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iHC

In-House Community *Magazine*

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iHC
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Magazine

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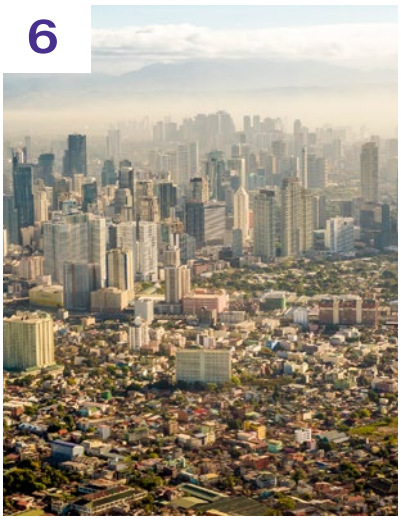
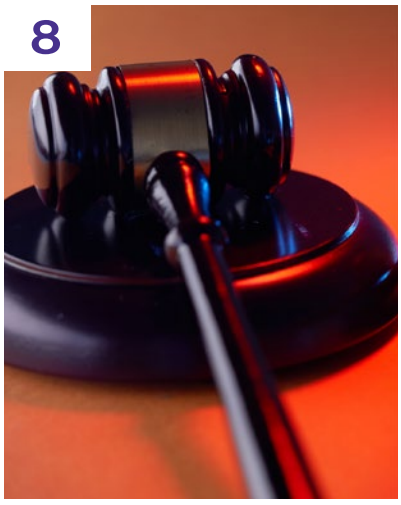
ANTITRUST & COMPETITION





JURISDICTION UPDATES

In this issue

Country's Achievements under the Philippine Development Plan

BY ERIC RECALDE

The National Economic Development Authority (NEDA) released in 2017 its five (5)-year Philippine Development Plan (Plan). It seeks to implement the lofty objectives of the Philippine Competition Act (PCA). In detail, it aims to review potentially anti-competitive legislation and policies, analyse competition issues in priority sectors, investigate anti-competitive conduct and agreements, promote competition-related policies and best practices, and conduct capacity-building activities for government agencies and other institutions.

The Philippine Competition Commission (PCC) has made great strides in implementing the Plan. The pandemic has not deterred the PCC in fulfilling its mandate. It is worth mentioning its efforts having impact on businesses. It has taken a stand on significant competition law issues, as found in its numerous policy notes, affecting priority sectors. To date, it has trained its sights on rice, sugar, pharmaceutical, shipping, and construction industries.

In 2020, the Supreme Court (in *Philippine Construction Accreditation Board (PCAB) Vs. Manila Water Company, Inc.*) considered the PCC's stand on the nationality restriction imposed on construction activities. It noted the PCC's explanation that such restriction was unfair and a significant barrier to entry of foreign competition. This led the Supreme Court to invalidate the long-standing administrative rule limiting foreign contractors' participation in the country's construction activities. It is only a matter of time for this Supreme Court ruling to become final, and for PCAB to ultimately accede to this significant pronouncement.

The PCC is mandated to align the country's competition policies with various regulatory requirements. Consistent with such mandate, the PCC has coordinated with different regulatory agencies and other administrative bodies and has concluded special arrangements with the country's financial regulators, namely: the Securities and Exchange Commission, the Bangko Sentral ng Pilipinas, and the Insurance Commission. It has also aligned with the Department of Justice and the Office of the Ombudsman for its enforcement actions.

In the early years of PCA's implementation, the PCC placed significant attention on the implementation of the country's merger control regime. It is *mandatory* and *suspensory*, such that the transactions that meet the

prescribed notification thresholds cannot be *closed* until the PCC's approval is obtained, whether explicitly, or implicitly with the mere passage of time without action. The parties' failure to comply with this requirement renders the transaction void, and they may be held liable for hefty administrative sanctions. The notification requirement covers not only typical mergers and acquisitions but also joint ventures resulting in control by all JV partners. Control, in this context, refers to competitively sensitive business actions.

It is no surprise the PCC has taken an overly cautious approach in the early years of its implementation. It has prevented, or imposed significant conditions on, major acquisitions. The PCC's actions, at times, created inconveniences even on obviously non-competitive transactions. The PCC sensed this. As a dynamic agency, it clarified its position on land acquisitions, including foreclosure transactions. The same is true regarding business reorganisations. It also provided an exemption, subject to certain conditions, for Public-Private Partnership projects, whether solicited or unsolicited, and other NEDA sanctioned projects. Initially, the PCC shunned voluntary notifications but ultimately permitted such. It adopted an expedited review mechanism, although some expressed doubts as to its utility.

The merger review requirement has been streamlined and, temporarily at the height of the pandemic, liberalised. The pandemic limited the PCC's merger review activities, as few had appetite in making acquisitions. The Bayanihan Law (RA 11494) partly contributed to this hiatus when it temporarily increased the threshold for compulsory notification, from P2.4 billion to P50 billion, up to September 2022, being the perceived end of the pandemic. Thereafter, the threshold will revert to the pre-pandemic amount, subject to the established periodic adjustment benchmarked on the country's economic growth.

Following the lapse of the statutory grace period for businesses to adjust their practices, the PCC immediately focused on investigation of conduct and agreements that have long stifled competition. This has been done in tandem with its leniency or whistleblowing program, and capacity building for its personnel geared towards a robust enforcement action. The Supreme Court, in turn, has adopted the rule on administrative search and inspection. Notably, dawn raid requirements are similar to those for search and seizure. To date, there have been no known PCC initiated dawn raids. The Supreme Court has also decided on abuse of dominance cases involving relatively small players, although the country has yet to see its decision on a high-profile investigation.

This is the final year of the Plan and is the best time to step back to assess whether the PCC has been effective and successful in implementing the Plan and realising the lofty objectives of the PCA.

The views and opinions expressed in this article are those of the author. This article is for general information and educational purposes, and is not offered as, nor does it constitute, legal advice or legal opinion.

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Conflicts and Clarity: UK Supreme Court provides further clarity on important conflict of law issues frequently arising in cross-border claims

BY JEREMY LIGHTFOOT
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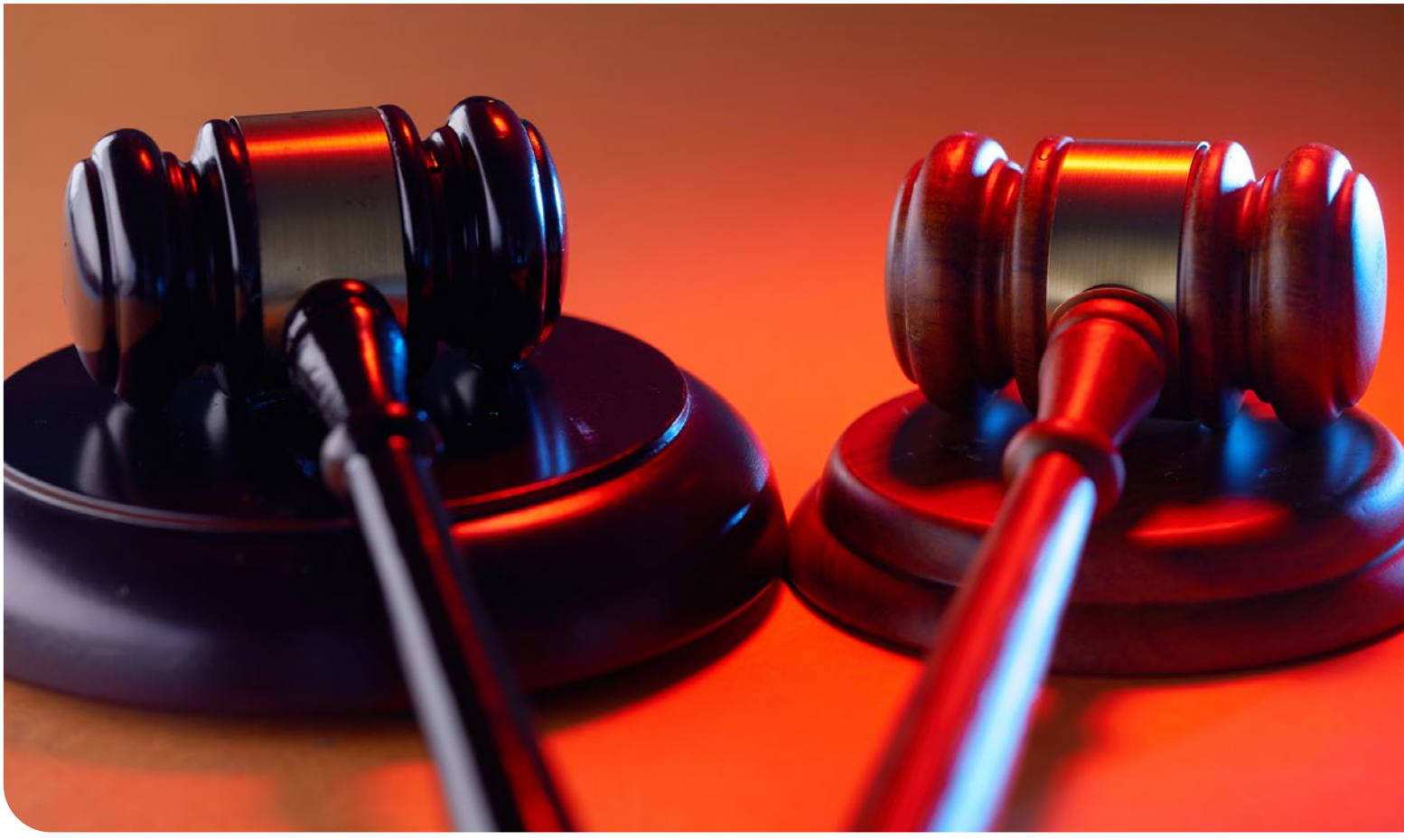

The recent decision in FS Cairo (Nile Plaza) LLC v Lady Brownlie (as Dependant and Executrix of Professor Sir Ian Brownlie CBE QC)[1] has provided instructive guidance on the breadth of the jurisdictional gateway for tort claims and brought further clarity regarding the conceptual differences between the 'default rule' and the 'presumption of similarity' that are often relied upon in the application and pleading of foreign law. This decision is of widespread relevance given the frequency with which these issues arise in cross-border claims.

The case concerned an application to serve claims in tort and contract on an Egyptian company out of the English jurisdiction. Before permission may be given for service of a claim form outside the jurisdiction, the relevant domestic rules require that the claimant must establish that: (1) the claim falls within one of the gateways set out in paragraph 3.1 of Practice Direction ("PD") 6B to the CPR; (2) the claim has a reasonable prospect of success; and (3) England and Wales is the appropriate forum in which to bring the claim.[2]

The defendant raised two issues before the Supreme Court. The first (the "**tort gateway issue**") was whether Lady Brownlie's (the claimant's) claims in tort satisfied the requirements of the relevant jurisdictional 'gateway' in the CPR. The second (the "**foreign law issue**") was whether, in order to show that her claims in both contract and tort had a reasonable prospect of success, Lady Brownlie would have to provide evidence of Egyptian law.

