

# asian-mena Counsel

Volume 17 Issue 5, 2020

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The Law Society of England & Wales president Simon Davis

**Privacy during Covid-19**

Staying compliant  
in China

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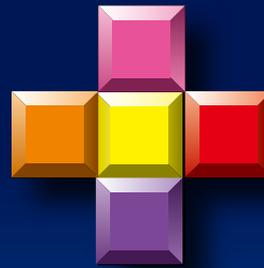
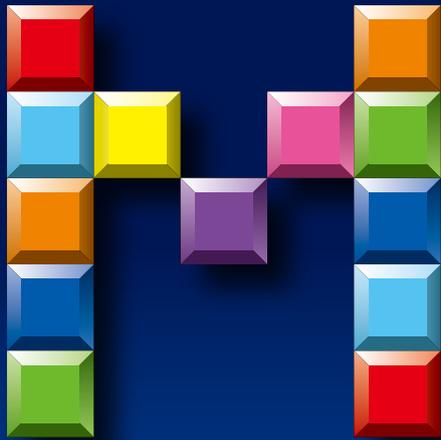


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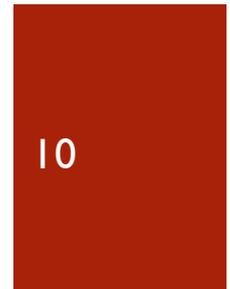
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## The effect of Covid-19 and business resilience

Companies worldwide are, or will inevitably be, affected in the short and medium-term by the coronavirus pandemic (Covid-19). Decline in commodity prices due to the falling demand in China, travel restrictions, city and provincial quarantines, confinement of people willingly or by force to their homes, and the reduced job mobility affect the trade of goods and services for hundreds of millions of people around the world.

The Covid-19 pandemic is very different from the financial crisis that affected the financial sector in 2008. It keeps everything in a standstill or, at least, in slow motion for several months. No one knows exactly how long this situation will last. However, the next few months should allow a clearer assessment of the economic impact of the pandemic (eg, the unemployment insurance claims in the US during the week of March 8 were already up to 282,000). We might also observe a high and negative level of debt on banks' financial liquidity. The healthcare system and losses of skilled medical workers, the negative effects of the education system and force majeure litigation, which will lead business lawyers to work overtime to protect the interests of their clients.

### How can leaders and the corporate world manage the effects of the Covid-19 pandemic?

From the economic and legal strategy stand-

“From the economic and legal strategy standpoint, the “toolbox” of companies must be expanded. Companies must work closely with business lawyers to obtain the needed legal opinions on key and essential contracts of their business”

point, the “toolbox” of companies must be expanded. Companies must work closely with business lawyers to obtain the needed legal opinions on key and essential contracts of their business such as lease agreements, accounts payable, insurance contracts, or even on thematic such as the extension of loans, debt collection in cases of force majeure and renegotiation of terms and conditions of contracts. Similarly, companies will have to use their lawyers to obtain legal opinions to make informed decisions on the maintenance, suspension and/or the unilateral or mutual termination, as the case may be, of joint venture

agreements, exploration, exploitation of mineral, oil and gas resources, as well as the various contracts on energy, airport, port, railway and other infrastructure-related agreements. In this exceptional context, the best option to keep businesses at a certain threshold of profitability is to effectively use new technologies to reduce certain operating expenses such as office rental by minimising the use of offices with virtual video conferences, online services and remote working. Marketing expenses can be very well optimised through the use of social media, online networks and webinars.

Business leaders should keep calm and maintain a long-term perspective. In the short run, government around the world are passing laws and giving incentives to mitigate the impact of the Covid-19 (such as payroll loans, tax holiday, New York State will implement a 90-day moratorium on evictions for residential and commercial tenants).

In the medium and long run, the African economy in new technologies, healthcare infrastructure, the energy industry and other key sectors will offer a huge opportunity for suppliers and investors from around the world.

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## Pandemics, police power and private contracts

With the worsening coronavirus outbreak, President Rodrigo Duterte has shifted gears.

In an unprecedented “virtual” special session, Congress approved the bill now known as the “Bayanihan to Heal as One Act”, granting the president emergency powers to address the public health crisis. While Congress has parsed out contentious provisions including the extension of emergency powers and take-over of private businesses, the current law still somehow bears upon the property rights of citizens.

Under the Bayanihan Act, the president is empowered to order private hospitals, passenger vessels and other establishments to direct their operations towards Covid-19 efforts. Unjustified refusal or the inability to operate such enterprises for Covid-19 related purposes will allow the president to take-over the companies’ operations. The president may procure the lease of real property for medical purposes; require businesses to prioritise and accept contracts for materials and services; impose grace periods for the payment of residential rent and bank loans; and ensure the availability of credit by lowering effective lending interest rates, among others.

An Orwellian application of the law will impinge upon a right oft-overlooked in the constitution — the non-impairment of contracts. This is contained in Section 10, Article III of the Constitution, which provides that no law impairing the obligation of contracts shall be passed.

The businesses contemplated by the new Bayanihan Act share existing contracts with a myriad of parties. As it stands, the law carries the possibility of altering the terms of existing contracts, imposing new conditions or dispensing with conditions already expressed.

The aim of the non-impairment clause is to protect private agreements from state interference, with the goal of encouraging trade and credit by promoting the stability of contractual relations.

As early as the 1922 case of *Clemens v Nolting*, the Supreme Court ruled that a law which impairs the obligation of a contract is null and void.

The freedom of contract, however, is not meant to be absolute. Over time, the Supreme Court has expounded on the application of the non-impairment clause and carved out exceptions thereto. Foremost is that the right to non-impairment yields to the State’s police power.

Hence, a statute passed in the legitimate exercise of police power, although incidentally destroying existing contract rights, must be upheld by courts. The non-impairment clause is understood to be subject to reasonable legislative regulation aimed at the promotion of public health, morals, safety, and welfare.

Similar to the freedom of contract, however, the invocation of police power is not set in stone. There is the well-settled rule that a statute built on police power requires the concurrence of a lawful subject and lawful method; in other words, the interests of the general public are involved and the means employed to promote public interest are *reasonably necessary*.

In *National Development Company v Philippine Veterans Bank*, the Supreme Court clarified that police power trumps the non-impairment clause only “where the contract is so related to the public welfare that it will be considered congenitally susceptible to change by the legislature in the interest of the greater number.” In the same case, which involved a Marcos-era Presidential Decree extinguishing all mortgages and liens attached to assets of a bankrupt corporation, the Supreme Court found that the loan and mortgage contracts were purely private transactions. Without the “indispensable link” to public welfare, the Supreme Court held that there was an impairment of the obligation of the contract, a deprivation of property rights, and, accordingly, a need to annul the law (ie, the Presidential Decree).

All in all, government interference with private

contracts is justified under police power, so long as the private agreements carry a demonstrated connection to the public interest, and so long as police power is tempered by both lawful subject and method.

Due to the pandemic, the new law theoretically conforms to the requirement of “lawful subject” under the police power concept. It remains to be seen, however, whether the methods are “reasonably necessary”.

For instance, the president’s power to lower lending rates may unduly affect lenders whose charges and interests have already accrued, and which may be considered vested property rights. The moratorium on residential rent and loan payments, while easing the financial burden of the lessee and debtor, in turn strains the landlord and creditor. Establishments which are vaguely described as “no longer capable of operating their enterprises” for the Covid-19 efforts, may be subjected to take-over by the president.

To be sure, the coronavirus cannot enlarge the scope of the emergency powers bestowed upon the president. If, in the exercise of such emergency powers, the president would impair contracts in favour of *specific* interests, then even an outbreak should not prevent courts from later nullifying such actions. With portions of the new Bayanihan Act painted in such broad and abstract strokes, however, the public can only rely on the wisdom of the executive branch in implementing the law, for now. And there lies the rub.

*This article first appeared in Business World, a newspaper of general circulation in the Philippines. The views and opinions expressed in this article are those of the author. This article is for general informational and educational purposes, and not offered as, and does not constitute, legal advice or legal opinion. Samantha Beatrice P. King is an Associate of the Litigation and Dispute Resolution Department of the Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW). [spking@accralaw.com](mailto:spking@accralaw.com) or (632) 8830-8000.*



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## Liability exemption due to the Covid-19?

