

# asian-mena Counsel

Volume 17 Issue 1, 2019



## CYBER CRIME & DATA PROTECTION

### Rules of civility

The Mindful  
Business Charter

### The techlash is coming

Introduce AI with great  
care

### In-House Insights

Michael Ting of  
Manulife





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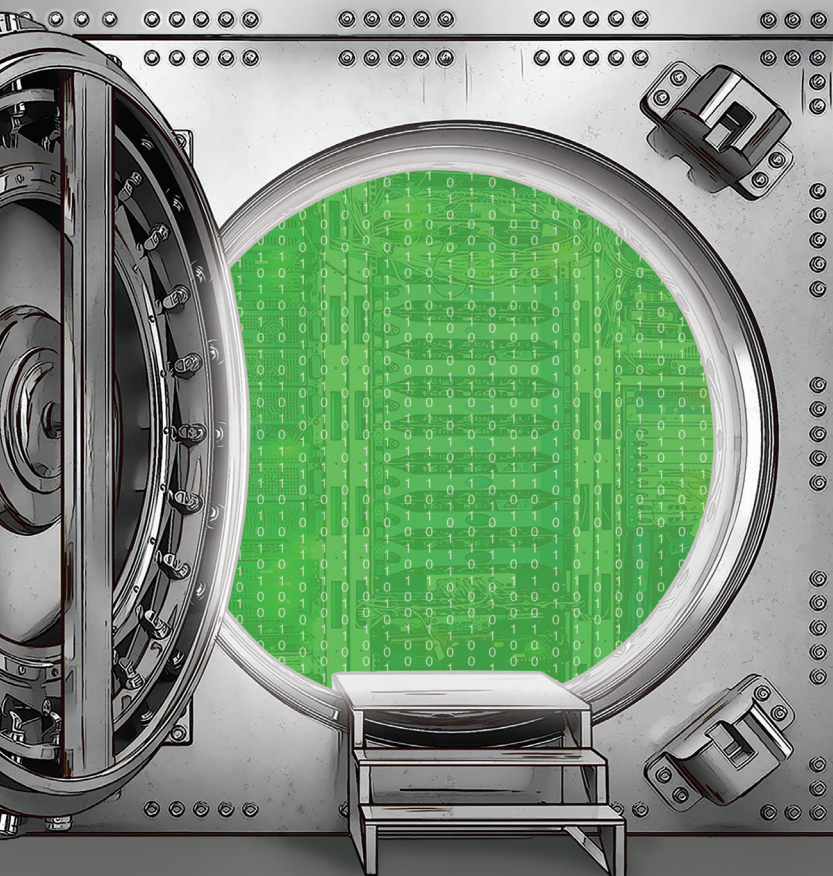
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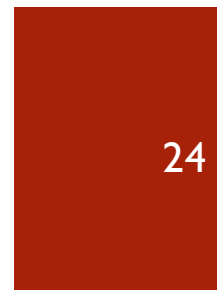
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## Coal-driven power train is running out of steam

Swedish teenager Greta Thunberg's theatrical denunciation of world leaders so dominated news coverage of the recent UN Climate Summit in New York that other developments at the meeting slipped under many a radar.

For Africa, an announcement by the African Development Bank that it is making a surprise policy turn away from fossil-fuel investment and ploughing a new renewable energy path was of enormous significance — yet it mainly featured on business pages and hardly at all on mainstream broadcast media.

The BusinessLive website did carry an item headlined "African Development Bank drives US\$500 million nail into coal's coffin". These are strong words, particularly given much of Africa's reliance on coal-burning power, not to mention an abundance of coal reserves that has for decades been seen as the inexpensive power foundation on which to build the continent's development.

Strong words, but probably prophetic. For climate-change worries are forcing a dramatic shift in the way the world views fossil fuels and the pollution they cause.

ADB president Akinwumi Adesina told the UN summit the bank had launched a US\$500 million initiative to assist African countries to shut down coal-fired power stations and switch to renewable energy generation.

"Coal is the past and renewable energy is the

African Development Bank president Akinwumi Adesina told the UN summit the bank had launched a US\$500 million initiative to assist African countries to shut down coal-fired power stations and switch to renewable energy generation

future," said Adesina. "For us at the ADB, we're getting out of coal."

The US\$500-million "green baseload scheme" will be rolled out in 2020 and is expected to draw US\$5 billion of further investment.

The ADB will have done its sums and looked closely at partner commitments, so everything points to a major shift in energy investment strategy in Africa — which has long been in a state of inertia on the matter.

The ADB is following the lead of other development and commercial banks across the world in extricating itself from fossil fuels and the greenhouse gas cloud that was starting to damage its brand value.

In South Africa, Nedbank and First Rand announced in the past year that they were cutting

investment in coal power plants, while Standard Bank says it will only put money into coal projects that fall within strict emission parameters and only if they are in desperately poor countries that badly need power to lift people out of poverty.

Internationally, Deutsche Bank, US Bancorp, Barclays, Credit Agricole and a dozen other multinationals have been setting the trend

The writing was clearly on the wall for coal when mining companies — the ones making the most money out of it — started shedding their coal interests. In South Africa, mining giants Anglo American and South 32 have sold or are selling their coal operations, while, internationally, mega-miners Glencore, BHP Billiton and Rio Tinto are in retreat from the black stuff.

Of course, it's not as easy as simply dumping coal — as much as the climate activists might say it should be. For example, South Africa's state-owned power utility Eskom relies heavily on coal power and any transformation to renewables would be tumultuous and expensive. Plus, tens of thousands of unionised workers are involved in the mining and power plant matrix and the government is extremely sensitive about the political implications of such disruption.

But the change train is clearly rolling — and it isn't being pulled by a coal-and-steam-driven locomotive.

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## New government regulation on organisation of electronic systems and transactions

The Government of Indonesia finally issued Government Regulation No. 71 of 2019 on Organisation of Electronic Systems and Transactions (GR 71/2019) on 4 October 2019, gaining momentum as the country sees the rise of 'unicorns' and President Joko Widodo boasting about the country's digital economy. GR 71/2019 replaces Government Regulation No. 82 of 2012 with the same title and came into force on 10 October 2019.

GR 71/2019 has 11 chapters and an extensive scope. It introduces several new concepts, such as the private and public categories of electronic system organisers (ESO), the right to delist and the government's role in electronic systems and transactions.

The following are several key provisions of GR 71/2019.

### ESO: New categories and registration

GR 71/2019 introduces two new categories of ESO:

- a. ESOs in the public sector: These ESOs include legislative, executive and judicative institutions along with other agencies formed under the laws and regulations (collectively, Agencies) and institutions appointed by the Agencies to manage and organise electronic systems for and on their behalf. However, regulatory and supervisory authorities in the financial sector are not considered public ESOs.
- b. ESOs in the private sector: These ESOs are Indonesian or foreign individuals, business entities, and the community that manage and organise electronic systems.

According to GR 71/2019, private ESOs are those who have internet portals, sites or applications and are engaged in the provision of goods or services or which offer trading, including financial services and a broad range of other internet and data services.

GR 71/2019 requires ESOs in both the public and private sectors to be registered before the users can use them. ESOs should submit their registration applications to the Minister of Communication and Informatics (MOCI). The registration procedures still follow those under MOCI Regulation No. 36 of 2014.

In Chapter VIII of GR 71/2019, the government of Indonesia, through MOCI, will play a role in and be able to prevent the use and dissemination of electronic and documentary information that violates the laws.

### The right to be forgotten (right to erase) and the right to delist

GR 71/2019 provides users the right to be forgotten and to delist, and ESOs must remove electronic documents under their control as requested by the electronic document and information owners. The right to be forgotten is provided under Law No. 19 of 2016 on amendments to Law No. 11 of 2008 on Information Technology and Electronic Transactions. Meanwhile, the right to delist is a new term introduced in this regulation meaning to be removed from a search engine list.

### Sanctions

Sanctions for non-compliance vary. Depending on the type of non-compliance, they can be written warnings, fines, a temporary suspension of the business, termination of access or being removed from the list. GR 71/2019 does not explain whether the "list" refers to the list of registered ESOs that the MOCI is responsible for. The termi-

nation of access according to the elucidation, means the blocking of access to the internet, the deactivation of an account, or the deletion of content by the MOCI.

However, according to the elucidation of the regulation, moral and civil violations are not subject to administrative sanctions under GR 71/2019.

### Transitional provisions

Existing ESOs must register (in both the private and the public sector) within one year after the issuance of GR 71/2019, that is by 10 October 2020.

GR 71/2019 revokes GR 82/2012, but its implementing regulations remain valid as long as they do not contravene GR 71/2019. MOCI will likely issue implementing regulations in the future, since some regulations remain under GR 82/2012. For example, the procedures for registering an ESO are still those under MOCI Regulation No. 36 of 2014, which at that time only required ESOs in the public sector to register. The issuance of GR 71/2019 means that MOCI will have to amend this regulation.

### What to expect next

In Chapter VIII of GR 71/2019, the government of Indonesia, through MOCI, will play a role in and be able to prevent the use and dissemination of electronic and documentary information that violates the laws. This includes the ability to terminate access to electronic information that:

- (i) violates the prevailing laws and regulations ;
- (ii) is unsettling to the public and public order; or
- (iii) provides ways or access to distribute illegal electronic information or documents.

It will be interesting to see how the government and MOCI (especially the latter, as it will issue separate implementing regulations) will apply the above, especially when GR 71/2019 allows the public, law enforcement officers and courts to submit requests for the termination of access to such unsettling or illegal information as described in (i) – (iii) above.



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## The 2019 HCCH Judgments Convention and the enforcement of foreign judgments in the Philippines

In a world where cross-border transactions are commonplace, disputes inevitably arise. Thus, the recognition and enforcement of foreign court decisions is a key issue.

On this score, the Hague Conference on Private International Law (HCCH) adopted last July 2, 2019, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters seeks "to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation". This is intended to fill in the gap in cross-border litigation, particularly the uncertainty of recognition and enforcement of court decisions in another jurisdiction and seeks to serve as a mechanism similar to the New York Convention on the recognition and enforcement of foreign arbitral awards, which has been widely ratified by a number of states.

Uruguay was the first country to accede to the Convention. The Philippines, which participated in the discussions, has yet to accede to the Convention.

The Convention applies to the recognition and enforcement of foreign judgments in civil or commercial matters in one contracting state of a judgment given by a court of another contracting state. It shall, however, not extend to revenue, customs or administrative matters. It further excludes within its scope foreign judgments on status and legal capacity of natural persons, family law matters, wills and succession, insolvency, carriage of passengers and goods, defamation, privacy, intellectual property or anti-trust matters, among others.

The Convention mainly provides that there shall be no review on the merits of the foreign judgments in the requested state. This is consistent with Philippine jurisprudence, which already recognises that "a Philippine court will not substitute its own interpretation of any provision of the

law or rules of procedure of another country, nor review and pronounce its own judgment on the sufficiency of evidence presented before a competent court of another jurisdiction". (Bank of the Philippine Islands Securities Corporation v. Guevara, G.R. No. 167052, March 11, 2015) This is also in accordance with the "policy of preclusion" or the policy in all legal systems to limit repetitive litigation on claims and issues. (Mijares v. Ranada, G.R. No. 139325, April 12, 2005)

The Convention also provides limited grounds for the refusal of recognition and enforcement of a foreign judgment:

- a. lack of notification to the parties sufficient to enable them to prepare their defence, or was made in a manner incompatible with the fundamental rules of the requested state concerning service of documents;
- b. the judgment was obtained by fraud;
- c. the recognition or enforcement of the judgment would be manifestly incompatible with the public policy of the requested state;
- d. the proceedings in the court of origin were contrary to an agreement; or a designation in a trust instrument, under which the dispute was to be determined in court of a state other than the state of origin;
- e. the judgment is inconsistent with a judgment given by a court of the requested state in a dispute between the same parties; or
- f. the judgment is inconsistent with an earlier judgment given by a court of another state between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested state.

The foregoing grounds are similar to those provided under Section 48, Rule 39 of the Rules of Court with the exception of the ground that there

is a clear mistake of fact and law in the foreign judgment sought to be enforced in the Philippines. This may be due to the fact that this ground has been used (or misused) to re-litigate the case in the Philippine courts, which is inconsistent with the "no merit review" provision under the Convention.

However, in *Soorajmull Nagarmull v. Binalbagan-Isabela Sugar Company, Inc.*, (G.R. No. L-22470, May 28, 1970), our Supreme Court refused recognition and enforcement of the foreign decisions as they were found to have been rendered upon a clear mistake of law. The Supreme Court did so on the basis that the foreign decisions make an innocent party suffer the consequences of the default or breach of contract committed by another party. This then begs the question as to whether this case would have been decided differently under the Convention, or is it possible to frame this under the public policy exception?

