

# iHc

In-House Community  
Magazine



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Regional General Counsel at  
Egis Asia Pacific



**PRIVATE PRACTICE INSIGHTS**

The ever-changing Thailand  
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**PHILIPPINES**

Institutionalizing Arbitration  
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Boom Times Across Asia Pacific



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We talk to Sesto E Vecchi of  
Russin & Vecchi about M&A  
in Vietnam



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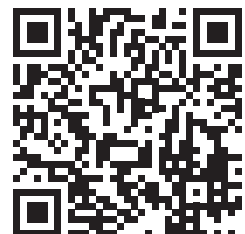


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Charles heads the international M&A and private equity team in Asia. He focuses on complex regional and global cross-border transactions and investments. He has represented clients on acquisitions, disposals, joint ventures, restructurings and financing transactions involving almost every jurisdiction the Asia-Pacific region.



**Sesto E Vecchi**

Sesto has over 35 years experience practicing law in Vietnam. His expertise includes corporate, commercial law with particular emphasis on foreign investment. He acts for numerous multinational and mid-size investors, both foreign and Vietnamese. He has written and spoken extensively on Vietnamese legal issues.



**Roderick Lai**

Rod is a Partner in the corporate team in Hong Kong and principally acts on cross border M&A, private equity backed deals and joint ventures.



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Kristin Siao is a highly regarded Corporate and M&A Partner of V&A Law, with complementary expertise in Tax and Competition Laws. She previously acted as general counsel for a leading renewable energy company in the Philippines.



**Jack Cai**

Jack is the Managing Partner of Eversheds Sutherland's Shanghai office. He specialises in cross-border mergers and acquisitions, China-related investments, employment law, general commercial law, data privacy, corporate restructuring and general corporate and regulatory advisory.

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# Institutionalizing Arbitration of Intra-Corporate Disputes

BY JOHN FREDERICK E. DERIJE



Republic Act No. 11232, or the Revised Corporation Code of the Philippines (RCC), came into force on 23 February 2019. One of its salient features is the provision on institutionalising arbitration of intra-corporate disputes. These are conflicts arising from intra-corporate relations, relationships between or among stockholders of the same corporation, or relationships between the stockholders and the corporation.

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

It is good that Section 181 of the RCC allows for an arbitration agreement in the articles of incorporation or bylaws of a corporation to enable parties to refer to arbitration any dispute between the corporation, its stockholders or members arising from the implementation of the articles of incorporation or bylaws, or from intra-corporate relations. The institutionalisation of arbitration of intra-corporate disputes animates the state policy to encourage and actively promote the Alternative Dispute Resolution (ADR) as a way to achieve speedy and impartial justice and to declog court dockets. The RCC states that an arbitration agreement in the corporation's

articles of incorporation or bylaws shall be binding on the corporation, its directors, trustees, officers and executives or managers.

### **ENFORCEABILITY AND ENFORCEMENT OF THE ARBITRATION AGREEMENT**

To be enforceable, the arbitration agreement should 1) indicate the number of arbitrators, 2) indicate the procedure for the appointment of the arbitrator(s), and 3) designate a third-party which shall have the power to appoint the arbitrator(s) forming the arbitral tribunal.

Under the RCC, the court in which an intra-corporate dispute is filed is empowered to dismiss the case before the termination of the pretrial conference, if the court determines an arbitration Agreement is written in the corporation's articles of incorporation, bylaws or in a separate agreement. On the other hand, the Securities and Exchange Commission (SEC) is given the power to appoint the arbitrator(s), upon request of the parties to the arbitration, should the designated third-party fail to appoint arbitrators in the manner and within the period specified in the agreement. The RCC also requires that arbitrators must be accredited or must belong to accredited arbitration organisations. The law also empowers the arbitral tribunal to grant interim measures necessary to ensure enforcement of the decision or award, prevent a miscarriage of justice or protect the rights of the parties.

## ESSENTIAL ELEMENTS OF AN ARBITRATION AGREEMENT

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

- a. *Scope.* The arbitration agreement should be broad enough to cover not only intra-corporate disputes but also matters which may be directly, or indirectly, related to a intra-corporate dispute. This would ensure a wide array of disputes within the corporation shall remain subject to arbitration and eliminate (or at least substantially reduce) possible court cases between the corporation and its stakeholders.
- b. *Choosing the right arbitration mechanism/procedure and selecting an arbitration body.* Arbitration in the Philippines can be ad hoc or institutional. In an ad hoc arbitration, the proceeding is administered by an arbitrator or the parties. An arbitration administered by an institution is regarded as ad hoc if the institution is not a permanent or regular arbitration institution in the Philippines. An institutional arbitration is administered by an entity registered as a domestic corporation with the SEC and engaged in arbitration of disputes in the Philippines on a regular and permanent basis.
  - *Ad hoc arbitration.* If the corporation chooses an ad hoc arbitration, the general provisions of the Arbitration Law and Department of Justice Circular No. 98 (DOJ Circular No. 98) or the 2004
- c. *Rules of evidence.* The rules of evidence in arbitration should be more flexible than those in civil cases. The corporation may opt to incorporate in the agreement that any evidence a reasonable mind could accept as adequate to support a conclusion should be admitted as evidence.
- d. *Arbiter/arbitral body selection.* The corporation should decide the number of arbitrators, their qualifications, method of selection and other conditions which the corporation deemed necessary. When the corporation adopts the institutional arbitration rules and procedures, the provisions related to the selection of arbiters may be modified accordingly by the agreement.

Implementing Rules and Regulations of the Alternative Dispute Resolution Act will generally apply in the absence of an in-house arbitration rule/procedure governing the intra-corporate disputes. The corporation can also opt to adopt the arbitration rules and procedures of the United Nations Commission on International Trade Law (UNCITRAL) Model Law or those governing institutional arbitration through the Philippine Dispute Resolution Center (PDRCI) and the Philippine International Center for Conflict Resolution (PICCR). To strengthen party autonomy however, the corporation may adopt its own in-house arbitration rules and procedures.

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



- e. *Venue of the arbitration.* The corporation should choose a venue generally convenient for the possible parties and the most cost-efficient for the corporation. The most common venue is the principal place of business of the corporation.
- f. *Time frame/periods.* The corporation should set the most expeditious, but realistic, time frame for the entire proceedings, from commencement to hearing, up to the period for rendering the decision.
- g. *Governing Law.* The corporation should indicate laws of the Philippines as governing law since both the venue of the arbitration and the place of enforcement of the decision will be the Philippines.
- h. *Limitations on damages and allocation of fees and costs.* It is prudent to incorporate in the agreement a cap on the amount of other damages which may be awarded, apart from actual/compensatory damages, which may be akin to a provision on liquidated damages, and a specific amount to cover interests, when applicable. Further, delineate the costs and fees to be shared equally by the parties, from the costs/fees which each party should solely bear. Such limitations shall give the parties more control over, and/or opportunity to manage, the shared and independent costs of the proceedings. The costs of arbitration are usually borne by the unsuccessful party.
- i. *Enforcement.* While the RCC indicates an arbitration agreement shall be binding on the corporation, its directors, trustees, officers and executives or managers, the corporation should ensure that enforcement of the decision or award shall be done with ease, regardless of who receives the more favorable verdict.
- j. *Confidentiality.* Although the arbiters and the parties are generally subject to an obligation of confidentiality and the arbitral proceedings are in most cases held in private, the corporation can incorporate a provision reinforcing confidentiality in the agreement, along with a remedy for violation of the confidentiality requirement, such as injunction, damages or annulment of award.

### **BENEFITS OF ARBITRATION OF INTRA-CORPORATE DISPUTES**

By enabling the amicable resolution of disputes through arbitration, the parties provide solutions that are less time-consuming, less tedious, less confrontational and more productive of goodwill and lasting relationships. (LM Power Engineering Corporation v. Capitol Industrial Construction Groups, Inc., G.R. No. 141833, 26 March 2003, 399 SCRA 562)

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



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## NEWS

## Baker McKenzie's AI practice unveils new report into child detention

A new AI tool created in Baker McKenzie's fledgling machine learning practice hopes its first major report will reveal more about the impact of child detention around the world.

*Reinvent Social Impact: Child Detention* is an AI-driven study looking into child detention and family separation. The study identifies links between child detention and unintended negative consequences for detained children and the authorities detaining them.

The report uses data science and technology built by the firm's AI partner SparkBeyond

and is a result of Baker McKenzie's recently announced machine learning practice, run by co-Founders Danielle Benecke and Brian Kuhn.

The report shows how detention hurts children's cognitive functions, physical development and long-term health. Detained children are often victims of violence, frequently denied nutrition, excluded from education and recreation and fail to develop vital social skills such as self-control and conflict resolution.

A Baker McKenzie spokeswoman said evidence for all this was known by sociologists for many years, but the research is widely dispersed in thousands of studies, journal



## NEWS

articles, academic research papers, news sources and government websites.

But now that AI-powered technology has advanced sufficiently, a project like this can systematically analyse each piece of sociological data to create a comprehensive bank of insights.

The motivation to build the tool, she said, is because Baker McKenzie wants to “raise awareness about children’s rights” so different communities can understand and protect those rights.

“Yes, we are business lawyers who work to advance the business objectives of our corporate clients around the globe. But that is not all we are. Pro bono work is part of our obligation as lawyers, as professionals and as global citizens. It is part of our firm’s DNA,” the spokeswoman said.

Baker McKenzie chief innovation officer Ben Allgrove said the project proves that both legal domain expertise and machine learning can be combined to uncover solutions to complex social issues.

“By bringing machine learning and data science into a law firm proved we can quickly bring a more accurate understanding of cause and consequence to inform policy, public opinion and advocacy on behalf of these children. We can scale the impact of our pro bono efforts,” Allgrove said.

SparkBeyond research lead Roey Tzezana said the tool demonstrated the company’s AI engine is largely free of bias and emotion and can quickly see alternate perspectives that are important to the public and to policy makers.

The project analysed 400 billion web pages and uncovered millions of points of evidence

linking child detention to a host of unintended consequences. The detrimental links between child detention and health, for example, were featured in more than 10 million publications. More than 100,000 evidence points alone connected detention to anxiety and depression.

Top findings from the Child Detention project include:

- While the media focuses largely on the immediate tragedy, the long-term consequences of child detention are highly damaging to the children — and costly to society;
- While the stated purpose of child detention is often related to safety, the effect can be to decrease the safety of a community as well as for the child;
- Government officials and agencies should consider the full range of enduring negative consequences of child detention in many spheres, from mental health to crime and net cost to society.

Cedric Foussard, global initiative coordinator at Terre des hommes, a Children’s Rights organisation, said the tool offers new ways to address child detention.

“By studying a huge volume of research from all over the world, we now have concrete information on the thousands of children impacted by detention, and the consequences to society.”

Baker McKenzie Partner and head of Pro Bono practice Angela Vigil said the firm is also asking non-government organisations (NGOs) to outline what the firm could look at next, as part of its Reinvent Social Impact initiative.

## NEWS

“We want to help NGOs and other advocates make more nations aware of the negative impacts of child detention, to at least limit the behaviour, if not end it entirely,” Vigil said.

The tool will be demonstrated at this year’s World Congress on Justice with Children.

Baker McKenzie has delivered multiple high-quality pro bono projects in the past few years.

In 2020, it launched a partnership with leading organisations including the Centre for International Rights to create the Youth Rights Resource Compass. The website directs young people, as well as those who advocate for them, to the entities, organisations, governments and other agencies that are open and available to them.

It also has created a partnership with the Consortium for Street Children to launch a Street Youth Atlas – an online database documenting street child law across the globe.

Other ongoing projects include attempts to address racism in encounters between law enforcement or security forces and young people.

## Pinsent Masons appoints head of corporate for Asia Pacific

Pinsent Masons has appointed Singapore-based partner Nicholas Hanna as its new head of corporate, Asia Pacific.

Nicholas will be a key member of the firm’s transactional services global leadership team. The team will focus on growth, enhancing the service to clients across key sectors and delivering greater connectivity between the regions, with the aim of providing the firm’s clients with seamless service globally, all the while still retaining the firm’s identity as a purpose-led, professional services business with law at its core.

Nicholas joined the firm in July 2020 from K&L Gates. His practice focuses on equity capital markets, private equity, joint ventures, as well as cross border M&A and restructuring transactions.

“Since joining the firm, Nicholas has helped drive forward our business in the region, working closely and collaboratively with other colleagues to ensure that we continue to provide our valued clients with the high quality of advice and service that they have become accustomed to. Nicholas is a great addition to my team, as he brings with him a wealth of skills and knowledge. I very much look forward to working closely with Nicholas,” said Hammad Akhtar, head of Transaction Services.

## NEWS

## Simmons & Simmons launches £100,000 GreenTech Fund



Simmons & Simmons has launched a new GreenTech Fund, which will support start-ups focused on using technology to mitigate the climate and biodiversity emergencies.

