting so much time and money to defending the indefensible, the tobacco industry does not invest those resources into researching and developing products that do no harm.
BRITISH PRIME MINISTER THERESA MAY IS DETERMINED TO BEGIN THE PROCESS OF EXITING THE EU BY MARCH 2017, BUT A HIGH COURT RULING MAY DERAIL HER PLAN. WHAT SHOULD COMPANIES DO WHILE WAITING FOR A CLEAR PICTURE OF BREXIT TO EMERGE?
VANDANA CHATLANI REPORTS
Commenting on the High Court decision, Alasdair Steele, a partner at Nabarro in London, says: "My view is that the issue which was at stake was nothing to do with the Brexit vote but all about the power of the executive [government] versus the legislative [parliament]. The UK constitutional piece is relatively clear – parliament makes the law and only parliament can change a law which it has made.

"The controversy here is politically driven and stems from the ultimate problem underlying the entire Brexit issue – it was never supposed to happen," he says. "Article 50 was written on the basis it would never be used [otherwise it would be much more extensive]. Similarly the UK referendum legislation only deals with the question to be asked and the process for holding the referendum itself… [it] says nothing about the result and what it means. The argument that the referendum result is a mandate for government to do that misses the point that the referendum legislation does not give that authority to government.

"As with article 50 itself, the position the government is in is a consequence of what was arguably deficient drafting in the referendum legislation. However, had parliament had to consider the ramifications of a "leave" vote and what government would be authorized to do in the circumstances, there would have been considerably less chance of the referendum bill having been passed in the first place. Arguably, having sacrificed the detailed requirements in drafting the original legislation for political expediency, government is now suffering the constitutional consequences of not having sought the necessary authority at the time."

In September, former European Council president Herman Van Rompuy told the BBC that negotiations over Britain’s exit from the EU would take a back seat for at least a year until Germany’s new government is formed after elections in September 2017. "You can always start with more technical matters, but the hardcore … difficult topics will be tackled after the constitution of a new German government and that will be October/November [2017],” he said. He referred to Britain’s exit from the EU as a "political amputation of the first degree", saying that the image of a "strong Europe" had "tarnished a lot after Brexit".

European powers remain nervous following the UK's vote to end its membership of the EU in a referendum on 23 June. Many have voiced concerns that the UK's eventual exit could inspire other EU members to follow. European Council President Donald Tusk urged EU member states to introspect during their meeting in Bratislava without the UK, to discuss the road ahead following Brexit.

"We haven't come to Bratislava to comfort each other, or even worse, to deny the real challenges we face in this particular moment in the history of our community after the vote in the UK," said Tusk. "We can't start our discussion … with this kind of blissful conviction that nothing is wrong … we have to assure … our citizens that we have learned the lesson from Brexit and we are able to bring back stability and a sense of security and effective protection."

Tusk had previously warned that the UK’s decision to leave the EU should not be viewed in isolation. The concerns expressed in Britain about immigration, security and cultural preservation, he said, were part of "a desperate attempt to answer the questions that millions of Europeans ask themselves daily". Both European Commission President Jean-Claude Juncker and German Chancellor Angela Merkel have said that the EU is facing an "existential crisis".

On 3 November, the London High Court issued a ruling that could foil Prime Minister Theresa May’s plans to trigger article 50 and kick-start the UK’s departure from the EU. The court ruled that a parliamentary nod was needed before the Brexit process could formally begin. The government promptly announced its intention to appeal this decision in the Supreme Court on 5 December.
Although May supported the campaign to remain within the EU, she has been firm about respecting the outcome of the referendum, stating “Brexit means Brexit”. Once article 50 is invoked, the UK will have two years to leave the EU.

“No one knows what will happen next, or what the future holds,” says Steele. “Everything is conjecture, which is not helpful to businesses in the UK, Asia or elsewhere.”

Steele also points out that “neither the so-called ‘Brexiteers’, nor other European countries, know what they actually want from a Brexit. Indeed, no two Brexiteers I have heard speak at events have said the same thing about what Brexit means, or should look like.”

Despite the uncertainty, Asian and other foreign companies should have enough time to consider possible outcomes and actions before any Brexit agreements are struck. “It is more likely to be a case of evolution over a number of years rather than a revolution,” says Magnus Rodrigues, a partner at Chadbourne & Parke. “Indeed, from a practical perspective there are major limits as to how much legislation the UK’s houses of parliament – or for that matter any country’s legislative body – can pass in any year.”

In a sense, this means a longer drawn out period of uncertainty, but equally, business as usual. “Given past history, the likelihood is that any deal between the UK and EU will not be done until the

### No two Brexiteers I have heard speak at events have said the same thing about what Brexit means or should look like###

Alasdair Steele
Partner
Nabarro
very last minute,” says Steele. “And early indications are that non-EU countries do not want to enter into trade negotiations with the UK without knowing first what the UK’s relationship with the EU will be.”

So against this backdrop of uncertainty, what should businesses be doing?

Steele and his team have advised clients to perform an assessment exercise to establish the impact on their business if no deal between the UK and EU is struck at the point of Brexit, and to quantify the costs, impact and potential solutions to those consequences including the time required to implement solutions.

“This will then mean that once the two-year notice period is triggered, businesses will know what they need to decide, and when in order to be ready for Brexit,” says Steele. “For those businesses looking to launch or expand in the UK and Europe, they can also factor these thoughts into their planning. The UK is a full member of the EU until the moment of Brexit, so it is very much business as usual. However, it would be foolish not to be thinking ahead as to possible consequences and solutions.”

Steele says that if May is successful in invoking article 50 in March 2017, investors can expect the end of the two-year period – and likely uncertainty – during the first half of 2019. “The timing is calculated to fall as much as possible between the various elections in Europe, particularly in France and Germany, but before the next European parliamentary elections and selection of the new EU Commission in 2019,” he says. “However, despite the outline timetable having been set, there is still no clarity on what sort of Brexit the UK will be looking for, with different ‘Leave’ campaigners suggesting different Brexit outcomes.”