At any rate, as the Convention operates under the framework of mutual trust between and among states, it also provides an "objection mechanism" for a contracting state to notify the depositary of the Convention, which is the Ministry of Foreign Affairs of the Kingdom of the Netherlands, that its accession shall not have the effect of establishing a relationship with another contracting state. In other words, this allows a contracting state to choose which state's judgments it does not want to be bound to recognise and enforce.

In the end, any matter raised for or against the accession to the Judgments Convention should be gauged in the light of its promise for greater recognition and enforcement of Philippine court decisions involving cross-border transactions in other jurisdictions. For now, we shall see what will happen next.

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





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## Notes to foreign financial investment corporations that are starting businesses in South Korea

### I. Entry barriers to the Korean financial investment market

As of September 2019, there were 47,799 foreign investors registered with the Korea Financial Supervisory Service, including 36,190 institutional investors (22,899 collective investment vehicles; 2,302 pension funds; 994 securities firms; 737 banks and 509 insurance companies). Foreign investors hold 38.5 percent of the KOSPI market cap and 10.5 percent of the KOSDAQ market cap. According to the Korea Financial Supervisory Service on September 30, 2019, there are 11 foreign securities firms operating in Korea using local subsidiaries, including Deutsche Securities, and 11 foreign securities firms conducting business in Korea through branch offices, including Goldman Sachs Securities.

Foreign investment is playing an important role in the Korean financial investment market and there are many foreign companies that are leaders in the Korean financial investment market, earning sizeable profits. However, as in any country, there are exacting laws regulating the financial investment market and these regulations can act as a barrier to foreign financial investors entering the Korean financial investment market.

Establishing a subsidiary or branch office in Korea and registering/obtaining approval for operating a financial investment business requires considerable effort and cost to satisfy the many legal requirements. Consequently, some foreign financial investment companies instead consider conducting their business activities involving Korean residents overseas, without obtaining approval or registration and without establishing a subsidiary or branch office in Korea.

### 2. Financial Supervisory Service's guidelines

The Financial Investment Services and Capital

Markets Act provides that it shall not apply to situations where a foreign investment trader or foreign investment broker conducts certain acts abroad (Article 7(6)4. of the Capital Markets Act; Article 7(4)6. of the Enforcement Decree of the Capital Markets Act). However, given the lack of clarity, many foreign companies have complained that the provisions of the Act make it difficult to determine legality. Consequently, the Financial Supervisory Service announced its "Guidelines on Business Targeting Domestic Investors by Foreign Investment Traders and Brokers" on October 5, 2015. While these guidelines are not legally binding, they are an important reference because in practice, the Financial Supervisory Service often determines whether business activities are illegal using these guidelines.

### A. When the business is targeting domestic investment traders

When a foreign investment trader/broker conducts business activities outside Korea by having as its counterpart a Korean company that has been approved in Korea as an investment trading business, the foreign investment trader/broker is obligated to operate within the following parameters:

- (i) A foreign investment trader/broker can do work with a Korean investment trader within the scope of work permitted to be performed by an approved Korean investment trading or investment brokerage business;
- (ii) The business contacts must be made by telephone, email, etc. from abroad and in principle, a foreign investment trader/broker should not visit a domestic Korean investment trader to discuss its specific investment products;
- (iii) However, a foreign investment trader/broker may visit a domestic Korean investment trader if:
  - (a) such Korean investment trader requests

the visit or visits such foreign investment trader/broker directly;

- b) such foreign investment trader/broker makes a routine visit for greetings without mentioning specific financial investment products; or
- (c) a foreign investment trader/broker accompanies a Korean investment broker to assist such domestic investment broker in explaining its products without any investment solicitation.

### B. When the business is conducted via domestic investment brokers

A foreign investment trader/broker may trade financial investment instruments with a domestic resident, or act as a broker, intermediary or agent for trading financial investment instruments outside Korea through a company that has obtained approval to operate an investment brokerage business in Korea. Foreign investment traders/brokers are not allowed to directly solicit investments from a domestic resident. Business activities must follow the below guidelines:

- (i) Same as the requirements in (i) of paragraph A above;
- (ii) Same as the requirements in (ii) of paragraph A above;
- (iii) However, a foreign investment trader/broker may visit a domestic Korean investment trader if:
  - (a) Same as the requirements in (iii) (b) of paragraph A above ; or
  - (b) Same as the requirements in (iii) (c) of paragraph A above.

As mentioned previously, the Financial Supervisory Service's guidelines have removed some uncertainties regarding the business activities of foreign financial investment companies. However, cross-border financial activities are becoming more diverse and complex over time, and it is always important to consult with legal counsel who can evaluate your specific factual situation before planning and executing business activities in South Korea.





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#### **Legal Counsel, Finance | 4-7 yrs pqe | Shanghai REF: 15397/AC**

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#### **Senior Associate | 6-8 yrs pqe | China REF: 15420/AC**

This IP boutique law firm is looking for a Senior Associate to join its China office based in Beijing/Shanghai. You will be responsible for working on PRC IP contentious and non-contentious work with a focus on IP enforcement. Ideally, you will have 6-8 years' experience of handling IP matters. Experience of IP enforcement is highly desirable. Fluency in English and Mandarin is mandatory.

#### **Disputes Associate | 5+ yrs pqe | Singapore REF: 14735/AC**

This US law firm with a strong presence across Asia seeks an experienced dispute resolution lawyer to join their regionally-focused practice. Although based in Singapore you will be involved in top-quality work in the fields of data privacy, investigations and regulatory compliance throughout Southeast Asia so relevant experience in those areas is vital. Ideally, you are Singapore/UK/US qualified with over 5 years' PQE at leading law firms. Fluency in Chinese is required.

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## Legal issues on peer-to-peer lending business in Vietnam

Peer-to-peer (P2P) lending has been growing rapidly in Vietnam, along with the development of financial technology. There are a number of such enterprises using online platforms to connect borrowers and lenders, including Tima.vn, Vaymuon.vn, Fungo.vn and Lendbiz.

### What is the principal legal framework of Vietnam for P2P lending business?

As a general principle under the Law on Investment of Vietnam, P2P lending is neither a prohibited nor a conditional business line. This is probably the most favourable legal basis for P2P lending to be conducted in Vietnam in the current context.

With no specific regulation promulgating P2P lending, it may be considered as an e-commerce trading platform, with the "buyer, seller" being the borrower and lender, and "goods, services" being lending activity. However, continuous lending for profit is deemed banking activity and is restricted to credit institutions pursuant to Vietnamese laws. On the other hand, it is prohibited by law to take advantage of the name of e-commerce business activities for illegal capital raising from other traders, organisations and individuals. This is probably the reason why almost all P2P lending businesses fail to register as an e-commerce trading platform in Vietnam.

In practice, because P2P lending companies and all other companies in Vietnam have to register their business activities, P2P lending companies in Vietnam mostly register as investment consultancy, information search services via contracts, financial consultancy supporting services, brokerage activities, etc.

**In the current context, what legal issues may a P2P lending company in Vietnam be faced with?**

First of all, regarding business activities that are not governed by laws and imply potential risks to the society that may not be managed by state agencies, there is a possibility that the Vietnamese state agencies will consider risk-mitigating measures or enact a regulatory framework for the purpose of management. In fact, the State Bank of Vietnam is currently developing a plan to allow a number of companies that have good financial capacity to pilot P2P lending businesses. After that, the State Bank of Vietnam may add P2P lending to the group of conditional business lines to tighten its management.

The second issue relates to loan interest. As there is no governing regulation, the lending interest rate in civil transactions through P2P lending under the Civil Code 2015 shall be agreed by the parties, but must not exceed 20 percent per year of the loan. It is noted that if the interest rate in a civil transaction is five times higher than the maximum interest rate specified in the Civil Code, earns an illegal profit of from VND30 million to under VND100 million or recommit this offence despite the fact that he/she has incurred an administrative penalty or has an unspent conviction for the same offence, it may constitute a crime of usury in civil transactions under the Criminal Code.

The third matter is responsibilities of P2P lending business to the loan. Due to the absence of legal provisions governing the P2P lending business and responsibilities of P2P lending companies, in the current context, the responsibilities of P2P lending company in case the borrower fails to pay the debt based on the civil laws and the agreements signed between the parties, as well as the rules and regulations of the P2P lending platform which are developed and published on their websites. Therefore, if the

agreements, rules and regulations are not well prepared, loans are not well managed, KYC appraisal procedure is absent or not reliable enough, it shall easily lead to an increase of bad debts and complaints about the responsibilities of P2P lending companies when bad debts arise.

The fourth is the issue of payment. A number of P2P lending businesses act as payment intermediaries between borrower and lender for the purpose of controlling information of the loan and fee collection. This activity may face the risk of being considered as a payment intermediary business, which must be licensed by the State Bank of Vietnam. The provision of payment intermediary services without a licence of the State Bank of Vietnam may be subject to administrative fines and confiscation of proceeds.

Fifth, regarding anti-money laundering, organisations conducting financial activities are currently required to comply with very strict anti-money laundering regulations by the Law on Anti-Money Laundering. P2P lending activities that have not been governed by anti-money laundering regulations may lead to the risk that the P2P lending business is unable to control money laundering activities that may arise in loan transactions and potential risks from these money laundering activities.


Learning from the lesson of the explosion of uncontrolled P2P lending in China, leading to the collapse of hundreds of P2P platforms in 2018 and the recent trend of redirection of some P2P lending platforms to Vietnam, the Government will issue legal regulations in the coming time to manage, control, prevent risks and other forms of corruption from P2P lending in Vietnam. Therefore, during this time, P2P lending investors need to do research on relevant Vietnamese regulations carefully to orient their business activities and to avoid the risks of violating the laws. Investors may also consider proactively submitting their business plans to the SBV for consideration and approval to legally pilot this business activity.





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### Further transparency in respect of Cayman Islands companies

The Cayman Islands has often been referred to pejoratively as a “secrecy jurisdiction”. The two main supports for the secrecy allegation were on the one hand the existence of “secrecy” legislation, The Confidential Relationship Preservation Law (CRPL) dating back to the 1970s, which made it a criminal offence to divulge “confidential information” as defined in that Law, and on the other hand the absence of publicly available information about the directors and shareholders of Cayman Islands companies unlike, for example, the UK.

In fact, not only was nobody ever held criminally liable for divulging confidential information, but no prosecution was ever brought under CRPL. More significantly, the one thing the law never did was to prevent confidential information being shared with law enforcement agencies and foreign tax authorities. The Cayman Islands has been at the forefront of requiring licensed service providers to collect and retain verified beneficial ownership information and providing an effective mechanism of making such information available at the request of foreign law enforcement and tax authorities. In this respect it was streets ahead of the UK, which did not require such information to be verified so that Michael Mouse could be named as a shareholder or director, or US states, which did not even require such information to be collected in the first place.

In any event, the so-called “secrecy” law was repealed in 2016 and replaced with the Confidential Information Disclosure Law, 2016 (CIDL), which is a more modern and fit-for-purpose law based upon civil liability for breach of confidence under common law and as such wholly unobjectionable.

The question of the lack of availability of public information as to the directors and shareholders of Cayman Islands companies has

The issue here is not the collection of beneficial ownership information or the sharing of that with relevant authorities, which already happens, but solely whether such information should be made public

also been addressed recently by the coming into effect of an amendment to the companies legislation and by a significant government announcement.

#### Public register of directors

Section 5 of the Companies (Amendment) Law 2019 introduced a requirement for the Registrar of Companies to make available to the public, upon payment of a fee, the names of the current directors of a Cayman Islands company and this Law came into force on October 1, 2019. Now for the very first time anyone who wishes to know the identity of the directors of a Cayman Islands company may pay CI\$50 (US\$60) and visit a kiosk in the lobby of the Government Administration Building in George Town to find out. A similar provision applies in relation to Limited Liability Companies under section 3 of the Limited Liabilities Companies (Amendment) Law 2019.

#### Beneficial ownership registers

On October 9, 2019, the Cayman Islands government gave a formal commitment to implement public registers of the beneficial ownership of

companies when such registers become implemented by the UK and by EU member States by 2023 pursuant to the requirements of the Fifth Anti-Money Laundering Directive.

This announcement follows the earlier announcements from the Crown dependencies of Jersey, Guernsey and the Isle of Man made in June.

At first sight it appears to be a policy shift by the Cayman Islands government, which had hitherto opposed the mandating by the UK government of beneficial ownership registers in the Overseas Territories by Order in Council. However, this is too simplistic an analysis. The position of the Cayman Islands government has always been that there should be a level playing field and that it will comply with global international standards. The announcement therefore represents a timely recognition that global standards will inevitably advance to the point of public beneficial ownership registers and that the Cayman Islands will take the necessary steps in advance of that time to be ready to comply when the time comes. As Cayman Finance said in its response to the announcement: “Now that the UK and EU are establishing an emerging global standard for ownership registers to be public, the Cayman Islands financial services industry will work closely with the Cayman Islands Government to ensure we meet that standard also.”

It has to be borne in mind that the issue here is not the collection of beneficial ownership information or the sharing of that with relevant authorities, which already happens, but solely whether such information should be made public.