The fund will award £100,000 (US\$136,126) worth of legal advice from across the firm's network to four businesses that are innovating to try and avoid, or limit, the worst effects of the climate crisis.

The GreenTech Fund is now open to applications from businesses, who seek to utilize technology to restore environmental balance and biodiversity, and to tackle climate change.

Applicants are invited to share their entries via video from November 2, 2021 until December 31, 2021. Eligibility criteria and the application process can be found on the Simmons website.

The initiative is being led by members of the firm's environmental sustainability network (the green room), and involves a collaboration with a number of investors, accelerators and incubators who have a particular focus on sustainability, including Techstars, Entrepreneur First and Illuminate Financial.

The GreenTech Fund is an evolution of the FinTech fund that Simmons launched in 2016 to support early stage FinTech businesses navigate the legal problems faced by many fast growth companies in their early years. Marshmallow, one of the UK's most recent FinTech unicorns, is a testament to the initiative's success.



## NEWS

“In common with many organizations, Simmons is looking for ways to maximize its positive impact, and the GreenTech Fund is an attempt to achieve that by sharing our skills with businesses that are actively seeking solutions to the crisis in which we find ourselves. We will need multiple solutions and we firmly believe that collaboration is our best hope,” said Ali Crosthwaite, co-lead of the green room.

Rezso Szabo, partner at Illuminate, also commented:

“We are seeing early stage climate and sustainability technology companies starting to catalyse real change. As a VC fund backing several of such start-ups, we are delighted to be collaborating with Simmons on the GeenTech Fund initiative, aiming to support businesses in this critical space.”

## Dentons to combine with LuatViet in Vietnam

Dentons, the world’s largest law firm, will combine with leading Vietnamese law firm LuatViet, giving Dentons a presence in the key locations of Ho Chi Minh City and Hanoi.

LuatViet has three partners and more than 30 legal professionals. The firm enjoys a strong reputation for world-class legal services in Vietnam. It is widely recognized for leadership in Manufacturing, Real Estate & Construction, Banking & Finance, and individual representation. The combination will lead to significant synergies, in light of Dentons’ strengths in many of these areas.

LuatViet’s reputation as a leading counsel in Vietnam to global clients, coupled with



Dentons’ worldwide reach, will connect services to clients in Vietnam. This proposed combination is a critical milestone, as Dentons continues to build its presence across ASEAN by combining with a highly-esteemed firm with whom it has a long-standing relationship.

LuatViet and Dentons have served clients collaboratively for many years, in practice areas such as Banking and Finance, M&A, and Corporate & Investment. Dentons’ proposed combination with one of the oldest firms in Vietnam is a testimony to years of successful collaboration.

It will further advance Dentons’ strategy to become the leading global law firm in the ASEAN region, helping clients to navigate challenges in five countries in the region, and 205 locations across 81 countries around the world.

## MOVES



Mayer Brown has added **Musonda Kapotwe, Andy Kolacki and Myles Mantle** as partners in

London. Kapotwe and Kolacki join the firm's banking and finance practice, while Mantle joins the project finance team. Joining from Barclays, Kapotwe has extensive experience as an in-house lawyer at two large financial institutions. She has also advised boards, senior management and other stakeholders on large-scale, cross-border regulatory implementation projects. Previously a partner at DLA Piper, Kolacki has represented private credit funds, banks, private equity sponsors and corporate borrowers. He advises on both domestic and international acquisition and leveraged financings, refinancings and restructurings, in relation to senior and subordinated capital structures. A project development and finance lawyer, Mantle advises on the development, financing and acquisition of complex and high-profile energy, offshore, petrochemical, manufacturing and infrastructure projects, mainly in emerging markets. He has worked in Japan, Russia, the UAE, UK, France and Singapore. He will initially be based in London, before relocating to the firm's Tokyo office in early 2022. Prior to joining the firm, he was a partner at Haynes and Boone.



Phoenix Legal has added **Harsh Arora** as a partner to its Delhi office in the firm's banking and finance practice. Arora's current practice includes legal services, with specific focus on banking and finance, restructuring, infrastructure and public-private

partnerships. With over 18 years' experience, he has represented major international and Indian banks, corporations and financial institutions in their debt and equity investments in Indian companies. He has advised on transactions ranging from vanilla banking to structured finance, project finance and M&A. Some clients with whom he has been closely associated include India's Ministry of Defense, SBI Caps, Delhi Mumbai Industrial Corridor Development Corporation, Government of Goa, International Finance Corporation, RECTPCL, Airports Authority of India and CIDCO.



Tiang & Partners has added **Gaven Cheong** as head of investment funds. Joining from Simmons & Simmons Hong Kong, Gaven has over 15 years' of fund formation and Hong Kong regulatory experience. He centres his practice on the establishment and structuring of collective investment schemes and the provision of regulatory advice in relation to investment management activity. He is also a pioneer in the crypto fund formation and regulatory advice space, having helped obtain the first regulatory licenses in Hong Kong for the management of a fund of crypto funds. Gaven advises on the entire lifecycle of investment funds, from inception, restructuring through to termination. He received his Bachelor of Commerce (Accounting and Finance), LLB (Hons) and LLM (Distinction) from the University of Western Australia. He is qualified to practice in Western Australia, Hong Kong and England & Wales. He is fluent in English and Cantonese, and conversant in Mandarin.

## MOVES



Mayer Brown has added leading investment funds partner **Paul Moloney** to its corporate and securities practice in Hong Kong. Moloney has extensive experience advising clients on the establishment of public and private investment funds in Hong Kong, various offshore jurisdictions and Europe. He also advises institutional investors on their investments into funds. Moloney further assists clients in Hong Kong licensing matters, in relation to the Securities and Futures Commission, the Department of Customs and Excise (Money Services Operator licenses), the Companies Registry (Trust and Corporate Services Licenses), and regulatory matters, including managing and implementing large regulatory change projects, the acquisition of licensed entities, cross-border distribution of funds and the launch of innovative products, such as ICO products, cryptocurrency businesses and robo-advisory platforms.



HFW has hired **Euan Pinkerton** as a partner in Saudi Arabia. He joins the firm's Riyadh office from US law firm Baker Botts and will work closely with HFW's transactional teams across the Middle East and globally. Pinkerton advises on finance (conventional, Islamic and capital markets), corporate matters and financial regulation, as well as on the procurement, development and financing of large-scale projects. He has more than 20 years' experience, including a decade living and working full-time in Saudi Arabia, spanning a wide range of sectors, such as infrastructure, energy (including LNG and renewables), petrochemicals, aerospace, defense, transportation and manufacturing.



O'Melveny has added veteran deal-maker **Woojae Kim** as a partner in Seoul. He is a trusted advisor to Korean companies on their outbound, cross-border matters, as well as to international investment banks and private equity clients in major transactions involving Korean businesses. Kim is highly regarded for his broad abilities spanning cross-border M&A, joint ventures, private equity investments, financings and securities offerings. Before joining the firm, he was a partner at one of Korea's largest domestic law firms, and a corporate partner in a top-tier firm in Seoul. Kim also previously practiced in New York and Hong Kong, giving him a rare, Asia-regional and international perspective and approach. He is admitted to practice in New York and is registered as a foreign legal consultant in Korea. He is fluent in English and Korean.



DLA Piper has added **Kristi Swartz** as a partner in its intellectual property and technology practice, based in Hong Kong. She joins from Swartz, Binnersley & Associates, a boutique firm she established in 2018. Prior to this, she was the Hong Kong managing partner of Bryan Cave for five years. Originally a corporate finance lawyer, Swartz has focused on the fintech sector since 2010, and is now a regulatory and licensing expert for fintech businesses. She advises on a broad range of matters for technology and fintech clients, including structuring, licensing and corporate governance, as well as regulation and licensing requirements for digital assets, security and asset-backed digital tokens, stablecoins,



## MOVES

payments, developing equity crowdfunding platforms, robo advisory apps and the structuring, set-up and running of compliant crypto exchanges.



Clifford Chance has added **Alan Yeung** as a partner in Hong Kong. Yeung is a highly-experienced, US-qualified practitioner advising clients for more than 20

years in Asia Pacific. He is widely recognized for his extensive work on many market-leading debt and equity issuances, including high yield and investment grade bond offerings, and IPOs. He joins from Shearman & Sterling,

where he was a partner who advised on debt and equity offerings of securities into the US, high yield and investment grade debt offerings, Rule 144A/Regulation S placements, and liability management transactions. Yeung first worked at Clifford Chance in Hong Kong as an associate from 2000-2005 in the finance and capital markets practices. He received his JD from the University of British Columbia, has a BA in Economics, Asian Studies and International relations from Cornell University, and is fluent in English, Mandarin and Cantonese.

## DEALS

**Allen & Gledhill** has advised **Oversea-Chinese Banking Corporation**, as arranger, and DBS Bank and United Overseas Bank, as dealer, on establishing a S\$1 billion (US\$741m) multicurrency medium term note programme and issue of US\$650 million sustainability-linked notes by Nanyang Technological University (NTU). The notes were issued under NTU's sustainability-linked bond framework, prepared in line with the Sustainability-Linked Bond Principles 2020 by the International Capital Market Association. Partners Margaret Chin and Sunit Chhabra led the firm's team in the transaction.

**Allen & Gledhill** has also advised **CLI Treasury and CapitaLand Investment** on

the establishment of a S\$6 billion (US\$4.4b) euro medium term note programme by CLI Treasury, pursuant to which CLI Treasury may issue notes. Notes issued will be guaranteed by CapitaLand Investment. Partners Tan Tze Gay, Wu Zhaoqi and Sunit Chhabra led the firm's team in the transaction.

**Allen & Gledhill** was the transaction counsel for **JK Global Treasures** on its S\$926.48 million (US\$687.4m) voluntary unconditional cash offer for Fragrance Group. Following the close of the offer on September 10, Fragrance Group was delisted in Singapore on October 6. Partner Lee Kee Yeng led the firm's team in the transaction.

**DEALS**

**Allen & Overy** has advised Thailand-listed **Indorama Ventures** on the issuance of a 10 billion (US\$305m) triple-tranche sustainability-linked bond (SLB) to institutional and high-net-worth investors in Thailand. Bangkok-headquartered Indorama Ventures is the world's largest manufacturer by volume of 100% recyclable polyethylene terephthalate (PET). The triple-tranche structured issuance includes five, seven and 10.5-year tenors, which offer coupon rates from 2.48% to 3.6% per annum. The issuance considers Indorama's Sustainability-Linked Financing Framework, which guides its approach and strategy towards sustainability-linked instruments correlated to the achievement of sustainability performance targets. Bangkok banking practice head partner Stephen Jaggs led the firm's team in the transaction.

**Ashurst** has advised **UBS Australia Branch** and **Merrill Lynch Equities (Australia)**, as the joint lead managers, on the issuance of A\$400 million (US\$297m) 1.6% senior unsecured convertible notes by Australia-listed Flight Centre Travel Group (FLT). The notes are convertible into FLT ordinary shares and have a final maturity date of November 1, 2028. Certain shareholders entered stock borrowing and lending arrangements with an affiliate of UBS Securities Australia, up to an aggregate maximum amount of 20 million FLT shares. Concurrently with the convertible notes issuance, a delta placement of about 3.5 million ordinary shares was executed. The firm also advised the clients on FLT's convertible bond offering in November 2020. Hong Kong partner Jini Lee, supported by Sydney partners Jamie Ng (global markets),

Caroline Smart (global markets), Greg Golding (corporate), Ross Zaurrini (competition) and Vivian Chang (tax), led the firm's team in the transaction.

**AZB & Partners** is advising **Go Digit General Insurance** on the Rs14.86 billion (US\$200m) acquisition of equity stake in the company by Faering Capital Growth Fund III, Faering Capital International Growth Fund III, Ithan Creek Master Investors (Cayman), Wellington Hadley Harbor AIV Master Investors (Cayman) III, SCI Growth Investments III, IIFL Special Opportunities Fund-Series 8, IIFL Monopolistic Market Intermediaries Fund and miscellaneous individual investors and employees of Go Digit. Partners Darshika Kothari and Arvind Ramesh are leading the firm's team in the transaction, which was signed on November 8 and is yet to be completed.

**Baker & McKenzie** has advised **Japan's Pacifico Energy** on an agreement with SSE Renewables on the formation of a jointly owned company that will pursue offshore wind energy development projects in Japan. The creation of this jointly owned company, SSE Pacifico, involved the US\$208 million acquisition by SSE Renewables of an 80% interest in an offshore wind development platform from Pacifico Energy and its affiliates. The acquisition was completed and became effective on October 29. The Japanese government will instal 30-45 GW of offshore wind power by 2040 as part of its plan to achieve carbon neutrality by 2050. SSE Pacifico will collaborate with local communities and authorities

## DEALS

to integrate offshore wind farms with local environments. Tokyo partners Gavin Raftery and Kiyoshi Endo led the firm's team in the transaction.