THE TORT GATEWAY ISSUE

Paragraph 3.1(9)(a) of PD 6B to the CPR provides that domestic jurisdiction can be assumed in tort claims where *"damage was sustained ... within the jurisdiction"* (similar wording of the tort gateway can be found in offshore jurisdictions such as the BVI and the Cayman Islands). By a 4:1 majority, the Supreme Court found that the breadth of the tort gateway should be interpreted broadly and rejected a narrower reading that sought to distinguish between direct and indirect damage. The Court considered the word "damage" to refer to actionable harm, direct or indirect, caused by the wrongful act alleged;[3] it should not be limited to the damage necessary to complete a cause of action in tort. In particular, Lord Lloyd-Jones opined that:

> *"...damage is likely to be relevant to the identification of an appropriate jurisdiction for the adjudication of a claim in tort not because it may complete a cause of action but, more generally, because the damage actually suffered by the victim may, depending on all the circumstances of the case, serve to link the wrongdoing to a particular jurisdiction... the word in its ordinary and natural meaning and when considered in the light of the purpose of the provision extends to the physical and financial damage caused by the wrongdoing, considerations which are apt to link a tort to the jurisdiction where such damage is suffered."*[4]

THE FOREIGN LAW ISSUE

It is common ground that Lady Brownlie's claims were governed by Egyptian law. In relation to the foreign law issue, the Supreme Court considered and distinguished two related rules: the 'default rule' and the 'presumption of similarity'. The 'default rule' is a rule that, in a case to which foreign law applies, *"in the absence of satisfactory evidence of foreign law, the court will apply English law"*.[5] The 'presumption of similarity' is a presumption that, in the absence

[1] [2021] UKSC 45
[2] Para.25
[3] Para.81
[4] Para.57

of evidence to the contrary, foreign law is presumed to be the same as English law.[6]

Lord Leggatt (with whom all others were in agreement) emphasised the need *"...to recognise that there are two different rules which are conceptually quite distinct. So too are their respective rationales. The presumption of similarity is a rule of evidence concerned with what the content of foreign law should be taken to be. By contrast, the 'default rule' (as I shall use that term) is not concerned with establishing the content of foreign law but treats English law as applicable in its own right where foreign law is not pleaded."*[7]

For the application of the default rule, Lord Leggatt found that it depended on neither party choosing to advance a case that foreign law is applicable. If either party pleads that foreign law is applicable to an obligation, and the case is well founded, it is the duty of the court to apply foreign law. To apply English domestic law in that situation would *ex hypothesi* be unlawful.[8]

The presumption of similarity, on the other hand, is justified by the object of adjudication to do practical justice between the parties.[9] The Court noted that the application of this rule is limited: *"...The question is one of fact: in the circumstances is it reasonable to expect that the applicable foreign law is likely to be materially similar to English law on the matter in issue (meaning that any differences between the two systems are unlikely to lead to a different substantive outcome)?"*[10] The presumption of similarity is thus only ever a basis for drawing inferences about the probable content of foreign law in the absence of better evidence.[11] The Court also provided some general guidance on when it may properly be employed. In particular, there is more scope for relying on the presumption of similarity at an early stage of proceedings when all that a party needs to show in order to be allowed to pursue a claim or defence is that it has a real prospect of success. By contrast, to rely solely on the presumption to seek to prove a case based on foreign law at trial may be a much more precarious course.[12]

While the parameters of *Brownlie* will be tried and tested in the years to come, it is an important decision that provides clarification on several key conflict of laws concepts. It is reasonable to expect that this judgment will have significant implications for practitioners in common law jurisdictions and will be of persuasive authority for the offshore courts in considering similar issues when dealing with applications to serve claims on foreign defendants.

[5] Dicey, Morris and Collins, *The Conflict of Laws*, 15th ed (2012), para 9R-001, rule 25(2)
[6] Supra note 4, para. 108
[7] Para.112
[8] Para.116
[9] Para.124
[10] Para.126
[11] Para.149
[12] Para.147

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

NEWS

Eva Chan heads Simmons' Hong Kong office

Financial Markets Group partner, Eva Chan, was appointed as head of the Hong Kong office of Simmons & Simmons, effective 1 January 2022. She joined the firm in 2005, and has more than 18 years' experience in advising global asset managers and financial institutions on a wide range of investment funds related matters. She is a member of the firm's Global Partnership Appraisal Committee and various steering groups. From 2016 to 2021, she was also a co-partner of graduation recruitment of the firm's Hong Kong office.

Established in 1979, the Simmons Hong Kong office was the first and largest of the firms offices in Asia.

"I am honoured to be appointed as the new head of Simmons Hong Kong office. I look forward to working more closely with my colleagues, who are our firm's most important asset, to strengthen our position as an industry-leading law firm by delivering smarter solutions to our clients' most complex challenges," Chan said.

"I would also like to take this opportunity to thank Fiona Loughrey, on behalf of the firm, for her outstanding leadership and contribution as the Head of Simmons Hong Kong office over the past years," she added.

Jonathan Hammond, Asia Regional Head of Simmons & Simmons, commented: "Eva is an experienced lawyer who always works with dedication and commitment. We are confident that our Hong Kong office will continue to thrive under her leadership."

Norton Rose appoints a new head of banking and finance for EMEA

Norton Rose Fulbright has appointed Madhavi Gosavi as head of banking and finance for Europe, Middle East and Asia (EMEA), effective 1 January 2022. She succeeds Chris Brown, who held the leadership role from 2019.

Madhavi also assumes a position on the firm's EMEA management committee. She joins four new committee members, including head of Hong Kong, Psyche Tai, head of Singapore, Yu-En Ong, head of Paris, George Paterson, and global co-head of

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information governance, privacy and cybersecurity, Ffion Flockhart.

"I am excited and enthused to take over the leadership of our EMEA banking and finance team, which is one of the leading practices in the market. The opportunities for Norton Rose Fulbright ahead are vast, and I am look forward to working with our clients and our banking partners to build on our global platform," said Madhavi.

Peter Scott, EMEA managing partner, commented: "At a time of profound change for our firm and our clients, we need strong and dynamic leadership to drive forward our banking and finance practice. Madhavi is an outstanding lawyer and, with her wealth of experience, we will continue to deepen our capabilities and enhance the value we provide to clients."

Baker McKenzie Bolsters its Financial Services Practice in Hong Kong

Virtual assets and investment funds lawyer, Joy Lam, has joined Baker McKenzie's Financial Services Practice in Hong Kong, where she will advise clients on virtual asset funds, tokenized offerings, and the development of infrastructure that support the virtual assets ecosystem.

Joy has acted in a wide range of transactions, including advising on Asia's first open-ended tokenized fund, Asia's first close-ended tokenized fund, and securing the Hong Kong Securities and Futures Commission's first approval for a virtual assets fund that permits subscriptions and redemptions to be effected in cryptocurrency.

Her experience also includes advising on virtual asset funds, non-fund tokenized offerings, and the complex and rapidly evolving regulatory requirements for managing investments in virtual assets and operating secondary exchanges for virtual assets.

Baker McKenzie notes that Joy is a founding committee member of the Asia Security Token Alliance, is active in thought leadership and the publication of whitepapers related to tokenization, and is also a regular speaker at conferences, including those organized by OSL, Hong Kong's first regulated crypto exchange and Asia's largest digital asset trading platform. She joins from Sidley Austin, where she was a partner.

"At a time when financial institutions, sponsors and fintech providers across the globe are working to integrate and expand their digital assets offerings and investments to future-proof their business, having Joy on board will help us better meet our clients' growing needs. Joy's track record and experience with blockchain technology, tokens and virtual asset exchanges will no doubt be of significant value to our clients, and will further solidify our market-leading position," said Jason Ng, head of Baker McKenzie's Financial Services practice in Hong Kong SAR, Mainland China and Singapore.

MOVES

Christopher & Lee Ong, a member firm of Rajah & Tann Asia, has strengthened its capital markets practice with the addition of new partners **Annette Soh** and **Daphne Lam**, and their team of lawyers.

Soh joins the capital market practice as co-head, bringing with her a wealth of experience in the field of equity capital markets, acquisitions and disposals, mergers and demergers, and joint ventures. She began her career at a prominent law firm in Malaysia, where she grew her expertise in corporate finance and general litigation, before focusing her practice on capital markets. Soh has advised on many notable IPOs and corporate exercises over the years. She was also involved in the drafting of the Malaysia Equity Capital Markets Due Diligence Guide. She is a member of the Bar Council Corporate and Commercial Law Committee (CCLC), and she heads the Securities Commission Sub-Committee.

On the other hand, Lam brings extensive experience in this field, having successfully advised on numerous IPOs, as well as equity and debt securities offerings. She has advised clients from a wide range of industries, from industrial automation solutions providers to those in the construction and manufacturing industries, on their corporate exercises. Her expertise also extends to matters involving takeovers, M&As, commercial property transactions and joint ventures.

Mayer Brown has added **Soumitro Mukerji** as a partner in its banking and finance practice in Singapore. He joins from Hogan Lovells in Singapore, and previously practiced in London at Linklaters. Mukerji has nearly 15 years of experience advising on complex banking and finance matters, including fund-level financing, leveraged and acquisition financing, general corporate financing and structured lending. His clientele includes banks, financial institutions, funds, corporates and financial advisors across the credit spectrum. Having previously worked in London and Mumbai, and based in Singapore since 2019, he is able to offer a truly international perspective on transactions. Alongside his broad finance practice, Mukerji has one of the most active fund finance practices in Singapore, concentrating on representing both financial institutions and fund managers on fund financing products, including subscription line financings, umbrella facilities, NAVs, hybrids and GP facilities. He sits on the APAC Advisory Council of the Fund Finance Association (FFA), where he actively supports the development of the investment funds market within the APAC. He also sits on the FFA's APAC Diversity Committee, and is a vocal advocate for diversity and inclusiveness within the APAC finance community.

MOVES

LC Lawyers, the Hong Kong law firm member of the EY global network, has added **LI Fai** as a partner. He advises on corporate finance, capital markets, M&A and regulatory compliance. Prior to joining the firm, LI had been with reputable international and Mainland China-based law firms. He is experienced in Hong Kong IPOs, as well as fund raising and M&A involving Hong Kong-listed companies.

Milbank has added **David Cho**, one of the leading corporate and M&A lawyers focused on South Korea, as a partner in the firm's global corporate group. Temporarily based in Los Angeles, Cho will ultimately be based in the firm's Seoul office, where he will act as managing partner. Cho will be joined by special counsel Spencer Park and associates, Amos Yoo and Susan Yoon. Cho's practice focuses on cross-border M&A, as well as other corporate finance and capital market transactions. He has extensive experience working with multinational clients, including major Asian companies, on international transactions spanning a wide array of sectors, such as private equity, ESG, technology, life-sciences, manufacturing and energy.