The Cayman Islands, together with the Crown Dependencies, have by their respective announcements, placed themselves at the forefront of the development and implementation of global standards, rather than being seen as reluctant followers. Whether Bermuda and the British Virgin Islands will follow suit remains to be seen, but it is difficult to see how they could not without doing themselves reputational damage.



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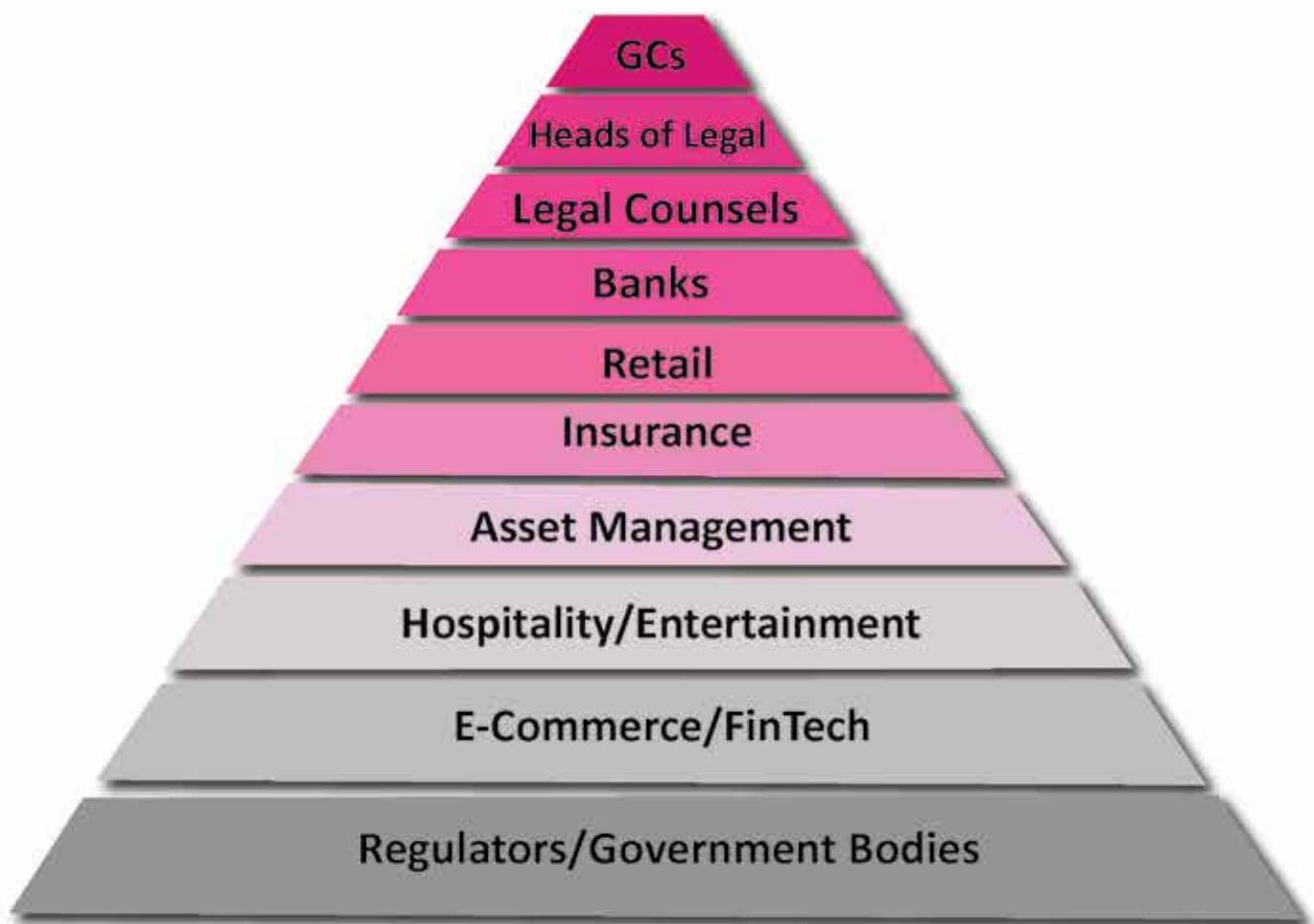
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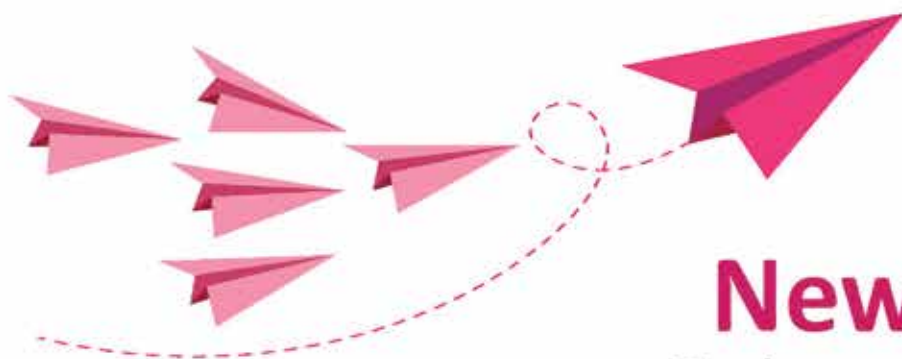


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## EVENT REPORTS

## Mumbai, Hong Kong and Shanghai Congresses

The 15th annual Mumbai In-House Congress was held on September 18, opening with welcome remarks by publisher Rahul Prakash and followed by lively and interactive panel discussions on the in-house development model for technology and women in law. Moderated by publishing director Patrick Dransfield, the discussions were well-received by all in attendance with actionable insights provided by our panellists — Preeti Balwani, general counsel, The Kraft Heinz Company; Poornima Sampath, vice-president, Tata Sons; Gautam Bhattacharyya, partner and India business team head, Reed Smith; Kohe Hasan, partner, Reed Smith; and Shahana Chatterji, partner, Shardul Amarchand Mangaldas & Co.

The rest of the afternoon saw engaging workshops by our co-hosts about India's Insolvency Code (L&L Partners), international joint ventures (Reed Smith), POSH Act and employment law (Shardul Amarchand Mangaldas & Co) and corporate investigations (Mintz Group). The Congress was also supported by the Mumbai Centre for International Arbitration.

After Mumbai, we hosted our 21st Hong Kong In-House Congress on October 3. With more than 450 in-house counsel in attendance, the Congress was a grand success. Patrick Dransfield opened the event with welcome remarks and followed by moderating a panel discussion about technology and talent management. In the technology panel, Patrick was joined by Jessica Lyn Bartlett, director, financial crime legal – APAC, Barclays; Mycroft Lai, barrister at law, Central Chambers; Rebecca Hong, managing counsel, Greater Asia Region, Intel Semiconductor; Brian Downie, general manager – legal (operations and growth business), MTR Corporation; Mathew Keshav Lewis, SVP – advisory, partnerships and solutions, Axiom; and Robert Lewis, chief expert, docQbot. As we moved to discussing talent management, Miranda So, partner from Davis Polk, joined the other panellists.

It was a productive day for the delegates thanks to workshops with co-hosts Addleshaw Goddard, Axiom, Clyde & Co, Conyers, Davis Polk, Debevoise & Plimpton, Zhong Lun with docQbot, First American Title and FTI Consulting. The Congress was also supported by Astral, Hughes-Castell, Lewis Sanders, Praxonomy and Taylor Root.

Founding director Tim Gilkison opened the 19th annual Shanghai In-House Congress on October 30 with a welcome speech and introduced Hemant Sahai from HSA Advocates, who informed the attendees about investment opportunities in India. Mary Zhu from TianTong Law Firm then took the stage to briefly give a keynote address on commercial arbitration in China. Robert Lewis of docQbot introduced the topic of technology and talent management for the legal department, followed by a panel discussion on the same by Xi Zhang, general counsel, Bayer Greater China; Jill Xu, general counsel for North Asia, JLL; Michelle Gon, partner, McDermott Will & Emery (Strategic Alliance – MWE China Law Offices) and moderated by Tim Gilkison.

Ample learning and engaging sessions awaited delegates with workshops from co-hosts Anjie Law Firm, Debevoise & Plimpton, Zhong Lun with docQbot, Dorsey & Whitney, FenXun Partners, FTI Consulting, Herbert Smith Freehills with HKIAC, McDermott Will & Emery (Strategic Alliance – MWE China Law Offices) and TianTong Law Firm. Thanks also to our sponsors, Hughes-Castell, SSQ and Taylor Root.

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## MOVES

## The latest senior legal appointments around Asia and the Middle East



## AUSTRALIA

**K&L Gates** has added **Kane Barnett** as a partner in the financial services team at its Sydney office. He joins from Clifford Chance, where he led that firm's Australian funds practice. Barnett has extensive experience acting for Australian and international clients on fund formation, investments in funds, and investments by and transactions involving funds. He advises across a broad range of asset classes, including listed and unlisted real estate, infrastructure and private equity funds. Barnett regularly assists foreign investors with structuring their investments in Australian infrastructure and real estate assets, and also advises on Australia's financial services regulatory regime. His clients included many leading Australian and international asset managers, as well as sovereign wealth funds and large pension funds from Asia, North America, Europe and the Middle East.



Kane Barnett



## HONG KONG

**HFW** has hired senior corporate finance partner **Wing Cheung**. He specialises in capital markets, including IPOs, as well as M&A, private equity and other transactional work. Cheung joins HFW's Hong Kong office from US law firm Locke Lord, where he was Hong Kong managing partner. He advises clients on a wide range of corporate and commercial matters, and he also has significant experience in regulatory enforcement and compliance, having acted on major investigations and other proceedings by the Hong Kong Stock Exchange and the Hong Kong Securities and Futures Commission.

**Weil, Gotshal & Manges** has added **Daniel Abercromby** as a partner in the banking and finance practice, based in Hong Kong. He joins from Kirkland & Ellis, where he was a partner in the Hong Kong office. His practice focuses on cross-border leveraged and acquisition finance transactions, both public and private, together with the refinancing and restructuring of such transactions, ranging from covenant resets to debt-for-equity swaps. Abercromby acts for both borrowers (primarily



Daniel Abercromby

private equity funds and their portfolio companies) and lenders (primarily direct-lending credit funds).



## SINGAPORE

**Kennedys** has hired a team of motor and general insurance lawyers from Withers KhattarWong in Singapore. Partners **Patrick Yeo** and **Lim Hui Ying** are joined by an associate, paralegal and support staff. Yeo has been with KhattarWong since 1996, when he was admitted to the Singapore bar, and has been an equity partner since 2006. He became a senior equity partner after the firm's merger to become Withers KhattarWong in 2015. Lim joined KhattarWong after being admitted to the Singapore Bar in 2004 and became a junior equity partner in 2016. The team's work is largely focused on motor insurance matters, covering contentious litigation and alternative dispute resolution at all levels of the Singapore courts. In particular, the team specialises in combatting fraudulent injury claims stemming from low-speed vehicle collisions, along with issues of constructive total loss, vehicular collision damage claims for plant and machinery, and dispute work for suspected drink-driving cases. They also specialise in policy coverage and disputes and regularly advise and act for insurers for both contentious and non-contentious policy issues or disputes.



Patrick Yeo

**RHTLaw Taylor Wessing** has further bolstered its corporate restructuring and insolvency practice with the appointment of partner **Zachary Scully**. He brings more than two decades of experience and is qualified to practice law in Singapore, Malaysia and Australia. Scully has diversified expertise gathered from both private practice as well as from being general counsel in a listed Malaysia-based oil and gas company. His other areas of practice include dispute resolution and corporate commercial matters, where he regularly advises clients on cross-border transactions, joint ventures, corporate finance, investments, trust structures and other commercial agreements.



Zachary Scully



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

## DEAL OF THE MONTH



## Asian-mena Counsel Deal of the Month

## Quadria's US\$65m sustainability-linked financing

*The Singapore private equity firm has signed a world-first loan that is pegged to its sustainability performance.*

Lenders around the world are developing a new generation of financing facilities to meet the demand for investment opportunities that encourage sustainability. Asia has not always been at the forefront of such trends, but that is changing.

In October, Singapore-based private equity firm Quadria Capital Management signed the world's first sustainability performance-linked fund financing. The up to US\$65 million three-year revolving loan facility for Quadria Capital Fund II provides for a borrowing interest rate that is pegged to the sustainability performance of the fund, which is measured against a set of environmental, social and governance (ESG) performance targets that follow the UN's Principles for Responsible Investment.

The set of ESG metrics is based on key performance indicators provided by

B Analytics, a data platform that measures impact for investors, fund managers and individual companies; Quadria's own ESG framework; and an independent materiality assessment. The interest rate will go down if B Analytics' yearly assessment proves that Quadria is meeting its sustainability targets.

Arranged by ING, it is the first financing in the world to link the interest rate of a private equity fund to the sustainability performance of its portfolios.