**Baker McKenzie** has advised **Copenhagen Infrastructure Partners (CIP)**, through its Copenhagen Infrastructure New Markets Fund I (CI NMF), on the acquisition of a 50% interest in a 400 MW portfolio from Auko subsidiary Auko Energy Indonesia, and on related equity funding and joint venture arrangements with Auko. This transaction continues the firm's previous work, advising CIP through its Copenhagen Infrastructure II and Copenhagen Infrastructure III funds as sponsors on the US\$3 billion project development and financing of a 589 MW offshore wind farm project in Taiwan. Under the joint venture, CI NMF and Auko will jointly develop an initial portfolio exceeding 400 MW of onshore wind, solar, and run of river hydro projects in Indonesia. Baker McKenzie Indonesia member firm HHP Law Firm acted as Indonesian and joint international counsel; Singapore member firm Baker McKenzie Wong & Leow (BKWL) acted as Singapore and joint international counsel; and Netherlands member firm Baker McKenzie Amsterdam (BKA) acted as Netherlands counsel. Auko Energy Indonesia was advised by Herbert Smith Freehills. Norman Bissett, HHP partner Nadia Soraya, BKWL principals Kim Hock Ang and Andrew Zaw, and BKA partner Kim Tan led their respective firm's teams in the transaction.

**Baker McKenzie** and its Singapore member firm **Baker McKenzie Wong & Leow** have also acted as lead legal counsel to

**EDP Renewables (EDPR)** on its acquisition, using an agreement with Sunseap major shareholders, of an 87.4% stake in Sunseap for €600 million (US\$680m), which represents an enterprise value of €870 million (US\$986m). Sunseap's portfolio includes 5.5 GW of renewable projects at different stages of development. This investment enhances EDPR's deployment of a portion of its US\$22 billion investment plan through 2025. Between signing and closing, EDPR may upsize its stake to 91.4%. Singapore principals Ashok Lalwani and Kenny Kwan, supported by Baker McKenzie Wong & Leow principals Caryn Ng, Martin David, Kim Hock Ang, Kah Chin Chu, Dennis Lim, Ken Chia, Zhao Yang Ng and Harikumar Pillay, and Baker McKenzie partners Lan Phuong Nguyen (Vietnam) and Ean Mac Pherson (Japan), led the firm's team in the transaction.

**Bird & Bird** has advised **90 Seconds** and its founder on its business combination with Murri Holdings, a special purpose acquisition company (SPAC) sponsored by Bombora Investment Management. With the A\$11 million (US\$8m) fund raise as a result of Bombora's investment, the transaction puts 90 Seconds at a market capitalisation of A\$86 million (US\$63m) ahead of its planned Australia listing. 90 Seconds is a cloud-based corporate video creation company, and its platform is currently being used by more than 13,700 creators. Some of its existing investors include major VC funds Sequoia Capital, AirTree Ventures and SIG. Singapore partner Marcus Chow led the firm's team in the transaction.

**DEALS**

**Clifford Chance** has advised the joint lead managers on the international aspects of **Woolworths Group's** €550 million (US\$638m) 0.37% sustainability-linked fixed rate notes due 2028, A\$350 million (US\$262m) 1.85% sustainability-linked fixed rate notes due 2027, and A\$350 million (US\$262m) 2.75% sustainability-linked fixed rate notes due 2031, under its medium term note programme. The notes are structured with a direct link to Woolworths' sustainability goals to reduce carbon emissions. The joint lead managers included Citigroup, BNP Paribas, HSBC, MUFG, SMBC Nikko, Commonwealth Bank of Australia and Westpac Banking. Partner Mark Chan led the firm's team in the transaction.

**Dentons** has acted as international and Chinese counsel for **Yunnan Communications Investment and Construction Group** on the Regulation S global offering of its

English law-governed US\$100 million 3.8% guaranteed notes due 2026, to be listed in Hong Kong. China Industrial Securities International was the sole global coordinator, while ICBC International, ICBC Asia, Industrial Bank Hong Kong Branch, China Minsheng Banking Corp Hong Kong Branch, Shenwan Hongyuan (HK), Guotai Junan International and Glory Sun Financial were the joint lead managers and joint book-runners. Hong Kong capital markets partners Gordon Ng and Man Chiu Lee and Kunming senior partners Ma Wei and Li An led the firm's team in the transaction.

**JSA** has advised **B Capital** on its US\$50 million Series B investment in EpiFi Technologies, a neo-banking start-up. Post the fundraising, EpiFi will be valued more than US\$300 million. EpiFi Money allows users to directly open a bank account. One of its

## DEALS



unique features is tracking and moderating users' expenses on e-commerce apps. At the backend, Epifi has partnered with Federal Bank for opening of bank accounts. Partner Manvinder Singh led the firm's team in the transaction.

**JSA** has also advised **State Bank of India, Union Bank of India, UCO Bank, Bank of Maharashtra** and **Indian Bank** on a secured term loan facility of R44 billion (US\$578m) extended to MSRDC Tunnels (MTL), a wholly-owned subsidiary of Maharashtra State Road Development Corporation. MTL has been awarded the concession for designing and constructing the missing link of the Mumbai Pune Expressway and augment the existing section of Mumbai Pune Expressway between Khalapur Toll Plaza and Khopoli Exit. The facility will be used for part-financing this project. Partner Dina Wadia,

supported by partner Soumitra Majumdar, led the firm's team in the transaction, which was valued at US\$580.43 million.

**Khaitan & Co** has advised **RPSG Ventures and RP-Sanjiv Goenka Group** on the successful bid for a new Indian Premier League (IPL) franchise. Two new cricket team franchises were being offered through a tender process conducted by the Board of Control for Cricket in India (BCCI). RPSG Ventures was declared as one of the successful bidders. The new franchisee at Lucknow Stadium will be owned and operated, through a newly incorporated company, by RPSG Ventures, along with private/unlisted companies of the RP-Sanjiv Goenka Group. Gross payment for the new franchise is Rs70.9 billion (US\$950m), payable over ten years. With a US\$6 billion asset base and US\$4 billion revenue, the RP-Sanjiv Goenka Group is one

## DEALS

of India's fastest growing conglomerates with a significant global presence. Senior partner Haigreave Khaitan and partners Ashish Razdan and Ashraya Rao led the firm's team in the transaction, announced on October 25.

**Kudun and Partners** has represented **Thammasat University** on the preparation of the licensing agreement with German company Antitoxin which specialises in the development of certified blood-typing reagents for automated and manual applications. Through this collaboration, the research team in Thailand will develop advanced biomedical technologies (Deep Tech) and bring the university's research on biomolecular science to the international market. Partner Kongkoch Yongsavasdikul led the firm's team in the transaction.

**L&L Partners** has acted for **Dr Lal Path Labs (LPL)** on the acquisition of 100% of the equity share capital of Suburban Diagnostics (India) (SDI). LPL is a provider of diagnostic and related healthcare tests and services in India, while SDI is a leading player in the diagnostics business in Western India. The deal was valued at Rs9.25 billion (US\$124m), plus certain performance linked payments capped at Rs2.25 billion (US\$30m). The deal was structured as an auction and LPL emerged as the highest initial bidder. LPL hopes to leverage on SDI's strong consumer and medical brand recognition, wide network and professional management team to further accelerate its growth. Senior partner HS 'Bobby' Chandhoke and partners Shonali Choudhry and Jay Parikh, supported by partners Abdullah Hussain and Rudresh Singh and partner

designate Subhash Bhutoria, led the firm's team in the transaction.

**Maples and Calder** has acted as Cayman Islands counsel to **NIO**, a pioneer and a leading company in the premium smart electric vehicle market in China, on its sale up to US\$2 billion of its US depositary shares, each representing one Class A ordinary share of the company, through an at-the-market equity offering programme to certain sales agent. Partner Lorraine Pao led the firm's team in the transaction, while Skadden, Arps, Slate, Meagher & Flom acted as US counsel. Latham & Watkins acted as US counsel to the sales managers.

**Maples and Calder** has acted as Cayman Islands counsel to medical device company **Broncus Holding** on its IPO of approximately 89.35 million shares, and the listing in Hong Kong. The offering, which closed on September 24, raised about HK\$1.67 billion (US\$214.4m). Partner Derrick Kan led the firm's team in the transaction, while Davis Polk & Wardwell advised on Hong Kong and US laws, and King & Wood Mallesons advised on Chinese law. The joint sponsors, Goldman Sachs and Haitong International Capital and the underwriters were represented by Sullivan & Cromwell (Hong Kong) as to Hong Kong and US laws, Dentons as to Hong Kong law, and Han Kun Law Offices as to Chinese law.

**Paul Hastings** has advised **Goldman Sachs, JP Morgan** and **Samsung Securities**, as the joint book-runners, on the US\$1.3 billion global offering and listing of Kakaopay in Korea. A subsidiary of Kakao Corporation, Kakaopay operates Korea's leading mobile

## DEALS

financial services platform. Corporate partner Dong Chul Kim led the firm's team in the transaction.

**Rajah & Tann Singapore** is advising **Asian Tour** on the establishment of its partnership with LIV Golf Investments to boost the Asian Tour. The partnership will introduce a new premier professional golf league sanctioned by the Asian Tour and has a projected commitment totalling US\$200 million over the next 10 years. Partner Lau Kok Keng is leading the firm's team in the transaction.

**Simmons & Simmons** has advised **Samsung Asset Management (Hong Kong)** on the launch of the Samsung Bloomberg Global Semiconductor ETF, the first global semi-conductor ETF listed in Hong Kong. The ETF was listed in Hong Kong on November 9 and comprises 20 global companies that derive significant revenue from semi-conductor business. Partner Eva Chan led the firm.

**Wong & Partners** has acted for **Tenby Educare**, a subsidiary of International Schools Partnership, on the acquisition of 100% of the equity interest in Straits International Education Group, which operates Straits International School Penang and Straits International School Rawang, from SIEG Holdings, Dato Ong King Seng, GUH Capital, Dato Sri Tiew Soon Thung, CYF Ventures Holding and Choo Kian Woon. Managing partner Munir Abdul Aziz led the firm's team in the transaction, which was completed on October 13. Wan Emiliana Advocates & Solicitors advised the sellers.

**WongPartnership** has acted for **KKR**, as shareholder of PropertyGuru, on the US\$1.8 billion merger with Bridgetown 2 Holdings, a special purpose acquisition company backed by Richard Li and Peter Thiel. Managing partner Ng Wai King and partners Kyle Lee and Soong Wen E led the firm's team in the transaction.

**Zul Rafique & Partners** has represented **Maxis Mobile Services** before the Court of Appeals (CA) on an unfair dismissal claim originating from the Industrial Court (IC). The case concerns the dismissal of an employee for exiting the WhatsApp Groups at work without her superior's approval. The IC found that the dismissal was with just cause. The respondent applied for judicial review to quash the decision. The High Court overturned the IC's decision and ordered the case to be remitted to the IC to be heard anew by another chairman. Maxis appealed the decision. The CA ruled that the IC's findings were not plainly wrong, and that there were no valid grounds for the High Court to interfere with those findings. As such, the IC award was reinstated, and the respondent was deemed to have been dismissed with just cause. Employment and industrial relations partners Wong Keat Ching and Teoh Alvare led the firm's team representing the client.



# The ever-changing Thailand Legal landscape with Jessada Sawatdipong of Chandler MHM



Over a stellar 30-year career working with one of Thailand's top law firms, Jessada Sawatdipong has sealed many historical deals to help position Thailand as a serious legal hub in the Asia Pacific. He is now the co-managing partner at Chandler MHM Ltd. (CMHM), specialising in banking and finance, particularly project finance, with a focus on major, cross-border

energy and natural resources, infrastructure, and real estate projects.

## **IN YOUR EXPERIENCE OVER THE YEARS, HOW HAS THE THAILAND LEGAL MARKET EVOLVED?"**

Thailand's legal market over the past two decades has matured and the leading law firms now boast an international level of capability and service. Thai lawyers also tend to graduate and become dual qualified overseas. This is in part a response to the increasing complexity of Thai law as the country develops and responds to a local demand for greater sophistication of legal services. Another general trend is for US/UK-based law firms to exit the market and work closely in partnership with local counsel instead. On the other hand, leading Japanese law firms (such as Mori Hamada & Matsumoto) have recently entered and expanded their presence in Thailand.

## **WHERE DO YOU THINK THERE IS MOST ROOM FOR IMPROVEMENT IN DELIVERING LEGAL SERVICES IN THAILAND?"**

The most significant improvement in the delivery of legal services is likely to arise from the adoption of new technology. Clients expect





legal service providers to use technology to operate in an increasingly sophisticated and cost-effective manner in line with other professional service providers. Law firms have also traditionally provided services according to defined areas of legal practice. Specialised and complex advice is also in high demand to provide a collaborative cross-practice and cross-office approach.