It is about understanding now what your exposure is, says Gavin Williams, a corporate partner and part of the Brexit team at Herbert Smith Freehills. “Companies need to do their homework, conduct detailed due diligence and identify the major risks. They may find that Brexit only affects their businesses in a minor way. For companies that realize it’s a big concern, minimizing the impact depends on devising alternative structures – physical or legal
to minimize the impact of changes, and on making their businesses more resilient and robust.”

Richard Cranfield, a partner at Allen & Overy, says Asian clients who are the most engaged are those with the greatest investment across the EU, and thus potentially the most at risk. “The most active sectors from our perspective are financial services such as banking, investment banking and asset management, insurance and funds, automotive, life sciences, telecom media and technology, and general manufacturing,” he says.

Samantha Mobley, a partner and head of the EU, competition and trade practice group at Baker & McKenzie, says the UK has been result in customs duties, tariffs and import requirements for goods and services moving between the UK and EU,” says Mobley. “This could result in higher costs and administrative requirements for Asia corporates using the UK as a gateway to the EU.”

Some Asian companies could be hit by changes to the benefits of EU licensing and authorizations that allowed them to register and obtain licences or authorizations in the UK and then sell goods or provide services throughout the EU. “Going forward, these passporting arrangements may no longer be available and so these Asia-based companies are considering the possibility of needing to register and obtain licences or authorizations in another EU country,”

Many of our Asia-based clients are actively looking at potential UK acquisition targets in light of Brexit

– Samantha Mobley

an attractive jurisdiction for Asian businesses to establish their operations and venture into the broader EU single market. In addition, many of these businesses chose the UK as a hub to benefit from its favourable tax regime and to rely on EU tax directives that exempt interest, royalties and dividends from withholding tax when paid by companies in one EU country to companies in another.

“The UK has double tax treaties in place with all EU member states under which the rate of withholding tax is reduced, in some instances to zero,” says Mobley. “However, if the UK withdraws from this regime, UK companies receiving interest, royalties or dividends from their group companies in certain EU countries are likely to suffer a withholding tax cost. We have advised our Asia-based clients that this could make the UK a less attractive location for a European holding company.”

The future of business ties between the UK and Asia will depend on the shape of the trade deal the UK is able to negotiate with the EU.

“If the UK exits the EU single market, then depending on what trade agreement is reached between the UK and the EU, this could

says Mobley, although she adds that most of her Asia-based clients believe it is too early to take specific action now.

While the UK may decide to forge bilateral trade relationships with Asian countries post Brexit, technical and legal barriers stand in the way of formal progress in this direction. For example, in 2013, the EU and China announced the launch of negotiations for a comprehensive EU-China Investment Agreement, which aims to achieve progressive liberalization of investment and eliminate restrictions for investors to each other’s market.

“If such an agreement with the EU is finalized, post Brexit, the UK would no longer be party to it,” says Mobley. “The UK and China may, however, consider negotiating a separate free trade agreement and investment agreement.”

But as Williams points out, while the UK remains a member state of the EU, “the responsibility for negotiating free trade agreements lies not with the British government but with the European Commission. So although preliminary discussions can be had, it’s not currently legal for the UK to negotiate free trade agreements with foreign countries.”
One thing companies can try to do is influence the exit negotiation process, as the UK government tries to ascertain what path will gain the most support. Understandably, it is mainly large Asian companies that are major employers and profit generators in the UK that will be able to wield such influence. “It’s an inherently political situation which means that jobs and taxes and livelihoods play into the debate,” says Williams. “If there are major employers out there who’ve identified really significant risks and they conclude that they may need to relocate operations away from the UK to preserve the best interests of their business, then the government will want to know that. It’s hungry for that information.”

Some companies may have enough clout to go directly to a relevant minister with their concerns, while others may be represented by industry bodies. Williams says law firms like his can help individual companies or those represented by their associations craft arguments “into a form politicians will recognize” and hopefully steer the government towards addressing thorny issues and compromising on others.

Among the thorniest issues, immigration was at the heart of the EU referendum in the UK. For now, Europe is sticking to its guns with a strict view that the UK cannot enjoy free market access in the EU without permitting the free movement of people across its borders.

Mobley says some companies are concerned about the possibility of more stringent immigration requirements which would threaten their operations and their “flexibility in being able to mobilize and utilize their workforces across the UK and EU”.

Asian companies should be prepared for disputes if Brexit results in higher costs, alters regulatory requirements or has other adverse effects on businesses. “There is a possibility that counterparties to contractual arrangements may try to rely on force majeure or material adverse change events to seek to modify or terminate contractual arrangements, leading to the possibility of increased disputes and potential litigation,” says Mobley.

For some companies, particularly those with no exposure in the UK, Brexit may be a blessing. The plummeting pound and lower valuations mean the time is right for bargain hunting. “Many of our Asia-based clients are actively looking at potential UK acquisition targets in light of Brexit,” says Mobley. Steele says his firm is seeing a steady flow of investment – rather than a torrent – into the UK from a range of different geographies. “Japan is tending to the more cautious end, while we are seeing Chinese investors coming back into the UK market, particularly in real estate,” he says.

Companies may be exercising caution, but Williams says he anticipates the announcement of several deals in the coming months. “Due diligence will be very high; acquirers want to understand where every last risk may lie,” he says. “But money is cheap. The flow of work has far from dried up.”

If there are major employers ... [who] conclude that they may need to relocate operations away from the UK ... the government will want to know that. It’s hungry for that information.

Gavin Williams
Partner and Brexit Team Member
Herbert Smith Freehills
Revised law ushers in new era for private education

On 7 November 2016, the Standing Committee of the National People’s Congress passed a decision on the amendment to the Law on Promotion of Private Schools, which will take effect on 1 September 2017. The revised law reflects a major reform in the regulation of private schools in China; for the first time, it recognizes the legality of for-profit private schools.