"As a bank we aim to promote socially responsible behaviour among the funds and fund managers we finance so we encourage ESG improvement in portfolio companies by incentivising their shareholders," said Herry Cho, ING's head of sustainable finance in Asia. "We are delighted to bring ING's sustainability expertise to the US\$400 billion fund finance industry through this transaction. We believe this

will be the catalyst for many more similar deals in Asia and globally."

Quadria is a healthcare-focused private equity firm that manages more than US\$1.8 billion of assets through investments in some of the fastest-growing markets in Asia Pacific.

"It was a meeting of minds when ING first brought this up with us," said Abrar Mir, Quadria managing partner. "Quadria Capital is a company that focuses on positive investment returns with constructive social impact by increasing and improving accessibility and affordability to healthcare in South and Southeast Asia."

To date, ING has completed four sustainability improvement loan facilities in Asia.

Ashurst acted as lead counsel to ING, with partner **Jean Woo**, supported by New York partner **Mike Neary**, leading the firm's team in the transaction.

## Other recent transactions from around the region:

**Weerawong C&P** has represented **Asset World** on the corporate restructuring and offering of shares under Securities and Exchange Commission regulations and international offering under Regulation S of the US Securities Act and listing of its shares in Thailand. With a total market capitalisation value at IPO price of Bt185.74 billion (US\$6.14b), this is the largest listed company in the history of Thailand to date. The raised funds will be used to expand the company's hotel and other commercial property projects. The first day of trading was on October 10, 2019.

**J Sagar Associates** has acted as Indian counsel to **Anheuser-Busch InBev Group (AB InBev Group)**, the world's largest brewer, on the US\$5.75 billion IPO of its Asia Pacific group entity, Budweiser Brewing Company APAC, in Hong Kong. The IPO is the second largest IPO globally in 2019 and the largest in Hong Kong so far. AB InBev Group produces, imports, markets, distributes and sells a large variety of beer under multiple brands, including Budweiser, Stella Artois and Corona. Partners **Upendra Nath Sharma** and **Kartik Jain** led the firm's team in the transaction, while **Freshfields Bruckhaus Deringer** and **Sullivan & Cromwell** acted as overseas counsels for the Budweiser HK IPO.

**Shardul Amarchand Mangaldas & Co** has advised **Axis Bank** on raising Rs125 billion (US\$1.75b) through a qualified institutions placement (QIP). This is the largest QIP ever by any private sector company in India and the second-largest to date after the QIP by State Bank of India in June 2017, where the firm advised the placement agents. Axis Bank is India's third-largest private sector bank, in terms of total assets, based on public filings. The preliminary placement document was filed with the Indian stock exchanges on September 19, 2019, while equity shares pursuant to the QIP were allotted on September 26, 2019. Capital markets national practice head **Prashant Gupta** and partner **Nikhil Naredi** led the firm's team in the transaction. **AZB & Partners** acted as Indian counsel for the **book-running lead managers**, while **Latham & Watkins** acted as US counsel.

**LNT & Partners** has advised **Vietcombank**, the largest and strongest bank in Vietnam, in cooperation with a syndication led by Credit Suisse, cooperated with ICBC, Taiwan Business Bank and Taichung Commercial Bank, on the more than US\$250 million project finance with limited recourse with Novaland group. Partner **Le Net** led the firm's team in the transaction, while the syndication was advised by **Allen & Overy**.



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

### **Junior Partner – Private Practice**

**9 yrs PQE, Hong Kong or Singapore**

This international law firm is looking to grow its tech M&A platform. The firm focuses on representing entrepreneurs, founders, investors and technology companies across a global spectrum. The partner hired could be a key lieutenant (senior associate, counsel, partner) trapped under a behemoth marquee partner or an individual at a boutique firm who wants an international platform. The firm is also considering candidates currently in-house with a strong story and business plan. This firm already has a long-standing history in the Asia markets, particularly in the private client space, where they represent a number of Asia-based tech founders and other "new economy" tycoons. They are zeroing in on growing in the tech M&A space as a strategic complement to their already robust "founders' practice". [Ref: JWIHC-006]

Contact: Alexis Lamb  
Email: alexis@evanjowers.com

### **Legal Counsel – Entertainment**

**4-6 yrs PQE, Singapore**

This role is for a premier global entertainment streaming site where millions of people discover and consume primetime shows and movies subtitles in more than 200 languages. An exciting opportunity has arisen for a talented lawyer with a passion for digital media and internet-based distribution models to join this company's legal team in Singapore. Reporting to the head of legal and business affairs, responsibilities will include: advising business units and stakeholders on legal and risk management issues; supporting the roll-out of new product features and innovations; drafting, reviewing and negotiating legal documentation and contracts; working with internal/external counsel; assisting in administration of corporate policies and procedures; and supporting the business on a breadth of compliance, privacy and legal matters related to the company's worldwide business operations.

The ideal candidate is a proactive and decisive legal counsel who possesses excellent organisational, interpersonal and cross-cultural communication skills. The ability to work cross-functionally and effectively under pressure, and the willingness to learn and to deal with ambiguity in a dynamic and fast-paced environment is essential. Minimum 4-6 years of relevant legal experience (preferably in-house at an international media, technology or internet company) and licensed to practice law in Singapore, other Commonwealth jurisdictions and/or US. Experience in media, content acquisition/production, OTT, intellectual property, technology licensing, dispute resolution, corporate governance, compliance and regulatory regimes, and/or privacy and data protection preferred. Substantive knowledge and demonstrated expertise of US and/or international laws dealing with content regulation, intellectual property, advertising, data protection and privacy frameworks (including GDPR and CCPA), and consumer protection is also preferred. [Ref: HZ 132-00002]

Contact: Jessica Deery  
Tel: (65) 6808 6635  
Email: jessica.deery@horizon-recruit.com

### **Senior Compliance – Certification Institution**

**10+ yrs PQE, Hong Kong**

A well-known global certification institution is looking to add a senior compliance professional to its team in Hong Kong. Candidates must have excellent experience in formulating and implementing compliance policies in MNCs. Mandarin language skills are strongly preferred, and those with a legal qualification will be at an advantage. Excellent opportunity for those with extensive experience to move into a quasi-regulatory function. [Ref: AC8131]

Contact: Roshan Hingorani  
Tel: (852) 2537 7416  
Email: rhingorani@lewissanders.com

### **Legal Counsel – Conglomerate**

**6-9 yrs PQE, Hong Kong**

An established local conglomerate with businesses and investments in both Hong Kong and overseas is now looking for an additional lawyer to join its established legal team, advising on the company's investment projects. You should have 6-9 PQE gained in a well-established law firm or in-house. Solid experience in M&A and PE is a must. Possess strong commercial acumen, confident and articulate. Written and spoken English and Chinese is a must. [Ref: JO-1910-176350]

Contact: Sabina Li  
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### **Senior Corporate Counsel, Global – Retail**

**10+ yrs PQE, Hong Kong**

This role is with a global company and a market leader in Europe and Asia in health, wellness and beauty retail. A rare role has arisen to join this international team to take the legal lead in strategic commercial projects including in M&A, restructuring, financing, technology and e-commerce. The successful candidate will have spent several years in a leading law firm and ideally then moved in-house. Cross-border transactional experience in Europe and/or Asia is a must, and a second language, such as Mandarin, German or Dutch, would also be advantageous. [Ref: 15425/AC]

Contact: Doreen Jaeger-Soong  
Tel: (852) 2520 1168  
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### **IT/Personal Data Lawyer – IT**

**7+ yrs PQE, Hong Kong**

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

Contact: Andrew Skinner  
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Robyn Kidd  
Head of Managed Document Review  
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## What Happens After the Dawn Raid?

*There has been a dawn raid with 100,000 documents to review. What is the process from here?*

**T**he dawn raid has led to the forensic collection of 100,000 documents, now safely secured on a hard drive. What is the process from here? It's important to plan your strategy in advance to minimise downtime, extract relevant documents and get ready for production.

### Data Culling

The first thing to do with your core data set is reduce it to a manageable volume. There are a number of tools that can be employed here, the first being de-duplication. De-duplication works by identifying identical documents bearing the same MD5 Hash Values. This is applied at a global level to remove exact copies of standalone documents but also duplicate emails, resulting from multiple mailboxes being extracted and removing emails between mailbox custodians. This can quickly reduce your document set by 10-20 percent on average.

Email threading is a similar tool that can be applied to emails. Email threading takes those long chains of back and forth emails and removes all "early" emails, leaving just the final email chain in the data set for review (allowing potential reduction of 20-30 percent of an email set). It also recognises where emails split off from the main conversation and prioritises the documents so those two chains are sequential. This enables reviewers to ascertain the stories behind the emails more quickly and review more efficiently.

There are also tools that can allow Early Case Assessment such as Foreign Language identification, Near Duplicate Analysis and Clustering.

### Know What You're Looking For

The next stage is to take advantage of the forensically sound collection of your data and its preserved metadata by running some matter-specific identification of relevant material. This can involve restricting the data set to the specified data ranges pertaining to your matter, therefore further reducing the data set. In addition, keyword searches should be run across the set for numerous purposes, identifying:

- Potentially relevant documents to be included in review;
- Documents to be excluded such as irrelevant deals, projects etc;
- Documents to be segregated for different review teams/levels eg materials from a CFO which should be reviewed by Partner/General Counsel, etc rather than First Pass reviewed; and
- Key custodians to be prioritised or removed.

In addition, you should take this opportunity to consider whether your newly culled dataset is of such a size as would benefit from implementation of Technology Assisted Review (TAR) to either prioritise or further reduce the documents for review by inputting review decisions in an algorithm – akin to letting Netflix suggest your next film or TV show to binge-watch based on the TV shows you have watched to date.

### Managing Your Resources

The next query is who will be undertaking your review? Do you have a review team in-house or will you need to hire additional resources? Alternatively,

you could engage the services of a third party to leverage their teams of reviewers to undertake First Pass Review, effectively culling irrelevant documents and allowing your own reviewers to focus on key documents and preparation of legal strategy, making the most of their valuable time. You should also consider whether you require foreign language reviewers or translation services. In addition, depending on the matter, you will need to consider whether expert reports should be prepared and which experts to engage.

### Keep an Eye on the Clock

A final step with your documents – make sure you know your deadlines! Your matter timeline will impact decisions in relation to resourcing, as well as when to engage experts, Counsel and prepare evidence.

It's a lot to think about but spending time properly planning your project will save you valuable time in the long run.

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# Debunking tech and data myths

Practical ways to tackle laws regarding the collection, use, ownership and deletion of data.

*By Anita Lam, Brian Harley and William Wong of Clifford Chance*

**S**uccessful businesses understand data and how to extract value from data. What businesses do with data is not only central to enhancing customer satisfaction, optimising the efficiency of their operations and improving employee relations, but also to winning trust and remaining competitive. Yet as the technologies around data grow in complexity, myths emerge around the legal rules that apply to the collection, use, ownership and deletion of data. In this article we debunk some of those myths and provide practical ways to tackle the issues.

## **Myth 1: You own your data**

Data is a type of intangible asset, similar to literary works, inventions or trademarks, so surely it must be protected by some kind of intellectual property, right? Unfortunately not. Certain types of data may be protected by intellectual property rights if quite specific requirements are met: copyright may sometimes apply, although automatically generated data will rarely meet the threshold of an “original work of authorship”; certain jurisdictions recognise database rights, but these are limited in the scope of protection they afford and inconsistent across different legal systems. So, as a general proposition, machine-generated data is not straightforwardly subject to ownership by way of any intellectual property right.

If that were not enough of a hurdle for businesses seeking to realise the value of the data they generate or collect, certain types of data are also heavily regulated – especially personal data. Where the European General Data Protection Regulation (GDPR) applies, for example, businesses that collect personal data from individuals are tightly restricted in how they can process an individual’s personal data, to whom and to which countries the data can be transferred, and they may be under an obligation to delete an individual’s data on request (the so-called “right to be forgotten” – see Myth 3). So, far from enjoying some kind of free title of ownership in data, controllers of personal data have only a heavily qualified and temporary right to use that data.

## **Myth 2: Data is easily anonymised**

If personal data is heavily regulated, one way to avoid that regulatory burden is to ensure that the data is anonymised: if the identity of the individual which certain data concerns cannot be established, then the data is not personal data. Anonymisation can therefore provide a way for businesses to use and share data collected about individuals without infringing those individuals’ privacy rights. However, in the age of data analytics, data anonymisation is far from a straightforward proposition – merely deleting names and replacing them with an “anonymous” identifier (such as a number or random string of



characters) will in most cases fall well short of the mark.

### Is total anonymisation possible?

Under the GDPR, for example, a clear distinction is drawn between “pseudonymisation”, which involves the replacement of names with identifiers, and “anonymisation”, which involves making a certain data set impossible to extract personal data from. The dividing line between pseudonymisation and anonymisation lies in whether or not the process whereby the identity of the relevant individual is obscured can be reversed or not. If the names of individuals have been replaced with numbers, all you need is a list matching those numbers to the original names to connect the data with the individuals it concerns. If the data has been encrypted, anyone who has access to the decryption process (or who can hack through the encryption) can de-anonymise the data set.