**Clients expect legal service providers to use technology to operate in an increasingly sophisticated and cost-effective manner in line with other professional service providers.**

#### **HOW HAS THE RELATIONSHIP BETWEEN AN IN-HOUSE COUNSEL IN THAILAND AND A PRIVATE PRACTICE LAWYER CHANGED OVER THE YEARS?**

Developing strong long-term working relationships with in-house counsel is still important. However, as the role of external counsel has evolved the expectations of their relationships with external legal providers has also changed.

External legal providers are increasingly expected to understand the commercial environment in which an in-house counsel operates and the pressures they face. They are expected to be proactive rather than reactive. During Covid-19, we had to anticipate the legal issues that in-house counsels might face and quickly adapt our services. If there are regulatory or compliance issues on the horizon, we must alert in-house counsels of what they need to do along with the risks of non-compliance. A good example was the gradual implementation of the country's

Personal Data Protection Act which will impact all businesses.

In-house counsel operate in competitive commercial environments and law firms are expected to operate in a similar manner. As a firm we must constantly identify where we add real value to in-house counsel and where our service can be delivered in other ways.

#### **WHAT ARE SOME PERSONAL TRAITS OF YOUR IDEAL IN-HOUSE COUNSEL CLIENT?**

Open and frank communication is important if we are to work as a trusted advisor and in partnership with in-house counsel. We must know as much about the world in which our clients live as possible, as well as their expectations of us.

#### **HOW SERIOUS IS THE FIRM ABOUT YOUR LAWYERS' MENTAL WELL-BEING?**

Companies are increasingly aware of the need to provide a working environment that supports mental health. The pandemic highlighted the importance of support from management and colleagues. While our lawyers have been working from home, we ensure they can work in a manner conducive to good mental health (such as checking in on them). We have also endeavoured to create a safe working environment so our lawyers can work with colleagues from time to time to receive extra support.

#### **WHICH PRACTICE AREAS OR INDUSTRY SECTORS WILL GENERATE THE MOST WORK FOR THE FIRM IN THE COMING YEARS?**

In the short term we expect a rebound in investment activity once border restrictions are lifted. This means more M&A activity in banking and finance. Other sectors such as real estate will also see a



rebound. This would apply to both inbound and outbound investment.

In the longer term we expect to advise more on risk and compliance issues in areas such as the application of new technology. The move towards a zero-carbon world will also result in changes to certain industries. Renewable energy is a key focus for our firm and investment in clean energy will continue and broaden into new areas. One noticeable trend is the increasing demand for combining specialised practice with expertise from more traditional practice (such as aviation, insurance, technology, white-collar crime). More recently, we have seen growth in restructuring and insolvency because of the global pandemic. Other growing areas of specialism include antitrust, aviation, data protection, employment, insurance and technology.

**The biggest lessons from Covid-19 were the need to quickly adapt both our service offering and delivery, but most importantly ensure the personal wellbeing of others.**

**WHERE THERE ANY POSITIVE LESSONS FROM COVID-19?**

The biggest lessons from Covid-19 were the need to quickly adapt both our service offering and delivery, but most importantly ensure the personal wellbeing of others. The pandemic has accelerated a move to full remote working

and online communications. To some extent the new way of working will stay after the pandemic. However, this situation also taught us the value and benefit of working together in person as well.

**IN YOUR 30+ YEARS AS A LAWYER, WHICH CAREER MILESTONES HAVE YOU ACHIEVED?**

Being involved in the integration of Chandler & Thong ek and Mori Hamada & Matsumoto was notable since it resulted in the creation of one of the largest full-service law firms in Thailand. Overseeing the rapid recent growth of the firm as a co-managing partner has also been rewarding. Another key milestone was when our lawyer numbers tipped above 100. I've also worked on notable groundbreaking transactions and was proud to support younger lawyers in their ambition to become partners.

**AND WHICH MILESTONES REMAIN?**

To develop the next generation of leaders for the firm.

**WHAT DO YOU LIKE TO DO OUTSIDE OF WORK?**

It is important to have time away from work and have a good work/life balance. I like to spend quality time with my family.

CHANDLER MHM

[www.chandlermhm.com](http://www.chandlermhm.com)

# Events Calendar 2022



Empowering In-House Counsel

In-House Community eCongress events, symposiums, forums and webinars are the largest and most anticipated events for our community of In-House Counsel, Compliance professionals and other senior corporate decision makers in Asia, Middle-East and Africa.

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## OVER 1,200 ATTENDEES IN Q4, 2021

DEC 2021	<b>Malaysia IHC eCongress</b>
LATE JAN	<b>Vietnam IHC eCongress</b>
LATE JAN	<b>SPACS for In-House Legal Departments</b> <b>WEBINAR</b>
FEB	<b>Mumbai IHC eCongress</b>
FEB	<b>South Korea IHC eCongress</b>
MAR	<b>Philippines IHC eCongress</b>
MAR	<b>Counsels of the Year eAwards 2022</b>
APR	<b>Abu Dhabi IHC Congress</b> <b>IN-PERSON</b>
APR	<b>UAE Dispute Resolution Symposium</b> <b>IN-PERSON</b>
APR	<b>Johannesburg IHC eCongress</b>
MAY	<b>Shanghai IHC Congress</b> <b>IN-PERSON</b>
MAY	<b>In-House Innovation &amp; Technology IHC eForum</b>
JUNE	<b>Hong Kong IPO Symposium</b> <b>IN-PERSON</b>
JULY	<b>Japan IHC eCongress</b>
JULY	<b>Beijing IHC Congress</b> <b>IN-PERSON</b>
SEPT	<b>Indonesia IHC Congress</b> <b>IN-PERSON</b>
SEPT	<b>Thailand IHC Congress</b> <b>IN-PERSON</b>
OCT	<b>Hong Kong IHC Congress</b> <b>IN-PERSON</b>
NOV	<b>UAE IHC Congress 2022</b> <b>IN-PERSON</b>
NOV	<b>Malaysia IHC Congress 2022</b> <b>IN-PERSON</b>
DEC	<b>Singapore IHC Congress 2022</b> <b>IN-PERSON</b>

## BOOK YOUR FIRM'S EXCLUSIVE TOPIC NOW

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# Data, e-discovery and Covid-19 key topics at

# RELATIVITY FEST 2021



**T**he question of what to do with data was a major theme at Relativity Fest 2021 – from how to safely gather data to the necessity for legal professionals to upskill about dealing with data.

Given that the conference was held virtually for the second year in a row, Covid-19 was top of mind for every speaker as well. Most panelists had something to say about the pandemic which has radically altered how businesses and the wider legal profession must now operate.

In the popular eighth annual Judicial Panel session, judges from across the US and the UK

unpacked the results of switching to virtual court proceedings during Covid-19.

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**Nora Barry Fischer**, senior US District Judge of the US District Court for the Western District of Pennsylvania, said hearings conducted on Zoom were surprisingly popular with defendants.

“People often think of Zoom as impersonal, but that’s not true at all. Defendants say they enjoy seeing the judge more clearly and family and friends can also join the sessions.



“Also, Zoom makes it much easier for the press to attend our hearings. Judges can also make judgments available to a larger mix of people, since the public can dial in,” Fischer said.

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**William Matthewman**, federal magistrate judge for the US District Court for the Southern District of Florida, said the general success of virtual hearings was a “real eye opener” for him and he intends to use the technology even when the pandemic is over.

“It has been an excellent tool for all types of cases and proceedings. Zoom has been a silver lining to the pandemic.

“It has forced the legal community to adopt remote conferencing technology that lawyers probably wouldn’t have adopted otherwise. Zoom is also great for facilitating search warrants and litigation. Leading up to any trial, we’re trying to do as much on Zoom as possible,” he said.

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But it’s not a completely smooth technology for the courtroom.

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**Tanya Kennedy**, a Supreme Court Justice of the State of New York, Civil, said an attorney or defendant will often need to ask for a question to be repeated because of the impediment of wearing a mask or the crackly nature of a poor internet connection while using Zoom.

“Covid-19 has taught us that flexibility and understanding are both key attributes of a well-run courtroom. Now, more than ever,

it is important to consider all the circumstances. Ultimately, cooperation rules the day,” Kennedy said.

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US District Judge of the US District Court for the Western District of Texas **Xavier Rodriguez** agreed that the virtual hearings aren’t a perfect software tool just yet. Indeed, for some evidentiary matters, he still requires in-person court appearance.

“For example, if a recent criminal case was conducted on Zoom I wouldn’t have detected that a law enforcement officer was lying. Only when seeing his total body behaviour in person did I notice the anomalies.

“In saying that, I’ve had witness testimony of all forms conducted on Zoom. It’s certainly caused us to rethink ways of dealing with legal matters,” he said.

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**Andrew Peck**, a US Magistrate Judge for the Southern District of New York, is a bit more circumspect on the use of virtual conferencing technology.

“Zoom has worked well. But I do think the next e-discovery frontier will be when people ask for access to recorded Zoom sessions. The other question for courts is if the use of Zoom will continue after the pandemic because it was only ever meant to be a temporary measure.

“I remain concerned that the use of Zoom actually deprives the public of access to courtrooms,” Peck said.



**James Francis IV**, also a US Magistrate Judge in the Southern District of New York, said lawyers must learn to use new technologies like Zoom and better familiarise themselves with e-discovery.

“The big takeaway for e-discovery over the past two years was getting lawyers familiar with technology. That everyone now seems able to navigate these technologies is a step forward because even after the pandemic end a lot of our future proceedings will be remote.

“This is advantageous because it reduces costs and provides access to justice for people who otherwise would struggle to get to court,” Francis said.

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After all, e-discovery technology is rapidly advancing, and judges are often drawn in to deciding how data is used in proceedings – sometimes further into the weeds than they would like.

For Rodriguez, a common question he often deals with is when a judge should put their finger on the scales during e-discovery proceedings – particularly if it means asking parties about data or sources.

“I’m always a bit concerned about doing that. We don’t have time for babysitting, there’s too many cases. Also, judges will never know a case as well as the litigators. Judges must be cautious about how interventionist they become, but they also can’t be completely hands off.”

Matthewman agreed “babysitting” by court justices was not a good idea, but it’s a “bit like Goldilocks and the Three Bears: you want to have the porridge just right,” he added.

“I have seen e-discovery disputes infect a case and delay everything. So, my strategy when a motion is filed is to promptly address it and require a quick response. This saves a lot of time down the road.

“I tell everyone that I expect their cooperation on this. If there are good lawyers on both sides, e-discovery disputes are rare, and the ones I do see will be legitimate,” Matthewman said.

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Across the Atlantic, **Victoria McCloud**, Queen’s Bench Master of the High Court of England and Wales, said e-discovery is now an important part of many court proceedings as the world gets more digital.

But e-discovery hasn’t yet ironed out all the creases, either. McCloud said some of the more recent cases in the past few years reveal how much further the law concerning e-discovery must evolve.

“In one of my defamation cases, the process of e-discovery would have required the media defendant to let an expert witness look at some IT files. The defendant’s concern was that the data might be put together in such a way as to reveal confidential media sources.

“For me, the question was whether both sides should provide their own expert witnesses, knowing that this would have guaranteed the release of media sources. Thankfully, that was never resolved because the parties settled. But it does indicate that e-discovery still has some interesting precedents to sort out,” McCloud said.



In another session called the E-Discovery State of the Union, a group of consultants, judges, associates and legal professionals discussed the broader trends in e-discovery.

The panellists all said lawyers and the entire legal profession must become more familiar with data technology since they can't rely on the IT department to know what to do anymore.

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Legaltech News editor-in-chief **Zach Warren** said prior to the Covid-19 pandemic, if lawyers had an issue with technology they just "walked down the hall to the IT department," but that is impossible when staff are stuck at home during lockdowns or social distancing.

"On the flipside, the pandemic allowed firms to reassess what technology staff actually use and what software lawyers need, particularly what could be stored in the cloud," Warren said.

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Learning more digital skills is not only crucial for keeping lawyers at the top of their game, said TRU Staffing Partners chief executive **Jared Coseglia**, it could also be what saves their job since talent can now be found anywhere on the globe.

"What will never be the same is the speed of hiring during this pandemic. The use of video conferencing has radically dropped the time it takes for an employer to interview a candidate, select and make an offer. Those that aren't taking advantage of this technology will struggle."

Coseglia said after Covid-19, money is also no longer the top factor attracting great talent.

"Money is the fourth highest motivator for candidates making job moves. They are far more motivated by working from home.