According to the current Law on Promotion of Private Schools, promulgated in 2013, schools of compulsory education schools can be established as higher education schools and non-degree for-profit schools. Preschools, high schools, and its implementation rules did not specify from schools. However, as the current law generally allowed to demand “reasonable return” sponsors of non-profit private schools are generally allowed to demand “reasonable return” from schools. However, as the current law and its implementation rules did not specify a clear definition and criteria for “reasonable return”, it is difficult for the sponsors to obtain “reasonable return” in practice.

In contrast, the revised law explicitly classifies private schools into non-profit and for-profit schools. Preschools, high schools, higher education schools and non-degree education schools can be established as for-profit schools, but schools of compulsory education (i.e., primary schools and junior high schools) must be non-profit.

The revised law elaborates on different regulations and treatments applicable to the for-profit private schools and non-profit private schools in the following major aspects:

- **Distribution of surplus.** Sponsors of a for-profit school are entitled to the distribution of the surplus from school operations in accordance with the School Law, while for a non-profit school the surplus cannot be distributed to sponsors, and must only be used for school operations.
- **Registration of legal entity.** A for-profit school should be registered with the Administration for Industry and Commerce, while a non-profit school should register with the Administration of Civil Affairs.
- **Tuition and fees.** A for-profit school may determine tuition and fees based on market conditions, while a non-profit school school must follow fee scales set out by the provincial-level government.
- **Taxes.** A for-profit school may enjoy some preferential tax policies in accordance with national regulations, while a non-profit school can enjoy the same preferential tax treatments as public schools.
- **Use of land.** A non-profit school has the same preferential land policies as public schools, i.e., allocated land can be used to establish a non-profit private school. A for-profit school has to obtain land use rights according to national regulations.
- **Distribution of liquidating assets.** In winding up a for-profit school, assets must be liquidated according to the Company Law. With a non-profit school, the remaining assets after liquidation can only be used for operation of a non-profit school.
- **Government support.** Government support for a for-profit private school includes government procurement of services, student loans, scholarships/financial aids, and lease or transfer of idle state-owned assets. A non-profit school may also enjoy government subsidies, fund awards and donations.

For transition from the current law to the revised law, private schools established pursuant to the current law may choose to continue to be a non-profit school, or become a for-profit school once the revised law takes effect. If a school chooses to remain non-profit, it only needs to amend its articles of association and other registration information accordingly.

A private school may be re-registered as a for-profit school if it is applied for, provided that financial liquidation has been conducted to clarify the ownership of the properties of the school, and the related taxes and fees have been paid. The detailed regulations in this regard will be formulated by local governments at provincial level.

Private schools constitute an important component of the education sector in China. A report issued by Ministry of Education in 2015 counts 163,000 private schools nationwide. In particular, private schools constitute up to 90% of the total number of preschools. It could be reasonably expected that implementation of the revised law will have a profound impact on investment in the education industry in China. For-profit private schools will become popular targets of capital investment, and will be put into the assets pool of companies going for listing.

The authors expect that the revised law will also have a major impact on foreign investment in the private education industry in China. Foreign investors may have more options in determining appropriate investment structures, in addition to commonly used contractual arrangements. However, the revised law does not lift restrictions on the holding of foreign capitals in private schools, which means foreign investors still have to set up private schools in the form of Sino-foreign co-operation, and are permitted to invest in a for-profit private school and entitled to the profit distribution under the revised law.

The authors expect the release of more detailed implementing rules in connection with the revised law, and believe that its implementation will help the private education sector in China to enter a new era.

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Enforcement and the need to develop social honesty

Sometimes, winning a judgment means nothing to the plaintiff, since enforcement has been a serious and difficult problem under China’s legal system in past decades. All a People’s Court can do is seize, freeze or sell the properties of, or impose a fine or detention on, the person subject to enforcement according to the Civil Procedure Law.

However, those people subject to enforcement either have little fear of no more than 15 days detention, or have already concealed or transferred their properties long before the legal enforcement.

It therefore seems necessary, and urgent, for the Chinese government and the People’s Courts to improve the situation with several provisions and opinions having been issued in succession.

In July 2010, Several Provisions of the Supreme People’s Court on Restricting High Consumption of Judgment Debtors was issued, in which the natural person, or the legal representative, or key person-in-charge of the person, of an organization subject to enforcement according to the Civil Procedure Law.

In July 2013, Several Provisions of the Supreme People’s Court on Announcement of the List of Dishonest Persons subject to Enforcement was issued. Any person subject to enforcement who has the ability but fails to perform obligations determined in an effective legal judgment, and falls under any of the circumstances – such as obstructing or resisting enforcement, evading enforcement by fraudulent litigation or false arbitration, concealment or transfer of property, violating the property reporting system, etc. – must be included in a list of dishonest persons subject to enforcement and imposition of credit-related punishment.

The List of Dishonest Persons subject to Enforcement is circulated to relevant government departments, financial regulators, financial institutions, institutions that assume administrative functions, trade associations etc., and such relevant entities may impose credit sanctions against the dishonest persons in the aspect of government procurement, bidding, administrative examination and approval, government support, financing, credit, market access, and accreditation.

This is the first time that failing to perform the obligations of a judgment becomes a problem of dishonesty. By the end of August 2016, 1.55 million dishonest persons had been prohibited from taking trains, 4.7 million had been prohibited from taking airplanes, and 66,954 persons had been prohibited from registering as the legal representative, director, or supervisor of an organization. Large numbers of persons subject to enforcement have to perform their liabilities when facing these restrictions.

With this improvement, the Opinions on Accelerating the Advancement of Establishing System of Supervision and Sanctions towards Dishonest Persons Subject to Enforcement were jointly issued by the General Office of the Communist Party of China Central Committee and State Council in September. To date, this is the most comprehensive legal document towards the person subject to enforcement, including 11 different types and 37 different items of disciplinary actions.

Dishonest persons subject to enforcement are subject to restrictions on: joining the CPC; holding public office, industry-specific eligibility; engaging in specific industries or projects; government support or subsidies; honour and credit; special market trading; high consumption; and exits. Strengthened daily supervision and inspections, increased criminal penalties and other encouraged restrictions are also in place.