Simply eliminating identifiers from the data set entirely won’t necessarily anonymise it: multiple studies have shown the surprising ease with which a determined researcher can match data to individuals without the need for direct identifiers. One study, for example, was able to identify specific Netflix users from an apparently anonymised data set including their ratings of movies by comparing those ratings with publicly available ratings on the online movie database IMDB and matching them to the relevant IMDB users.

Because individuals leave unique “fingerprints” on their data in so many ways – such as their daily commute embedded in mobile location data; their specific interests and preferred websites in their browsing history; their particular combination of medical conditions in their health records – truly anonymising personal data requires an understanding of the power of data analytics to reidentify apparently anonymous data.

### Myth 3 : The right to be “forgotten” works globally

With the advancement of digital communication tools and social media, people often regret revealing personal data or other embarrassing information about themselves or others online. Deleting the relevant post or webpage may not fully undo the damage, as references to such data or information may still be seen in the results provided by search engines.



**Brian Harley**

The data privacy laws in many jurisdictions provide for, to different degrees, an individual’s right to request that their personal data be deleted by the data user/controller (the “right to be forgotten” or the “right to erasure”). In the context of online search engines, the right is manifested by requesting the search engine to remove a particular link from the list of results displayed following a search conducted on the basis of a person’s name, which is effectively a “de-referencing” exercise (as opposed to the removal of personal data from the underlying material, which is not controlled by the search engine).

On September 24, 2019, the European Court of Justice (ECJ) decided in Google LLC that under current EU law, search engines need to carry out the requested de-referencing in their European sites only (eg, google.fr, google.co.uk), but not all sites globally (such as google.com).

This decision arose from an order imposed by the French privacy regulator (CNIL) in 2015, following an earlier ECJ decision in Google Spain in May 2014 which suggested that the right to be forgotten under the relevant EU Directive applied outside of the EU as well. The CNIL required Google to apply the removal of links to



Anita Lam

all of its search engine's domain name extensions. Google refused, and only removed the results displayed following searches conducted on EU domain names. The matter was eventually referred to the ECJ for a preliminary ruling.

Since the Google Spain decision, Google says it has been removing search results from its European sites (it has received almost 850,000 requests to remove more than 3.3 million web addresses, with about 45 percent of the addresses eventually being delisted), and restricting results from its other sites if it detects that a search originates from within the EU.

Had the ECJ decided against Google in the most recent ruling, it would have been interesting to see how companies in other parts of the world (most notably US and Chinese tech giants) would have responded to the purported application of European regulations beyond the borders of the EU.

#### **Myth 4. Your personal data is safe on a blockchain**

In typical implementations of blockchain technology, transactions are recorded

chronologically on each copy of the blockchain ledger to form an immutable chain, recording the entire history of relevant transactions. Each record on the blockchain is technically visible to anyone with access to the system – and for open blockchain systems, that means literally anyone. As the key principle of blockchain is that copies of the ledger are distributed across many participants in the network, no single party controls the data on the blockchain.

Since data recorded on blockchains is intended to be immutable, there is an inherent clash between blockchain data structures and the right to delete personal data under the Personal Data (Privacy) Ordinance, the right to erasure and be forgotten under GDPR, and similar legislation around the world.

#### **How can the right to delete data be addressed in blockchain systems?**

There are at least two possible ways to address this issue:

- Pseudonymisation – One way to help comply with data privacy laws is to record pseudonymous data exclusively on the blockchain and not to process any clear personal data. For example, identifiers, names or personal details of users can be “hashed” – a one-way cryptographic operation on a set of data that makes it impossible to reverse-engineer the original data from the hashed data, but easy to verify if the “hash” recorded on the blockchain matches with the original set of data (on the limitations of pseudonymisation vs anonymisation, see Myth 2 above).
- Off-the-chain transactions – Another way to avoid data deletion issues is to take all the clear personal data off the blockchain, so there is nothing that needs to be deleted from the publicly available blockchain. Certain implementations of the blockchain enable certain transactions to be taken “off” the blockchain and processed separately. Once the off-the-chain transactions are completed, the fact of the transaction can then be written back on the blockchain, without the details ever needing to appear on the public blockchain.

Given that immutability is fundamental to blockchain designs, it will not usually be possible for users to change the privacy preferences once users have allowed their personal data to be



written to a blockchain, making this clear to users is particularly important. How teenagers express their privacy preferences today may be very different from how they may express their privacy preferences 10 years from now. Blockchain developers who have designed their blockchain implementation on the basis of privacy-friendly principles and offer users more control and ability to understand how their data is to be used will likely win more trust from customers and employees.

### **Myth 5: Facial recognition technology breaches your privacy rights**

As a start, there is no general right to privacy in Hong Kong.

Under current Hong Kong law, no personal data is taken to be collected unless data is either collected of an identified person or about a person whom the data user intends to identify.

Unlike traditional CCTV that merely captures facial images, facial recognition software reads the geometry of faces to distinguish between different individuals and gives each individual a personal identifier or a facial signature. If that personal identifier is then mapped to a database of known faces, this can be used to verify a person's identity, and the collection of personal data then kicks in. However, if the personal identifier is not mapped to any database that can identify the individual, there is technically no collection of personal data under Hong Kong data privacy laws.

Interestingly, in contrast to the Hong Kong position, a number of cities in the US have now banned the use of facial recognition technology. The EU is also exploring ways to impose stricter limits on use of such technology.

### **What are the recourses against facial recognition that breaches data privacy laws?**

Apart from the ability of data subjects to file complaints to the Hong Kong Privacy Commissioner, it is also an offence under section 64 of the Personal Data (Privacy) Ordinance for someone to disclose personal data obtained without consent for gain or if the disclosure causes loss in money. The maximum penalty is a fine of HK\$1 million (US\$128,000) and imprisonment for five years – sanctions not to be lightly ignored.

### **How can “ownership” of data be protected?**

These limitations on ownership have not



**William Wong**

prevented businesses from generating value from data and, indeed, in their contracting terms, asserting that they do in fact own the relevant data. How do they do it, if no such property right in data exists? In short, they create one by contract. If you set out in your contracts with others what it means for you to own the data (what you can do with it, how long you can keep it, to whom you can transfer it, etc), and you ensure that anyone who receives data from you, directly or indirectly, has to sign up to those same terms, you can then create something that looks like an ownership right for that data – similar to how businesses protect their “ownership” of their trade secrets and confidential information.

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# Protecting personal data in cyberspace: enterprise's obligations under the laws of Vietnam

*By founding partner Hoang Nguyen Ha Quyen, senior associate Nguyen Duy Thanh and associate Ngo Thi Phuc Tam, LNT & Partners*

## Introduction

Thanks to the invention of the internet, enterprises can now use cyberspace as an effective tool to sell goods and provide services. With high internet and smartphone penetration rates, Vietnam – the 15th most populous country in the world – can arguably be called a land of opportunities for domestic and foreign e-commerce companies. As in many other jurisdictions, the laws of Vietnam require enterprises to protect personal data that they collect during the course of online business. However, compliance with this requirement may prove a challenge due to the lack of a single comprehensive legislation which contains all relevant regulations.

This article presents some of the key takeaways that enterprises should be aware in this area.

## Enterprises' obligations to protect personal data in cyberspace under the laws of Vietnam

The legal framework on protection of personal data is scattered across many legal instruments, among which the Law No. 86/2015/QH13 on Cyber-Information Security (Law on Cyber-Information Security) is considered the general legal document. Other rules could be found in the Law No. 67/2006/QH11 on Information Technology (Law on Information Technology), the Law No. 51/2005/QH11 on E-transactions (Law on E-transactions), Decree 52/2013/ND-CP on E-commerce (Decree 52/2013/ND-CP), the Law No. 59/2010/QH12 on protection of consumers' rights (Law on protection of consumers' rights), etc. In addition, the recently promulgated Law No. 24/2018/QH14 on Cyber-security (Law on Cyber-security) also

“‘Personal data’ is defined as information associated with the identification of a specific person and “processing personal data” means the performance of one or more of the following operations: collecting, editing, utilising, storing, providing, sharing or spreading personal information in cyberspace for commercial purposes”

provides for additional obligations for enterprises processing personal data on the internet.

Under the Law on Cyber-Information Security, “personal data” is defined as information associated with the identification of a specific person (Article 3.15) and “processing personal data” means the performance of one or more of the following operations: collecting, editing, utilising, storing, providing, sharing or spreading personal information in cyberspace for commercial purposes (Article 3.17). These are arguably the only legal definitions of the terms, given that they are not clearly defined in any other legal documents.

In general, obligations that enterprises need to pay attention to when “processing personal data” in cyberspace can be summarised as follows:

#### **(a) Collecting personal data**

All of the above legal instruments state that any enterprise wishing to process personal data in cyberspace shall obtain prior consent of the data owner.<sup>1</sup> Each instrument, however, provides for different consent requirements. For instance, the Law on Cyber-Information Security requires that the consent shall include the scope and purposes of personal data collection and usage,<sup>2</sup> while the Law on Information Technology asks enterprises to inform the data owners of the form and place of processing data in addition to the content above.<sup>3</sup>

There are nonetheless exemptions from the prior consent requirement. Under the Law on Information Technology, an enterprise is not required to obtain consent where the collected information is used for the following purposes:<sup>4</sup>

- Signing, modifying or performing contracts on the use of information, products or services in the network environment;
- Pricing [or] calculating charges for use of information, products or services in the network environment;
- Performing other obligations in accordance with laws.



*Hoang Nguyen Ha Quyen*

“E-commerce businesses are not required to obtain data owners’ consent where the collected information is already published on e-commerce websites; or where the information is being collected to conclude or perform sale or purchase contracts, or to calculate prices or charges for use of information, products and services online”

Furthermore, e-commerce businesses (ie businesses conducting some or all of their commercial activities by electronic means connected to the internet, mobile telecommunications network or other open networks) are not required to obtain data owners’ consent where the collected information is already published on e-commerce websites; or where the information is being collected to conclude or perform sale or purchase contracts, or to calculate prices or charges for use of information, products and services online.<sup>5</sup>





Nguyen Duy Thanh

“Remarkably, offshore entities which collect, utilise, analyse and process user data are required to establish a branch or representative office in Vietnam. On a literal interpretation, this requirement would apply to all cyberspace service providers such as Google, Facebook or Sephora, etc and may present operational challenges”

### **(b) Using personal data**

#### **Issuing a policy**

Personal data shall generally be used in accordance with the scope and purposes identified by the enterprises processing the data when obtaining consent of the data owners, except where the enterprise (i) has an agreement to the contrary with the data owners; (ii) is providing services/goods as requested by the data owners; or (iii) fulfilling other obligations as required by laws.<sup>6</sup>

Under the Law on Cyber-Information Security, enterprises processing personal data in cyberspace are required to create and issue data security regulations in using information systems. However, currently there is no specific guidance on this legal instrument.

Decree 52/2013/ND-CP provides more detailed guidance on the requirement of building a data security policy, and specifies the mandatory provisions as follows:<sup>7</sup>

- Purpose(s) of collecting personal information;
- Scope of information use;
- Duration of information storage;
- Persons or organisations that may access such information;
- Address of the information collection and management unit, indicating how consumers can ask about the collection and processing of information relevant to them;
- Method and tools for consumers to access and modify their personal data on the e-commerce system of the information collection unit.

Other legal instruments do not set out any security policy requirement.

In addition to the security policy, enterprises processing personal data shall also apply suitable managing and technical methods to protect the collected data.<sup>8</sup>

#### **Sharing with a third party**

The Law on Cyber-Information Security, the Law on Information Technology, the Law on E-transactions, the Law on protection of consumers' rights as well as Decree 52/2013/ND-CP prohibit enterprises from sharing, disclosing or transferring personal data to any third party except with prior approvals of the data owners or otherwise required by laws.<sup>9</sup>

#### **Rights of the data owners**

The data owners are entitled to request the data collecting enterprises to review, update, modify or delete their own data. Such enterprises shall comply with the request of the data owners and accordingly review, update, modify or even delete their information.<sup>10</sup>

## Law on Cyber-security

Along with providing for duties of competent authorities, this set of law also sets out a number of additional obligations for enterprises, the most notable of which are:

- **Storing data in Vietnam**

Article 26.3 requires that domestic and foreign providers of services on telecom networks and on the internet and other value added services in cyberspace in Vietnam [cyberspace service providers] which collect, utilise, analyse and process their users' relationship information shall store data in Vietnam for a period [to be] specified by the government. It is worth noting that the Law on Cyber-security stipulates that the data shall be stored in Vietnam but does not clearly mention the server. Thus, it is arguable that enterprises may place their servers outside of Vietnam.