On April 1, 2020, the Vietnamese prime minister issued Decision No. 447/QĐ-TTg to officially declare Covid-19 a nationwide epidemic. The Covid-19 pandemic, along with the application of certain preventive measures of the Vietnamese competent authorities have greatly affected most Vietnamese-based enterprises (*save essential goods and services trading enterprises*). Consequently, many businesses failed to properly fulfil their contractual obligations with their partners and their own employees. One legal issue raised is that under Vietnamese laws, whether they are exempted from liability for breach of the contractual obligations.

There is no single answer to this question. Whether the defaulting party could be excused from their liability due to the Covid-19 outbreak and/or the government actions will largely depend on each transaction or case in terms of space, time and other considerations.

The Vietnamese legal framework for exemption of civil liability in case of contract breach due to a force majeure event is generally similar to other countries, specifically:

- Criteria need to be met for a force majeure event: (i) **An event occurs objectively;** (ii) **Unforeseeable;** and (iii) **Could not be overcome even all appropriate and possible measures have been taken** (Clause 1, Article 156 of the Civil Code 2015).
- **Where an obligor fails to properly perform its obligation due to an event of force majeure, it shall not bear civil liability, unless otherwise agreed or otherwise provided by law.** (Clause 2, Article 351 of the Civil Code 2015).
- **A contract-breaching party shall be exempted from liability in the following cases: A force majeure event occurs; or A breach is committed by one party as a result of the enforcement of a competent**

**state management agency's decision which the parties cannot foresee at the time of conclusion of the contract** (Clause 2, Article 294 of the Commercial Law 2005).

- **The contract-breaching party claiming liability exemption shall have the burden of prove** (Clause 2, Article 294 of the Commercial Law 2005).

In addition, there are some notable points below in relation to liability exemption due to a force majeure event under the Vietnamese laws:

- **Force majeure clause**

Unlike other jurisdictions (especially common law system) where an affected party may only get relief from its liability due to a force majeure event if such clause has been agreed in the contract in question, liability exemption clauses in case of force majeure event under Vietnamese law can be applied without setting out in the contract, provided that the governing law of such contract is Vietnamese law.

- **Scope of liability exemption**

Vietnamese laws are silent on the scope of liability exemption for non-performance of contract in the event of a force majeure event. It would seem that all civil liabilities of an affected party such as liquidated damages, late payment interest, penalty for breach, specific performance, etc. would be excused or limited in case of force majeure event. Meanwhile, laws of certain countries limit the scope of liability exemption only to the extent of compensation.

- **Conditions for contract termination due to force majeure event**

In some countries, the law provides that if the occurrence of a force majeure event permanently prevents a party from fulfilling its contractual obligations, it would enable the affected party to request for termination/

liquidation of the contract and such party will be released from their compensation liability.

Vietnamese laws have no specific regulation on the right of the party affected by a force majeure event to unilaterally terminate the contract. Article 296 of the Commercial Law 2005 only allows the parties to extend the time limit for performance of contractual obligations due to a force majeure event and at the end of this period, the parties may **refuse to perform the contract** and neither party is entitled to request the compensation from the other party.

In practice, Vietnamese courts have so far had no typical cases on liability exemption for epidemic-related reasons. Nevertheless, they have accepted the exemption of civil liability in case of contractual breach due to objective reasons and/or force majeure event. Case Law No. 25/2018/AL announced on November 6, 2018 regarding the failure of deposit payment due to objective reasons is a typical example. Under this case law, the legal solution for the depositary's violation under a deposit contract for house purchase since the house ownership certificate had not yet been issued is: **"In this case, it is determined that the reason for the non-performance on the commitment of the depositary is objective and the depositary is released from the penalty"**.

Given the negative impact of Covid-19 and the complicated legal issues arising therefrom, especially whether it would amount to a force majeure event to claim for liability exemption, the contracting parties should cooperate to seek a fair solution for both parties, while they should equip themselves with adequate knowledge and understanding of the governing law and applicable law as well as judicial practices related to liability exemption in case of a breach of contract due to force majeure events to well prepare for any dispute that might come.

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### The first red-chip listing on the SSE Star Market

On February 27, 2020, China Resources Microelectronics officially launched its initial public offering (IPO) on the SSE Star Market, becoming the first Cayman incorporated company to be listed in Mainland China. It has raised approximately US\$614 million, which will primarily be used for investing in 8-inch high-performance sensor and power semiconductor construction projects, and partly for improving product manufacturing and technological innovation capabilities, as well as strengthening forward-looking technology and product research and development capabilities.

Acting as the Cayman Islands and British Virgin Islands legal counsel to China Resources Microelectronics, our firm formed a team led by Lilian Woo, a senior partner with almost 30 years of experience, and Wynne Lau, a newly promoted partner with nearly two decades of experience. The team also consisted of Beverly Cheung (associate) and Rowan Wu (legal manager) as well as paralegals, who worked together to handle this highly significant and ground-breaking project.

China Resources Microelectronics is one of the largest power semiconductor enterprises in China. In the ranking of Chinese semiconductor companies for 2018, China Resources Microelectronics was the only enterprise in the top 10 that mainly operates as an integrated device manufacturer, and was the largest power device enterprise in China.

“In the face of differences between offshore and PRC laws, the prime task is to assist the client in coordinating different requirements of offshore and onshore jurisdictions, and smoothing out the difficulties in application process so as to ensure a successful listing”

#### What is the significance of the China Resources Microelectronics IPO?

First of all, it is the first red-chip structured enterprise in China to directly launch an IPO on the A-share market.

Secondly, it is the first red-chip enterprise listed on the A-share market that operates in the form of a limited company rather than a joint-stock company.

It also represents the first A-share issuer whose par value of shares is in Hong Kong dollars instead of renminbi.

Last but not least, it has set an unprecedented

example of a listed enterprise exercising an over-allotment option (commonly known as a greenshoe option) on the SSE Star Market.

Given the multiple “firsts” China Resources Microelectronics has created, there is no precedent for reference when coping with some legal issues. In the face of differences between offshore and PRC laws, the prime task is to assist the client in coordinating different requirements of offshore and onshore jurisdictions, and smoothing out the difficulties in application process so as to ensure a successful listing. Drafting articles of association for the issuer has proved to be one of the biggest challenges as Cayman law is based on the Western common law system. Though it is a Cayman company, the requirements on the rights of, and protection for, its shareholders shall in no way be less stringent than those of the PRC laws and regulations. As such, we have to abandon the standard form of the constitutional documents for Cayman companies and use innovative drafting skills to bridge the gap between the two completely different jurisdictions.

Another challenge faced by the offshore lawyers for China Resources Microelectronics was to conduct due diligence on a vast number of companies within a very short time frame. Unlike a typical due diligence, a different approach was necessary for this listing project. Our legal team conducted extensive due diligence on not only existing subsidiaries of the issuer, but also companies that were once in the group but had subsequently been dissolved. The sheer volume of work made it more difficult and time consuming than a regular IPO in Hong Kong.

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## MESSAGE FROM THE TEAM AT ALS INTERNATIONAL

Many of our clients and candidates are facing incredibly challenging issues and feeling anxious about their jobs, families and friends. If there is any help we can provide we will. Feel free to call us if you need any support and we will provide whatever help we can.