By establishing and developing social honesty, the person subject to enforcement not only faces the penalties implemented from judicial department, but from various other aspects, from work to lifestyle.

While having a better enforcement situation, we acknowledge that this is just the beginning of developing social honesty, and it is a complicated and comprehensive system. To further improve, the situation needs the co-operation of all departments from the courts, public security and the treasury to education, human resources, transport, etc.

The author believes that with the better co-operation of all departments, the development of social honesty, and the balance of benefit and cost of keeping faith, the difficulty of enforcement will be gradually improved and advanced in the future.

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PN3 brings clarity, confidence to e-commerce investment

India is now a global destination for attracting investment. The e-commerce sector has become one of the most sought-after sectors for investment, for foreign and domestic players. Framing the policy on foreign direct investment (FDI) in various sectors falls within the realm of the Government of India. FDI is regulated by the Department of Industrial Policy and Promotion (DIPP) and the Ministry of Commerce and Industry.

The extent and conditionalities for FDI across sectors in India is governed by the Consolidated Foreign Direct Investment Policy of India (FDI policy) and the Foreign Exchange Management Act, 1999 (FEMA), along with regulations framed under FEMA.

The government introduced a regulatory framework regulating e-commerce in India for the first time in 2000. Press note 2 (2000 series) inter alia permitted FDI up to 100% for e-commerce activities, subject to certain conditions. Such companies were also allowed to engage only in business-to-business (B2B) e-commerce, and not in retail trading.

The government eventually introduced a definition of "e-commerce" in the FDI policy, released in 2010, to mean inter alia the activity of buying and selling by a company through the e-commerce platform.

In November 2015 via Press note 12 (2015 series), among many FDI liberalizations, the government also permitted single brand retail trading (SBRT) entities to undertake e-commerce, which was not previously permitted. SBRT entities operating through brick and mortar stores were now permitted to undertake e-commerce. However, FDI in the business-to-consumer (B2C) model for multi-brand retail was, and remains still, not permitted.

MUDDY WATERS

The market witnessed several innovative structures that were adopted for e-commerce. Since the government permitted 100% FDI in wholesale trading/B2B e-commerce, FDI was routed into B2B entities, and the front-end retail entities continued to be Indian owned and controlled, having separate operations and management from the B2B entities. Foreign investors explored various other alternate structures, but these structures remained subject to the close watch of regulators.

In fact, a body of brick-and-mortar business supported by an industry association approached the Delhi High Court (All India Footwear Manufacturers and Retailers Association (AIFMRA) & Others v Union of India & Others) on the grounds that the online marketplace model is permitting companies with FDI to undertake retail sales to end-customers, and hence was violating the FDI policy. Consequently, with the release of clarifications by the DIPP pursuant to Press Note 3 (2016 Series), or PN3, on 29 March 2016, the petitioners in the said litigation have approached the Delhi High Court (order dated 12 August 2016).

PN3 AND THE ROAD AHEAD

The major impetus and reaffirmation of the policy on FDI in the e-commerce sector came with the DIPP’s release of PN3. Some of the critical clarifications pursuant to PN3 are:

1. For the first time, the policy has been vocal about “market place model” and “inventory model”. PN3 reaffirmed that FDI is permitted in a market place model, while it is not permitted in the inventory based model. A foreign investor can invest in a market place model;

2. E-commerce has been defined to mean not just selling and buying of goods through an online platform, but also buying and selling of services, where such sale of goods and services is facilitated through digital and electronic networks (i.e., through computers, televisions, mobiles, extranets, etc.);

3. It is clarified that an e-commerce entity can provide support services to the sellers, such as logistics, payment collections and facilitation in conformity with Reserve Bank of India guidelines, warehousing, order fulfilment, call centre and other services;

4. The e-commerce entity will not permit more than 25% sales through the platform from one vendor or its group companies;

5. The sellers will at all times own the inventory. Further, after-sales service, delivery of goods to the customer, customer satisfaction and warrantee/guarantee of goods and services sold will be the seller’s responsibility. There appears to be a conflict between the conditions prescribed since support services also include logistics/delivery of goods by the e-commerce entity; and

6. E-commerce entity will not directly or indirectly influence the sale price of goods or services, and shall maintain a level playing field.

The recent move by the government has definitely led to increased investor confidence in the e-commerce sector, and in the government’s vision for this sector. There are still questions to be answered. However, with the sector, the policy will also evolve with time.

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Celebrities: Just what are their personality rights?

Image/personality rights, also known as the right to publicity, protects against the unauthorised appropriation of an individual's persona, which would result in an unearned commercial gain to another. In the field of sports, the unauthorised use of the image/personality for a commercial purpose would result in infringement of the individual sportsperson's image or personality rights.

The right to publicity does not constitute a statutory right in India. Indian courts (at the level of the High Court) have recognized the right to publicity and laid down essential components for its infringement. The Supreme Court has not yet disposed of a case pertaining to this right.

LEGAL SOURCES
There is no specific legislation in India to protect image or personality rights. Through various judgments, especially ICC Development (International) v Arvee Enterprises, the Indian courts have read the right to publicity into articles 19 and 21 of the Indian constitution by calling it an inherent part of the right to privacy, an established constitutional right. Further, image or personality rights are a form of intellectual property (IP) rights, which can survive even after the death of the individual.

Image or personality rights recognize the commercial value of the picture representation of a prominent person, performer or sportsperson, and protect their proprietary interest in the profitability of their public reputation or persona.

In Europe, organizations have used player's image and personality rights to generate huge revenues. In September 2013, Real Madrid bought Welsh footballer Gareth Bale for a world record transfer fee of £85.3 million (US$105.3 million). Bale in return assigned 50% of his image rights to Real Madrid, which eventually helped the club to recover the massive investment by using his image rights for the sale of merchandise and other product endorsements.

This also affects the wage structure of a player with the club, where a figure is agreed on to split wages and payments for image rights. Players such as David Beckham and Wayne Rooney have even found ways to be tax-efficient by incorporating companies to hold their image rights.