"Firms wanting candidates to come back to the office face their job postings staying open for 12 weeks while employers offering work-from-home will fill their vacant spots in an average of six days. Something must give. Law firms better start coughing up money for middle-market e-discovery professionals or law firms will lose the talent and lose the business," he said.

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**Debbie Reynolds**, the US-based "Data Diva," agreed that businesses are looking for talent in all places, not just locally.

"Firms now have a broader pool of talent to pick from, not simply limited to people that can show up in the office every day. Online technology also allows for more flexibility in schedules since people don't have to waste time commuting.

"However, this will all introduce issues and create new types of data. Attorneys must always be brushing up on what's new in legal technology, and e-discovery is an important development," Reynolds said.

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Ari Kaplan Advisors chief executive **Ari Kaplan** added that the longer the Covid-19 pandemic lasts, the more the legal profession will "elevate itself" and become more proficient with technology.



“Lawyers must remember that technical competence isn’t just about the device, it’s about developing ways to boost productivity and insight with those devices,” he said.

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Mastering the simple digital skills, according to FTI Consulting senior director **Inés Rubio**, will be the most critical for any lawyer. Thankfully, those skills are about asking the right questions, something with which lawyers are deeply familiar.

“For anyone dealing with data – which is pretty much all of us – the most important thing is to ask good questions. Things like: where is a file being saved? How is it being sent? Will it be encrypted?

“Very often, clients and lawyers are unable to answer these basic questions about their data and where it is stored. Data governance, discovery and litigation can all be greatly enhanced by learning how to ask these questions, and it will smooth any e-discovery process later,” Rubio said.

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In the International Panel, a session on global e-discovery perspectives, the panellists were adamant that although the European Union’s General Data Protection Regulation (GDPR) still has its teething problems, the GDPR is quickly becoming the global standard for data governance.

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Cordery co-founder and partner **Jonathan Armstrong** said the GDPR has altered how digital companies process and store their data – not least due to the enormous fines for mishandling data.

He said 967 cases have already created over €1.2 billion in fines. The impact of the GDPR was also felt in litigation as people are bringing more actions following data breaches and an increase in “chancers” threatening litigation (even if many of those threats don’t stand up to scrutiny).

“There is always a balance between telling people what you’re doing with their data and wanting not to tell too many people what’s going on. The same is true in litigation or investigations. As data regulations mature, it may be necessary for companies to issue multiple disclosures about what will be done with a customer’s data and gain their consent each time.

“Lawyers are already finding it hard to track such transparency obligations, and it will only get harder. People must seriously think about how to balance the individual’s rights with the obligations to the employer, courts and third-parties,” Armstrong said.

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EY Forensics & Integrity Services partner **Meribeth Banaschicks** said frameworks like the GDPR will can be expected to increase the quantity of data subject access requests (the right for an individual to obtain a copy of their personal data) which will in turn require legal professionals to “brush up” on their data governance processes.

“Former employees, furloughed employees – and even current employees - will ask what’s happening with their data. Considering the GDPR only gives you 30 days to respond to one of these requests, you need to have your data ducks in row. You don’t have time to wonder where the data is.





“So, make sure you have processes in place, understand where the requests should go and who should be reviewing them. These questions are all important to think about for e-discovery long before you can even start delivering on the first request,” Banaschick said.

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McCann FitzGerald partner **Karyn Harty** added that as GDPR becomes a pillar in a universal reform of data procedures, “privacy by design” must become a mantra.

Privacy by design aims to embed privacy across the design and architecture of IT systems and business practices.

“I am seeing a lot of clients building processes with privacy at the centre, which is making everyone’s lives better. For those involved in developing policies, please ensure that privacy is built in from the start,” Harty said.



Proving that the GDPR is now a clear standard for countries hoping to set their own data privacy regulations, Australia-based Clayton Utz partner

**Steven Klimt** expect over the next few years Australia’s privacy regulation will “move closer to that of the GDPR.”

He said this will occur particularly in the definition of personal information, the prescription of consent, default settings to reflect privacy protections and the graduation of consent.

“A right of erasure may also be included in any new legislation and Australia might even add a fairness and reasonableness standard about how information is collected and used, over and above if consent was obtained.

“The GDPR and the Europeans are ahead of the Australians, and there will be a lot we can do to learn from the GDPR formula,” Klimt said.

RELATIVITY  
FEST OCT 4-6, 2021



# Q&A with Chee Hoong Pang, Regional General Counsel at Egis Asia Pacific



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

I often ask aspiring lawyers: “What do Nelson Mandela and Mahatma Gandhi have in common?” And my typical reply is: “They are world leaders who studied law and changed the world”.

More than two decades ago I made the transition from the Bar to the Roll of Solicitors, and from private to in-house. Each chapter of my career was the start of a new learning curve as I navigated my ways in firms like property development, contracting and engineering consultancy.

The Egis Group already does well in the Asia Pacific, turning over about €100 million each year with nearly 1000 people across a dozen countries and territories, and the company has a five-year target to increase its potential in the region. Unlike a General Counsel who joins a corporation laterally to fill a pre-existing position, I am the first Egis APAC General Counsel tasked with establishing a set of cultural and operational issues and developing solutions to deal with the unique challenges of managing legal functions in APAC. My other compliance-related

responsibilities are as the regional Ethics and Risk Correspondent which draws on the strength of my qualifications as a Certified Fraud Examiner, Certified Enterprise Risk Advisor, Certified Business Continuity Manager and Certified ISO37001 Anti-bribery Lead Implementer.

## Q: HOW BIG IS YOUR TEAM AND HOW IS IT STRUCTURED?

Currently I am the sole qualified person in the regional legal department of Egis Asia Pacific. I am grateful to the Group Legal team members and the management of Egis APAC who are unwavering in their support. I will be adding team members in the months to come. I believe that people are at their best when they love what they do and are great at doing it.

## Q: WHAT DO YOU THINK ARE THE BIGGEST CHALLENGES FACING IN-HOUSE LAWYERS TODAY?

General Counsels are constantly transforming their teams and each member must demonstrate how they add value to the legal services and the business. I believe that by benchmarking our team’s operating model, we can show how we add value to critical services, measure performance, identify key cost drivers, use technology to do more with less and introduce change and efficiencies.



**Q: WHAT HAVE BEEN YOUR OWN BIGGEST CHALLENGES? HOW DID YOU / YOUR TEAM OVERCOME THEM?**

My own biggest challenge is the need to establish consistency, promptness and clarity in my work. To overcome these challenges, I establish clear boundaries and foster a supportive culture to contribute to the wider organisation.

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

I was fortunate to meet my mentor at the beginning of my legal career. It is with heavy heart that I must add she passed away many years ago. But her kindness will be etched in my memory for a life-time. Good mentorship is important for young lawyers as it helps steer them in the right direction.

**Q: WHAT ARE THE BIGGEST CHALLENGES SPECIFIC TO YOUR INDUSTRY?**

The challenges for the architectural, engineering and consulting industries include ongoing climatic fluctuations, diversity and inclusiveness, need for improving energy efficiency, skill gaps, staff shortages and advances in project management and technology. For the future prosperity of our industry, our architects, engineers and consultants must be proactive in tackling these challenges.

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

Technology is reshaping the modern workplace by changing how businesses communicate, enabling remote working and improving efficiency of employees. Communication among the employees, horizontally or vertically, is now instantaneous, collaborative and unified. Time management is easier with modern tools. Cloud computing and improved information management systems are enabling the employees to work from anywhere and

video conferencing has made it possible to connect the employees wherever they are.

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

I always prefer a law firm which can impress upon me their specialist area of practice to fill in gaps. Responsiveness is my top priority. I enjoy working with external counsels who are humble and don't let egos cloud their judgement.

**Q: OTHER THAN LAW FIRMS, WHAT OTHER SERVICE PROVIDERS AND TOOLS HELP YOU THE MOST?**

We employ due a diligence service provider and tools as part of our integrity and KYC programme.

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

I enjoy contributing to the needs and growth of a single client and becoming part of a team working to facilitate positive outcomes and regulating risk for the client. Trust takes years to build and hopping from one client to another may not afford me the chance to "deep dive" the client.

**Q: LOOKING FORWARD, WHAT CHANGES DO YOU FORESEE IN HOW LEGAL SERVICES WILL BE PROVIDED IN COMING FEW YEARS?**

The legal service landscape will not be the same in the coming years. We must move with the times and evolve. Broadly speaking, three areas are setting the trends for legal services, and they will be powered by some combination of technology, process and creative resourcing:

1. Legal services will find ways to complete routine work more efficiently to free up their senior lawyers up to perform higher value tasks for clients;
2. Legal services will concentrate on risk velocity (anticipation and reaction) as delay



recovery measures for the resources wasted on risk remediation (i.e., on prolonged litigation and length alternative dispute resolution); and

3. Legal services will respond in more sophisticated ways to compliance programmes of the magnitude that have consumed time and money (for instance, GDPR, Personal Information Protection Laws, ISO37001 Anti-Bribery, KYC, industry-centric regulatory requirements).

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

My advice to young lawyers is to take risks. The old model – join a prestigious law firm, hang on for years, make partner and then work there until you are unceremoniously removed by the Grim Reaper – is history. The only way they will find true happiness and their calling is to take chances. Life begins at the end of one’s comfort zone.

**Q: WHAT DO YOU MOST LIKE TO DO AWAY FROM WORK?**

Reading for pleasure at night helps me wind down and communicates to my brain that it’s time to put the worries of the day aside and power down for sleep. During busy periods I don’t have much time to read, but even five minutes before nodding off connects me to my passion and reminds me that there is more to life than my to-do list. I may buy a book that I can look forward to reading once a big project is completed or during a vacation. I have been known to hoard books during stressful periods. I may need to reach out to Marie Kondo to solve my “tsundoku” issue.

**Chee Hoong** is a construction and engineering, and commercial/corporate lawyer, a Certified Fraud Examiner, Enterprise Risk Advisor, Business Continuity Manager and Anti-Bribery Lead Implementer.

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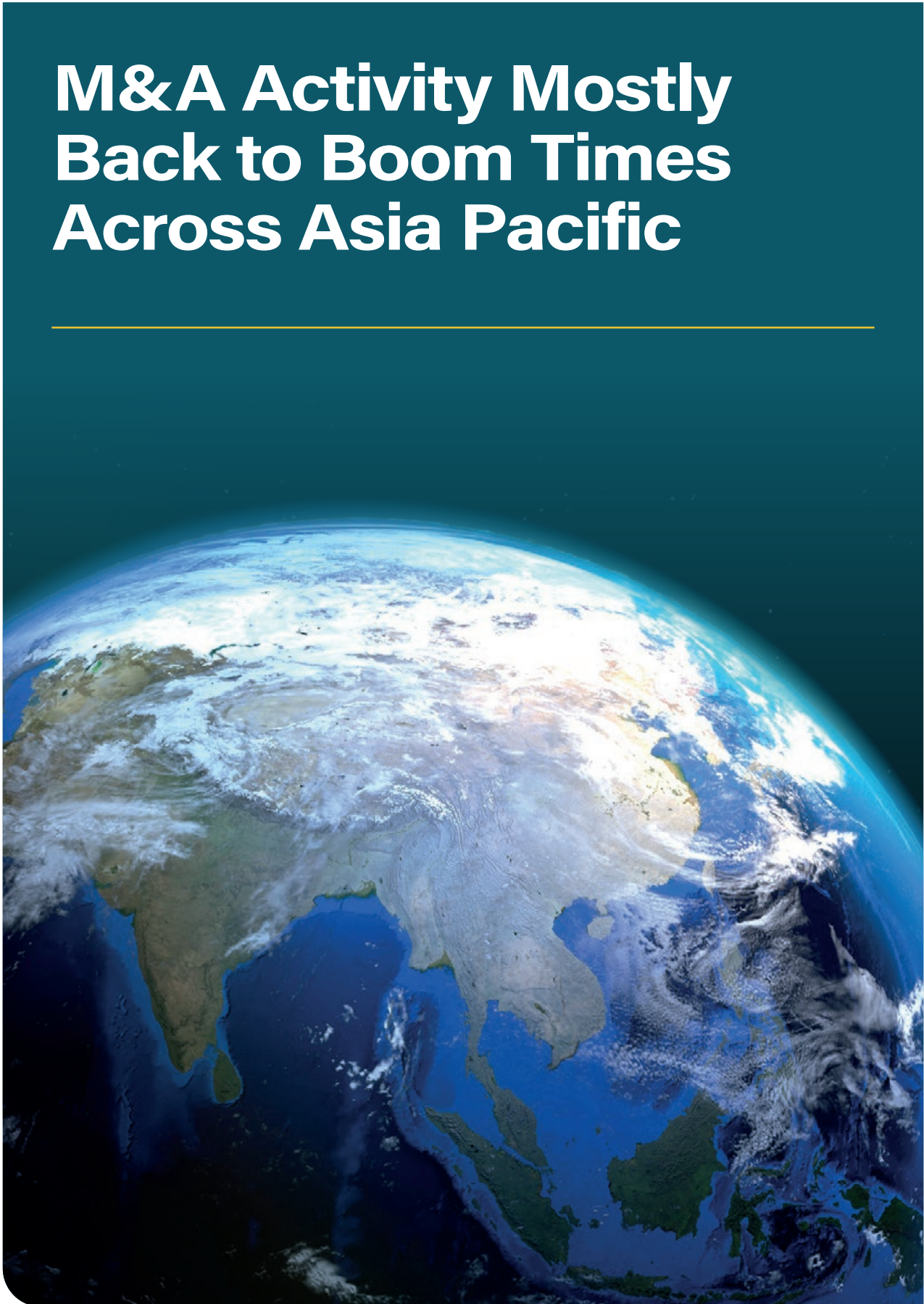


# MERGERS & ACQUISITIONS



# M&A Activity Mostly Back to Boom Times Across Asia Pacific

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One clear sign that the Covid-19 crisis may have been both less impactful than first feared and also now ending is that mergers and acquisition (M&A) activity is returning to normal in the Asia Pacific.