- **Establishing commercial presence in Vietnam**

Remarkably, offshore entities which collect, utilise, analyse and process user data are required to establish a branch or representative office in Vietnam. On a literal interpretation, this requirement would apply to all cyberspace service providers such as Google, Facebook or Sephora, etc and may present operational challenges.

## Waiting for the Decree guiding the Law on Cyber-security

Implementation of the above obligations under the Law on Cyber-security awaits further guidance from the government. Such guiding Decree is expected to clarify key issues such as what types of data shall be stored in Vietnam and when, whether the server shall be located in Vietnam, and provides detailed guidance on the requirement that offshore enterprises must establish a commercial presence in Vietnam.

However, in light of the government's increasingly stringent approach to cyberspace security, from now on any enterprise that processes personal data should stay up-to-date with relevant regulations to ensure compliance with the laws of Vietnam.



**Ngo Thi Phuc Tam**

1. Article 17.1 (a) Law on Cyber-Information Security; Article 70.1 Decree 52/2013/ND-CP; Article 21.1 Law on Information Technology; Article 6.2 (a) and (b) Law on protection of consumers' right
2. Article 17.1 (a) Law on Cyber-Information Security
3. Article 21.2 (a) Law on Information Technology
4. Article 21.3 Law on Information Technology
5. Article 70.4 Decree 52/2013/ND-CP
6. Article 17.1 (b) Law on Cyber-Information Security; Article 21.2 (b) Law on Information Technology; Article 71.1 Decree 52/2013/ND-CP
7. Article 69.1 Decree 52/2013/ND-CP
8. Article 19.1 Law on Cyber-Information Security; Article 21.2 (c) Law on Information Technology
9. Article 17.1 (c) Law on Cyber-Information Security; Article 22.2 Law on Information Technology; Article 46.2 Law on E-transaction; Article 70.3 Decree 52/2013/ND-CP; Article 6.2 (dd) Law on protection of consumers' right
10. Article 18 Law on Cyber-Information Security; Article 22.1 Law on Information Technology; Article 73 Decree 52/2013/ND-CP; Article 6.2 (d) Law on protection of consumers' right

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# Growth of e-discovery across Asia

The e-discovery landscape across Asia is diverse, but increased adoption was in evidence at the 10th annual Relativity Fest, write *Tim Gilkison and Rahul Prakash*.



**Ben Sexton**  
VP eDiscovery and Analytics  
JND eDiscovery

**E**-discovery (or 'e-disclosure', as the British insist on calling it), has gone from being a fairly niche concern to a vital and growing business, and a key aspect of any major organisation's defence. Its tools are used by law firms, corporates and, increasingly, government agencies. Mostly driven by the forces of litigation in the US, and as an investigative-compliance tool everywhere, how e-discovery is applied is very much dependent on the jurisdiction. In the US, for example, companies have historically been compelled to hand over larger amounts of data and documents to be shared with parties involved in any dispute, whereas, in Europe or Canada, privacy concerns and respect of proportionality mean that only documents deemed to be highly relevant are usually demanded. And while the US system has become more privacy conscious over recent years, the need protect your organisation by being on top of your data is more important wherever you are. As Meribeth Banaschik, a partner at EY, put it: "There's now a monetary reason to organise your data."

Wendy King, senior managing director of technology with FTI Consulting told us: "We are starting to see that corporate counsel are recognising the need to know what's happening with their data. They want to have more involvement in e-discovery and paper investigations. They have a big interest in controlling what goes out from their

corporations from a data perspective, and the tools available to maintain data privacy, accelerate the review process and to keep costs down while doing so. In-house counsel are becoming more part of the e-discovery conversation than in the past."

Ben Sexton, vice-president of e-discovery and analytics at JND, a US legal administration company, adds: "Plaintiffs' ability to substantiate their claims often depends on how effective they are at locating a small slice of evidence amidst a trove of non-responsive documents. 'Finding the truth' is plaintiffs' primary objective, and they are eager to leverage the most cutting-edge technology and workflows to do so. Like plaintiffs, in-house and defence counsel make decisions in the interest of their company or client, but their incentive package looks a bit different. A corporate or defence firm may be slow to change their approach simply because a new software advertises being better at finding "smoking guns" against their client, especially if it means spending more money. Corporates aren't anti-change, but the more compelling forces to adopt new technology for corporates are often cost reduction or regulatory compliance."

Relativity, the legal tech company headquartered in Chicago, produces one of the most widely used e-discovery platforms globally. With offices in London, Krakow, Hong Kong and Melbourne, as well as their home in



**Wendy King**  
Senior Managing Director -  
Technology,  
FTI Consulting





Opening of Relativity Fest 2019 with gospel choir singing 'You are our everything'.

Photo credit: Rahul Prakash

the 'Windy City', in their words, they "make software to help users organise data, discover the truth, and act on it".

### Relativity Fest

According to Relativity, they now have more than 175,000 users with 185,000-plus active cases currently running in Relativity alone, and an incredible 127 billion files under management. Given the scale of the Relativity's market penetration (including RelativityOne, the cloud-based version of the platform), it's perhaps no surprise that its three-day user conference, the 10th iteration of which took place at the Hilton Hotel in Chicago in late October, is a big deal.

A mixture of training, with dozens of workshops each day, peer networking, development and socialising, we joined the more than 2,000 delegates, mostly Relativity users, attending the event, which opened with a gospel choir (this is Chicago after all) that gave the gathering the feeling of a revivalist meeting, after which the company's key executives, greeted with similar fervour, took turns on stage to announce the latest updates, initiatives and new add-ons to the platform, and closed three days later with Relativity's Innovation Awards, which notably, from an Asia-Pacific perspective, recognised the initiatives of a significant number of Australian law firms and developers.

With goateed techies and suited lawyers mingling together in the corridors of the hotel, along with the hosting Relativians (yes, they call themselves that) it was a strikingly diverse crowd, but it was also noticeable talking to

attendees that there was a genuine (almost evangelical) passion for e-discovery development, and particularly for Relativity. Contributing to that may be the extent to which the platform is augmented by a wide variety of partner-developed add-ons, many of which were being demoed at the event, and which allow for a greater level of user engagement, and strengthen the base offering, from translation and navigation to integration and analytic tools, and mean that many are not just users but part of the platform's evolution.

### Security

Aside from the adaptability and array of add-ons, another key aspect of the platform cited by its users is its overall security.

Amanda Fennell is the chief security officer at Relativity, overseeing all aspects of compliance, product and cyber security at the company. Her Calder7 security team has quadrupled in size since its introduction in 2018 and is responsible for delivering Relativity's fully integrated security program and industry-leading security posture, making her and her team key figures in the organisation.

"We take a holistic view of security which means we take all of our cyber expertise and intel and merge that into the product area with a compliance backbone," she says. "An example is if a new exploit [a malicious attempt to gain unauthorised access, or to force a vulnerable program or operating system to perform unexpected actions] becomes more active in the threat landscape,



**Amanda Fennell**  
Chief Security Officer,  
Relativity



**Brad Kolacinski**  
Principal,  
Control Risks



**Benson Mak**  
Manager – APAC, Global  
eDiscovery & Data Advisory,  
Baker McKenzie



**Hideki Takeda**  
Chief Technology Officer,  
Fronteo

“in the age of information explosion and a globally litigious environment, it’s not only difficult to find the right data, but also do it in an efficient manner”

we are able to use our intel to proactively recognise that trend and reprioritise the risk associated with needing to patch or deploy a defence in-depth perspective on the exploit.

“In regards to the security of our SaaS platform, RelativityOne, it is of paramount importance because the platform handles large amounts of potentially sensitive data. Advanced persistent threats (APT) attacks, like APT10 or APT31, are becoming more and more active in the cloud arena. With data this sensitive, being a strong link in the supply chain is paramount.

“Many organisations see the ‘people’ as their security weakness, but I like to see people as our biggest strength. It is often glossed over that the building blocks of a security program are technology, process, but most of all: people.”

### An Asian discovery perspective

Baker McKenzie is one of the major law firms using Relativity for a large part of its e-discovery process. Based in Hong Kong, Benson Mak is the regional manager in the firm’s growing global e-discovery team in Asia (currently with two members in the SAR and two more in Australia).

“Where many other firms use vendors for their e-discovery, Baker McKenzie are one of the few firms in the region that manage everything in-house. I joined the firm three years ago as part of that process, and at the same time we started using the Relativity platform in-house in APAC.” So what’s driving the growth of e-discovery in Asia right now?

“One factor is the current uncertainty about trade relations between US and China, which has led several companies to consider moving their factories out of China into other countries in the region, such as Thailand and Vietnam,” says Mak. “This has the potential to lead to disputes with local partners and employees in the Chinese operations.”

In addition, Mak says, the effect of new privacy laws in other countries means that companies are increasingly turning to law firms to seek advice on how they should collect and review data in a more compliant way.

E-discovery and data forensics are increasingly being used as tools in Asia, according to Hideki Takeda, chief technology officer (among other directorial roles) with Fronteo in Japan. “But in the age of

information explosion and a globally litigious environment, it’s not only difficult to find the right data, but also do it in an efficient manner,” he says. “The language barriers in Asia do not help in this.”

Discussing their own platform, Takeda adds: “Our KIBIT AI technology, which is capable of handling Asian languages (currently supporting Chinese, Japanese and Korean), helps in making the e-discovery process more efficient by reducing the amount of unnecessary data generated. We make use of KIBIT AI throughout the e-discovery process, not just document analysis, thus improving the speed and quality significantly.”

One trend is in data infiltration investigations, especially in relation to IP and patent issues in China and Silicon Valley, according to Brad Kolacinski, principal in the compliance, forensics and intelligence practice at Control Risks.

“Clients come to us when they become aware or suspect that staff, say engineers, newly hired from one of their competitors, have brought with them unwanted data from their previous employer, for example their IP or trade secrets, which could be a huge litigation risk for the hiring company,” he says. “Once it’s established that this data has been brought into the business, it’s incumbent on the hiring company to investigate, find the data, delete it from their databases and track where else in the organisation the data has spread to. Control Risks comes in as an independent third party to do the investigative analysis. A large amount of data is pushed to the Relativity environment which helps us to identify where the unwanted data is in the network.”

Jason Lo, the litigation practice group and e-discovery manager based in Davis Polk’s Hong Kong office, was another attendee at Relativity Fest. His e-discovery journey started with Epiq Systems, later working for a bank via a business process outsourcing company before joining the US law firm last year. Being the first e-discovery specialist in the firm’s Hong Kong office Lo works closely with his Davis Polk discovery colleagues in New York. One the reasons he sees for e-discovery growth in Asia is the increasing variety of data sources.

“For example, clients in India, China, Korea or Japan all use different platforms for messaging,” he says. “In China, WeChat is prevalent, whereas in Korea they might be

using Line, and WhatsApp elsewhere, so collection of data is more complicated.”

Are the firm’s clients always aware of the e-discovery processes and purpose? “It really varies, for example the banks tend to be very aware and even have their own e-discovery teams in-house running their forensic collections, whereas in other industries we might have to assist and educate them much more in the process.”

And how does Lo think the e-discovery landscape will develop in Asia going forward? “It partly depends on the development of the regulations. In the US, the SEC and the DoJ have their guidelines on how we handle e-discovery production, whereas in Asia, many of the regulators don’t have such guidelines, so we have to deal with things on a case-by-case basis, discussing with the regulators and opposing parties any production protocols we may have ahead of time before we start.” Lo continues: “We see a lot of growth in e-discovery in Korea and China particularly, though in China, because of the very particular state secret and data privacy issues, we need to ensure documents are reviewed within the country and not moved elsewhere, unless we are certain those issues are not relevant.”

Stuart Hall has more than 20 years of e-discovery industry experience, including the last five at Relativity, where he currently works as Relativity’s manager for the Asia-Pacific region.

“The e-discovery landscape across Asia is diverse,” he says. “Singapore and Hong Kong implement e-discovery much in the way it is in the US or Australia, whereas in jurisdictions like Japan and South Korea, where they are not subject to the same discovery obligations, use of e-discovery is driven more by compliance regulations, anti-corruption efforts, personal data protection rules or by a company’s US-inbound activities.

“For Relativity, our client-base breaks down into four main groups: advisory and channel partners, which includes the big four, and companies such as BDO, Control Risks, Grant Thornton etc, as well as the e-discovery vendors such as Epiq, KLD or Law in Order; and then our enterprise business focuses on both local and global law firms such as Clayton Utz, Kim & Chang or Herbert Smith Freehills and Baker McKenzie etc. We also have a

number of governmental department clients, such as the Hong Kong SFC, and then we have the corporate clients, mostly those who operate in either highly litigious or heavily regulated areas, which obviously includes those in financial services.”

For the advisory partners, Hall’s role is to help them build out their services using the platform, providing certification training so they have qualified people using the technology and to help them “maximise their utilisation of the platform. We also have co-selling arrangements with a number of the partners.”

Hall says: “One of the macro trends we’re managing right now, particularly with the law firms, is a move to the cloud. We’re helping our customers move through that process as they have questions related to cost, and concerns about data regulatory implications, etc.