If the name, image or the likeness of a person is registered or used as a trademark, or has been copyrighted, then the said trademark or copyright can be licensed. Some Indian sportspersons, especially famous cricketers such as Sachin Tendulkar and Kapil Dev, have protected their image rights by trademarking their name or domain names for their websites.

JUDICIAL PRECEDENTS
In India, while no specific law has been created in this respect, Indian courts have acknowledged and enforced this right in various cases.

In DM Entertainment v Baby Gift House and Others, the Delhi High Court held that the defendants were liable for false endorsements and for passing off, violating popular Indian singer Daler Mehndi's right to publicity by having toys that were identical to his likeness.

In Titan Industries v M/S Ramkumar Jewellers, the court observed: "When the identity of a famous personality is used in advertising without their permission, the complaint is not that no one should not commercialize their identity, but that the right to control when, where and how their identity is used should vest with the famous personality. The right to control commercial use of human identity is the right to publicity."

An example of the power of image or personality rights is the offer of appointment of Jose Mourinho as manager of England’s Manchester United, bringing two superpowers of the sport, Chelsea and Manchester United, to a halt over the issue of his image or personality rights, as Chelsea held a number of EU trademarks for his name, signature and various other goods, and also owned his image rights. Manchester United finally had to pay an undisclosed sum running into millions of pounds to obtain the image rights.

The protection offered to such image/personality rights of sportspersons in India is still in a nascent stage. For instance, the Indian government had permitted the use of a picture of John Terry, a world renowned footballer who was the captain of England’s national team, on cigarette packets.

With Sachin Tendulkar assigning his image rights for his biography, Playing It My Way, more and more celebrities and sportspersons are following the trend. There is a need for greater exposure, which will lead to more commercial opportunities, which in turn leads to a host of legal issues.

So a statutory codification of the principles of passing off with reference to personality or image rights may lead to greater awareness and protection of the rights that are inherent in celebrities and sportspersons.

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Indonesia is attracting private investment to deal with a chronic infrastructure shortage. The nation is estimated to need about US$400 billion in infrastructure financing, for which the government could only provide 63%, leaving the private sector to fill the gap. In recent years, Indonesia’s government has made efforts to enhance the bankability of public-private partnership (PPP) projects through fiscal and non-fiscal instruments.

PPP-based infrastructure projects in Indonesia are unique in that the project company is eligible for a number of government support initiatives otherwise unavailable to projects undertaken under other schemes. This article lists the tools and measures at the government’s disposal to offer investors an enhancement of a PPP project’s bankability based on existing regulations.

Presidential regulation No. 38 (2015) allows payment mechanisms for PPP projects in the form of: (1) tariff payment; (2) availability payment; and (3) other legally compliant mechanisms to enable returns on investment. The base tariff rate is set based on an investor being able to obtain return on investment, taking into account capital expenditure, operational expenditure and profit margin. Where such base tariff is deemed too high for end users, the government contracting agency may offer viability gap funding.

However, viability gap funding is available only for infrastructure deemed socially important, covers only 50% of the infrastructure construction costs, and a project receiving viability gap funding will not be eligible for availability payment. Previous governments had considered and debated the concept of availability payment – i.e., the payment for an infrastructure facility to be at operational level, without necessarily delivering the goods or services contracted for – in PPP projects. The enactment of regulation No. 38 formalizes availability payment, a step forward in the positivist legal system that is Indonesia.

The government contracting agency can pay for availability payment for projects of high economic and social significance, and where the return of investment on which cannot be adequately obtained from tariff payment. Availability payment is payable only when the infrastructure is deemed operationally ready by the government contracting agency, based on the standards and specifications set in the PPP cooperation agreement.

Indonesia seeks to juggle between offering adequate guarantee against sovereign and sub-sovereign risk, and minimizing direct liability to the government. Consistent with this approach, sovereign risk guarantee is primarily provided by PT Perusahaan Infrastuktur Indonesia (Persero, known in English as the IIGF), an SOE established to provide guarantee against a contracting agency’s defaults.

The IIGF guarantees the project company against a government contracting agency’s non-payment caused by risk allocated to the contracting agency. Please note that the scope and category of risks guaranteed by the IIGF refers to its risk allocation guideline, which is regularly updated. To put a guarantee into force, non-payment caused by the guaranteed risk must have occurred. The IIGF will pay to the project company the sum payable by the contracting agency, and will in turn recourse against the non-paying government contracting agency. As such, at least in theory, the project company would be shielded from contracting agency defaults.

Viability gap funding is granted to enhance the financial feasibility of a project. It is granted by Indonesia’s Minister of Finance for the purpose of covering a certain portion of construction costs (e.g., materials, installations, and construction loan interests). Only projects that are financially feasible but for the viability gap funding will be eligible. In addition, the Ministry of Finance needs to be satisfied that the following criteria are met:

- The project applies the user-pays principle;
- The investment value is at least 100 billion Indonesian rupiah (US$7.5 million);
- The project company is established by the winner of a competitive project tender;
- The project scheme is BOT (build-operate-transfer);
- The feasibility study demonstrates:
  - (1) optimum risk allocation between the government contracting agency and the winning bidder;
  - (2) economic feasibility of the project, covering technical, legal, environmental and social aspects; and
  - (3) the project becomes financially feasible if the viability gap funding is granted.

Notwithstanding all the above measures available for the government to enhance a PPP project’s bankability, PPPs generally have not progressed as fast as those financed purely through the government budget. Reasons for this include: there are additional feasibility studies that need to be concluded regarding the contracting model; the amount of guarantee and funding that the government will commit to; the financial and economic feasibilities of the project; and the risk allocations.

The authors are encouraged to see that the government has made available these regulatory tools, an important step before it can make financial commitments to projects. Feasibility studies will soon be finalized and projects will then move on to the tender stage.