Despite facing a significant downturn there are still some roles that we are working on details of which are below:

### SENIOR LEGAL COUNSEL

HONG KONG 12+ PQE

Conglomerate seeks an experienced commercial lawyer with IT experience to advise on commercial legal matters with an IT focus. Strong in-house experience handling commercial work and a proven track record in people-management is necessary. Cantonese required. (IHC 18422)

### IPO

HONG KONG 5-10 PQE

Well known investment bank has a rare opportunity for a corporate finance lawyer with good IPO experience and experience drafting and reviewing underwriting agreements. Work will also involve other finance deals including advising on structured finance but IPO experience and fluency in Chinese is critical. (IHC 18419)

### SENIOR CORPORATE

HONG KONG 12+ PQE

Established Fintech has created an exciting new role for a senior corporate/commercial lawyer with good commercial acumen to join the legal team. Work involves a broad range of legal work. Experience with a top tier firm and some in-house experience is critical as is fluency in Cantonese. (IHC 18421)

### IT/DATA

HONG KONG 4-8 PQE

Well known Fintech has a new vacancy for a data privacy lawyer to join its legal team and support an expanding business. Whilst focusing on privacy data issues you will also be involved in IT contracts and general commercial work. Private practice and / or in-house experience and fluency in Cantonese needed. (IHC 18426)

### LEGAL DIRECTOR

SINGAPORE 6-12 PQE

Growing asset management firm with focus on private client is looking for a legal counsel to manage all legal affairs based in Singapore. The ideal candidate should come with some experience in either asset management, banking finance, or wealth management work. (IHC 18386)

### LEGAL COUNSEL

SINGAPORE 4-7 PQE

Global consulting company is looking for a mid-level counsel to join their regional legal team based in Singapore. The ideal candidate should be Singapore qualified with general corporate and/or litigation work gained in a reputable law firm. (IHC 18342)

### LEGAL COUNSEL

SINGAPORE 8-10 PQE

Major US-listed company in the IT space is looking for a legal counsel to join their team based in Singapore. The ideal candidate should be qualified in either Singapore, Australia or the UK and have good corporate experience. (IHC 18328)

### ASSOCIATE LEGAL COUNSEL

SINGAPORE 2-4 PQE

Major US-listed company in the IT space is looking for a legal counsel to join their team based in Singapore. The ideal candidate should be qualified in either Singapore, Australia or UK and have good corporate commercial or litigation experience. (IHC 18058)

To apply, please send your updated resume to [als@alsrecruit.com](mailto:als@alsrecruit.com), or contact one of our Legal Consultants:

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MOVES

The latest senior legal appointments around Asia and the Middle East

 AUSTRALIA

**HFW** has continued its growth in Australia with the addition of workplace, industrial relations and safety specialist **Charmaine Tsang** as a partner in the firm's Perth office effective April 14, 2020. Tsang joins from Lavan.



Charmaine Tsang

 HONG KONG

**Withers** has bolstered its international arbitration practice in Asia with the addition of arbitration specialist **Sherlin Tung** as a partner in its Hong Kong office. With over a decade of experience in international arbitration, Tung has advised clients based in Asia, the Americas and Europe on all aspects of cross-border disputes, and is experienced under a number of leading arbitral rules and institutions. As a Taiwanese-American US-qualified lawyer and a registered lawyer in Hong Kong, Tung has worked in various roles in international disputes worldwide, in both English and Chinese. She has worked for the ICC International Court of Arbitration, in both Hong Kong and New York, where she was a founding member of the New York case management team. She also worked in-house for a publicly-listed international conglomerate based in Europe, where she handled the group's international litigation and arbitration disputes, before returning to private practice, where she worked in the international disputes practice at a leading international law firm in Hong Kong.



Sherlin Tung

 INDIA

**J Sagar Associates** has added **Rajeev Reddy** as a partner in its Hyderabad office, with effect from April 1, 2020. With more than 16 years of experience in corporate and commercial laws, Reddy has advised leading companies on a wide range of transactions, such as private equity investments, cross-border investments, acquisitions, joint ventures, joint developments, setting-up of operations, corporate restructuring, debt funding, public private partnerships and general corporate advisory. He graduated as a gold medallist from NALSAR University of Law Hyderabad in 2003. Prior to joining the firm, Reddy was a partner at Tatva Legal Hyderabad since 2010.

 SINGAPORE

**CMS** has appointed intellectual property, technology and data privacy specialist **Sheena Jacob**, who joins as a partner in the firm's Singapore office. Her appointment follows the arrival of IP head Jonathan Chu in Hong Kong, and the relocation of life sciences and technology partner Sarah Hanson to Singapore, in January, whom Sheena will work closely alongside as part of her regional role. Jacob's practice covers a broad range

of services including patent prosecution, trademark prosecution, IP disputes, commercial IP, data privacy and cybersecurity. She acts for Forbes 500 companies and startups, government organisations and statutory boards across a range of industries including technology, life sciences and media, helping clients build and extract value from their global IP assets.



Sheena Jacob

**RHTLaw Asia** has added **Nigel Pereira** as a partner in its corporate restructuring and insolvency practice. He brings to the firm extensive experience in restructuring and insolvency, with an emphasis on investigations and cross-border asset recovery. Pereira is a certified fraud examiner, a member of the Chartered Institute of Arbitrators and INSOL International, and an affiliate of the Society of Trust and Estate Practitioners. He has advised on a wide range of matters, such as fraud, investigations, anti-bribery, corruption, data and computer misuse, employment, commercial litigation and international arbitration, as well as family, private wealth and succession.



Nigel Pereira

 UAE

**Trowers & Hamlins** has recruited partner **Matthew Showler** to head its commercial dispute resolution team in Dubai. Showler is a specialist in international arbitration and litigation and acts for a wide variety of clients, including financial institutions, multi-national corporations, governmental institutions, NGOs, heads of state, high net worth individuals and FTSE 100 (or equivalent) companies. He is an English-qualified lawyer who has practised in the UAE and internationally since 2010 after spending the first part of his career in London.



Matthew Showler

 UK

**McDermott Will & Emery** has hired **Ranajoy Basu** to its London office as a partner. Ranajoy has a background in structured finance, securitisations, derivatives, debt capital markets and debt restructurings. He will drive the strategy of the India practice across the firm, as well as helping to develop the firm's structured finance practice in London and globally. He is recognised as one of the leading practitioners in the important area of cross-border social impact finance, including social and development impact bonds. In addition, he has wide experience in renewable energy and green structured finance transactions.



Ranajoy Basu

Asian-mena Counsel  
Deal of the Month

May 2020

## AMTD lists Singapore's first dual-class shares

*The Li Ka-shing-backed investment bank debuted on the exchange through a virtual ceremony.*

Deal-making continues despite the restrictions imposed by the Covid-19 crisis, with initial public offerings in Hong Kong and Singapore now employing virtual listing ceremonies to welcome new companies on to their exchanges.

Singapore Exchange's first such ceremony was on April 8, for the debut of AMTD International, the investment banking and asset management platform of AMTD Group, a Hong Kong financial services group backed by Li Ka-shing's CK Hutchison.

It is the first company to be dual-listed on the New York and Singapore stock exchanges, and also the first company with a dual-class share structure to list in Singapore. At the time of listing, it had a market capitalisation of S\$3.9 billion (US\$2.7bn).

AMTD launched one of the first virtual

banks in Hong Kong in 2019 through a joint venture with Xiaomi, so it was fitting that AMTD International listed in Singapore virtually.

The company styles itself as the largest independent investment bank in Asia, one of Asia's biggest independent asset managers and a long-term investor in financial and new economy sectors.

"AMTD is committed to embracing Southeast Asia capital markets," said Calvin Choi, chairman and chief executive of AMTD International. "We will leverage on Singapore's dynamic capital markets, energetic new economy sectors and diverse talent pool to create supreme connectivity between Singapore, Southeast Asia, the Greater Bay Area and the rest of China."

Most importantly, we are committed to bringing into Singapore our SpiderNet



ecosystem, expertise in capital markets and connectivity in the new economy sector to empower local entrepreneurs, support their innovations and developments and connect them to the capital markets."

The company also launched a US\$1 billion medium-term note programme in Singapore alongside its listing, arranged by AMTD and Bank of East Asia.

**Clifford Chance** advised **AMTD International** on both the listing and the MTN programme. Partner **Raymond Tong** led the firm's team in the transaction. **Ogier** advised the company on Cayman Islands law for the MTN and **Linklaters** advised the arrangers and dealers.