In his decades-long career, Cho has worked on some of the largest and market-leading M&A, private equity and capital markets transactions in Korea, such as on Lone Star's purchase of Korea Exchange Bank, the IPO of OCI Resources and its listing in New York, and SK hynix's participation in the consortium that bought Toshiba's memory business. Cho joins from Dechert, where he served as head of its Hong Kong office and Asia co-managing partner. He is fluent in both English and Korean, and received his JD from the Chicago-Kent College of Law.

Ashurst has strengthened its dispute resolution practice with the appointment of **Alexander Dmitrenko** as a partner, based in Tokyo. Dmitrenko has over 15 years' experience specialising in white-collar defence, internal investigations, sanctions and export controls, and dispute resolution. He has substantial experience advising on compliance with sanctions and export controls, anti-bribery and corruption, anti-money laundering, human rights and forced labor, and other laws and regulations; establishing compliance policies and procedures; conducting due diligence and compliance clearance on various projects and investments; and conducting internal and regulatory investigations related to potential violations, for example, of the US sanctions or the US Foreign Corrupt Practices Act. Dmitrenko also advises financial institutions and other companies on compliance and risk mitigation measures related to US-China regulatory tensions and potential conflict of laws. He is qualified to practice in New York, England and Wales, and the Russian Federation. He speaks English, French, Japanese, Russian and Ukrainian.

MOVES

Ashurst has also expanded its debt capital markets expertise with the appointment of **Jessica Li** as partner in the global markets group, based in Hong Kong. Li joins from Allen & Overy, where she worked from 2013, prior to which she was trained at Clifford Chance in Hong Kong and London. Her practice focuses on debt capital markets in Greater China, and her key clients include local and international banks and financial institutions, as well as other corporate entities. Li advises on various debt and equity-related capital market products. She has experience in advising issuers and dealers on various debt capital market transactions, including standalone bond offerings, MTN program establishment and note issuances thereunder, hybrid securities offerings, equity-linked debt products, and Basel III compliant regulatory capital issuances, with a special focus on China-related markets. Li is qualified in Hong Kong. She is native in Mandarin, and fluent in English and Cantonese.

Virapon Panabut has joined Thailand law firm, Kudun & Partners, as senior counsel of the firm's Dispute Resolution, Litigation and Arbitration, and Restructuring and Insolvency Practice. Khun Virapon is a highly acclaimed and well-known counsel who has held several remarkable positions such as Deputy Attorney General of the Department of Administrative Litigation, Office of the Attorney General, Director-General of the Office of Appellate Litigation Region 7, Director-General of the Foreign Affairs Office, Director-General of the Office of Legal Counsel, and Director-General of the Department of Administrative Litigation, Office of the Attorney General. His area of expertise includes government procurement contracts, administrative contracts and laws, local and international arbitration, and commercial and business litigation.

Eversheds Sutherland has added **Roger Zhou** as an equity capital markets partner in its Hong Kong office. Specialising in Hong Kong capital market transactions and general corporate law, Zhou has extensive experience in representing issuers and underwriters on all aspects of IPOs, in addition to counselling on foreign direct investments in China. He also regularly advises Hong Kong-listed companies on post-IPO compliance issues, including annual compliance, M&A, bond issuance and placements. Prior to joining the firm, Zhou was an international partner at a global law firm, based in Hong Kong.

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HFW has continued the growth of its Australian construction practice with the hire of **Michael Debney** as a partner in Melbourne. Debney advises contractors, financiers and owners on all aspects of project development and implementation. Joining from Herbert Smith Freehills, he previously spent more than a decade in industry in senior legal and commercial roles in Australia, England and the Middle East. Debney has a broad advisory and transactional construction practice, with a focus on the energy, natural resources, industrial plants, transport infrastructure, and transport operations and maintenance sectors. He advises clients across every stage of construction projects, from project structuring to drafting and negotiating project agreements, as well as advising on issues arising during project implementation. Debney has worked on some of the world's largest infrastructure projects, including the A$4 billion (US$2.8b) Sydney Trains PPP, as well as many of Australia's most innovative projects, such as the development of AGL's grid forming battery storage system and TasNetworks' A$3.5 billion (US$2.5b) Marinus Link subsea interconnector. He previously held a senior in-house role with the Downer Group in Australia, and also has extensive experience on construction disputes.

White & Case has expanded its global M&A practice with the addition of **Sayak Maity** as a partner in Singapore. Maity regularly advises global private equity funds on investments in India and the wider Asia-Pacific region. He also advises international companies on M&A, joint ventures and corporate governance, with particular experience in the manufacturing, extractives, pharmaceuticals and technology sectors. He joins from AZB & Partners, where he was a partner.

FenXun Partners has added M&A/PE lawyer, **Zhang Hong**, at its Shanghai office, as head of private equity practice for China. Zhang, who has worked in leading international and domestic firms, brings with her deep experience in complex domestic and cross-border M&A and corporate transactions inside and outside China. She has over a decade of experience in advising Chinese companies and multinationals on both China inbound and outbound investments. She focuses on domestic and overseas cross-border M&A and related legal issues, including complex private equity and venture capital investment and financing, 'red-chip' structures, pre-IPO equity financing for various types of corporations, as well as strategic cooperation and joint venture transactions. Over the years, she has accumulated extensive experience and unique insight across a wide range of sectors, including Technology, Media and Telecom, fintech, healthcare, real estate, financial institutions, high tech and high-end manufacturing. Zhang graduated from East China University of Politics and Law with a bachelor's degree in law, and she obtained her master's degree in law from Columbia Law School (with honors). She is admitted to practice in China and the State of New York in the US.

MOVES

Gibson, Dunn & Crutcher has added **Grace Chong** as Of Counsel in its Singapore office. As a member of the global financial regulatory practice group, her practice will focus on assisting a range of financial institutions with their most complex regulatory matters. Before joining Gibson Dunn, Chong practiced with the regulatory and digital business team at Simmons & Simmons in Singapore and Hong Kong, where she advised banks, asset managers and corporates on regulatory and fintech matters. She is a certified cybersecurity GIAC GLEG, IAPP CIPP/A/E and IAPP CIPM professional, and regularly conducts cybersecurity assessments and investigations in Asia. In addition, she is an International Association of Privacy Professionals (IAPP) Fellow of Information Privacy, and is part of the IAPP Women Leading Privacy Board. Chong is a board member of the Singapore Association of Cryptocurrency Enterprises and Startups (ACCESS), and serves on the ASEAN Advisory Board of the Global Association of Women in Payments. She is also a member of the AML Committee of the Law Society of Singapore.

Chong is a member of the Environmental, Social and Governance Working Group in the Alternative Investment Management Association (AIMA), and was involved in drafting an ESG Primer for Asset Managers in Asia in October 2020. Previously, she was in-house counsel at the Monetary Authority of Singapore, as well as in-house counsel in the global internal investigations group at the Hong Kong headquarters of a leading multinational bank. She graduated with First Class Honors from University College London. She is admitted as an Advocate and Solicitor of the Supreme Court of Singapore, and as a Solicitor of the High Court of Hong Kong.

Patent Pledges and IP Financing

BY RONALD YU
KENNETH YIP
CO-FOUNDERS,
MAKEBELL LIMITED

The rise of open innovation and open source software has caused some organisations to rethink long-established practices, including their attitude towards intellectual property (IP) and IP Rights (IPRs). Add to this the growing presence of insurance firms, lenders and venture capitalists willing to use IPRs as collateral for financing, and a definitive shift in mindset can be seen taking place.

To further fuel the trend, in late 2021, China announced amendments to its procedures to register patent pledges after the China National Intellectual Property Administration (CNIPA) proposed a few amendments in its Proposal on Revision of the Patent Pledge Registration Method (Draft for Soliciting Comments), consultation period which closed on 10 August 2021.

The updated measures, announced in November 2021 (http://www.gov.cn/zhengce/zhengceku/2021-11/17/content_5651398.htm), include provisions outlining what is needed to register a patent pledge, such as a contract (Art. 3), consent of all co-owners (Art. 4), and application requirements (Arts. 7-9), as well as provisions dealing with amendment (Art. 13) and cancellation (Art. 14).

TWO WORDS, TWO MEANINGS

It is important to note here that the term 'patent pledges' lacks a clear definition in general. Some may think of patent pledges as vehicles to be used by organisations to promote certain technologies, such as:

- IBM's promise not to assert 500 of its patents against the development, distribution and use of open-source software;
- Denso Wave Incorporated, which holds a number of patents on QR Code, allowing free use of the QR Code as long as the standards for QR Codes in JIS or ISO are followed; and
- Tesla CEO, Elon Musk, announcing, in 2014, that Tesla would not "initiate patent lawsuits against anyone" who uses their technology in good faith.

However, patent pledges can also be viewed in terms of collateral for IP financing, and it is this latter definition that China's legal drafters had in mind.

China's introduction of these patent pledge-related measures is not surprising as they help with the dissemination and development of new technology, outlined in China's latest five-year plan which emphasises technological independence and leadership in key technologies, such as AI, the Internet of Things, biotech, integrated circuits, and 5G and blockchain, along with lowering barriers to access technologies and financing for small firms and start-ups.

It is important to note here that the term 'patent pledges' lacks a clear definition in general.

Overall, China has increased lending support for the private sector, with new loans to private enterprises in the first ten months of 2021 reaching five trillion yuan (US$782 billion), according to a Xinhua report citing the nation's top banking and insurance regulator. Furthermore, IP financing has been growing rapidly in China. In 2020, the total confirmed amount of patent and trademark pledge financing in China reached 218 billion yuan - a year-over-year growth of 43.9%, while the number of pledged projects grew 43,8%, to 12,093. COVID-19 accelerated this trend when CNIPA and intellectual property bureaus at all levels carried out a series of measures to promote IP financing.

The changes also dovetail well with the open licencing provisions of China's updated patent law, whereby patent holders may grant non-exclusive (but not sole or exclusive) licenses, while annual patent fees paid by patentees will be reduced or exempted.

This combination of changes will further help companies and individuals seeking financing using their IPRs. To avoid confusion, companies seeking to promote their technologies using promises not to sue may want to reconsider their nomenclature.

There is yet another potential benefit for the new registration system – it provides a backhanded way for inventors and companies to find out who has been providing financing for IP.

But this is only half of the matter. Lenders will need to do their due diligence before signing off on, for example, a loan backed by patents as collateral.

THE US AND OTHER COUNTERPARTS

China's patent pledge measures are actually nothing new. Other patent jurisdictions also track IP securitisation. The US Patent and Trademark Office (USPTO), for example, tracks patents (or applications) pledged as part of a security agreement on its public database, but as 'assignments' rather than 'patent pledges'. The sample illustrated here shows patents assigned to a bank – JPMorgan Chase – and a list of assignments pledged as part of a security agreement.

Having an up-to-date and easy to search, publicly accessible list of patents pledged as financial collateral (e.g. for a loan or venture financing), allows lenders to ensure that the same patent has not been pledged multiple times concurrently by bad-faith patent owners.

Patent assignment 051929/0645

SECURITY AGREEMENT

Date recorded
Feb 13, 2020

Reel/frame
051929/0645

Pages
20

Assignors
STUBHUB, INC.