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BVI companies well set to invest in Indonesia

The British Virgin Islands (BVI) company has long been a vehicle of choice for Indonesian corporate and finance deals. Foreign direct investment (FDI) into Indonesia structured through BVI entities totalled US$157.4 million in Q1 of 2014 in respect of 70 projects. This put the BVI ninth in terms of FDI into Indonesia, behind only such financial heavyweights as the US and Hong Kong, and traditional trading partners such as the Netherlands. BVI companies are involved in large-scale, tangible and valuable projects in Indonesia across a spectrum of sectors including mining, retail, and the food industry, and bring the corresponding benefits of FDI injection into these areas.

Investors into Indonesia remain attracted to the BVI for its common-law legal principles, administrative simplicity and ability to ring-fence liabilities. BVI as a jurisdiction is recognized by regulators worldwide, enabling investors to exit through a private sale or a listing on a major stock exchange. BVI companies can list their shares on major international stock exchanges, including the London Stock Exchange, the New York Stock Exchange and the Tokyo Stock Exchange.

The BVI does not impose a double layer of tax or regulation. BVI companies are flexible in their structure and handling, and there are few prescriptive statutory requirements. Ultimately, a BVI business company will be more flexible in operation, particularly if the company needs to raise equity finance for working capital purposes. The incorporation and ongoing costs of using a BVI company are low, while high standards are maintained as required by the International Organization of Securities Commissions (IOSCO), of which the Financial Services Commission in the BVI is a member.

The BVI has established robust business-friendly corporate jurisprudence with an ultimate appeal to the Privy Council in the UK. A large volume of international joint venture disputes pass through the courts in the BVI, with The Economist noting that “the courts in the British Virgin Islands hear a good share of all disputes involving international joint ventures”.

Additionally, structuring benefits of using a BVI company include:

- BVI law no longer requires a company to have a share capital, and the concept of capital maintenance has been abolished;
- Flexibility to upstream profits via dividend, subject to a simple solvency test;
- A BVI company may acquire the shares of a member and there are no financial assistance restrictions;
- BVI law permits creation of the parties’ desired voting majorities for approving corporate matters, and is not restricted to prescribed statutory majorities;
- A wide variety of transactions may be carried out by way of a court-approved scheme or plan of arrangement;
- Shares in a BVI company can easily be granted as security; and
- BVI companies may merge with one or more BVI or foreign companies, and the surviving company may be in a foreign jurisdiction, and a BVI company may migrate from the BVI to another jurisdiction.

ON THE GROUND IN INDONESIA

While Indonesian companies can have different share classes, preference and other share class structures remain uncommon and somewhat untested in Indonesian courts. Local Indonesian law firms advise that “deal execution risk is significantly increased, from an Indonesian regulatory perspective, if a complex capital structure involving multiple types of shares is used”.

This risk can be mitigated if the complex capital structure is at the offshore holding company level. The ability of a BVI company to create separate share classes is enshrined in BVI legislation. BVI companies can provide a low-cost, minimal regulation, tried-and-court-tested mechanism to incorporate a non-vanilla capital structure.

Should an investor require collateral for investment, enforcing security over Indonesian assets can prove to be problematic. Enforcement always requires registration and enforcement in Indonesia. One solution is to have a BVI company act as the holding company for Indonesian assets. The shares in a BVI company can easily be mortgaged, such that upon enforcement the investor obtains control of the structure without requiring any action at the Indonesian level. The security documentation can be governed by the same governing law as the relevant transactional documentation (typically English or Singaporean law).

Indonesian companies are subject to various Indonesian regulatory authorities, including the Capital Investment Co-ordinating Board and the Ministry of Law and Human Rights. While an investment into Indonesia will always involve some Indonesian regulatory considerations, having financing and joint venture arrangements at the offshore BVI holding company may provide a more efficient structure for international investors and cross-border transactions.

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Chinese companies active in Asian infrastructure

The One Belt, One Road (OBOR) initiative accelerated during 2016. According to China’s Ministry of Commerce (MOFCOM) statistics, from January to November Chinese companies participated in 53 OBOR direct investment projects with a cumulative investment of US$13.35 billion, primarily investing in Singapore, Indonesia, India, Thailand, Malaysia, Vietnam, Laos, Iran and Russia. In the construction and engineering industries, Chinese companies signed 7,367 construction contracts relating to countries along OBOR with a cumulative value of US$100.36 billion across many industries including roads, railways, oil pipelines, energy, ports, development zones, business logistics centres, and economic and trade cooperation zones.

One of the main restrictions on economic development in Asia is inadequate and differing infrastructure, which causes disparate market conditions. China’s OBOR initiative will greatly promote Asian infrastructure construction and energy collaboration to the mutual benefit of countries along OBOR, while at the same time promoting opportunities for Chinese companies to go abroad.

Although the OBOR initiative is an attractive opportunity, in practice Chinese companies participating in outbound infrastructure construction projects should understand the varying political, economic, local market and legal systems within Asia, as well as the target country’s own politics, economy, law, culture, environment and work culture. During this familiarization process, companies should first perform comprehensive due diligence of the economic and legal environment, and explore different methods to communicate with the related government administrations, such as during negotiations.

Looking back on many failed outbound projects, it is apparent that missing just a minor detail during due diligence for these projects may result in billions of dollars in losses. For example, the authors provided legal services relating to an Indonesian oil pipeline project. During the initial stages of this project, the client engaged in several rounds of negotiations with its Indonesian partner and other local parties. After these negotiations the client believed that there were no major problems to its participation in the project, and planned to collaborate with an Indonesian partner to jointly act as the project owner, introduce a Chinese construction company to perform the related EPC construction work for the pipeline, and then, after the pipeline had been completed, rent the pipeline out to an Indonesian oil company.

However, after the client engaged our firm, we promptly performed due diligence on the required approvals and informed the client that, although Indonesia does not restrict foreign operation of oil pipelines, it does have restrictions on foreigners performing construction work for pipelines. Specifically, Indonesia does not allow foreign entities to perform onshore oil pipeline construction work. Since the majority of the contemplated oil pipeline would be on land, the prohibition on foreigners building onshore oil pipelines had a tremendous impact on the client’s original plan to introduce a Chinese construction company, as well as wasted a substantial amount of time, energy and capital.