#### Other recent transactions from around the region:

**Allen & Gledhill** has advised **Singapore Airlines (SIA)**, **DBS Bank** and **Morgan Stanley Asia (Singapore)** on SIA's S\$5.3 billion (US\$3.7b) renounceable rights issue of new ordinary shares and the S\$3.5 billion (US\$2.4b) renounceable rights issue of mandatory convertible bonds, to raise S\$8.8 billion (US\$6.1b). DBS Bank was appointed as sole financial adviser and, together with Morgan Stanley Asia (Singapore), as joint lead managers for the rights issue. Partners **Lim Mei**, **Leonard Ching**, **Hilary Low**, **Magdalene Leong**, **Lim Wei Ting**, **Tan Tze Gay** and **Wu Zhaoqi** led the firm's team in the transaction.

**Yulchon** is advising **Prudential Financial** on its sale of The Prudential Life Insurance of Korea to Korea's KB Financial Group for W2.3 trillion (US\$1.9b). M&A partners **Nina Kim** and **Hyeon Hwa Shin**, supported by M&A partner **Hyung Ki Lee**, tax partners **Jeremy Everett** and **Sang Woo Song**, and labor and employment partners **Jae Woo Park** and **Christopher Mandel**, led the firm's team in the transaction.

**Simpson Thacher** is advising **CVC Capital Partners** on the formation and raising of CVC Capital Partners Asia V. The fund exceeded its target size of US\$4 billion, reaching its hard cap of US\$4.5 billion. Partners **Gareth Earl**, **Adam Furber** and **Daniel Lloyd** led the firm's

team in the transaction.

**Paul Hastings** has advised **Binance** on its agreement to acquire CoinMarketCap. Binance is the global blockchain company behind the world's largest digital asset exchange by trading volume and users. CoinMarketCap operates the world's most-referenced price-tracking website for crypto assets. Corporate partners **Meagan Olsen** (Los Angeles) and **David Wang** (Shanghai), supported by partners **Jia Yan** (corporate), **Robert Miller** (corporate), **Douglas Schaaf** (tax), **Stephen Harris** (employment and benefits), **Todd Schneider** (IP and technology), **Scott Flicker** (regulatory) and **Katherine Bell** (finance), led the firm's team in the transaction.

**Ashurst** has acted as English, Singapore and New York law counsel to **ANZ** and **ING**, as the mandated lead arrangers and book-runners, on a US\$400 million reserve-based lending facility to finance Udena's acquisition of Chevron's 45 percent operating interest in the Malampaya gas field in offshore Palawan, Philippines. The Malampaya gas field is developed and operated by Shell Philippines Exploration, which also has a 45 percent interest. Partner **Alfred Ng**, supported by partners **Jean Woo**, **Mike Neary** and **Christopher Whiteley**, led the firm's team in the transaction.



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.

### General Counsel

#### – Banking

15-20 yrs PQE, Taipei

Well-known bank is looking for a General Counsel to head up its legal team in Taiwan. This role will be required to manage a large team. Together with this team, it oversees legal support for all of the bank's business lines and also manages the bank's legal and reputational risks. The ideal candidate should have prior experience at other top tier financial institutions and also experience in managing a team. Candidates should be qualified in a recognised jurisdiction and have business level Chinese skills, with the ability to read and write in traditional Chinese. Candidates already based in Taiwan or looking to repatriate back will have a distinct advantage, although candidates looking to relocate there will also be considered. This is an excellent opportunity for a senior financial services lawyer to take on a pivotal role at a reputable organisation. [Ref: AC8174]

Contact: Chris Chu  
Phone: (852) 2537 7415  
Email: cchu@lewissanders.com

### Senior Corporate/Commercial Lawyer

#### – Fintech

12+ yrs PQE, Hong Kong

Established Fintech has created an exciting new role for a senior corporate/commercial lawyer with good commercial acumen to join the legal team. Work involves a broad range of legal work. Experience with a top tier firm and some in-house experience is critical as is fluency in Cantonese. [Ref: IHC 18421]

Contact: Andrew Skinner  
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### Senior Manager/Manager, Legal

#### – FMCG

8+ yrs PQE, Singapore

A multinational FMCG company with an established presence in Asia is looking for a senior legal counsel to take on a regional responsibility based in Singapore. Reporting to the Legal Director, you will provide legal support and advice to regional functions on a wide range of legal matters, including corporate, commercial, M&A, insurance, anti-bribery, conflict of interest, data privacy, labour, IP, and R&D issues. Singapore qualification is required for this role. The ideal candidate will have over 8 years' relevant PQE, gained at a law-firm or in-house at a leading company. Willingness to travel and open to challenges such as potential relocation for work will be preferred. [REF: 15704/HI]

Contact: Katherine Fan  
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Email: kfan@hughes-castell.com.hk

### Fund Formation Junior Partner

#### – Private Practice

8+ yrs PQE, Singapore

Top global law firm is looking to hire a fund formation junior partner into their Singapore office. You would NOT be required to bring in any business as you will be taking the lead on servicing deals from this firm's numerous Southeast Asian fund clients. Attorneys at the counsel or senior associate level will also be strongly considered, as there is a clear business case to be promoted to Partner within a few years. [Ref: Ref: JVIHC-0030]

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## How to speak IT

*Erick Gunawan talks to Rakesh Kirpalani, chief technology officer at Drew & Napier.*

### Should all companies have information governance officers?

Ideally, everyone should have a basic understanding of the company's IT infrastructure, not least because as more companies digitise, the risk of cyber threats increases. A cyberattack can come from anywhere and it is now very common for attacks to originate from company employees who inadvertently allow an attacker into the system. However, it is particularly critical for a company's crisis response team to be familiar with the company's IT infrastructure to be able to respond decisively when required. At the same time, designated information governance officers responsible for formulating data management policies and executing the same would be important given the increasing scrutiny on the manner a company stores and protects its data.

### How can external counsel work with forensic experts to assist organisations on issues concerning electronically stored information?

The interface between legal rights and obligations and technology is often a blind-spot for most lawyers and in-house counsel who usually tend to be less technologically inclined and focus on more traditional methods of protecting their client's interests. Similarly, forensic experts are experts in electronic evidence preservation and analysis, but they usually do not have the ability to creatively consider legal or commercial solutions to problems.

It is crucial for the two disciplines to interface more and understand the synergies that exist between them. It often helps to have a tech-savvy lawyer

or a legally trained forensic expert to bridge the gap. It is often quite surprising as to how effectively solutions to commercial problems or crafting legal arguments can be found when technology and law collide. From a practical perspective, this means that forensic evidence preservation, review and analysis may need to become part of mainstream legal practice with both lawyers and forensic experts playing their roles seamlessly to serve the client's interests.

### What challenges do you see facing in-house lawyers who need to work with their IT counterparts?

Often, in-house lawyers and their IT counterparts will speak different "languages" and have different concerns. For instance, in a situation where a company has suffered a malware attack, the IT department's chief concern may be getting to the technological root cause of the issue, while the legal department's main concern may be preserving privilege over any investigative report commissioned by IT and the accompanying regulatory risk.

Differences in the "languages" spoken also manifest in day-to-day operations. Taking the current Covid-19 situation as an example, where many employees may be forced to work from home, IT's selection of a third-party service provider for teleconferencing may be driven by certain technological features, but a legal counsel will have to carefully scrutinise both the terms and conditions of use, as well as the protocols used by the system to transmit data, to ensure they are secure.

### How can in-house lawyers address these challenges?

In-house counsel should take the time and effort to understand their company's IT infrastructure. This does not mean they should be fluent in such matters, but they should have at least a conceptual understanding of how the company's IT infrastructure works, its strengths and weaknesses, and be updated on IT developments and exploits.

At the same time, in-house counsel should hold regular training courses for their IT counterparts to educate them on issues such as regulatory risk and privilege. The goal would be for in-house lawyers and their IT counterparts to be able to bridge the gap in the "languages" to better protect their organisation and its interests.

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# Investments in Asia?

*How to better use business intelligence.*

By Ben Yeung, director and Stuart Witchell, managing director of **Berkeley Research Group**

**M**aking investments or entering into an M&A deal can involve uncertainties and potential pitfalls. These can include financial and commercial issues, clashing business cultures, sudden changes in government regulation, poor strategic fit or simply bad timing, to name a few. Fortunately, shrewd investors and their legal counsel can identify many risk areas early by gaining a deep understanding of the company they will invest into and its surrounding business environment.