Execution date
Feb 13, 2020

Assignee
JPMORGAN CHASE BANK, N.A.
JPMC CB COLLATERAL SERVICES, 10 S. DEARBORN, FLOOR L-2
MAILCODE: IL1-1145, ATTN: DOCUMENT WORKFLOW MANAGEMENT DEPT.
CHICAGO, ILLINOIS 60603

Correspondent
CT CORPORATION
4400 EASTON COMMONS WAY
SUITE 125
COLUMBUS, OH 43219

Properties (81 total)

Patent	Publication	Application
1. METHODS AND COMPUTER-READABLE STORAGE DEVICES FOR MANAGING TRANSACTIONS WITH MULTIPLE BROKER AFFILIATES Inventors: JACOB M. DUBIN, JERRY L. THOMPSON		
7792700 Sep 7, 2010	20050015303 Jan 20, 2005	10606086 Jun 25, 2003

Assignment abstract of title for Application 14987691

Invention title/Inventor	Patent	Publication	Application	PCT	International registration
USER-SPECIFIC EVENT POPULARITY MAP Ramon Elias, Matthew B. Gustke, Srini Venkatesan	10223757 Mar 5, 2019	20160132974 May 12, 2016	14987691 Jan 4, 2016		

Assignments (4 total)

Assignment 4

Reel/frame
051929/0645

Execution date
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Feb 13, 2020

Properties
81

Pages
20

Conveyance
SECURITY AGREEMENT

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IP VALUATION

The above complements the process of IP valuation as a pledge/assignment would add an additional wrinkle to an IP asset and thus potentially affect its value and, of course, some form of IP valuation would be needed as part of any IP financing exercise. IP valuation itself is a complex topic well beyond the scope of this article, but, suffice to say, valuing IP is not the same as valuing other assets, such as real estate, because of the business, technological-related (typically with patents but increasingly with some copyright protected content), and legal variables, including IP assignment or pledging risks.

Lenders – including not just banks, but also organisations providing IP-backed business funding (e.g. venture capital) – should ensure their loan evaluators understand the nature of IP value and that their due diligence procedures account for IP-related risks in addition to excessively pledged/assigned IP or events that impact the value of pledged IP.

NEW CAVEATS FOR LENDERS

A patent pledged as loan collateral can be invalidated or openly infringed with devastating effects on its value, and the risks are not exclusive to patents. There are a multitude of potential risks for copyrighted works, including infringement (both primary and secondary) or disputes among joint authors or owners (something we see, for example, in the NFT space where sales of NFTs were halted due to disputes among joint authors of a work). Finally, if an IP owner cannot enforce its IPRs, the value of the IP may be eroded.

A patent pledged as loan collateral can be invalidated or openly infringed with devastating effects on its value, and the risks are not exclusive to patents.

There is a common joke among legal professionals that lawyers often like to start an answer with the words ‘it depends’ but, in the case of IP valuation, with the confluence of business, technological and legal considerations, the value of any IP really does depend on many things and, as noted above, can quickly change dramatically.

As more companies seek to offer their IP as collateral, lenders and counsel will need to start learning more about IPRs, particularly the related risks, and get comfortable with the inherent uncertainties involved.

Ron Yu

Ron Yu teaches intellectual property law and Fintech at the Chinese University of Hong Kong (where he also does research), the University of Hong Kong, and the Hong Kong University of Science and Technology.

What's in Store for the Legal Consulting Market in 2022?

BY HELEN LIBSON
GEORGEANNA MOK
FELICITY WARREN
DONNA TITLEY
MARIE KIRBY
AZARA DIGAN
AMIE DAVIDSON

Demand for flexible legal resourcing has risen sharply during the pandemic. The Peerpoint team reflects on the drivers behind this rise and explain why 2022 is a great time for lawyers to explore legal consulting as a career option.

WHAT IMPACT HAS THE PANDEMIC HAD ON LAWYERS' ATTITUDES TO LEGAL CONSULTING?

Initially, the pandemic resulted in a slowdown in the flexible resourcing market. However, it has been buoyant again, particularly over the last 10 months. One reason is that many more lawyers switched to consulting over this period as part of a trend that some economists are dubbing "the great resignation". Millions of people are now using the unprecedented disruption and uncertainty caused by the pandemic as an opportunity to re-evaluate what they want from life and assess how their careers can make those goals happen.

"A lot of people are rethinking their careers and looking for the variety, control and new learning opportunities that legal consulting brings," says Marie Kirby, Head of Talent at Peerpoint. "In-house lawyers, for example, can sometimes hit a career ceiling and see fewer options to progress, so legal consulting offers different challenges and opportunities in new environments. Sometimes a change is as good as a rest, and this change can give their career the boost it needs."

In terms of client demand, Peerpoint has seen a very sharp rise in clients seeking out resourcing solutions as in-house legal teams

experience budget constraints and resourcing challenges. "There is a clear talent shortage for permanent hires, which is where the flexible and short-term solutions that Peerpoint and similar providers offer is key," says Helen Libson, Global Engagement Manager.

ARE THESE TRENDS CONSISTENT GLOBALLY, ACROSS MARKETS?

For the most part, yes. In Asia, for example, Peerpoint is also seeing a marked rise in lawyers turning to consultancy. "However, this is being driven less by a need to re-evaluate life priorities and more by an increase in opportunities," says Georgeanna Mok, Resourcing and Business Management Executive, Asia. "As economies here start to rebound from the pandemic, there is greater demand for the legal services that can help businesses facilitate growth."

Demand has been compounded by a talent shortage. In corporate hubs like Hong Kong and Singapore, for example, the pandemic saw an acceleration in senior lawyers taking early retirement. At the same time, many expatriate lawyers who had built careers in Asia moved back to their home markets to avoid the travel restrictions on when they could reunite with family.

"These shifts, coupled with the organisational restructuring, layoffs and hiring freezes also associated with the pandemic have left a significant gap in the mid-to-senior level legal talent pool," explains Felicity Warren, Senior Client Development Manager, Asia. "That's proving a real challenge for the global organisations now looking to increase headcount in their Asia offices as economies start to open up again across the region."

Peerpoint is seeing organisations, especially in the financial services sector, scrambling to fill open positions. "Some firms are also aggressively competing for legal talent by offering much higher-than-average salaries," Warren says.

Peerpoint is seeing organisations, especially in the financial services sector, scrambling to fill open positions.

"All this is resulting in many more corporate legal departments turning to flexible legal resourcing to fill their talent gaps with top-quality interim and project-based support. At the same time there's been a rise in permanent job offers for consultants after they finish their contracts, indicating that this is very much a talent-driven market right now."

LOOKING AHEAD, HOW MIGHT THIS PLAY OUT OVER 2022? WHAT ARE YOU EXPECTING TO SEE OVER THE NEXT SIX MONTHS, AT LEAST?

The demand for interim legal resources will likely keep rising as businesses adapt to the shifting post-pandemic market. Employers seeking to fill talent gaps are eager to avoid delays caused by traditional recruitment processes, especially in firms already impacted by pandemic-related cost pressures and headcount freezes.

"In the U.S., deal teams remain busy," says Amie Davidson, Head of Peerpoint U.S. "As a result, we are seeing sustained demand from clients for transactional lawyers, particularly at the mid associate level. For a lawyer considering whether to make the move from private practice to an in-house role, short term assignments can be a great way to gain in-house experience at a variety of organisations before committing to a permanent position. "It's also likely that the pandemic and its economic consequences will continue to present some organisations with additional challenges, as out-of-the-ordinary matters such as disposals, insolvencies and disputes arise. Such issues require specific legal skill sets that may not exist within current teams."

"In Asia, Peerpoint is also seeing especial demand for short-term personnel in the burgeoning technology space. Consultants with the skill sets and interest to work in this area are particularly hot commodities right now," says Donna Titley, Talent Development Manager, APAC. "But across the board, there is an ever-increasing range of options available for lawyers seeking to leave the traditional law firm or in-house legal environment and embrace the ability to chart their own career course, while still having the support and resources of a global law firm."

WHAT ARE THE KEY THINGS LAWYERS AND CONSULTANTS SHOULD BEAR IN MIND AS WE HEAD INTO 2022?

Despite the ongoing uncertainties associated with the pandemic, as demand continues to increase and flexible resourcing becomes more fully established in the mainstream, this is an especially good time for lawyers to consider legal consulting as a career option.

That might include legal consulting for a period, then moving back into a permanent role or taking time-off to pursue other interests before coming back to consulting again. "We have so many great opportunities right now that offer more flexibility in how and where people work," says Kirby.

Azara Digan, Peerpoint's UAE Business Manager, adds: "Another consideration for many lawyers is specialism. Some potential consultants perceive their experience is too specialised or too generalised for consultancy. In the Middle East we see a real melting pot of people from all sorts of international backgrounds which means there are some really unique opportunities. Don't count yourself out because you think your experience won't fit consulting. Nine times out of ten after a conversation with our team, we find that there are more options for you than you initially realised."

Making this shift might seem daunting but, as the team also points out, Peerpoint isn't just about sourcing roles. "We offer tailored coaching and support so lawyers can succeed as legal consultants. Having access to A&O and its resources and networks also differentiates us in the market by connecting consultants to a top law firm without necessarily needing to work for one," says Libson.

Kirby puts it this way: "We actively help people move through career stages or change direction in the flow of work. It's really all about building careers and supporting consultants to be the best they can be."

WHAT OTHER OPPORTUNITIES HAS THE PANDEMIC BROUGHT ABOUT FOR LEGAL CONSULTANTS?

Around the world, lockdowns forced organisations to speed up a switch to digital ways of working. Firms everywhere beefed up their remote working and virtual conferencing capabilities and, as a result, there is now considerably more scope for legal consultants to work remotely for foreign clients.

"Some roles are entirely remote – if clients can't source the right talent in their local market, they're often open-minded about someone doing the role from another location. Ultimately, they want the best people," says Kirby.

In Asia, Peerpoint is seeing an unprecedented number of opportunities for consultants to work on projects for jurisdictions they are not based in. "For example, we're currently partnering with a consultant who has an option to work for a bank in the UK, a fintech in the UK and a fund in Dubai, all without leaving her Hong Kong base," Warren reports. "For lawyers looking to gain international experience, pandemic-related travel restrictions need not act as an insuperable barrier."

FIND OUT MORE

To learn more about Peerpoint and how it might benefit you, please visit our website or contact a member of the team:

Georgeanna Mok in Asia
Azara Digan in the UAE
Nikki Pantges in Australia
Louise Catton in the UK
Amie Davidson in the U.S.

You can also take a look at our latest job opportunities here.

Peerpoint.
by ALLEN & OVERY

Helen Libson

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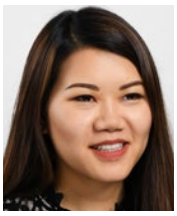
Helen is the Global Engagement Manager for Peerpoint where she drives engagement for the business, both on the client and consultant side, with a focus on comms, content creation and PR. She is also co-author of The Future for Legal Talent: A major study into how lawyers view their careers in a new world. The report was born out of Peerpoint's global survey of over 1000 lawyers and law students. She has a background in branding strategy and HR.