Outbound projects abound in opportunities, obstacles, risks and profits, and pose numerous difficulties for traditional Chinese companies in how they operate, invest, and hire managers and other key staff (such as ensuring that related employees are appropriate for outbound investment projects). The need for improvement is particularly clear for state-owned companies investing abroad, such as, for example, increasing the effectiveness of their internal investment approval procedures.

As a legal services institution that assists companies going abroad, we also face similar obstacles with law firms from other countries such as culture, legal structure (including capped fees versus hourly rates, as well as related assumptions) and work methods, particularly the disparity between legal service quality, such as when comparing developed and undeveloped jurisdictions.

These differences test Chinese law firms and their management (which act as overall legal service coordinators), such as how to communicate with local firms to provide effective, unified and professional legal services. The authors and their legal team have participated in dozens of outbound investment projects and for each project have selected and engaged local law firms to collaborate with to provide comprehensive legal services including legal due diligence, determining transactional structure design, drafting transactional documents, and accompanying clients during on-site visits to meet with the local government and local partners.

Through these experiences, abundant practical knowledge can be accumulated, including how to supervise and collaborate with local legal counsel and, as Chinese attorneys, how to incorporate the clients’ goals and requirements into tailored legal services, build extensive bridges with local attorneys, etc., with the overall purpose of assisting Chinese companies going abroad.

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Implementation of Data Privacy Act in full swing

Since 2012, the Philippines has had a comprehensive law governing personal data privacy – Republic Act No. 10173, or the Philippine Data Privacy Act of 2012. However, its full implementation was not realized until the National Privacy Commission (NPC) was officially constituted in the early part of this year. The Implementing Rules & Regulations (IRR) of the act was promulgated on 24 August, 2016.

This is the comprehensive law that governs data privacy protection in the Philippines. With the release of the IRR and the creation of the NPC – the primary agency tasked to oversee the administration of the act – implementation of personal data privacy protection in the Philippines is coming into full swing.

REGISTRATION REQUIREMENTS
Under the IRR, compliance with the following registration requirements must be completed within a period of one year from the date of effectivity of the IRR (9 September, 2016):

1. Registration of personal data processing systems (whether automated or non-automated) that involves accessing or requiring sensitive personal information of at least 1,000 individuals; and

2. Registration of automated processing operations subject to notification, where the automated processing becomes the sole basis of making decisions that would significantly affect the data subject.

The Data Privacy Act and the IRR define "sensitive personal information" as personal information about: one’s race; marital status; age; colour; religious, philosophical or political affiliations; health and education; any court proceedings; information issued by government agencies peculiar to an individual (e.g., social security numbers, health records, licences and tax returns); and those specifically declared as classified, by law or regulation.

EXTENSIONS POSSIBLE
The period to comply with the above-mentioned may be extended by the NPC upon request, and with good cause shown. Additional registration requirements may be imposed by the NPC through issuances and circulars, including guidelines that will provide for procedures in complying with the current registration requirements mentioned above.

The IRR also fleshes out the act’s provisions on data breach. It is required that notification must be given by the personal information controller to the NPC and the affected data subjects within 72 hours, upon knowledge of, or when there is reasonable belief, that the following have been acquired by an unauthorized person, and that such an unauthorized acquisition is likely to give rise to a real risk of serious harm to any affected data subject:

1. Sensitive personal information; or
2. Any other information that may, under the circumstances, be used to enable identity fraud.

NOTIFICATION DELAYS
Notification can be delayed only to the extent necessary to determine the scope of the breach, to prevent further disclosures, or to restore reasonable integrity to the information and communications system. Failure to comply with this duty of providing data breach notification, if determined to be unjustified, may constitute concealment of security incident/data breach sanctioned under the act (subjected to mandatory fine and imprisonment).

The IRR also regulates outsourcing and subcontracting agreements between personal information controllers and personal information processors. It provides for stipulations that must appear in any outsourcing and subcontracting agreements that involve processing of personal data. The IRR also defines the term "data sharing" to mean any disclosure or transfer to a third party of personal data under the custody of a personal information controller or processor.

CONSENT REQUIRED
Generally, data sharing must require the consent of the data subject, even if the data is to be shared between related companies, affiliates, and other similar relationships. If data sharing will be for commercial purposes (e.g., direct marketing), it must be covered by a data sharing agreement.

The NPC promises to be open to comments/suggestions from industry stakeholders, and responsive to their needs and concerns. Although the NPC will be releasing several official circulars, rules and issuances that will serve as guidelines for proper compliance, it is hoped that the initial stages of implementing the act will be a learning experience, as well as an adjustment stage among the relevant sectors in the Philippines.

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The investor’s purpose in VC, funds industries

"Techventure" kicked off in September this year to great fanfare. Many who attended the event could not help but agree that the start-up space in Singapore is brimming with opportunity and has never been more vibrant. The Singapore government signified its endorsement not only with Deputy Prime Minister Teo Chee Hean gracing the event’s opening ceremony, but also with his announcing of disruptive innovation as part of the overall budget for the entrepreneurial sector at a whopping $19 billion (US$13.7 billion). It was an affirming display of the direction that Singapore has charted towards establishing a robust start-up and technology innovation ecosystem.

Recent years have witnessed numerous government-led initiatives spawing the start-up space along with foreign stakeholders. Notably, NUS Enterprise, the leading player in pairing start-ups with funds, recently partnered with unBound Media to host a platform for discussing the latest trends in global and Asian innovation. Such efforts have provided start-ups with vital financial support.

At Techventure, the National Research Foundation launched the new SWITCH programme in partnership with SLUSH from Finland. New support initiatives are reported almost weekly as the collaboration between funds and start-ups strengthens amidst the flourishing start-up scene. Mentions of Block 71 and Block 79 have found their way even into the US through start-up publications and paraphernalia there.

The interest from investors is clear for all to see. Securing investor confidence, it is suggested, stems from the attitude and mind-set of start-ups and their founders. The start-up mentality is widely viewed as the most important consideration behind the investment decision-making process of funds and venture capitalists.