## Uncovering past track record and existing problems

Common pitfalls can be identified by performing proper investigative due diligence. Most firms know of the need for some due diligence prior to investment, but many limit those investigations to financial, commercial and legal dimensions, with the occasional 'background check' thrown in. These efforts are useful for obtaining a baseline as to the company's past performance, market conditions and other public information on the company and its key management.

These checks do not, however, address big-picture risks that could potentially undermine the longer-term viability of the deal. Many well-known examples demonstrate how 'routine' due diligence can be grossly ineffective, despite being audited by reputable global firms, especially in identifying debilitating cultural differences, intentional misreporting and—worse still—outright fraud. The potential 'traps' involving companies in emerging or frontier markets can be even more significant.

Another risk for investors is that processes may be rushed, with some management eager to reach a deal as quickly as possible. BRG professionals have uncovered deliberate, multiyear coordinated accounting misconduct by senior management in

inflating revenues, leading to a significant overvaluation of companies. The turning of a blind eye to known issues in an attempt to reach a deal quickly is often commonplace.

Although truly robust financial due diligence might identify potential red flags prior to deal closing, questions about key management figures and relationships with customers and external vendors would require a more in-depth exercise. Commercial due diligence and 'background checks' are necessary, but they are no substitute for deep-divide investigative due diligence to capture suspicions of wrongdoing, irregularities, regulatory transgressions or other reputational red flags to which prudent investors should pay heed. In many cases, the most troubling information is not a matter of public record and can be obtained only through systematic discreet inquiries with regulatory contacts, business partners and/or individuals who have insight into the company's 'dirty laundry'. Investors are often surprised by the volume of valuable information hidden from the public domain.

## Assessing the broader business environment

Factors beyond the direct control of a company also have a bearing as to the viability of any business. For example, a deal can be affected by government red tape, local opposition to the project, political conflict within local stakeholders, inconspicuous resistance by factions inside the company or other 'unwritten rules' of business. These factors affect companies both foreign and domestic.

Take Tata Motors, a subsidiary of the massive Indian conglomerate Tata Group, as an example. In 2006, it acquired 400 hectares of land in Singur, a small town in West Bengal, to build a factory for its low-cost Nano car, which has sometimes been called the world's 'cheapest car.' The site initially

appeared promising, as the state of West Bengal had formulated an industrial policy to support the development of a local automobile industry to solve local unemployment problems. However, when displaced local farmers began to receive compensation checks from the local government following the sale of the site, they quickly grew angry with the low level of compensation offered. A series of protests erupted, which quickly turned violent. Once the first Nanos began rolling off the production line, other local figures began to demand that the bulk of the land be returned to the local farmers. After a lot of wrangling, Tata Motors realised how untenable the plant had become and ultimately decided to leave West Bengal. Unfortunately, its shift of location to Sanand, Gujarat, created a production delay of eighteen months, which coincided with a period of great hype for the innovative vehicles. The political and reputational fallout from the saga haunts Tata Motor's reputation to the present day.

The importance of properly assessing risks and developing a nuanced understanding of a local environment simply cannot be overstated. If a Tata Group subsidiary can get into such a quagmire in its native country, then a foreign firm hoping to break into a similar market would be wise to assess its prospective business environment diligently and intelligently. Tata Motors' experience in West Bengal shows that having a good understanding of not only the domestic legal system, but of the nexus between local power brokers, interest groups and political factions, and potential flashpoints is critical prior to making any major investment.

Specialised risk-advisory firms can provide invaluable support in this regard, because detailed insights pertaining to specific sectors and localities are simply not covered by strategy consulting studies, 'ease of doing business' reports, or 'background check' reports.

### The importance of business intelligence

Successful M&A, or indeed any investment, demands a thorough evaluation of all facets of risk surrounding an opportunity. The underlying commercial soundness of the deal, the broader business environment and the likelihood of potential changes to that environment are all important areas to be looked into. Unsurprisingly, the depth of research and level of due diligence demanded by sophisticated investors have expanded immensely in recent years. As we enter into the new decade, firms that continue to rely solely on traditional commercial, legal and financial due diligence will do so at their own peril.



**Ben Yeung**



**Stuart Witchell**

### About BRG

Ranked by Global Investigations Review as one of the world's top investigations consultancies, BRG's Global Investigations + Strategic Intelligence practice provides companies, their counsel and other advisors with critical information to make well-informed business and compliance decisions. Our professionals possess a wide range of skills and disciplines and include intelligence experts, forensic accountants, computer forensics and technology consultants, and data analytics specialists, as well as cybersecurity, governance, regulatory, security and industry experts. BRG's multidisciplinary team has deep experience in consumer goods, energy, financial services, gaming, healthcare, manufacturing, mining and mineral extraction, pharmaceutical, real estate, technology and telecommunications and media. Our professionals have conducted investigations throughout Asia-Pacific. Our teams leverage depth and breadth of experience with sophisticated analytical tools and industry expertise to provide bespoke solutions to complex legal, business and regulatory matters.

*The views and opinions expressed in this article are those of the author(s) and do not necessarily reflect the opinions, position, or policy of Berkeley Research Group, LLC or its other employees and affiliates.*



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# The impact of Covid-19 on Mena M&A

The pandemic will undoubtedly cause lasting economic and societal changes that will affect the way that deals are conducted, write **Gibson, Dunn & Crutcher's Hardeep Plahe, Fraser Dawson, Hanna Chalhoub and Thomas Barker.**



**Hardeep Plahe**

**M**any of us are facing more difficult and imperative personal and business decisions today than before the crisis. However, despite the unprecedented nature of this situation we must believe that life, including economic activity, will begin to return to normal in the near to medium future. In this article we look beyond the crisis to the possible long-term effects on M&A in the Middle East and North Africa (Mena) region.

## IMPACT ON INDUSTRY SECTORS

All businesses are adapting to market conditions and restrictions imposed by governments to limit the spread of Covid-19; many economies are bracing for contraction or, at best, feeble growth.

### Which industries will be most affected?

While the pharmaceutical, healthcare, food supply and certain logistics industries are experiencing an uptick in demand during social distancing, the vast majority of businesses are dealing with an acute slowdown in operations. The tourism and hospitality sectors have been particularly hard hit and major airlines across the globe are seeking government support to survive the crisis; national carriers in the Middle East are no exception.

Reduced travel has also had a knock-on effect on other industries in tourist hotspots, including retail, leisure and restaurant

operators. These ancillary industries are particularly important in the Middle East where strategies to diversify economies away from a dependence on oil and gas revenue has often focused on attracting international tourists.

The asymmetric effect of the pandemic on different sectors means that, post-crisis, businesses will be looking at potential M&A transactions from vastly different perspectives. Some companies will have continuing cash flow issues and may consider spinning off non-core assets or divisions to provide additional liquidity; whereas those that successfully weather the storm may have greater ability to be acquisitive and pursue M&A opportunities.

Even before the spread of Covid-19, consolidation was a major theme of recent M&A in the Mena region, particularly among financial institutions: the US\$5 billion merger of Alawwal Bank and Saudi British Bank and the creation of an enlarged ADCB through the three-way merger of local banks being notable examples. We expect this trend to accelerate in banking as well as other industries (such as education and insurance) where companies with complimentary business and geographic footprints may find synergy-achieving mergers attractive.

### Private equity and sovereign wealth

In recent years investment professionals have regularly cited inflated asset prices – driven in part by low interest rates and cheap debt – as a significant limiting factor on investment



activity. If, however, asset prices fall and remain subdued following the crisis, then asset managers should be able to acquire assets at a significant mark-down to pre-crisis levels, allowing healthy returns in the medium to long term provided that there is not a profound effect on economic activity.