A year ago, most businesses were contemplating the frighteningly uncertain prospect of what to do if the pandemic continued in 2021. Many Asia Pacific companies simply decided to push on as normal and either begin new M&A deals or finalise those that were set on pause.

According to EY, [in the first half of 2021](#) M&A values in the region increased to US\$535 billion, up from US\$284b in the same period in 2020. The region has counted more than 50 deals valued over US\$1b so far this year, an increase of almost five times year-on-year.

The EY report pointed to the technology sector as the leader of M&A deal activity, accounting for a third (28%) of the cumulative deal value in the first half of 2021, with deal value increasing by 88% year-on-year. The advanced manufacturing and mobility sectors were also active this year.

According to a [Mergermarket report](#), in 2020 Asia Pacific M&A deal volume decreased by a nominal 4%, compared to the global decline of

14%. The report said rising consumer confidence led these trends and the region retains a positive GDP outlook.

Eversheds Sutherland Head of International M&A Asia Charles Butcher said the pandemic in 2020 had an obvious activity-suppressing impact early on with many investors adopting a precautionary, “wait and see” approach regarding M&A activity.

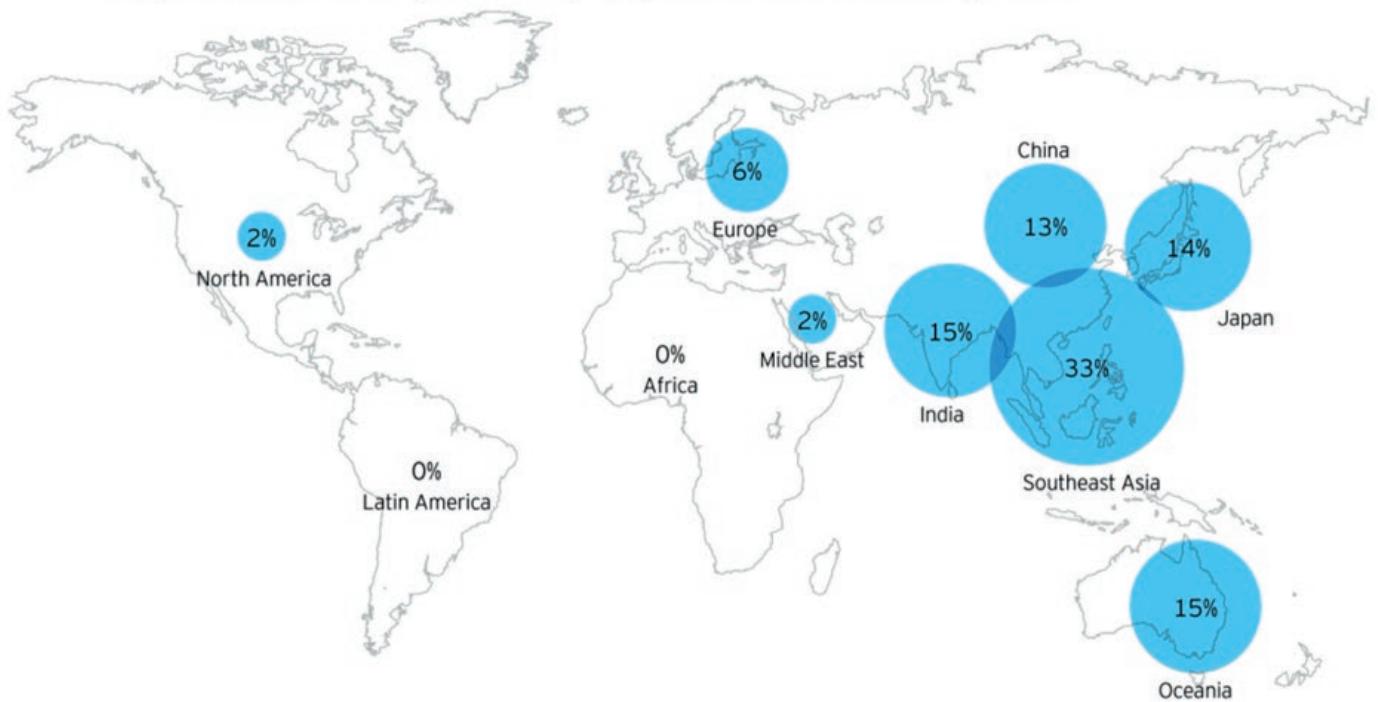
“By the second half of 2020 we were already seeing the market adapting in terms of deal mindset which, combined with recognition that the pandemic was helping to catalyse new opportunities, meant a generally strong finish to the year. The full 2020 year ended up being a lot better than most predicted,” he said.

While well-advanced projects were generally able to progress last year, many early-stage deals were delayed or suspended indefinitely. Originating new deals was challenging – particularly in Asia where relationships and face to face meetings are so important – but by 2021 this had become less of a barrier as deal-makers adapted and found different ways to interact, Butcher said.

But the region isn’t out of the frying pan yet. The [2021 EY Global Capital Confidence Barometer survey](#) of more than 2400 C-suite executives globally shows nearly half of



**Q Which region do you anticipate will generate the most growth and opportunities for your company in the next three years?**



**Asia Pacific will be the centre of gravity for M&A for the near future - source: 2021 EY Global Capital Confidence Barometer survey**

respondents expect it will take until 2022 before revenues return to pre-pandemic levels.

However, an overwhelming 90% of these senior executives expect significant growth opportunities within Asia Pacific in the next three years. Companies in the region express an eagerness for M&A, with 53% of respondents saying that they are actively planning to pursue acquisitions in the next 12 months.

“As the initial shock of Covid-19 subsided, Asia Pacific senior executives pivoted, conducting comprehensive strategic portfolio reviews to reimagine their competitive position. Now, they are seeking to rev up their M&A and transformation programs as they look to reshape their future in a post-pandemic world,” the EY survey said.

**PRIVATE EQUITY AND TECH COMPANIES**

The trends are positive for another reason: there is still a lot of private equity capital looking for a home, desperate to find options with good returns on investment.

A [report by EY](#) found that PE now represents 30% of the M&A market, surpassing its prior peak of 25% in 2006. Throughout the first three quarters of 2021, PE firms were involved in US\$868b worth of acquisition deals globally, “putting the industry well within striking distance for its first trillion-dollar year on record,” EY said.

Eversheds Sutherland M&A partner Rod Lai said PE continues to play a significant role in M&A activity in the Asia Pacific with record





levels of “dry powder” on hand and ready access to low interest financing.

“Early in the pandemic many PE houses cautiously focused on portfolio management and protection rather than new deals. In the first half of 2021, Asia Pacific-focused PE funds raised more than US\$80b, boosting the value of PE driven M&A transactions to a record US\$102b,” Lai said.

PE activity has been particularly prominent in the technology and healthcare sectors. Technology mergers and acquisitions, for example, accounted for about 25% of deals by value and 30% of deals by volume over the last twelve months.

Lai explained this M&A focus on technology reflects the increasingly normal “stay-at-home” working lifestyle that has provided new opportunities for companies in media streaming, gaming, food delivery, e-commerce, virtual banking and digital currencies.

“Another factor is that traditional corporates see technology as an accelerated path to achieving transformative change within their own organisations,” he said.

Eversheds Sutherland Shanghai Office managing partner Jack Cai added that many technology M&A plays in traditional industries also align well with ESG (environment, social and corporate governance) considerations, which are increasingly important for every firm.

For instance, the automotive sector sees a natural alignment with the Chinese market to leverage the sector’s existing manufacturing capabilities to encourage rapid transition from fossil fuel engines to electric vehicles (EVs). Hence why China already accounts for more than 40% of global EV sales.

“These are a few of the vectors favouring technology deals and we expect the current high deal volume level to continue in the near term,” Cai said.

## Top Ten Asia-Pacific Announced Deals of Q2 2021

Target Name	Target Country	Buyer Name	Buyer Country	Target Industry Sector	Transaction Value (\$, in billions)
Advanced Info Service Public Company Limited	Thailand	Gulf Energy Development Public Company Limited	Thailand	Communication Services	11.2
SOHO China Limited	China	The Blackstone Group Inc.	Multiple Countries	Real Estate	6.1
The Star Entertainment Group Limited	Australia	Crown Resorts Limited	Australia	Consumer Discretionary	5.9
Intouch Holdings Public Company Limited	Thailand	Gulf Energy Development Public Company Limited	Thailand	Communication Services	5.7
Celcom Axiata Berhad	Malaysia	Digi.Com Berhad	Malaysia	Communication Services	4.4
eBay Korea Co., Ltd.	South Korea	E-MART Inc.	South Korea	Consumer Discretionary	3.0
Invesco Office J-REIT, Inc.	Japan	Invesco Global Real Estate Asia Pacific, Inc.	Japan	Real Estate	2.9
Australian Logistics Property Portfolio	Australia	Investor Group	Multiple Countries	Real Estate	2.9
Jiangsu Sailboat Petrochemical Co., Ltd.	China	Jiangsu Eastern Shenghong Co., Ltd.	China	Energy	2.9

Impressive deals inked in only Q2 of 2021 - Source: S&P Global Market Intelligence.



## How In-House Counsel Can Adapt to M&A in 2022

In-house counsel teams are typically smaller than external law firm teams and the inability to work collaboratively with business colleagues in the regular office environment during the pandemic was a particularly isolating experience for some.

But the pandemic has also changed many aspects of the job in healthier ways.

In recent years, for instance, many in-house lawyers have taken on a more proactive and strategic role in the M&A process and this trend has further accelerated during the pandemic – whether through leading or taking a key part in valuation analyses, negotiations, due diligence, contracts and deal closing.

In-house counsels also play a particularly important role in early stage planning and issue-spotting - helping their business teams to prepare for anticipated M&A activities and identifying potential gating issues early. For instance, early due diligence processes may commence before external advisers are on board and in-house lawyers need to guide their deal teams on initial legal process and structuring considerations.

The rise of the Zoom conference call meant companies more often negotiating and signing deals virtually, with colleagues and

counterparties dispersed around the world, rather than the traditional face-to-face, 'lock everyone in a room' approach to get deals over the line.

But, at least for some in-house counsel, over-reliance on Zoom can re-introduce the dreaded "meeting curse." What could be solved in a few minutes with a simple phone call or corridor discussion can end up taking an hour if the parties insist on using Zoom. This has impeded quick decision making in some scenarios and it will be important to find a better balance in 2022.

More changes to the profession are expected over the next year as a flow-on effect from Covid-19. Alongside these changes will come more work. In-house lawyers in 2022 will need to balance their mental health with the increased workload.

While there have been positive steps taken by many law societies in trying to deal with well-documented mental health concerns in the legal profession, these can be a particular challenge for in-house lawyers who often do not have deep teams to share the workload. More can be done to help lawyers achieve a better work-life balance and keep them operating at a high level for longer.

### SPACS, ESG AND GOVERNMENT STIMULUS, OH MY!

Special purpose acquisition companies (SPACs) are also more prominent in global deal activity through their sheer number and value of funds raised, in particular in the US. However, their overall impact on Asian markets, at least volumetrically, remains relatively limited.

A SPAC is a company with no commercial operations and is formed strictly to raise capital for M&A activities through an initial public offering (IPO). Also known as "blank check companies," the popularity of SPACs has risen in recent years.

In 2020, 247 SPACs were created with US\$80b invested, and in just the first quarter of 2021,



a record US\$96b was raised from 295 new SPACs. By comparison, only two SPACs came to market in 2010.

While some of the SPAC enthusiasm in the US has waned, Butcher expects that as suitable North American targets become more difficult to find (and/or valuations overheat) some US-based SPAC sponsors will look more closely at potential Asia Pacific targets and SPACs may therefore feature more frequently in regional M&A transactions.