Georgeanna Mok

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Georgeanna manages the resourcing of Peerpoint's consultant panels in Hong Kong and Singapore. Georgeanna comes from a legal and recruitment background, having first completed her legal studies in Hong Kong. She transitioned into talent acquisition and recruitment, wanting to support others in their career journeys. Her focus has been resourcing lawyers for blue-chip clients across different sectors in Singapore and Hong Kong and Greater China.

Felicity Warren

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Felicity is the Senior Client Development Manager for Peerpoint in Asia. She supports our clients' legal resourcing needs by carefully matching them with high quality consultant lawyers. Felicity places a high value on the importance of deep relationships and a continual curiosity about people and the markets. Before joining Peerpoint in 2018, she already had 10 years of experience in sales and marketing roles within professional services firms across the UK and Asia.

Donna Titley

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Donna is responsible for the career management and development of the Asia Pacific Peerpoint consultant panel. She works closely with self-directed lawyers to support their transition into consulting and successfully develop a consulting career. Donna has worked in learning and development in Asia Pacific for more than 15 years as a consultant, facilitator and coach.

Marie Kirby

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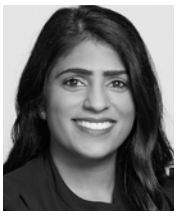
Marie is Head of Talent for Peerpoint and is responsible for Peerpoint's UK resourcing and consultant management teams. Marie comes from a strong background in strategic talent management and acquisition with both agency and in-house experience. Throughout her career, Marie has resourced for many blue-chip clients across different sectors including the legal sector and in the interim and permanent market.



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As Peerpoint's UAE Business Manager Azara oversees the UAE business which was launched in 2021. She has 13 years' experience within talent acquisition. Having spent close to 10 years within legal recruitment in the UK and the Middle East, most recently Azara worked for Bank of New York Mellon where she was a lead recruiter supporting the legal division as well as many other front office businesses across APAC.

Amie Davidson

Amie joined Peerpoint in 2020 to launch and now lead the U.S. business. She has a wealth of legal industry experience, having spent 16 years in marketing, business development and client account management roles within global law firms and Big 4 accounting firms, including more than a decade with Allen & Overy in New York and London.

The Role of the In-House Lawyer Amidst the Rising Tide of ESG Regulations

WITH VIVIEN TEU
MARK D. SCHROEDER
CHEE HOONG PANG

Environmental, social, and governance (ESG) factors are fast making their way into mainstream business and investment consciousness. Far from being the cherry-on-top of an otherwise good company, these criteria are increasingly becoming part and parcel of business practice. Pressure to adopt ESG standards has come from consumers and a growing responsible investment community, as well as the expansion of governmental and regulatory requirements.

These standards create the framework for all stakeholders, including lawyers, to assess the sustainability and ethical practices of a company when reporting on such company or in making investment decisions.

Indicative of this trend toward increased ESG focus, in late November 2021, the Hang Seng Indexes Company launched a new index in which socially responsible considerations sit up front and centre – the HSI ESG Screened Index (HSI ESG). This index applies ESG principles to the standard Hang Seng Index (HSI), with constituents screened for compliance against the United Nations Global Compact (UNGC) Principles as well as for involvement in controversial product.

Focus on ESG criteria has thus come a long way from being about feel-good investment choices; these factors are now regulated and widely tracked. More than this, however, focus on companies adhering to ESG principles may well make financial sense. In comparing the performance of the HSI ESG to the HSI from the base date of the former, 7 December 2018, to present we see that the HSI ESG actually outperforms the market standard – and by a relatively long way.

As Mark D. Schroeder, Strategic Advisor to the Governance Solutions Group , put it, ESG frameworks help us assess the impact of a company to create value over time, in other words it's about "doing well by doing good".

So, what does this mean for the in-house legal community? To best understand the characters in this production and the role of the lawyer, one needs to get acquainted with the backstory that has gotten us to where we are and the scene that it sets.

DRIVERS OF CHANGE

Vivien Teu, partner and head of ESG at Dentons in Hong Kong, highlighted as catalysts for this ESG movement, the growing public consensus on the trend amidst increasing expectations and requirements of institutional investors, governments, regulators, and consumers.

Schroeder indicated that in China pressure has come primarily from regulators, such as the China Securities Regulatory Commission. In Hong Kong, the financial regulators – the Hong Kong Monetary Authority and the Securities & Futures Commission – have led the way, while the Hong Kong Stock Exchange (HKEx) listing rules have clout over listed companies. Outside of these primary influencers, he said, we can look to the institutional investment community, such as Black Rock, Fidelity, and BNP Paribas, as drivers of change. Corporate reporting standards, in turn, are the consolidated effort of the Sustainability and Accounting Standards Board (SASB), the Global Reporting Initiative (GRI), the Task Force on Climate-Related Financial Disclosures (TCFD), and the International Financial Reporting Standards Foundation (IFRS); and for the investment community, the United Nations Principles for Responsible Investment (UNPRI).

Of course, not all sustainability issues can be blanketed into one framework and many are dealt with individually.

"On climate and environment, especially, laws and regulations have been introduced in recent years with mandatory requirements, and with more to come as many countries commit to climate goals aligned with the Paris Agreement. Under the Strategic Framework for Green Finance, announced in December 2020 by the Hong Kong Green and Sustainable Finance Cross-Agency Steering Group and co-chaired by the Hong Kong Monetary Authority and Securities & Futures Commission, climate-related disclosures aligned with the recommendations of the TCFD will be mandatory across relevant sectors no later than 2025," Teu said.

Teu further cautioned that with global financial markets and cross-border investment, as well as global supply chains, foreign or international laws and regulations – such as the EU Corporate Sustainability Reporting Directive and the EU Sustainable Finance Regulation – might mandate additional disclosures or due diligence regarding ESG issues such as labour practices, modern slavery, bribery or corruption, human rights abuses in supply chains, and climate and environmental matters.

ESG AND THE IN-HOUSE LAWYER

Given the above, there seems to be something of a minefield of new and existing regulations and best practice, both at the local level as well as international.

In order to navigate this sea of change, Chee Hoong Pang, Regional General Counsel for Agis, advised that in-house counsel are required to take on a wider role, becoming part of the "think tank" responsible for establishing the company's ESG strategy and guiding its business conduct, procedures, and processes to abide with developing ESG laws and regulations.

It falls on in-house counsel, specifically those with dual legal and compliance responsibilities, to keep abreast of ESG developments.

In-house counsel, Pang recommended, "should embark on upskilling themselves

on ESG issues such as (i) green finance, (ii) supply chain integrity, (iii) business human rights protection, (iv) their industry specific standards for business conventionalities, (v) COP26, and (vi) local government regulations, standards and code of practice and consequences of their breaches (e.g., fines, prosecution, reputational loss, commercial loss, termination of contracts, etc.)"

On a practical level, Teu outlined some of the ESG related requirements for both listed and non-listed companies in Hong Kong.

"The Hong Kong Companies Ordinance requires companies to include, in the business review section of the annual directors' report, a discussion on the environmental policies and performance; an account of the company's key relationships with its employees, suppliers and others that have a significant impact on the company; and a statement on compliance with relevant laws and regulations with significant impact on the company. This applies to all Hong Kong companies, unless exempted (such as for private companies below certain thresholds or size), whereas public companies are generally subject to the requirement.

"The HKEx is one of the earliest stock exchanges to require listed companies to issue an ESG report (since 2013). Therefore, companies listed on the HKEx are also subject to ESG reporting requirements, which have now been enhanced to being mandatory to report on board engagement and oversight on ESG matters and with 'comply or explain' disclosure obligations in relation to four environmental aspects and eight social aspects," Teu said.

Thus, in-house counsel, Teu explained, "has or can play a key role in supporting the board of directors and senior management of the company or corporate group to put in place relevant internal structures, policies, systems and processes for board and management oversight and management of ESG issues in its business lines and operations. They can also play a part in advising internal stakeholders on relevant laws and regulations relating to the ESG issues that have an impact in the business operations of the company or corporate group."

Teu emphasised the need to consider not only ESG issues that have (financial) impact on the company or corporate group, but also ESG issues that may impact stakeholders or the community from the conduct of business

activities and operations – the concept of "double materiality" that is gaining awareness.

In sharing his own experience as an in-house counsel, having taken on the additional roles of Ethics and Risks correspondent, Pang illustrated what an in-house counsel may expect from the coming years in the ESG arena and how to best be prepared.

"I anticipate a trajectory increase in my involvement at both regional and Group levels on ESG issues and their risks management, including their identification, assessment, prioritisation, mitigation, closure and monitoring. Given the fast output in laws, regulations, industry standards, public expectations, and the legal accountability of both governments and corporations in relation to climate change and human rights concerns, there is always room for improvement as we navigate our way to align with the strategic priorities, objectives, and planning of the company.

"However, we need to be future-proof and not just meet current requirements, and it will be helpful to partake of industry bodies and government/regulatory consultations with emphasis on ESG compliance, opportunities, and challenges specific to their sector (e.g., to share best practice and create common standards and taxonomies)," Pang explained.

"GREENWASHING" AND TICKING BOXES

There exists a concern, however, that some companies have merely tried to "greenwash" their processes and ask their in-house lawyers, in this instance, to perform something of a "tick-box" exercise when it comes to following ESG protocols.

In advising against such practices, Dentons' Teu referred to the enhanced ESG reporting requirements of the HKEx for listed companies, introduced in December 2019, which apply to financial reporting periods after July 2020. These, she said, were introduced as previous generic disclosures of listed companies' ESG reports were considered highly inadequate.

"Institutional investors, as well as regulators, are increasingly expecting more transparency and reporting on ESG information, data and metrics. Companies that engage in greenwashing will not eventually be able to stand up to increasing scrutiny, which will place the company under reputational risk if claims of positive E, S or G performance turn out to be false," Teu cautioned.

Schroeder added that there is real value in a robust disclosure of all ESG risks and opportunities, regardless of the direction in which they're moving. More disclosure, he said, will prevent accusations of greenwashing and can provide an opportunity for a company to admit to issues and show what they are doing to actively deal with them.

Teu further warned that there are business concerns beyond those reputational in nature.

A company that engages in greenwashing instead of having appropriate processes on ESG will likely have ESG risk issues

"A company that engages in greenwashing instead of having appropriate processes on ESG will likely have ESG risk issues that are not properly managed as they should be, and which can turn into significant business risks or financial risks for the company, or such company may find itself in breach of applicable ESG-related law or regulations. For such

companies, its directors and management may be falling short of the expected legal or statutory duty of care. That exposes the companies as well as the individuals to legal or regulatory risks. In-house counsel should remind boards of directors and management of such risks and strongly urge that ESG issues should be taken seriously," she said.

Schroeder further emphasised that to achieve accuracy and efficacy in disclosures, legal and business should not be operating in isolation of each other. He stated that the role of the Chief Sustainability Officer (CSO) is no longer a sidelined one but rather a core function involved in the profit and loss of a company and one that, in his opinion, belongs in the legal function.