The impact on PE funds could vary significantly depending on the amount of dry powder left to be deployed. At the end of 2019, private equity and venture capital funds had amassed almost US\$1.5 trillion globally, according to Preqin – the largest amount ever at year end. But the majority of this capital (approximately 62 percent) is held by funds from the 2018 and 2019 vintages. We expect managers of those funds to be especially acquisitive to take advantage of situations where the proposed purchase price falls below the perceived intrinsic value of the asset. This applies equally to public and private companies and, therefore, we also expect to see an increase in take-private transactions – although the majority of these will probably occur outside of the region given the limited track record and relatively less developed regulatory framework for such transactions in Mena.

Older funds, such as those raised between 2012 – 2017, have generally deployed a larger proportion of their capital and will be focused on managing their portfolios through the crisis – calling further capital as necessary to do so. We may also witness a decline in the number of

PE exits generally as funds look to hold assets until economic recovery has started and valuations have bounced back.

Sovereign wealth funds (SWF) (including those in the Middle East) generally have longer term horizons than traditional PE firms and may, therefore, find themselves having to deal with both scenarios simultaneously – managing existing portfolios and seeking further acquisitions. SWFs also face a third dynamic which shapes their M&A approach – the need to consider the broader economic and policy considerations. Oil prices have fallen significantly in recent months making these considerations particularly relevant in the Mena region where oil revenues constitute a large proportion of government revenue. However, we expect Mena-based SWFs to pursue strategic M&A opportunities at the right price. For example, the Public Investment Fund of Saudi Arabia recently acquired an 8.2 percent stake in a large cruise operator and has also reportedly acquired stakes in certain publicly listed oil producers.

In the longer term, PE firms, SWFs and large multinational conglomerates may try to rebalance their portfolios by mixing in assets in defensive industries (such as healthcare and supermarkets) in an attempt to hedge against future pandemics.

### Globalisation vs nearshoring

Finally, the effect of the pandemic on social



**Fraser Dawson**



Hanna Chalhoub

norms is expected to reshape several industries in the Middle East. For example, we expect regional governments to ramp up nearshoring to reduce reliance on imports thereby reversing some effects of globalisation. Corporates who experienced disrupted supply chains during the pandemic may also establish localised production centres and storage facilities. This could create investment opportunities for both foreign and regional investors to support growth in these sectors.

### IMPACT ON M&A TRANSACTIONS AND DEAL DOCUMENTATION

While many market participants are adopting a wait-and-see approach at the moment, M&A opportunities that arise in the post-outbreak era will inevitably present new issues borne out of recent experiences.

#### Due diligence

Buyers will consider the robustness of the target to handle similar situations in the future and may, therefore, request specific warranties designed with Covid-19 in mind. On some transactions, buyers may also appoint specialist advisers to carry out diligence on pandemic-related issues. As for legal due diligence, advisers will have a renewed focus on termination rights and whether force majeure clauses could be applicable during a future pandemic.

Stressed and distressed M&A situations often have truncated deal timetables which make it difficult to conduct full due diligence on the target group. Buyers will, therefore, need to consider what can be achieved in the time available and whether this will provide them with sufficient comfort. To compound this, sellers in a distressed situation may be unwilling to provide a full warranty package on

the status of the target group. This protection gap is something which any potential buyer will need to balance against the potential upside or seek to mitigate through R&W insurance or deferred consideration mechanisms.

#### Valuations and purchase-price adjustments

A key issue for those considering a potential transaction following the crisis is whether accounts from the 2020 financial year are an appropriate basis to accurately reflect the target business's value. If the company suffered a sharp fall in revenue during the pandemic, then using an Ebitda multiple based on accounts covering that period may significantly undervalue the business (particularly if the business is showing signs of a strong recovery). It may, therefore, be more appropriate to use adjusted Ebitda or alternative accounts from periods that did not overlap with the coronavirus-related downturn. Using an Ebitda multiple might become a blunt tool in determining the purchase price but potential alternatives – such as using discounted cash-flows or valuations of similar publicly-listed businesses – have their own limitations.

Purchase-price adjustment mechanisms also need to be carefully considered. Locked-boxes are less likely to be acceptable to buyers if the date of the locked-box accounts is prior to the pandemic given that they will be on-risk for the performance of the business from that date. By way of comparison, if the locked-box date is set after the crisis has subsided, buyers may see an opportunity to take advantage of any upside in the target business as the recovery takes effect.

Traditional price adjustment mechanisms may also require modification. For example, normalised working capital levels may need to be adjusted as businesses stock-pile to minimise future disruption. Moreover, sellers may have taken drastic measures to maintain sufficient liquidity at the target-company level and may want to seek collars to permitted working-capital adjustments to avoid being unduly penalised as they continue to manage the situation.

#### Consideration structures

The reasons for pursuing a potential transaction in the aftermath of the pandemic will drive the type of consideration a seller is seeking. Where a seller is in financial difficulty, all-cash offers

payable immediately on completion will be given a premium over offers with an element of non-cash or deferred consideration.

When a longer term view is being taken by the seller and high valuation is of greater importance vis-a-vis immediacy of funds, deferred consideration structures are likely to become more prevalent. The target business's ability to rebound is likely to remain uncertain and, therefore, earn-outs based on the future performance or the retention of equity by the seller may prove attractive to both buyers and sellers. Earn-outs may also help to de-risk some of the uncertainty regarding valuation methods discussed above.

If debt financing proves costly, non-cash consideration structures (whether for all or part of the purchase price) may become a common alternative to all cash deals. Non-cash assets are not ideal for private equity and other financial institutions who need to provide returns to their investors, but listed equities may be acceptable where there is a liquid market for the securities and yield-paying loan notes may also be attractive in a post-crisis low-interest rate world.

### Closing conditions

Even prior to the Covid-19 outbreak, it was well known that establishing that a material adverse effect or material adverse change had occurred was extremely difficult in most jurisdictions – especially when such provisions had been drafted without a particular situation in mind. As a result, we may see a trend of specific closing conditions being requested by buyers relating to the financial or operational performance of the business if a new pandemic arises prior to closing of the transaction.

Sellers may also want the ability to extend the longstop date to satisfy regulatory closing conditions if they become delayed due to government departments/regulators operating at reduced capacity (or closing altogether) during a future lockdown period.

### Changes to the M&A process

At their most basic, M&A transactions rely on two parties (buyer and seller) working together to achieve a shared goal – the disposal/acquisition of the target business or assets – and the success of an M&A transaction is often dependent upon the parties building a strong relationship throughout the process. This is



often easier to do through face-to-face meetings, where individuals can look their counterparts in the eye and get a sense of comfort that a fair outcome has been reached. Changing cultural norms may see less business travel and a greater reliance on technology throughout the negotiation process making that trust and comfort harder to come by.

Technology will also play a greater role in M&A through virtual closings and the use of electronic signatures, especially in the Mena region where physical closings have been common. In the longer term, we also expect processes in M&A transactions to be modernised, such as the need for physical execution of share transfer instruments in the presence of a public notary or the need for physical filings. For example, the UAE has recently announced that meetings with notaries will be available through an online portal to ensure business continuity during the imposed work-from-home policy.



**Thomas Barker**

### CONCLUSION

While the full impact of the Covid-19 pandemic is impossible to predict, it is increasingly clear that there will be long-term changes to the global economy and societal behaviour as a result. The M&A market is no different and we will see deal activity, practices and processes change to address the reality of the situation post-crisis.

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# Scrutinising CP Group’s acquisition of Tesco

The decision of Thailand’s competition authorities will set a precedent regarding merger control and provide clarity on market definitions, write *Nuanporn Wechsuwanarux, Pranat Laohapairoj and Chotiwut Sukpradub* of Chandler MHM.



**Nuanporn Wechsuwanarux**

## Introduction

Thailand’s Trade Competition Act, BE 2560 (2017) is the primary law that regulates and oversees five areas of anti-competitive behaviours and market practices:

- (1) abuses by dominant players of the market and other operators;
- (2) abuses by non-dominant players of the market and other operators;
- (3) merger control, covering amalgamation, share acquisition and asset acquisition;
- (4) cartel behaviours, covering horizontal and vertical cartels; and
- (5) cross-border arrangement.

Many of the above areas have already been tested with cases and investigations, but one area that has remained largely untested until now is the merger control.