“Another emerging trend we’re seeing particularly throughout Asia,” continues Hall “is the importance of compliance. Where I’m based in Australia, the Financial Services Royal Commission really drove a huge amount of interest in compliance and I think it’s cascading throughout Asia. There’s a greater obligation for corporations to manage their information more effectively. Where discovery is a reactive issue that may not be so relevant for those in jurisdictions where there are no formal discovery requirements, there is still an obligation to track and manage data and so we’re seeing a growing number of corporations and law firms in the region show interest in our proactive compliance monitoring solution, Trace, which allows these organisations to better manage risk. Whether the processes being flagged relate to anti-money laundering, the Foreign Corrupt Practices Act or insider trading, Trace allows its users not just to monitor the transactions themselves, but the communications associated with those transactions, so if you’re on a Bloomberg or Reuters chat and talking about all these different trades you’re able to monitor all that and pull it together with some of the trade data, and combine that with other sources as well, to see if there’s, say, any insider trading going on. It’s about putting the organisation ahead of any problems, rather than just being reactive to them.”

It will be interesting to see how many Asia-based counsel are ahead of the curve by the time next year’s Relativity Fest takes place.



**Jason Lo**  
*Litigation Practice Group &  
E-Discovery Manager,  
Davis Polk*



**Stuart Hall**  
*Manager Asia Pacific,  
Relativity*

“It’s about putting the organisation ahead of any problems, rather than just being reactive to them”



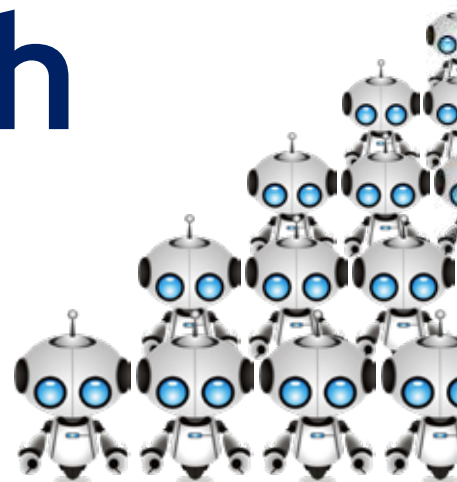


# The techlash is coming



Ronald Yu

Introduce artificial intelligence systems with great care – or suffer the consequences, writes *Ronald Yu*.



For many organisations, artificial intelligence has arrived or will be coming soon, bringing all sorts of new challenges for counsel, especially with respect to cross-border data flows.

While most discussion regarding international data transfers has been focused on privacy and cybercrime, these are just two aspects of an increasingly complicated set of converging issues.

To understand how complicated these matters could become, let us start with demolishing any notions that current AI thinks like a human being. It does not. There is so much that still we do not know about the human mind, essentially precluding the possibility of replicating the operation of a human mind by artificial means.

AI is, however, good at analysing and extracting patterns from massive amounts of data and deriving generalisations from these patterns.

## The limitations arise

We are only now starting to more broadly recognise the limitations of this approach.

For instance, what if we developed an AI system to identify potentially dangerous animals but only trained it to recognise potentially dangerous or large mammals located in Europe?

That system would not be robust enough to deal with the potential dangers kangaroos hopping across a road could pose to a fast-moving car and using it in a self-driving car in Australia, without the proper alterations to its programming, would be irresponsible. This was, in fact, the very problem Volvo encountered in 2017 when it discovered that its autonomous

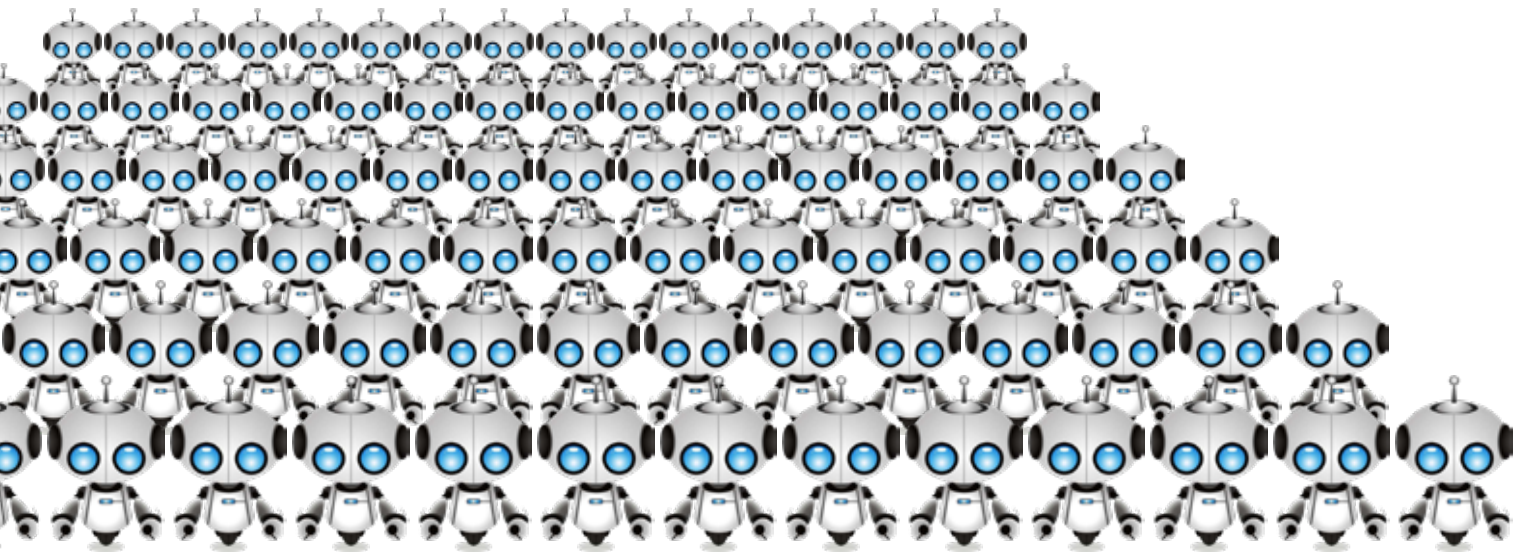
vehicle prototypes, which had been trained to recognise the potential dangers of large Swedish moose and elk, did not know how to react to Australian kangaroos.

AI systems, of course, can learn new tricks though not always what their developers expect or want as Microsoft famously learned when its Tay chatbot began posting offensive tweets through its Twitter account, causing Microsoft to shut down the service within 24 hours of its launch. While Microsoft blamed this on a coordinated attack by people who had exploited a vulnerability in Tay and it later admitted it had made a critical oversight for this specific attack.

## Controversy and court action

Though AI systems are often touted for their putative benefits: mitigating human bias and error, and offering the promise of cost efficiency, accuracy and reliability, poor implementation – particularly in health care, criminal justice, education, employment, benefits disbursement and other areas, has resulted in numerous problems – and challenges, both in the courts of public opinion and in actual courts.

For example, while more police departments employ predictive policing systems to forecast criminal activity and allocate police resources, such systems are increasingly being challenged by critics who claim they are built on data produced during documented periods of flawed, racially biased and sometimes unlawful practices and policies, resulting in controversial policing practices. Critics also slam vendors' assurances that their systems adequately mitigate or segregate this data as insufficient.



There has also been litigation in America and Europe over the use of AI in the disbursement of medical benefits, public school teacher employment and juvenile criminal risk assessment.

### That's not all

But these are not the only problems with AI systems. Modern AI systems are often criticised for their lack of creativity or adaptability as compared to a human (though it should be noted that an AI system could be updated with new training data though this would not be instantaneous).

AI systems still have communications limitations, thus the reason why some AI companies employ armies of humans to review conversations recorded by their devices (eg, Amazon's Alexa) for accuracy, resulting in all sorts of privacy-related critiques.

Finally, AI systems are limited in metacognition – they cannot really think about how they think. Thus, if an AI system encounters a problem, it will revert to what it has been trained to do and will continue to do so as it is unable to step back, consider what it is doing wrong, analyse the problem and try a different (and hopefully successful) approach.

While we might deride such behaviour in a human – ie, doing the same thing over and over again expecting a different result – as insanity, AI systems just do not know any better.

### Implications

The implications are that we will have to live with communications-challenged AI systems for a bit longer and that human intervention will be required where AI systems encounter

something they do not expect. The latter means that AI-based products may still require considerable additional development to adapt to local conditions – something tech companies developing AI products will need to consider (as well as the related data-transfer issues) – and that companies introducing AI systems must recognise that the systems they are introducing may be wholly inappropriate for their business environments.

Given the aforementioned public backlash and legal action against poorly implemented AI, this is no small consideration.

### And one more thing...

This growing resistance to AI and related technologies such as facial recognition may likely mean companies will have less flexibility in employing new technologies, will need to be more careful in how they introduce and implement AI systems, or both. How this could affect longer term growth and progress is yet to be seen.

However, as if the potentially serious issues with an AI system that was trained using biased or limited data, employs problematic algorithms or was sloppily implemented – or the concerns of future worker displacement by AI – were not enough, there is also the present problem of worker disaffection among tech workers who increasingly feel left out of the mainstream, as exemplified by protests against ride-sharing companies (that employ AI and data analysis extensively) by livery drivers in the New York metropolitan area or by collective bargaining actions undertaken by African workers in Minnesota against Amazon in the past year.

The techlash is just beginning...

SPECIAL FEATURE

RULES

OF

CIVILITY

INTRODUCING

THE MINDFUL BUSINESS CHARTER

*By Patrick Dransfield, In-House Community*

Photo: Wendy Chan



**D**uring my time working directly for international law firms (to say nothing of my time at publishing house Euromoney), I have been on numerous occasions the recipient of blisteringly rude and on occasions patently offensive emails. It was therefore a relief to be introduced to the Mindful Business Charter (MBC) during the IBA Annual Conference in Seoul in October. The MBC is not a panacea for all issues and all parties relating to email communications in the legal community, but when applied conscientiously the MBC will begin to take out at least some of the avoidable stress that misconceived email communication between in-house clients and private practice law firms can and often does cause.



**Patrick Dransfield**  
Publishing director  
Asian-mena Counsel  
and co-director  
In-House Community



*Creating harmonious partnerships: from left: the author; Kieran Pender, IBA; Richard Martin, Byrne Dean; Hanim Hamzar (moderator), Zico Law; Laura Devine, Laura Devine Immigration; and Pallari Shroff, Shadul Amarchand Mangaldas*

It is worth noting that the MBC came about not via an email but through direct conversations between the Barclays in-house legal department in London and private practice partners at Pinsent Masons and Addleshaws around 18 months ago. As a consequence of its simple, grass-roots focus on, among other things, email communications between client and law firm urging new rules of civility, the MBC is gaining wide adoption in London and now being rolled out globally.

It may be surprising to learn, given the English reputation for good manners, that civility as a concept didn't take hold in England until the 16th century, when according to John Gallagher\*, "the national mood was a mixture of bravado and temerity". English manners over the subsequent 300 years were improved initially through exposure to the French court and also as a consequence of thousands of published books on manners. The apotheosis of such civility has to be Winston Churchill: after the Japanese bombing of Singapore and

Hong Kong in 1941, Churchill dispatched a letter to the Japanese ambassador announcing that a state of war existed between England and Japan. After noting the acts of aggression, Churchill's letter ended with these words: "I have the honour to be, with high consideration, Sir, Your obedient servant, Winston S Churchill." Churchill commented in his memoirs: "Some people did not like this ceremonial style. But after all, when you have to kill a man it costs nothing to be polite."