In echoing these sentiments, Pang said that management of ESG standards should be jointly driven by business and all support functions, including legal. He views his role as an in-house counsel on these matters to be a collaborative one in nature, where he finds himself working alongside teams at multiple levels (both group and regional) and from multiple backgrounds, including business, science, environmental studies, engineering, and communications.

This approach, in which duties and responsibilities are shared by multiple functions, creates an environment of checks and balances which may limit undue pressure from any one business unit to skirt ESG protocol.

Teu also suggested that companies need to move beyond a compliance mindset, which tends to be reactive instead of proactive, especially with fast evolving ESG standards and requirements. In this, companies should conduct a deep review with key internal and external stakeholders to identify core corporate purpose and values, and assess material ESG issues in its business and operations. "This process will enable companies to be prepared and build resilience, establishing internal and external communication channels for meeting new ESG disclosure or reporting requirements," Teu said.

HARMONISATION AND ALIGNMENT

Complying with all relevant laws and regulations seems a tall ask, especially for companies

operating internationally. However, there may be hope that the role of the in-house lawyer and the requirements placed on a given company will become more streamlined with time. In this, Schroeder emphasised the importance of the standardisation of requirements and that such may be within sight.

"Without standardisation, ESG disclosure is a PR exercise and is essentially meaningless. The value of rigorous adherence to standards is the credibility that comes with it. Once the IFRS has gained more momentum in its ESG standardisation project, issuers that have not already begun to fully disclose across all parameters will find themselves scrambling.

"Due to the efforts in Europe with the EU Taxonomy, similar efforts have followed such as those of the Monetary Authority of Singapore (MAS), publishing ESG standards to influence the ASEAN region, as well as the IFRS, with their recently launched International Sustainability Standards Board (ISSB). Indeed, substantive momentum towards global standardisation is happening. This said, the likely future is that each relevant regulator within each jurisdiction will ultimately establish their own taxonomy (for example, we are likely to see 'ESG with Chinese Characteristics')," Schroeder said.

While standardisation may seem like the golden ticket, Schroeder said that specification by industry is key as there are many differences between each industry and each market. While a single blue print might seem enticing as it can ease some burden on management, should such become regulation it could be an issue.

For now then, it remains up to the in-house lawyer to provide guidance on navigating the web of interrelated ESG laws and regulations that, to some extent, seem likely to remain complex.

In providing some concluding remarks, Schroeder declared that shareholder centrism has ended. It's now about all stakeholders, being employees, clients, suppliers and society as a whole. Stakeholder Capitalism, as he calls it, is here to stay. The private sector, rather than government, is being called on now, more than ever, to solve the big challenges our societies face. To this end, being well versed in the roles we can play in both business and legal functions can have far-reaching impacts.

Vivien Teu

Vivien is a partner and head of Asset Management & ESG at Dentons Hong Kong. She has more than 20 years' experience as a corporate lawyer, specialising in the investment management and financial services industry, and has developed a unique focus around environmental, social and governance issues.

Mark D. Schroeder

Mark D. Schroeder has been providing legal and regulatory advisory in China and Asia for more than 20 years. His practice includes corporate governance, with a focus on ESG integration and ethics consulting often involving compliance investigations as well as data privacy, data protection, cyber-security and disclosure structure / mechanisms. Based in Hong Kong and responsible for North Asia at EPIQ, Schroeder also serves as an external advisor to GSG (Governance Solution Group) on corporate governance and ESG best practices, frequently including integrity issues and disclosure advisory.

Chee Hoong Pang

C H Pang is a construction and engineering, and commercial/corporate lawyer, a Certified Fraud Examiner, a certified Enterprise Risk Advisor, Business Continuity Manager and ISO37001 Anti-bribery Lead Implementer. His most recent regional position focuses on contracts, mergers & acquisitions, ethics and compliance, risk management strategy, and corporate/secretarial matters.

Q&A with Reski Damayanti, General Counsel and Corporate Secretary at Unilever Indonesia

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

I started my career as a lawyer specialising in capital markets, banking and corporate. After 5 years in private practice, I moved in-house, starting in a local pharma company, followed by P&G and Heinz, before joining Unilever Indonesia 6 years ago as the senior legal person. My experience in Unilever includes partnering for the Home Care business in SEAA for about 3 years, before taking on a new responsibility in 2020 as the corporate secretary (Unilever Indonesia is a major publicly listed company in Indonesia). I'm currently the General Counsel and Corporate Secretary for Unilever Indonesia.

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

Unilever Indonesia is a USD 2.5 billion company. There are 5 senior lawyers that directly report to me and 1 junior lawyer, with agile working principles, supporting the senior lawyers. We also have 1 senior compliance person leading the business integrity agenda. Our legal team may be lean compared to other companies of the same size. The idea for this structure is for the in-house counsel to take more strategic roles, so as to create more value for our business partners.

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

The biggest challenge is to integrate more into the business, becoming a risk artisan while still working within the boundaries.

This is a real challenge because, as lawyers, we are used to precedents which have trained us to be prepared for the worst-case scenario of certain issues.

We also often separate ourselves into "WE" - the lawyers - and "YOU" - the business team – this has to be changed. The growth of the company is everyone's responsibility, including the legal team's. When providing

advice, we need to start thinking from a business perspective, using a lawyers' strengths in critical and analytical thinking.

This is where I think technology can help lawyers to mine and analyse the data, including business information, so lawyers can be more active business partners and not just people who are turned to after a problem has already arisen.

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

Yes, I have. My mentor has been very important in providing psychological support and guidance in my career, especially in the early stages. Even though my mentor is no longer with the company, the relationship still continues. I still seek his wisdom and advice.

I have other mentors also, and they are not just those with a legal background, but those from business and finance also, which helps me to get a better understanding of the businesses expectations of the legal department.

One of the most important things that I learned from my mentor in my early career was to be confident to initiate discussions about my career aspirations. Being a junior person in an organisation doesn't mean you should rely on others to take your career to the next level. I'm responsible for my own career and where I want to take it.

More recently, my mentor has helped me with my soft skills, like storytelling to senior people in management and navigating the dynamics in workplace relationships.

Q: HOW IS TECHNOLOGY CHANGING THE WAY YOU WORK?

First of all, technology helps us especially by taking over repetitive legal work so the team can be more focused on strategic and added value work. This is a massive change because it helps to free up our time and is good for the team's well-being as well.

Technology also helps us in making faster and more data-driven decisions. It helps lawyers to make decisions by balancing the art (like legal knowledge, intuition, people acumen, and business acumen) and science (like risk quantification and data analysis).

On a personal level, technology helps me in giving me back my personal time. For example, instead of being stuck in traffic for meetings (if you have been to Jakarta, you know what the traffic is like), I can join them from home via video conference or other tools. But with the benefit that it brings, self-discipline is also necessary otherwise you end up with too many meetings which can burn you out.

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

The experience of the lawyer is the first criteria for the shortlisted, but mostly external lawyers must bring their expertise to add to the expertise of our own team.

I look for lawyers that have a good understanding of the FMCG industry, offer prompt support and practical solutions, and are also cost sensitive. As part of the business, we need to be accountable to the investment that we make and need to make strategic choices in our investment. It is important for our external counsel to understand this perspective.

Q: OTHER THAN LAW FIRMS, WHAT OTHER SERVICES AND TOOLS HELP YOUR LEGAL DEPARTMENT THE MOST?

Contract management tools are the service that we currently use and we continue to look for other services with the objectives:

1. to take over non-strategic work; and
2. to help in-house counsel in making faster and data driven decisions.

Damayanti with her children

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

I really enjoy the opportunity to be able to wear my legal hat and combine it with a business mindset, so I can assist the company with important business decisions and strategic planning.

Developing the team is another area that I enjoy greatly. To have my team members being regarded as "not just a lawyer", but as a business partner, is the best part of my job.

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

I think technology will play an important role. Nowadays, electronic meetings/video conferences are a common tool, and I cannot imagine what AI can do in the next few years. The pandemic has also pushed lawyers to be more tech savvy. I think the legal service will have to embrace this change without compromising on quality. In my view, there will be two different types of services:

1. services for more strategic advice for important projects; and
2. services with two goals, as I mentioned before, to take over non-strategic work and to help in-house counsel in making faster and more data driven decisions.

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

I sum it up into two things: always be curious and stay humble.

What we learn from legal theory in school may have different implementations. Keep an open mind and embrace new challenges. Just because things seem to be difficult, it doesn't mean they can't be solved and never take an easy route sacrificing your integrity. As a junior lawyer there could be pressure to take a short cut, but integrity will always be an important value for a lawyer.

Humility is also important. Never think you are better than others just because you have reached a certain milestone in your career. I have met a person with a non-legal background who has more knowledge in a particular legal topic than me. Everyone has their own strength, and you can always learn something from someone else. Humility helps you to stay curious.

Q: WHAT IS YOUR HINTERLAND (WHAT DO YOU MOST LIKE TO DO AWAY FROM WORK)?

With the kids having to do online school, I'm elevating my cooking hobby to a new level by experimenting with more recipes and doing it with them.

The pandemic also provided me the opportunity to rethink my habits. I have never been a sporty person, but I have started practicing yoga, jogging, and learning to play golf.

I have lost around 10 kgs since the start of pandemic and my BMI is getting better. It's a journey with ups and downs that I'm currently enjoying.

ANTITRUST & COMPETITION

Asian Antitrust Watchdogs on the Prowl Against Big Tech

BY FRENY PATEL

The pandemic that hit the world in 2020 was a boon for Big Tech and the digital economy. Amazon, Facebook, Google, WhatsApp, and Apple along with Asian tech giants Alibaba, Naver, and Rakuten to name a few, profited by keeping tabs on users, watching and capitalizing on their data. Today they have come under fire as antitrust authorities worldwide are watching. Competition watchdogs are homing in on killer acquisitions related to data and scrutinising agreements of platform operators for unfair trade practices.

Antitrust authorities have turned the tables and are watching and questioning every move Big Tech makes. The story is no different in Asia, though some might say the magnitude may be less aggressive than the scene in the US or Europe.

Asian authorities like their peers in Europe and the US have become skeptical of transactions involving data and digital markets. Many apply existing antitrust tools to preempt potential anti-competitive conduct while others contemplate new rules to rein in the digital market. Reducing merger thresholds is in vogue for deals involving the digital economy.

Regulators are invoking novel theories of harm outside of the traditional antitrust analysis and considering broader topics such as data power, innovation, network effects, and sustainability in their review.

"Themes across various jurisdictions are very similar and we are seeing convergence in enforcement in the digital economy," said Natalie Yeung, Hong Kong-based partner at Slaughter & May.

EFFECTIVE ENFORCEMENT

While the number of investigations in the digital sector may be relatively lower in Asia, they are not ineffective, lawyers at Baker McKenzie said.

China's State Administration for Market Regulation (SAMR) penalized Alibaba USD 2.8 billion in April 2021 and Meituan USD 537 million in October 2021 for abusing their dominant market position and forcing merchants on their respective platforms not to transact with competing platforms. The industry has since toed the line as Xun Yang, a partner at Links Law Offices, said that "this is no longer an issue."