Under the Trade Competition Act, any action that qualifies as a merger, which will result in a dominant player in the market will require prior approval. The approval could be conditional or unconditional. However, if a merger will not result in a dominant player but will result in a significant reduction of competition, then the acquirer will only need to notify the Office of Trade Competition Commission (OTCC) after the merger.

## Definition of dominant player

The notification of the Trade Competition Commission Re: Criteria for Identifying Business Operators Dominating the Markets, BE 2561 (2018) provides that business operators with the following market share and sales revenue shall be classified as a dominant player:

- (1) any operator in a market of any goods or services having a market share in the previous year of 50 percent or more and sales revenue in the previous year of Bt1 billion or more; or
- (2) the first three operators in a market of any goods or services having in aggregate a market share in the previous year of 75 percent or more and each has sales revenue in the previous year of Bt1 billion or more, except that if the third one does not have 10 percent of the market share, then such third operator will not be classified as a dominant player.

Until a few weeks ago, the OTCC’s merger division mainly received post-merger notifications. This is about to change, as the OTCC is now facing a possibility of having to decide on a very significant merger which likely will result in a very powerful dominant player in a modern trade market.



### Acquisition of Tesco in Thailand by CP Group

Recently, Tesco announced the sale of its Thai and Malaysian businesses. The Thai conglomerate CP Group, a large and powerful modern trade player in Thailand, beat the other bidders.

According to the disclosure made to the Stock Exchange of Thailand on March 9, 2020, CP All and Charoen Pokphand Foods have given notice of their acquisition of Tesco Stores (Thailand) and Tesco Stores (Malaysia), through two special-purpose vehicles, CP Retail Holding and CP Retail Developer.

Tesco Stores (Thailand) operates a retail business under the trade name “Tesco Lotus”, which includes 214 retail hypermarket Tesco Lotus stores, 179 grocery-focused Talad Lotus stores and another 1,574 Tesco Express convenience stores, totalling 1,967 locations<sup>1</sup>.

CP Group currently operates around 11,712 7-Eleven convenience stores in Thailand, and 127 wholesale hypermarket Makro stores (having acquired Siam Makro from SHV Holdings back in 2013<sup>2</sup>).

According to the press conference by CP Group, the group says that Makro would be categorised as a wholesale store while Tesco Lotus would be categorised as a retail store, therefore the two are in different markets. However, there are contrary views. Notably, one non-governmental organisation (NGO) in Thailand has filed a complaint to the OTCC to obtain comment on this deal. According to the NGO, there are only three big players in the

modern trade market in Thailand: (i) Makro with a 37.4 percent market share, (ii) Big C with a 24.2 percent market share, and (iii) Tesco Lotus with a 38.4 percent market share. The acquisition of Tesco Lotus by CP will create a player with 75.8 percent of the market share of the modern trade market. Other commentators have stated that the modern trade market could include other players in the department store sector as well.

It is, therefore, to be seen how the OTCC will determine the definition and scope of the market, or perhaps markets, which could be wide or narrow. This depends on many factors. The OTCC will determine the market definition and review the possible impact on the market, consumers, trade partners and the economy as a whole. The OTCC technically has up to 105 days (90 days and 15 days of extension if necessary) to consider a deal after a pre-merger application is submitted and accepted by the OTCC.

Under the Notification of the Trade Competition Commission Re: Guidelines for Consideration of Market Definition and Market Share, BE 2561 (2018), the scope of the market will be holistically reviewed and determined based on an analysis of the facts surrounding demand substitutability, supply substitutability and barrier to market entry. Consideration would be given to what products and services are substitutable with the products and services in question, price of the products and services, utility, brand loyalty and supply shift-in from other areas, how easy operators



**Pranat Laohapiroj**



**Chotiwiut Sukpradub**

can shift their production lines and service models to cover certain products and services, and what the barriers are for new operators to join the competition, in addition to other factors. There are no written guidelines indicating which of these factors receives the most weighting.

The Notification of the Trade Competition Commission Re: Guidelines on Consideration of Unfair Trade Practices between Wholesale/ Retail Business Operators and Producers or Distributors, BE 2562 (2019) mentions the following categories of stores: hypermarkets (including wholesale and retail), cash & carry, supermarkets, specialty stores, department stores and convenience stores. However, this list does not discuss the scope of market, or markets, of these modern-trade type stores.

Based on available information, CP Group already operates wholesale hypermarkets, supermarkets and convenience stores, while Tesco Lotus operates retail hypermarkets, supermarkets and convenience stores, both operators are presumed to each have a large market share in some of these markets. The issue that the OTCC must determine is what is, or what are, the market definition(s) for these stores, how each category overlaps to the extent that they must be counted together and what the ultimate market share for each party is for each type of market, or perhaps for the overall modern-trade market. Ultimately, the question is likely to be along the lines of what the impact on the market may be, rather than if we are dealing with a dominant player

situation, and whether a grant of approval is beneficial to society as a whole.

**Conclusion**

The prospective acquisition of Tesco Lotus by CP Group will probably be one of the most scrutinised deals in the history of Thailand. All stakeholders and non-stakeholders alike are monitoring the situation, from lawyers to financial advisers, and from operators to ordinary citizens. It is expected that this case will set a precedent regarding merger control in Thailand. As a result of this case, subsequent cases will benefit from having a clearer field demarcation, whether narrow or wide, and clarity on how to determine the market definition under this law. The decision of the OTCC will ultimately have a long-lasting impact on the M&A industry in Thailand.

**Endnotes**

1. As of August 2019, based on the disclosure to the Stock Exchange of Thailand on 9 March 2020 of CP All Public Company Limited
2. As of 31 December 2019, based on financial statement for fiscal year ended 31 December 2019 of Siam Makro Public Company Limited

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# We need to look at IP in a new light



Ronald Yu

Cross-border data flows will become one of, if not the most important consideration for corporate counsel in the future given the implications for intellectual property, privacy, competition, trade, compliance and innovation, writes *Ronald Yu*.

**A**s we move further into the age of Industry 4.0, the need for expertise in IP will only continue to grow, particularly in the context of international data flows.

## Consider the facts.

Not only are the key assets of most companies today intangible, with much of this in IP of some form – inventions, strategic knowhow, content, brands, etc, but the proportion of intangible to tangible assets continues tilting towards the former as companies introduce new innovations, apps, products, services, etc.

“As more and more work is being conducted over networks, particularly now when extensive work at home arrangements are in place, worries over the potential loss of valuable IP have grown”

How are all these services and products being created? Increasingly through networked collaboration and cooperation, often across borders helped along mightily by improved communications and IT applications; and the recent Covid-19 crisis has only served to supercharge this trend.

Recently, though, there’s been a new twist – companies not typically associated with tech, entertainment or content publication, are now arming themselves with large IP portfolios. For instance, in 2019 American Express, Visa, Mastercard, Bank of America and Walmart (through Walmart Apollo) ranked among the top 30 holders of blockchain patents worldwide.

## The overlooked implications

While IP and IP rights are typically viewed in a protection framework – ie, you get patents to protect inventions, copyright protects movies, art, literature, music, etc, trademarks protect indications of origin – more IP sophisticated players have used IP rights to increase revenues (eg, through licensing) or further strategic corporate objectives such as promoting the wider adoption of their technologies or technologies with which they have an underlying interest, as Tesla has done by pledging not to take legal action against parties using their technologies in good faith, even without prior permission, or as IBM did earlier with its patent pledge that was ultimately designed to promote wider adoption of the Linux operating system.

There have also been other companies whose business models are based around monetisation

of IP rights – notably patent assertion entities (PAEs), pejoratively known as ‘patent trolls’, seeking licence fees from users who may intentionally or unintentionally infringe their patent rights.

While overly aggressive PAEs, such as the one that threatened small businesses with expensive infringement suits over their use of WiFi systems, have given PAEs a bad reputation, there are legitimate players who license important technologies and help ensure that the developers of these technologies are fairly compensated.

Furthermore, as more companies adopt ever advanced technologies, the threat that their business operations can be disrupted or their costs of doing business increased by key IP holders is now a real possibility. But things don’t end here.