The authors have worked with these funds and observe that what investors really look for, apart from the appeal of the product or invention of the start-up, is the mind-set of the founder. The founder has to be someone they can mentor and work with, and they are looking for humility and the ability to appreciate investor concerns.

An understanding of core investment concerns is crucial for the budding start-up. Many do not grasp that funding is not solely motivated by the popularity of the enterprise or its product. Funds have their own mandate to assess the prospects of start-ups, notwithstanding attention they may receive. “It’s a great time for start-ups and I wish we could be involved now as a start-up,” remarked Royston Tay, one of the co-founders of Zopim, which was eventually bought out by the US-based Zendesk. Tay presently plies his trade in an investment fund keen to uncover the next “big thing”. Asked about the types of start-ups he would collaborate with now that he is in funding, he explained that he would gravitate towards an enterprise that not only boasts aspirations but also is in tune with the funding concerns that at times prompt investors and funds to

"interfere" in the businesses in which they have placed a stake.

In general, venture capitalists and funds are adamant that if a start-up has a promising product, but its founders prove impossible to work with, they will not hesitate to drop the start-up. The journey together can be a long one and the start-up must share in the purpose of its funding partner. Investors and funds have much to offer the start-up in terms of spearheading growth through:

- Adding value to the start-up by broadening their network and expertise;
- Offering strategic business planning;
- Opening business doors; and
- Creating international footprints.

As for the fear of “interference”, it should be noted that investors or funds are typically granted corporate rights under an investment agreement with the start-up, which include:

- Right to appoint a nominee director and alternate director, as well as a representative on the start-up’s committees;
- Right to appoint observers to the board and committee meetings;
- Right to information;
- Veto or approval rights;
- Right of redemption of preference shares (in the event of default); and
- Right to appoint an authorised cheque signatory.

The authors speak regularly with funds looking to invest in the next disruptive medical device or application, and observe that the investor/start-up relationship can be evinced from the way both sides work together. Syphne, for example, is a start-up that has developed a portable unit to manage stroke patients from the home. The synergy between the various stakeholders in Syphne is evident in the steps taken by the start-up to allay investor concerns at every stage of the project, which in turn translates into investor confidence. This is the key to a successful co-existence.

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VC and Thai corporations: Navigating local law

As the venture capital (VC) market continues to grow, Thai start-ups are a natural focus for VC firms interested in Southeast Asian investment. Start-ups making use of new technology have a need for initial capital, are interested in disrupting existing markets, and offer potentially large equity returns on investment – a perfect asset for the investment portfolio of many VCs, which have the available capital to seed new ventures and bet on the next new thing, rather than financing existing and well-seasoned companies.

This perfect asset is not always a perfect fit, however, due to several quirks of the Thai legal system. As you will see, Thai law does not recognize the full spectrum of equity and debt relationships that exist in other legal systems such as Singapore, Europe, or the US. The outlier status of Thailand in this regard necessitates an alternative approach, which fortunately includes positive knock-on effects.

The standard business model of a VC firm involves financing a number of new companies with the hope of realizing significant gains from enough of them to be profitable. VCs are in the business of providing financing at an early stage, and then letting their companies innovate, experiment and expand. And while VCs have to be great at spotting the companies that will become successful, they don’t need to, or even particularly want to, take an active role in managing their companies.

Venture capitalists want new companies that think differently and create new products or services; they don’t want to squelch that creativity – they want to harness it. Typical VC investments embody this philosophy in several ways, often by making the VC financier into a sort of silent investor that takes no active role in management but enjoys the rights to profit from the company’s future growth – for instance, at the time of the company’s IPO.

Legal instruments such as warrants and call options, future equity grants, employee stock option agreements, convertible notes, and hybrid debt instruments offer investors a possible future equity position in exchange for early-stage financing, while preserving the management structure of the existing start-up as much as possible. Companies in the VC firm’s portfolio keep their existing management team and management style, and their VC sponsors get the chance to participate in future profits, which can be huge.

These legal relationships are murky at times, occupying neither a pure “debt” nor “equity” position in the corporate books. Yet they have been recognized by US, Australian and European legal systems, and VC firms and other investors in those jurisdictions frequently make use of these instruments.

Technical legal factors create several obstacles to VC business in Thailand – but also offer a way forward for investors who can structure investments creatively. Specifically, Thai law can restrict the ability of local corporations to issue many of the hybrid or future equity positions VCs so often use. An ideal work-around is made possible by the Thai Board of Investment (BOI) and several imaginative business structures.

Foreign investors are permitted to own domestic companies with approval from the BOI, an agency tasked with encouraging foreign investment in Thai businesses. However, and crucially, the ability under the BOI for an overseas holding company to hold 100% of a Thai company permits a neat work-around for this situation.

Alternatively, this foreign ownership stake can be accomplished through a foreign business licence (FBL). With approval for a 100% foreign owner of a Thai company under the BOI or through an FBL, a holding company in (for example) Singapore can then own the domestic Thai company and issue equity interests of its own stock – including hybrid and future equity interests not permitted under Thai law – to the VC, employees and other shareholders. This corporate structure complies with Thai business law while preserving the nimble ownership model preferred by VC investors.

Several tax advantages are available to companies adopting this structure. In addition to permitting a broader spectrum of investment types, other jurisdictions may have different tax rates on corporate or individual incomes. By creating an offshore investment vehicle for a Thai company, in a location which has double tax agreements with Thailand already in place, the investor is able to reduce withholding tax on profits and dividends.

Investors can allocate the management functions of the enterprise between jurisdictions to realize income where the tax rates are the most advantageous, and otherwise structure the company to maximize profitability and shareholder returns.

International investment and cross-border transactions necessarily involve the combination of different legal regimes, and picking and choosing between different jurisdictions. Quirks in the law make the process of investing more interesting, but they need not make it more difficult. Thailand’s system of foreign investment includes a host of challenges – but with a close understanding of relevant laws, it also allows a compelling way forward.

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