Even as the Taiwan Fair Trade Commission (TFTC) concluded its investigation into Google's Android operating system finding no evidence of wrongdoing, the authority said it would keep a watchful eye on the search engine.

Japan recently closed an investigation against Rakuten for "abuse of superior bargaining position", after the e-commerce marketplace submitted changes to its “free shipping” policy.

Action taken by Asian antitrust authorities ranges from soft- to hard-enforcement, as some regulators revised guidelines, while others increased advocacy efforts, conducted markets studies, and carried out investigations. Soft-enforcement initiatives have helped Asian antitrust watchdogs get up to speed and build capacity around the various competition issues in the digital sector, the Baker McKenzie lawyers said.

The Chinese government has clamped down on Alibaba, Tencent, Meituan, among other homegrown digital giants. Though the Anti-Monopoly Law (AML) is one of the many tools in China's antitrust arsenal, it is "arguably the more frequently used on the digital sector since late 2020," Stephanie Wu, partner at East & Concord Partners said.

It is early to conclude the impact on China's digital economy since the government tightened scrutiny. However, Xun pointed out that big tech giants are paying attention to compliance.

Two concerns associated with China's digital economy remain, Wu said. The exclusive arrangements between platform giants and their upstream or downstream counterparts and incidences of gun-jumping as parties fail to notify, she noted, citing Tencent/China Music deal.

Enforcement by Indonesia's antitrust authority in the digital sector has been "quite adequate", Winnie Yamashita Rolindrawan, partner at SSEK Legal Consultants said. This is despite the "continuously evolving market" with "new and innovative products" challenging the competition authority.

The Indonesian Business Competition Commission (Komisi Pengawas Persaingan Usaha or KPPU) should maintain an aggressive stance where no reasonable socio-economic justification of antitrust violation exists, Rolindrawan said. She cautioned that the clampdown on the digital sector could unduly restrict innovation and development.

India's antitrust authority might be seen to have adopted an aggressive stance as opposed to its earlier position to err on the side of caution given the recent spurt of antitrust inquiries targeting Big-tech firms.

India's antitrust authority might be seen to have adopted an aggressive stance

Unlike most other regulators, however, the Competition Commission of India (CCI) does not have the flexibility to pick and choose its battles once it receives a complaint, independent competition lawyer Rahul Rai said. The one exception was the self-initiated investigation into WhatsApp's privacy policy change.

The CCI is duty-bound by the Competition Act to assess every complaint received, and issue a formal decision, Rai pointed out. While CCI’s orders initiating inquiries cannot be appealed, its decision to not initiate can be contested before the appellate tribunal. "This unique quirk in Indian law possibly incentivises the CCI to err on the side of initiating inquiries," Rai notes.

As the CCI has yet to conclude investigations in most cases involving Big-tech companies, Rai said it is early to conclude whether the authority has adopted an aggressive stance.

STRENGTHEN REGULATORY ARSENAL

Many antitrust authorities are questioning whether existing tools suffice or whether there is a need for fresh regulations to determine what Big Tech companies can or cannot do, Yeung said.

The jury is still out on whether amending existing legislation is warranted. Baker McKenzie lawyers cautioned that changes in existing regulations should be weighed against the dynamic, fast-moving, and highly innovative characteristics of digital markets.

China's AML is broad enough to cover all types of anti-competitive conducts, Wu said. However, as businesses welcome certainty, clarifications to broadly-termed provisions can come in many forms, including antitrust guidelines, she added.

Competition authorities need to re-tool their skillsets to understand data, have the necessary IT material, and the people who can understand the business and pricing models, Ruben Lapa Maximiano, senior competition expert at the Organisation for Economic Co-operation and Development (OECD) said.

The Japanese diet passed the Bill on Improving Transparency of Transactions of Digital Platform Operators in 2019, which came into effect in 2020, Akira Inoue, partner at Baker McKenzie's Tokyo office noted.

It is not that the CCI lacks the tools to undertake effective enforcement actions, but rather its success in taking effective enforcement actions depends on the strength of its bench, budgetary support, and ability to act independent of any external influence, independent competition lawyer Shruti Aji Murali said.

CCI's annual budget is paltry at USD 8.7 million in 2020-21 against the US Federal Trade

Commission's budget of USD 350 million for 2021, Murali said.

CCI's resources will always be stretched, and thereby affect the quality of its decision-making, Murali pointed out. "Eventually if CCI's decisions aren't upheld by the appellate tribunal and the Supreme Court, they would lose deterrence value," she added.

Asian competition authorities are still developing and refining their approach to analyse digital platforms, Maximiano said. The novelty of it also explains the importance of international cooperation so agencies can learn from the developments and cases encountered by others, he added, citing the example of Thailand.

Thailand has set up a committee to prepare legislation for the digital sector and has closely been following the European Commission's proposal for the Digital Markets Act and Digital Services Act.

Thailand is not alone. Several antitrust authorities have set up digital units, including the Japan Fair Trade Commission (JFTC), which set up the Office of Policy Planning and Research for Digital Markets in April 2020. Malaysia has also announced similar plans to do so, Maximiano said.

As Asian competition agencies try to better understand how digital markets work, many including Australia, India, and Singapore have undertaken market studies, while Malaysia and Thailand recently announced their plans to conduct similar studies in 2022.

CHANGES ON THE ANVIL

The digital economy is on the radar of most Asian authorities, with Hong Kong's Competition Commission being one of the youngest enforcement agencies to target the

digital economy, as its executive director for operations, Jindrich Kloub said.

Hong Kong had been lagging behind other jurisdictions but earlier this week, the commission announced its investigation into food-delivery platforms Foodpanda and Deliveroo for using their market position to restrict potential rivals, and enter into exclusive tie-ups with restaurants.

The digital economy is also a focus area for China as SAMR's new chief, Gan Li said.

The Chinese authorities have invested more efforts to tackle challenges arising from the digital sector, Laura Liu, senior counsel at FenXun Partners said. Last November, China's National Anti-monopoly Bureau identified platform economy, technology innovation, and data security, as key priority areas for anti-trust enforcement, she added.

Xun anticipated the issuance of further guidance shortly and cited three key issues, namely the determination of monopoly behavior, the application of the "safe harbor rule", and the scope of vertical monopoly agreements other than price maintenance.

Last December, KPPU said that it is closely monitoring the digital sector with an emphasis on digital payment, marketplace, and online platform players, Rolindrawan pointed out.

The KPPU has repeatedly expressed its intentions to amend certain regulations to address potential issues in the digital economy. Rolindrawan cited the need for a new methodology in determining geographic market in the digital economy given the increase in the cross-border nature of digital platforms. There is a possibility of changing the method of calculating market share based on data flow rather than the turnover in the digital sector, she added.

HOLISTIC APPROACH

Adopting a holistic approach in regulating the digital economy involves collaboration among various regulators including antitrust, consumer protection, and data privacy, and would address the fast-emerging issues in the sector.

Adopting a holistic approach in regulating the digital economy involves collaboration among various regulators

China has deployed many tools aside from AML to regulate the platform economy, which ensures efficiency, Wu said.

Liu agreed and added that a holistic approach promotes innovation, creates new drivers of economic development, and benefits China's society.

With the misuse of personal information being rampant in the digital economy, Xun noted that the enforcement of data protection laws is aimed at transforming the digital economy "from fast-paced development to healthy development."

"The fast development of the digital economy and the rapid growth of tech giants has left the compliance issue behind," Xun said.

The Competition and Consumer Commission of Singapore though best-placed to handle issues related to the digital economy, has adopted a holistic, whole-of-government approach, Harikumar Pillay, principal at Baker

McKenzie Wong & Leow said. It engages and cooperates with various governmental bodies in Singapore, he said, citing the Personal Data Protection Commission.

While some countries believe in adopting a holistic approach, a regulatory turf war broke out in South Korea last year as both the Korea Fair Trade Commission (KFTC) and the Korea Communications Commission (KCC) came out with similar legislation to rein in platform operators. Due to the clash between the two agencies as to which should oversee the platform economy, two online-platform legislations -- KFTC's Online Platform Fairness Act and the KCC-backed Online Platform User Protection Act -- failed to see the light of day last July.

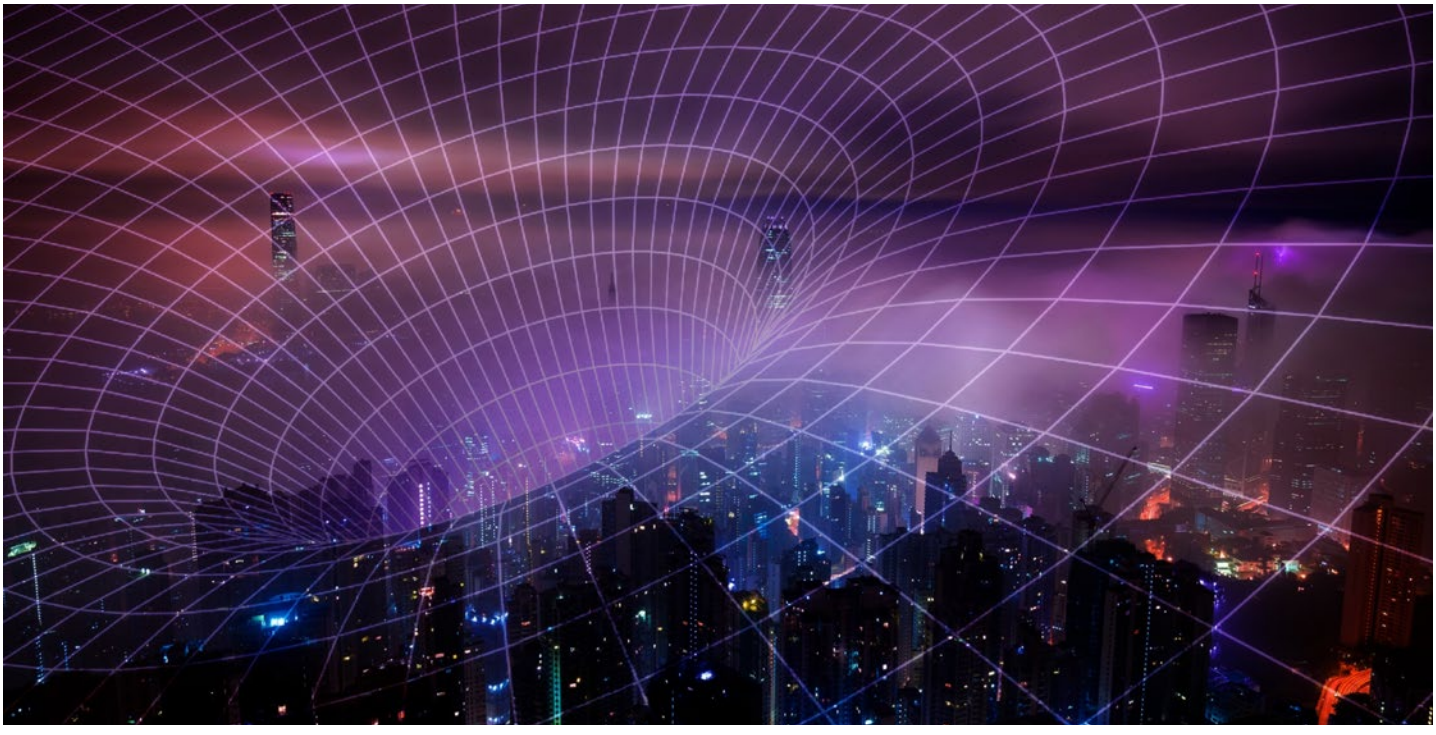
There exists some degree of overlap between the two authorities in regulating the digital economy, Peter Kwon, partner at RPC said. KCC took the lead in September 2021 and introduced legislation prohibiting app market operators -- the likes of Apple and Google -- from forcing certain in-app payment methods.