Clearly, the ability to maintain civility can be accomplished, even under the most adversarial situations. According to the French anthropologist René Girard, human behaviour is indelibly shaped by our tribal past. Over 200,000 years of conditioning help determine how we show off and seek recognition, prestige and pleasure from the tribe. It is this revelation that inspired Silicon Valley-based venture capitalist Peter Thiel to make his first US\$1 million investment in Facebook. So, what is determined as 'correct behaviour' is not only

\* Making a mouth in a contemptuous manner', John Gallagher, London Review of Books, 4 July 2020

created by the interaction and behaviour of our peers, but also this can change depending on what rules of conduct we decide to employ at any particular time. Our own behaviour can change radically when a new 'normal' is accepted across society. One of the early adopters of the MBC, Charles Penney, senior partner at Addleshaw Goddard, sums up the MBC succinctly:

*"Change takes time. We are trying to shift ingrained behaviours that have become common practice over the years – like over-use of emails, sending unnecessary emails late at night and poor discipline around taking time off from work to rest. To change behaviours, we must shine a light on the early adopters of the Charter, and the benefits that they are seeing, to encourage others to follow."*

Email as a means of communication is both ubiquitous and actually relatively new: in the early 2000s I remember dialling up and downloading my handful of emails once a day. Now that our inboxes are constantly full and our mobile devices are forever ping-pong, new rules of civility regarding communication by email need to be adopted. And I am delighted to say that that is exactly what has

happened with the creation and enthusiastic adoption of the MBC in the UK. It is my hope that this article, which charts the origin and principals of the MBC, will in some way prove a catalyst to its wider adoption, especially in Asia and the Middle East, and that a new code of civility will be adopted throughout the legal industry. It is my experience that what constitutes a law firm's culture in the headquarters of London or New York does not always export wholesale to Asia, especially when the lawyers have been laterally hired. The adoption and adaption of the MBC by the local Asian and Middle Eastern offices of international and domestic law firms is therefore a priority – but, as the true impetus of change comes from clients, it is also essential that legal departments also adopt the MBC. This will require time and effort and hence the MBC, and wellness in the legal workplace more generally, will be a theme that we at the In-House Community will be consistently returning to through our various platforms, including the plenary sessions of our annual In-House Congress events throughout 2020 and beyond. Colin Dunlop of Barclays' legal department in Hong Kong articulates the challenge in Asia thus:



**Colin Dunlop**  
Director, Banking Legal  
Asia-Pacific,  
Barclays

*"We face particularly unique challenges in Asia Pacific, for instance working across multiple time zones and with law firms in different geographies, which drive home the need to ensure we properly embed the principles of the Mindful Business Charter here. We have taken the time over the past 12 months to understand how our individual colleagues at all levels, and broader teams, work together in Asia Pacific, their personal priorities (or "non-negotiables") and challenges and stresses they face in their roles. Through the MBC, we are giving our colleagues the resources they need to adopt ways of working which can tackle avoidable workplace stress and also the tools to help them better engage with external legal service providers. Only with a clear commitment on our side to tackling avoidable workplace stress can we hope to drive change in the broader legal profession."*

There now follows statements from other various early adopters of the MBC regarding its history and the positive way that its adoption has enhanced work-life experience for the lawyers involved. Hopefully we will see its adoption encompass all stake-holders in the legal industry – after all, it is quite often the ancillary staff that bear the brunt of unrealistic demands, often manifested through email. To find out more about the MBC please find the link below, and also read the following experiences of those who have been converted to its benefits.

<https://mindfulbusinesscharter.com/>

“ Working life is undoubtedly stressful, perhaps more so now than it has ever been. Technology advances have brought welcome improvements, but also expectations of quicker turnaround times and 24/7 availability. Common habits such as unrealistic deadlines and turnaround times, staying connected while on holiday, joining conference calls during family-time and working outside of core hours can increase workplace stress. We know that stress can be a challenge to wellbeing, and a significant contributor to mental health issues.

The MBC came about through conversations between Barclays, Pinsent Masons and Addleshaw Goddard in London about mental health and wellbeing. Together, we decided to try to look at what we could do collectively to seek to take away the unnecessary causes of stress and unhappiness.

This is the first time that banks and their legal service providers have come together to reach a shared agenda for mental health and wellbeing.

### Why the MBC is needed?

We know that improving mental health and wellbeing will not happen overnight – it is a programme that will take sustained effort over a number of years. However, this initiative has already been impactful in getting teams to accept that we can do things differently and, when we do, service quality and delivery will improve. It has also sent a clear message that there is no taboo on the issue.

Responding to client and business needs is important and we recognise that there will be times when life outside work gets interrupted by an urgent matter or request. However, the reality is that there are times when this is not necessary. The ability to have control over how and when we work, as well as dealing with continued interruptions, can have a significant impact on how we feel about jobs, and on our relationships, family life, etc. Taking action against avoidable working practices will result in people feeling happier, valued and positive about their work. Ultimately, we get the best out of our people when they're at their best.

### MBC journey in Pinsent Masons so far

By October 2018, when the MBC was launched, it had received widespread support from key organisations across the financial services and legal sectors. Nine law firms and three banks committed to the Charter.

One year on, a further 26 organisations have adopted the Charter pledge. Performances against the principles are being discussed between the banks and their law firm advisers during relationship review meetings, resulting in honest feedback on both sides about successes and areas for improvement. Those who have signed the Charter are embedding the principles and designing processes within their organisations, to monitor the impact of the MBC through methods such as staff engagement surveys and feedback gathered as part of the appraisal process. Regular calls between the signatories have become a forum to share ideas and successes in this regard.

The Charter has been developed in such a way that it is flexible enough to be deployed across a wide range of corporates, not just commercial banks and legal advisers. We are already seeing a diverse range of corporates adopt the Charter and our hope is that others will adopt it over time, leading to an altogether more healthy approach to working across the City and beyond.



**Richard Foley**  
Senior partner of Pinsent  
Masons

”





**Charles Penney**  
Senior partner of  
Addleshaw Goddard

“ All the evidence points to a stress epidemic in the legal profession. Depression, anxiety and poor mental health caused by work-related stress are a concern across the sector, a leading cause of sickness absence in many law firms and a growing reason for attrition. Our view is that, while a certain level of stress is to be expected in our profession, even embraced, some of the stress which our people experience is avoidable.

The aim of the Charter is not to eradicate workplace stress, but to reduce stresses caused by poor working practices, lack of planning and communication, and poor people management. It also aims to re-establish some of the boundaries between our personal and professional lives which may have been lost with the advent of technology, enabling us to be available 24/7, and the increasingly competitive and global marketplace in which we operate.

It is the bilateral nature of the Charter – bringing together client and legal services supplier – which makes it both unique and powerful. Whilst there are many examples of initiatives to raise awareness or make available support for those suffering from mental health issues at work, none that we have come across has a focus on the underlying working practices that can cause unnecessary stress and brings together all parties to find a joint solution.

Although conceived in the UK, initially as a collaboration between Barclays, Addleshaw Goddard and Pinsent Masons, we believe that the Charter has wider application and have had conversations with lawyers and clients across the globe who are battling with the same issues and looking for a solution (it was a topic of frequent conversation at the recent International Bar Association Annual Conference in Seoul, Korea). The Charter is a universal set of common-sense principles, and at AG we are applying the Charter in all our dealings with our people and our clients who have signed up to the Charter across all our offices, including in Asia.

The Charter is not a panacea. People in our business still work very hard, and the hours will sometimes unavoidably be long, but we believe there is a more efficient and effective way to work. As the name suggests, at the heart of the Charter is the call for people to be more mindful of their impact on others and to challenge some of the unhealthy practices that we have come to see as normal.

”



“Asia is known for having long working hours; and my home town Hong Kong is crowned as one of the most hard-working cities. However, as a responsible employer it is not good enough to just accept that as the price we have to pay. Moreover, clients no longer see it as a positive for lawyers in Asia to take pride in recording 2,500 hours a year. For sustainability and to attract and retain talent, we have a responsibility to make changes now.”



The roll out of Pinsent Masons' Asian MBC programme, Hong Kong, October 2019



**Alvin Ho**  
Partner of Pinsent Masons  
[alvin.ho@pinsentmasons.com](mailto:alvin.ho@pinsentmasons.com)

Recognising the cultural differences we know we cannot just cut and paste the Charter in Hong Kong and expect it to work perfectly. We held a number of internal workshops and brainstorming sessions to get local buy-ins and dispel misconceptions. It was important that our people understood the charter is about providing direction on the type of behaviour we expect as a business. It is about building team culture and the embedding of best practice working guidelines. It is about how we help our people and our clients to be the best version of themselves. We recognise that there will be times when long hours and tight deadlines cannot be avoided, and actually most people thrive in those environments. Where stress creeps in and wellness is impacted is where those hours are being demanded without good reasons.

### Launch of MBC in Hong Kong on 29 October 2019

I am very grateful to all my colleagues in Hong Kong for their endorsement and commitment to adopt the Charter in Hong Kong. On 29 October 2019 we held a panel discussion to mark the launch. On the panel we had Colin Dunlop, to give us, from a client's perspective, the incentives and challenges in implementing MBC in Asia. We also had our senior partner (Richard Foley) and a colleague from our UK business (Becca Labib) shedding light on the positive impact (from both the management and junior perspectives) the Charter has already had on the behaviours and wellbeing of our employees.

We are at stage one where the Charter only has internal application but we are actively engaging with other law firms and clients to prepare for an external launch involving other signatories. If anyone reading this article is interested please get in touch with me!

”

# Michael Ting

The chief legal and compliance officer for Manulife in Hong Kong discusses the changing role of in-house counsel and the challenges of working in a highly regulated sector.



**Can you describe your professional background and your current role?**

I was trained up as a litigation lawyer after I left my comfort zone as a pharmacist at a young age. I then qualified in three different jurisdictions to advise on the law, joined a few financial institutions as an in-house lawyer before becoming head of legal and compliance officer for Manulife in Hong Kong.

**How big is the team you manage and how is it structured?**

I have a team of 38, comprising legal professionals and seasoned compliance officers who are divided according to function. Simply put, our legal team has a headcount of 10 people and the rest of the compliance leads are sub-divided to support different lines of business in Manulife.

**What are the biggest challenges you face in this role?**

The changes in the legislative and regulatory landscape have been nothing less than rapid in recent years. The most challenging part is not to manage the change with Manulife, but how to influence the regulator to create a doctrine that strives for a balance between regulation and practicality – so far I think we have made a great leap forward on this. For instance, I have proactively invited our regulator to sit down with our legal and compliance team on a periodic basis to discuss regulatory issues and more often than not this full and frank communication contributed to transparency on both sides. Based on this experience, we have



also successfully persuaded our business partners within Manulife to provide candid feedback whenever our regulator asks, say, during consultation exercise before a new guideline is issued, resulting in more predictability when a new requirement arrives. I am glad that our regulator is an open-minded one.

#### **What are the most important qualities of a good general counsel?**

In the past, I would have said knowledge about the subject matter, but I think that has become a basic requirement nowadays. The power to think big and the passion to drive change necessary for the business, as well as the ability to create value, seem to be the most important qualities of a good general counsel.

#### **Has the in-house legal function changed significantly during your career?**

It must be a yes, no doubt at all. In the “good” old days, in-house counsel could survive by merely providing textbook advice. No longer. The new business world is expecting not only a lawyer but a genuine partner in the business. Counsel has to provide legally sound and commercially viable options to the business to cope with the ever-changing market needs.

#### **What do you look for in external counsel?**

External counsel bring in a lot of invaluable insight to us as in-house counsel. For instance, they are able to instill their experience with different clients and in return provide a meaningful comparative analysis to enrich our understanding of the issues and to cover our blind spots.

#### **What type of work do you outsource to external firms?**

Mostly advice on new legislative changes and the proposed interpretation of the same. Also, it is not infrequent to seek advice from external lawyers who are qualified to advise foreign law, such as the EU, mainland China and other jurisdictions in Asia Pacific.

“In the ‘good’ old days, in-house counsel could survive by merely providing textbook advice. No longer. The new business world is expecting not only a lawyer but a genuine partner in the business. Counsel has to provide legally sound and commercially viable options to the business to cope with the ever-changing market needs”

#### **How is technology changing the way you work?**

It brings us speed when we need instant communication; of course, it also means you are reachable by your business partners even in the wee hours of the day. I think the advancement of AI will reduce repetitive work we do on daily basis and will enhance our efficiency too.

#### **Looking forward, what changes do you foresee in the way that legal services will be provided in the future?**

With the aid of technological advancement, sharing of information and knowledge has become barrier-free and advice on legal issues will almost become instantaneous. Also, the insights we gain from big data may help us to customise our advice to individuals, thus creating a truly unsurpassed experience to our client.

#### **What advice can you give to young lawyers starting out in their careers today?**

Be bold and creative, even when you are asked to give legal advice (but make sure the law is right). Think you are part of a bigger team and embed yourself with a higher goal. Join my team!

#### **What are your interests outside of the legal profession?**

Maybe I should have been a vet, I love puppies.

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

**AMC** Indicates an ASIAN-MENA COUNSEL Firm of the Year. **2016** **2017** **2018**

**MR** An ASIAN-MENA COUNSEL Most Responsive Firm of the Year.

**MR** An ASIAN-MENA COUNSEL Honourable Mention Most Responsive Firm of the Year.

**●** One of this firm's five largest practice areas in this jurisdiction.

**FS** Indicates a full service firm in this jurisdiction.

### Practice Area key:

**INV** Alt' Investment Funds (inc. PE)

**COM** Antitrust / Competition

**AV** Aviation

**BF** Banking & Finance

**CM** Capital Markets

**REG** Compliance / Regulatory

**CMA** Corporate & M&A

**E** Employment

**ENR** Energy & Natural Resources

**ENV** Environment

**FT** FinTech

**INS** Insurance

**IP** Intellectual Property

**IA** International Arbitration

**IF** Islamic Finance

**LS** Life Sciences / Healthcare

**LDR** Litigation & Dispute Resolution

**MS** Maritime & Shipping

**PF** Projects & Project Finance  
(inc. Infrastructure)

**RE** Real Estate / Construction

**RES** Restructuring & Insolvency

**TX** Taxation

**TMT** Telecoms, Media & Technology

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## Hong Kong International Arbitration Centre

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## Maxwell Chambers Pte Ltd

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