He said Asia Pacific exchanges are also looking to promote their own SPAC regimes.

“The Singapore Exchange was first out of the blocks and will look to capitalise on the flourishing Southeast Asian start-up ecosystem. The Hong Kong Stock Exchange’s recent accelerated consultation process also suggests its SPAC listing regime may not be far away either, albeit likely with some different features to that of other markets,” Lai said.

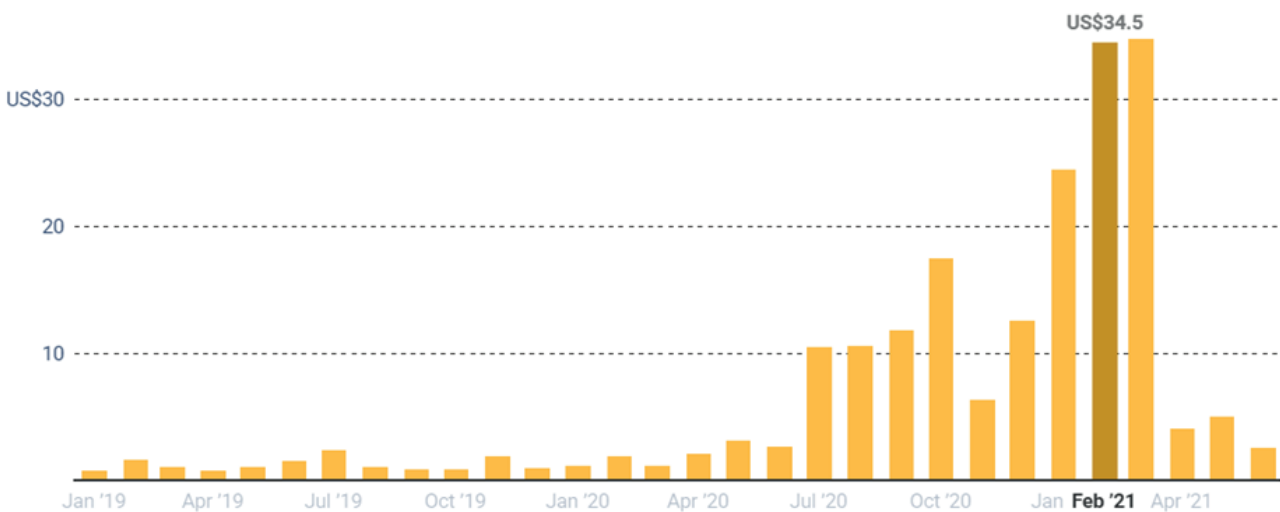
He added that SPACs can provide interesting alternative exit options for early stage, pre-profit but high-growth companies in the Asia Pacific.

As with other parts of the world, government stimulus packages were widely adopted in the Asia Pacific region to help keep struggling companies afloat during lockdowns and travel restrictions, particularly in infrastructure, health, education, tourism, aviation, social protection and other sectors.

For example, Japan’s government approved an eye-popping ¥108 trillion (US\$990b) package – worth about a fifth of its GDP. The US also passed a stimulus package of US\$2 trillion, worth about 10.5% of its annual output.

Singapore’s total stimulus now stands at S\$60 billion (US\$41.7b), or 12% of its GDP. Malaysia topped up its previously announced RM250 billion (US\$57.4b) stimulus with a further 10 billion ringgit. Thailand added a ฿1.9 trillion

### Global SPAC IPO fundraising by month (US\$b)



Note: Monthly data through June 21, 2021

The appetite for additional SPAC deals remains strong in Asia - Source: Refinitiv



(US\$58 billion) package – worth about 9% of GDP. And Indonesia will add Rp436.1 trillion (US\$26.36b) worth of economic stimulus measures valued at 2.5% of its GDP.

Butcher said it is difficult to assess the overall impact of government stimulus plans on M&A activity since these programmes are still playing out.

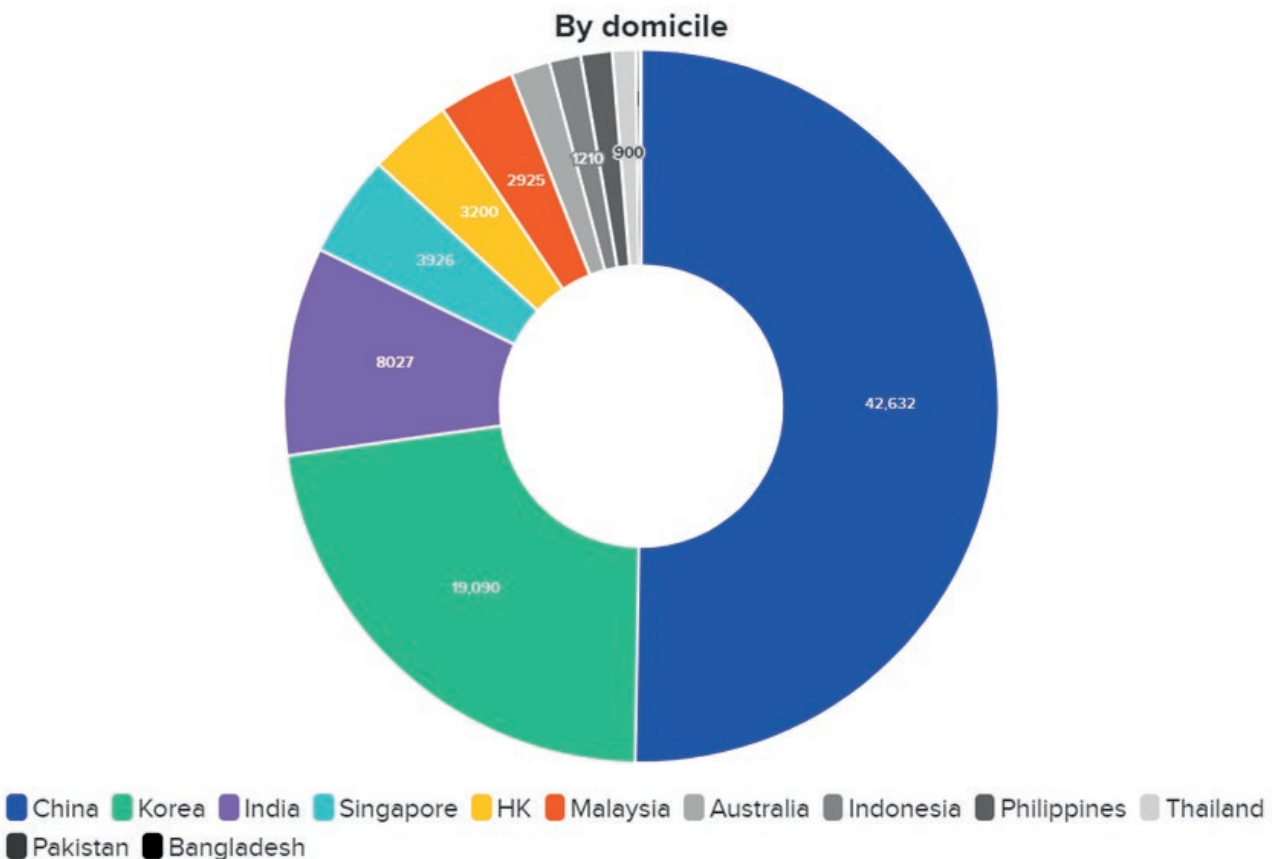
And although the nature and scale of stimulus measures have varied across the Asia Pacific (and globally), the general willingness of most governments to adopt some creditor support measures, combined with lender reluctance to call defaults and take early enforcement

action, has helped suppress the level of distress-driven transactions, he said.

“Broader stimulus measures have helped maintain overall business confidence, alleviating some systemic risk and providing justification for deal-makers willing to bet on the speed and shape of recovery,” Butcher said.

“However, we are now seeing greater willingness among lenders to enforce and as stimulus packages and other creditor protective measures fall away we expect to see more distress-driven transactions.”

## Backlog of Asian IPOs and share sales is growing



APAC equity markets have also been on a tear, with plenty of extra room for 2022 - Source: Refinitiv Deals Data



## OUTLOOK FOR 2022

For Asia Pacific as a whole, the long-term outlook is “incredibly strong,” Butcher said.

“Asia remains the most populous and economically dynamic region in the world. While there is material intra-regional variance, growth rates will continue to demonstrate sustained outperformance relative to most other regions,” he said.

Butcher added that while China’s perennially outsized economic growth rates have naturally tapered in recent years as its economy matures, those rates remain relatively high by comparison to other regions and the sheer scale of the China market means it will continue to attract a disproportionate share of M&A deal activity.

“Meanwhile, shifting regional investment and supply chain dynamics, together with geopolitical challenges, will also drive significant ‘rest of Asia’ opportunities – in particular emerging markets in Southeast Asia,” Butcher said.

From a sector perspective, technology and life sciences will remain dominant themes next year, he said. Regulatory concerns will also likely be increasingly relevant in M&A transactions.

Foreign direct investment (FDI) regimes are tightening in many jurisdictions along with a general drift towards greater regulatory scrutiny of corporate transactions. The ever-expanding universe of “sensitive” industries will present challenges for deal makers to navigate on cross-border deals.

“Supply chain recalibration is also an expected key theme. The pandemic shone a spotlight on the limitations of global supply chains and the risks associated with over-dependency on

single or dominant source models. How this plays out will vary across regions and sectors, but the supply chain mix will be shaken up with knock-on implications for M&A activity,” said Eversheds Sutherland’s Cai.

He already sees M&A activity picking up again and, based on the visible pipeline and market signals, expects it to continue at least through the first half of 2022.

“But there are many potential uncertainties and it is risky to predict exactly how markets will behave coming out of a once-in-a-century pandemic,” Cai said.

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# M&A in the Philippines: Trends, Challenges and Opportunities

BY KRISTIN CHARISSE SIAO





## 1. WHAT ARE THE M&A TRENDS IN THE PHILIPPINES OVER THE LAST 12 MONTHS?

The accelerated growth in the digital economy driven by Covid-19 has spurred M&A deals in the technology, telecommunications and logistics sectors. Likewise, there is sustained growth of M&A activity in power & energy, transportation, financial services, real estate development, manufacturing and healthcare.

Inbound M&A transactions are still mostly coming from China, Japan and Southeast Asia, with a smaller number from other parts of Asia, Europe and the US. We also perceive an increased interest in the past few years from global private equity funds acquiring minority stakes in Philippine businesses.

An emerging trend in the Philippine cross-border M&A market is a focus on environment, social and governance (ESG) aspects of the target, particularly on compliance, both historical and forward-looking. There is a move to require publicly-listed companies in the Philippine Stock Exchange to report their ESG index as a guide for sustainability-focused investors. Philippine companies with foreign investors are now deliberately incorporating ESG standards and reports in company policies.

Another recent M&A trend is the requirement for warranties and indemnities insurance, which are now being offered by a few insurance companies for Philippine M&A deals.

## 2. HOW HAS COVID-19 IMPACTED M&A ACTIVITIES IN THE PHILIPPINES?

The most significant impact of Covid-19 to Philippine M&A is the substantial but temporary increase in thresholds for compulsory merger control notification with the Philippine Competition Commission (PCC), intended to

encourage M&A despite the contraction of the economy. The prior thresholds for merger notification – ₱6 billion for Size of the Party (SoP) and ₱2.4b for the Size of Transaction (SoT) – represent a mere fraction of the increased thresholds introduced through Republic Act No. 11494 or the Bayanihan 2, a Covid-19 response and economic stimulus legislation, which raised the transaction values (referring to both SoP and SoT) threshold for notifiable transactions to 50b, effective from 15 September 2020 until 14 September 2022.

The Bayanihan 2 further exempted transactions entered into from 15 September 2020 until 14 September 2021 from PCC's *motu proprio* power of review. However, the PCC clarified that it may still conduct *motu proprio* reviews of transactions executed during this period. Considering this, some parties prefer to submit their transaction to the PCC either for a confirmation of non-coverage or for voluntary notification to provide some level of comfort to the parties as a condition to closing.

In addition, Covid-19 restrictions and community quarantine requirements have affected the timing for some M&A deals, particularly where regulatory approvals are required or where availability and access to documents and project sites are limited.

## 3. WHAT RECENT CHANGES TO LAWS GOVERNING M&A IN THE PHILIPPINES SHOULD PARTIES KNOW ABOUT?

Significant amendments to the Philippine Tax Code were introduced as part of the Comprehensive Tax Reform Programme (CTRP) of the current administration. Republic Act No. 10963 or the Tax Reform for Acceleration and Inclusion (TRAIN) is the first package of the CTRP that took effect on 1 January 2018. The second package of the CTRP is Republic Act No. 11534 or the



Corporate Recovery and Tax Incentives for Enterprises (CREATE) which became effective on 11 April 2021.