If the two above proposed legislation are enacted, the KCC and the Ministry of Science and ICT will have the authority to regulate digital platform operators in addition to the KFTC, Kwon said. The Korean antitrust watchdog implemented new rules in 2020 aimed at governing the unfair trade practices of major platform operators, which included self-preferencing in mobility and online shopping of multi-homing in app markets.

Legislators and regulators should be made aware of the unintended consequences of adopting regulations should competition principles not be integrated and/or considered in their design, as this could lead to more market power entrenchment, Maximiano cautioned.

CONVERGENCE

Asian antitrust authorities have not deviated much in their approach when dealing with competition issues that arise in the digital economy. While reference is taken from their peers in the US and Europe, Asian authorities adopt a slightly more cautious approach, Baker



McKenzie lawyers observed. The differences in their approach "have rightly been tailored to their respective domestic/national competition landscapes," they explained.

China's enforcement against platform giants coincides with the global trend. The country seems to be catching up with the West in its enforcement against unfair trade practices of tech giants with SAMR having imposed penalties on more than a hundred acquirers for gun-jumping, having failed to notify the authority and seek merger clearance.

The intersection between antitrust and data privacy laws involving tech giants especially when it comes to mergers has become a global concern further attracting the attention of enforcers, Wu said.

Xun cited market rumors that tech giants in China will be asked to divest the capital investment/acquisition division. This move could be in response to tech giants' aggressive expansion into related businesses in the digital sector, he explained, adding that it would prevent tech giants from gaining too much power.

Similarly, KFTC's proposal to amend laws to address platform operators' abuse of dominant position reflects the global trend, Kwon said. Given the unique ways in which domestic platform operators such as Naver and Kakao operate, he cautions that Korean regulators should consider competing factors such as fostering innovation and regulating monopolistic behaviors of platform operators.

South Korea set the ball rolling when it became the first jurisdiction to pass legislation forcing Apple to open up to third-party payment processors. The Netherlands followed suit. Apple and Google may be forced to introduce alternative in-app payment systems in other jurisdictions as well.

Xun Yang, Llinks Law Offices
Xun Yang is a partner at Llinks Law Offices, focusing on IP/IT practice, including IP protection, cyber security, and regulatory matters as well as investment in the high-tech areas.

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Peter Kwon is a Partner in the Commercial Disputes team at RPC and heads up the firm's Korea Desk. Specialising in financial services, asset management, anti-corruption, and commercial disputes generally, Peter also has extensive contentious and non-contentious regulatory experience.

Ruben Lapa Maximiano, OECD
Ruben Lapa Maximiano is a Senior Competition Expert at the OECD in Paris. At the OECD he is responsible for the work on competition policy in the Asia Pacific region and coordinates the work on the Covid-19 crisis in the Competition Division.

Shruti Aji Murali, ICW
Shruti Aji Murali is one of the founding members of ICW and serves as a senior research fellow. She has more than six years of experience in practicing competition law at (erstwhile) Amarchand Mangaldas, Mumbai, and AZB & Partners, New Delhi, where she advised global and Indian companies.

Rahul Rai
Rahul Rai is an independent competition lawyer. He focuses on contentious behavioural investigations, strategic merger control, and advocacy on competition policy. He was earlier a senior associate with AZB & Partners. Rahul has worked with the Competition Commission of India (CCI) on its advocacy initiatives and was part of the working group responsible for formulating the CCI's merger control regulations.

Winnie Yamashita Rolindrawan, SSEK
Winnie is a partner at SSEK, which she joined in 2007. She has represented major domestic firms and multinational companies in a variety of transactions. She has worked on numerous projects involving M&A, financial services and fintech, data privacy, pharmaceuticals and healthcare, corporate and commercial matters, foreign investment, e-commerce, and real estate and property (particularly hotels).

Stephanie Wu, East & Concord
Stephanie is a partner in East & Concord's Shanghai office. She specialises in antitrust and competition law and advises on all aspects and phases of anti-monopoly law, including compliance, investigations, merger filings, antitrust private litigation, and fair competition review.

Thailand: Trade Competition Commission's New SME Credit Term Limitation Regulation Now Enforced

BY PRANAT LAOHAPAIROJ
ATHIWUTH PHANPRECHAKIJ
SUPAKAN NIMMANTERDWONG

INTRODUCTION

SME vendors and service providers in Thailand may have little bargaining power when facing and negotiating with larger buyers, and often must accept long credit terms requested by these buyers. In fact, SME operators in Thailand, when dealing with large and powerful buyers, often face credit terms that are on average much longer than those of SME operators in neighbouring countries in the region. This, unfortunately, causes financial difficulties for Thai SME operators due to the impact on cashflow. This also has a negative impact on the whole supply chain and on employees. In contrast to credit terms with larger buyers, credit terms between SME buyers and SME vendors or service providers are ordinarily short, much like in other countries. Hence, the root cause of these extraordinarily long credit terms is the imbalance of negotiating power.

The Thai Trade Competition Commission, operating under the Trade Competition Act of 2017,

issued a regulation to combat this imbalance so as to assist SME operators during the period of economic hardship that has been exacerbated by the COVID-19 pandemic. The SME credit term limitation regulation (the "Regulation") limits the credit term that a buyer may request from an SME vendor or service provider to 45 days and further shortens credit terms to 30 days for businesses dealing in the agricultural sector, including agricultural products or processed agricultural products with non-complex production procedures. The Regulation was enacted on 18 June 2021 and became effective 180 days thereafter, on 16 December 2021. It is important to be aware that since the regulation already provided a 180-day grace period, it is unlikely that the authority will provide leniency for non-compliance.

APPLICABILITY

The Regulation applies to all commercial relationships with payment terms, including simple sales of products or services, product consignments, and other types of sales and service relationships. The Regulation will also apply to a situation whereby the buyer is also an SME. Conclusively, the only situation that this Regulation will not apply to is when the vendor or service provider is not legally categorized as an SME operator.

Note that the Regulation does not specifically exempt any existing relationships where an agreement is ongoing. A purchase order is arguably exempt if it was issued and accepted before the Regulation was enacted. However, the Regulation's credit term limits will apply to purchase orders that are issued after the regulation was enacted (although issued under an existing long-term sales, consignment, or supply agreement). This is because the special conditions prescribed by this Regulation have presumptively been made known to the participants to the contract.

SME STATUS

By law, a particular vendor or service provider is an SME operator when it falls under one of the following categories:

1. For manufacturing: having employees not exceeding 200 or having annual sales not exceeding 500 million THB.
2. For services, wholesale, or retail: having employees not exceeding 100 or having annual sales not exceeding 300 million THB.

The regulation employs a very rigid and technical classification whereby the word "or" will play a crucial role as a vendor or service provider must meet one, not both, of the conditions. This means that, for example, a low-headcount, high-productivity business such as an IT service company, a commodity brokerage, or a trading house with below-100 employees and a 10-figure income would still be classified as an SME operator. However, outsourced personnel will not count towards the employee headcount.

Furthermore, if a vendor deals with both manufacturing and services, wholesale or retail, the vendor must be compared against both sets of categories to determine whether that vendor is an SME under the Regulation.

It is the responsibility of a vendor or service provider to actively assert and prove that it is an SME operator by submitting reasonable evidence to the buyer. Based on statements from the authority, evidence that can be given by a vendor or service provider includes unequivocal evidence, such as government-issued certifications, audited statements, lists of employees, etc. Evidence may also include less official or verified documentation, such as a signed self-declaration. The authority has indicated that they will be lenient towards SME

operators when proving their status. If the SME status of a vendor or service provider is later proven to be false, the buyer may bring a claim against that vendor or service provider.

COUNTING METHODOLOGY

Credit terms commence once delivery of the products or services (or sale of an agreed consignment) has been completed, and all documents have been submitted. The authority has stated that parties should rely on the same list of documents that has been historically required. This means that buyers may not introduce new required documents for the purpose of delaying the start of a credit term. In addition, the authority has stated that they will likely allow the parties to have a reasonable period to verify the delivered products before the credit term is triggered. Note that the product inspection period should be as historically practiced, meaning the buyers cannot request a longer than necessary product inspection period simply to postpone the start of the credit term.

The resulting impact of this Regulation is the effective removal, or at least partial overriding, of the existing and historical monthly deadline for invoice submissions and monthly payment dates that are both prevalent among business operators in Thailand. In effect, the only factor that will matter is the satisfaction of the two regulation-prescribed conditions: 1) delivery of products or completion of services; and 2) submission of necessary documents. If the two conditions are met, the credit term will commence regardless of whether the buyer has a monthly document submission deadline or monthly payment date. SME vendors and service providers can submit documents whenever they want and the credit term will commence. Payments must be made before the deadline prescribed by law, meaning that in some cases the monthly payment date can still work for some invoices.

DEVIATION

By default, buyers must abide by the maximum length of a credit term prescribed by the Regulation. Any attempt to deviate from a credit term must be supported with a good rationale as there is no clear definition of the concept of reasonableness under the Regulation. Note that the authority has stated that deviation of a credit term must be approved and will generally be a rare exemption, not a general occurrence. Importantly, this Regulation aims to override the imbalance in the bargaining power between SME operators and larger buyers. As such, a bilateral declaration by parties that an SME vendor or service provider is satisfied with a current credit term that is longer than that prescribed by law will likely not be accepted as the Regulation was enacted to eliminate this type of bilateral arrangement.

By default, buyers must abide by the maximum length of a credit term prescribed by the Regulation.

PENALTIES

As the Regulation is issued under Section 57 of the Trade Competition Act of 2017, penalties are administrative fines of up to 10% of the sales figure in the year(s) during which the breach occurred. This can be a very substantial amount, especially for large companies, but in practice the imposed fines will be proportionate to the fault committed and the business unit involved.

CONCLUSION

Representatives of SME vendors or service providers may claim a limit on credit terms from buyers. It is also important to be aware that the Regulation does not include any provision for an exemption to the credit term limits in a case where an SME actively proclaims its status and unilaterally relinquishes its rights under the Regulation. In such a case a buyer may still be liable for compliance with the Regulation.

Buyers are recommended to prepare internal back-office systems to ensure compliance with the Regulation. Failure to do so may lead to penalties under Section 57 of the Trade Competition Act, which may result in hefty administrative fines as outlined above, as well as potential reputational damage.

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