Relevant to M&A, the TRAIN and CREATE laws increased the capital gains tax rate for sale of shares of stock not traded in the stock exchange to 15% of net capital gains. The donor's tax rate which may be imposed on share transfers for less than fair market value has been fixed at 6%.

Some of the salient amendments introduced by the CREATE Law which are expected to attract investments and boost the M&A market include:

- Reducing Philippine corporate income tax rate from 30% to 20% for SME-sized domestic corporations, 25% for large domestic corporations and 25% for resident foreign corporations, retroactive to 01 July 2020;
- Rationalising fiscal incentives, as follows:
  - o Income tax holiday (ITH) available for four to seven years for qualified enterprises as a uniform primary incentive;
  - o 5% special corporate income tax or enhanced deduction for qualified export enterprises, available for 10 years after expiration of the ITH, as a uniform secondary incentive;
  - o Enhanced deduction for qualified domestic market enterprises, available

for five years after the expiration of the ITH, as a uniform secondary incentive.

- Expanding and strengthening the framework for tax-free exchanges of property for shares of stock and removing the requirement for a confirmatory ruling from the Bureau of Internal Revenue (BIR) to avail of the tax exemption for tax-free exchange transactions.

#### **4. WHAT ARE THE LAWS REGULATING FOREIGN INVESTMENT/OWNERSHIP?**

Foreign ownership of Philippine businesses and undertakings is generally allowed. However, the Philippine Constitution reserves the right for Filipinos to participate in certain activities. Republic Act No. 7042 or the Foreign Investments Act and several other statutes further regulate foreign equity in certain sectors. These restrictions are consolidated in the Foreign Investments Negative List, and include:

- Up to 40% foreign equity
  - o operation of public utilities such as telecommunications, transportation, electricity transmission and distribution, water and sewerage;
  - o land ownership;
  - o development/utilisation of natural resources such as mining and renewable energy development;
  - o domestic market enterprise with paid-up capital of less than US\$200,000.







- No foreign equity
  - o Mass media, except recording and internet access providers;
  - o Retail trade enterprises with paid-up capital of less than US\$2.5 million.

Commonwealth Act No. 103 or the Anti-Dummy Law proscribes and penalises the circumvention of nationality restrictions by any means and prohibits the intervention of foreigners in the management, operation, administration or control of enterprises reserved wholly or partially to Filipinos, except technical personnel whose employment is specifically authorised by the Secretary of Justice. Foreigners may be elected to the board of directors of a corporation engaged in partially nationalised activity in proportion to their allowable participation in the share capital of such corporation.

Foreign direct investments in Philippine firms or enterprises may be registered with the Bangko Sentral ng Pilipinas, which is the Philippine central bank. A Bangko Sentral Registration Document (BSRD) is issued to a foreign investor which will allow the purchase of foreign exchange from the banking system for capital repatriation and remittance of earnings on duly registered investments.

#### **5. WHAT ARE THE KEY DUE DILIGENCE AREAS WHICH PARTIES MUST ATTEND TO IN AN M&A?**

Independent due diligence reviews are usually conducted for legal, financial, tax and technical matters. High priority areas for due diligence of a target in the Philippines include:

- Share title and share transfer restrictions
- Corporate structure and governance
- Compliance with foreign equity limitations, if applicable
- Regulatory matters – permits, licenses and compliance

- Employment matters
- Potential tax liabilities
- Disputes
- Change of ownership or change in control clauses in contracts and permits
- Land matters – titles, land use rights, tenurial instruments and land conversion
- Material contracts, loans, financing and related party transactions.

The due diligence exercise should be conducted with a view of flagging risk items that could impact the deal structure, transaction documentation or timing, or that could result in post-transaction exposure to the parties or the target.

#### **6. WHAT ARE THE TAX IMPLICATIONS FOR A FOREIGN INVESTOR?**

A foreign corporation may be categorised either as a resident foreign corporation (RFC) or a non-resident foreign corporation (NRFC) for Philippine tax purposes. RFCs are generally subject to 25% tax on net taxable income sourced from the Philippines, while NRFCs are generally subject to 25% final tax on its gross income with a Philippine tax situs.

Intercompany dividends received by RFCs from domestic corporations is exempt from tax. Dividends received by NRFCs may be subject to a reduced tax rate of 10% applying the tax sparing rule, or the applicable preferential rate under relevant tax treaty.

In case a foreign shareholder sells or divests its shares of stock in a domestic corporation, the transaction is subject to the 15% capital gains tax on net capital gains, regardless of whether the corporation is an RFC or NRFC.

Where applicable, NRFCs may access preferential tax rates under relevant double taxation conventions subject to approval or a tax treaty relief application filed with the BIR.



## **7. WHAT ARE SOME MISTAKES PARTIES MAKE OR POINTS THEY OVERLOOK WHEN CONDUCTING AN M&A IN THE PHILIPPINES?**

From a legal perspective, foreign investors or buyers at times fail to appreciate the gap between textbook law and actual implementation, as well as the volatility of the regulatory and political environment, when evaluating an investment opportunity. Parties usually focus on ticking off a checklist of necessary permits and approvals, but often fail to consider the social license or acceptability of the deal, the target or the project. For certain types of projects or industries, it is beneficial to have an engagement plan for regulators, local government units, host communities and other relevant stakeholders.

## **8. WHAT ARE THE FUTURE OPPORTUNITIES FOR FOREIGN INVESTORS IN THE PHILIPPINES?**

We expect an increase of foreign investments in the construction industry. A recent Supreme Court decision in the case of *Philippine Contractors Accreditation Board (PCAB) vs. Manila Water Company (GR No. 217590, 10 March 2020)* clarified that construction is not among the activities which the Constitution has reserved to Filipinos and struck down the rule requiring applicants for regular contractor's license to be at least 60% Filipino-owned. While the case is currently pending with the Supreme Court on a motion for reconsideration, foreign construction companies are gearing up to enter the market as soon as the decision is affirmed by the high court.

The banking and financial services sectors also promise a wealth of opportunities for foreign investors, especially with the fintech space riding a wave of accelerated digital transformation. The foreign ownership

restrictions in this industry have already been lifted in the last decade.

A Bill seeking to amend the Retail Trade Liberalisation Act to lower the capitalisation requirement for foreign retail trade enterprises is in its advance stages. Once it passes into law, more foreign retailers are expected to enter the Philippine market, whether by putting up physical stores or through the booming e-commerce industry.

Another Bill to ease foreign equity restrictions in transportation and telecommunications by amending the Public Service Act is likewise pending in Congress. The Bill proposes to limit the definition of "public utilities" to natural monopolies such as electricity transmission and distribution, water and sewerage, effectively releasing other public services traditionally considered as public utilities, such as transportation and telecommunications, from nationality-based restrictions imposed by the Constitution.

Other exciting opportunities for foreign investors are in capital intensive industries such as energy, infrastructure, manufacturing and real estate development. Because of globalisation and digitalisation, technology is a rapidly expanding area definitely worth exploring.

## **9. WHERE DO LOCAL LEGAL ADVISORS LIKE YOURSELF PROVIDE THE MOST VALUE IN AN M&A?**

The value of engaging local counsel is more pronounced in the Philippines where foreign lawyers and international law firms are generally not allowed to practice law. The value proposition of local legal advisors in M&A deals is highlighted in the following areas:

- **Deal structuring**

Transaction structuring requires broad legal knowledge and an experienced perspective



on complex and sometimes conflicting legal considerations for the deal, especially when involving highly regulated industries, activities that are subject to nationality restrictions or public companies subject to mandatory tender offers or certain disclosures. A competent local legal advisor offers a nuanced and practical approach to deal structuring that achieves a balance between risk management and commercial strategy.

- **Legal risk assessment and remediation/mitigation**

Findings from due diligence are best evaluated through a local lens to produce a comprehensive risk assessment that considers not only the materiality or impact of a risk but the likelihood of that risk. Solutions for the remediation or mitigation of identified risks may be offered by local counsel for purposes of the transaction, as well as in post-closing

integration and beyond. Local counsel's familiarity with the realities on the ground, including the political climate, local culture, and economic conditions, contributes to a robust risk management plan for the client.



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# We talk to Sesto E Vecchi of Russin & Vecchi about M&A in Vietnam

## CAN YOU GIVE US A GENERAL OVERVIEW OF THE CURRENT M&A LANDSCAPE IN VIETNAM?

Interestingly, despite a severe business lockdown between May and November 2021, Vietnam saw a steady stream of smaller M&A activity. Some involved transactions in the pipeline and many of them simply continued. They revolved around existing business activities, renewable energy, fintech and industrial real estate. The moving party was normally foreign. The reason, we suppose, was that the downturn and the immediate problems it caused resulted in Vietnamese companies searching for foreign investors to increase their stake.

## HOW HAS COVID-19 IMPACTED M&A IN VIETNAM?

According to a report by the Corporate Investment and Mergers & Acquisitions Center (CMAC), in 2020 the value of M&A in Vietnam was estimated to have fallen by about 49% year-on-year to US\$3.5 billion due to Covid-19. Most of the M&A activity that year was in the real estate, finance-banking,

industry and retail sectors, and that was before the strong negative impact of Covid, so the lockdown may have been affected by financial factors or normal economic factors.

We are yet to see the updated report for 2021. Generally, however, new M&A activities in the south of Vietnam were almost frozen during mid-2021 due to the strict lockdown in Ho Chi Minh City and other nearby provinces and only now is M&A slowly recovering. It is expected that the M&A volume in 2021 will stay at about the 2020 level.

## WHAT ARE SOME TRENDS EMERGING WITHIN M&A ACTIVITIES IN VIETNAM?

To the extent that one can perceive trends, renewable energy, education, fintech and industrial real estate all seem to have strong underlying demand or growth and additional capital requirements. Traditional sectors – residential real estate and retail – will continue. Besides the usual players from overseas, like private equity and growth funds, domestic corporations like Vingroup, Masan, etc are seen to be more active.



### **CAN YOU POINT OUT RECENT KEY LEGISLATION CHANGES IN VIETNAM WHICH HAVE HAD AN IMPACT ON M&A?**

The Investment Law and the Enterprise Law took effect on January 1, 2021. O21 2. The Law on Securities (also in effect since January 1) is also relevant to M&A activities, but to a lesser extent. The new laws introduce a slightly different regulatory process for most M&A transactions, and their impact would appear to be minimal. However, in some sectors such as real estate, there will be more regulatory hurdles to overcome to acquire a project that is still in an early state.

### **WHAT ARE SOME CHALLENGES FOR IN-BOUND M&A INTO VIETNAM? WHAT ARE SOME OPPORTUNITIES FOR FOREIGN INVESTORS?**

*Challenges:* Vietnam's legal framework is a continuing challenge as Vietnam doesn't have a unified law for M&A. M&A activities are governed by various laws on enterprise, investment, competition, securities, etc. This issue is not new, but it has an impact.

Legal interpretation is also an issue as supplements and interpretations of the key laws (such as the Law on Enterprise, the Law on Investment) are more frequently made by the authorities. There can be variations in views among provinces and even among officials. A lack of consistency among administrative bodies is a normal challenge.

*Opportunities:* Through M&As, foreign investors can rapidly access the consumers, locations and distribution channels of existing local companies. M&A also provides a good alternative to bank financing. Also, numerous foreign investors are seeking opportunities in Vietnam and there are many success stories.

The policy on state-owned enterprise (SOE) equitisation also brings opportunities to

foreign investors, especially for those wanting to become a strategic shareholder of an equitised SOE through M&A. SOE equitisation opens the door for foreign investors to enter certain business areas previously under controlled by the state, and to take advantage of an SOE's resources which private enterprises do not possess. However, it is a long process and patience is important.

### **ARE YOU SEEING ANY RECOVERY IN M&A ACTIVITY FROM COVID-19?**

As banks exercise more caution with lending limits and as the willingness to take risks continues, companies will increase capital from both existing and new investors in a market which yields significant growth in many fields such as electric powered vehicles, fintech, logistics, etc. With an underperforming second half of 2020 and an extended weak performance in 2021, next year will see some recovery, probably as early as the end of the first quarter or early second quarter.

### **WHAT IS YOUR FORECAST FOR M&A IN VIETNAM?**

Vietnam will continue to be an attractive destination for M&A in Southeast Asia and is expected to recover quickly after the pandemic. M&A will both reflect and drive recovery. However, uncertainties and difficulties will remain across the economy.

## **RUSSIN & VECCHI**



### **Sesto E Vecchi**

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Sesto has over 35 years experience practicing law in Vietnam. His expertise includes corporate, commercial law with particular emphasis on foreign investment. He acts for numerous multinational and mid-size investors, both foreign and Vietnamese. He has written and spoken extensively on Vietnamese legal issues.

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Your 'at a glance' guide to some of the region's top service providers.

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