### When in doubt spell it out

As more and more work is being conducted over networks, particularly now when extensive work at home arrangements are in place, worries over the potential loss of valuable IP, whether content or sensitive information – ie, trade secrets – have grown, leading companies to issue warnings about cybersecurity and employ technological solutions such as VPNs or surveillance software to keep tabs on remote workers (both of which have their own set of legal issues beyond the scope of this article).

Yet companies should also worry about IP ownership in networked environments, not only when a participant is not technically an ‘employee’ but also where other business parties are involved and rights to any newly created IP are ambiguous.

### The complications of confluence

The confluence of technologies, combined with increasing networked collaboration and development, particularly across borders, has brought about another IP-related concern that has so far escaped greater attention – the IP consequentiality of privacy legislation and free trade agreements (FTAs) that regulate cross-border data transfers.

Such a situation is not unprecedented; health regulations, for instance, have long proven more effective in protecting vulnerable wildlife than animal conservation laws themselves.

International data flows are not only necessary for operational reasons but also for product development – particularly for the localisation of applications or services and for artificial intelligence (AI) applications that require massive amounts of training data.

FTAs limiting the transfer of data or calling for data to be locally stored potentially limit product development, raise costs and complicate compliance matters (eg, because data now has to be stored in multiple locations under heterogeneous sets of rules and regulations).

“Companies not typically associated with tech, entertainment or content publication, are now arming themselves with large IP portfolios”

Provisions in FTAs that could potentially favour companies in one jurisdiction over companies outside that country are also potential red flags as are clauses in, for example, privacy regulation that may require disclosure of important trade secrets, such as the algorithms used in an AI application, under certain circumstances. Given that companies are increasingly employing bespoke AI systems, whose key critical IP lies in their data and algorithms, this is no trivial consideration.

And of course, where international data flows are concerned, there is always the possibility that an IP rights holder in another jurisdiction might try to use its IP to block its rival’s ability to conduct business there.

### Going mainstream

In short, the concerns that tech and content companies had regarding IP rights are now finding their way to other industries. Given that IP is now a major asset of most companies, increasing IP awareness is now a necessity particularly as privacy legislation and FTAs have become so important to the protection of valuable IP and data flows, so critical to operations and product development.

*Bryan Mercurio, Professor of the Faculty of Law and Simon F.S. Li Professor of Law at the Chinese University of Hong Kong, and Ronald Yu will be co-hosting a series of online, interactive sessions for the In-House Community covering connectivity, cross-border data flows and related IP issues commencing in late May. For more information contact [tim.gilkison@inhousecommunity.com](mailto:tim.gilkison@inhousecommunity.com)*



Chen Wenhao

# Protecting privacy during Covid-19

*Compliance recommendations for handling personal information under Chinese law during the coronavirus outbreak.*

**D**uring the Covid-19 outbreak, processing and protection of personal information can be a pivotal and difficult issue. The key lies in balancing the interest of information/data subjects and the interest of society. Considering that the legislation of personal information protection in China is yet under development, this article sets forth the principles for personal information processing, and the possible exceptions during the Covid-19 outbreak under the current Chinese legal framework. This article also suggests some compliance advice for enterprises that are not authorised or not eligible to collect or use personal information without the consent of personal information subjects.

## The principle provisions under Chinese law on personal information processing and possible exception during the Covid-19 outbreak

Generally, obtaining “consent” from data subjects is the legitimate basis for personal data processing. However, the major personal information protection laws also provide exceptions under certain circumstances, such as for the public interest purpose under epidemic outbreak. For example, Article 9 of GDPR provides a legal basis of the exceptions of “consent” principle in personal data processing. Under Chinese law, the general principle is that the consent of personal information subjects should be acquired before personal information can be collected and used. However, if such processing is for the purpose of

prevention and control of Covid-19, can the principle be set aside? And which institutions or entities can be exempted from this principle? These are urgent issues to be addressed in practice.

In order to prevent and control infectious diseases and handle public health emergencies, *Law of the People’s Republic of China on Prevention and Treatment of Infectious Diseases, Regulation on Responses to Public Health Emergencies* and other laws and regulations provide that relevant personal information can be collected without the authorisation of personal information subjects by certain departments and institutions, including the people’s government, health administrative departments, disease prevention and control institutions, and medical agencies. Furthermore, the people’s government can authorise relevant departments, institutions and organisations to collect information in the government’s “contingency plan for public health emergencies”. Based on this, it is an exception to the general principle for personal information processing during the Covid-19 outbreak. However, any other unauthorised entities or individuals are not eligible for such exemption.

On February 9, 2020, Office of the Central Cyberspace Affairs Commission issued *Notice on Effectively Protecting Personal Information and Using Big Data to Support Joint Prevention and Control* (the “Notice”). The Notice requires that “except for the institutions authorised by the health department of the State Council in accordance with *Cybersecurity Law of the People’s Republic of China, Law of*

*the People’s Republic of China on Prevention and Treatment of Infectious Diseases, Regulation on Response to Public Health Emergencies*, no other entities or individuals could collect or use personal information on the grounds of epidemic prevention and control and disease prevention and treatment, when it is without the consent of the personal information subject.” The Notice further clarified the exception and its scope of application for the purpose of prevention and control.

## Specific compliance advice

During the prevention and control of the current epidemic, those who collect and use personal information are varied and hence applicable rules are different. Depending on the one that collects and uses personal information, we could divide the personal information controllers into two categories: (1) the government and other public sectors which collect and publish relevant information based on statutory duties, (2) unauthorised entities and individuals which are obliged to report relevant information in support of epidemic prevention and control – so that the outbreak is monitored. For the second category, especially for employers neither authorised to collect/use personal information, nor eligible for the exception, our advice is as follows:

Firstly, employers should better establish internal control system of personal information management; clearly stipulate the workflow of information collection, storage and disclosure; impose confidentiality

requirements and disclosure bans on personnel with access to relevant information. In the meantime, employers should clarify job duties and ensure that the whole process of personal information collection and processing is under internal scrutiny.

Secondly, employers should establish encryption and storage

security measures to prevent the collected personal information from being accessed without authorisation, tampered with or misappropriated.

Thirdly, if employers plan to use the personal information after the epidemic, it must explicitly state its purpose to personal information subjects and obtain their consent. This

applies unless the enterprise can anonymise the personal information.

Lastly, employers should provide personal information subjects with the chance to view and rectify the information collected. Employers should delete relevant information upon the requirements of personal information subjects.

## 新冠疫情期间中国法下 有关个人信息处理的合规建议

**新**冠疫情下的个人信息处理及其保护问题，重点与难点在于个人信息上的信息/数据主体利益与社会公共利益两者之间的冲突与协调。鉴于我国个人信息保护立法尚在发展完善当中，本文将在我国当前个人信息保护法律体系下，结合疫情及其防控这一现实因素，阐述中国法下有关个人信息处理的原则性规定及疫情防控下的例外可能，并针对未获得授权、无法适用无需“经被收集者同意”而收集使用个人信息的企业提出几点合规建议。

### 一、中国法下个人信息处理的原则性规定及其在疫情防控背景下的例外可能

通常，获取个人信息主体“同意”是处理个人信息的合法性基础。但关于例如疫情爆发这一特定情形，全球主流相关立法也做出了例外性规定。例如，GDPR第9条相应的条款就有关个人数据处理“同意”原则的例外情形适用提供了相应依据；在中国法下，个人信息主体的授权同意仍是获取其个人信息的基本原则，但疫情防控需要所涉及的个人信息处理是否可以突破该等原则？哪些机构或单位可以豁免？是实践中各类个人信息收集单位面临的亟待解决的问题。

出于传染病防治和突发公共卫生事件应对的需要，依据《传染病防治法》以及《突发公共卫生事件应急条例》等法律法规中有关具体条文的规定，人民

政府、卫生行政部门、疾病预防控制机构以及医疗机构可以未经个人信息主体授权而收集有关个人信息，同时人民政府还可以在“突发公共卫生事件应急预案”中将信息收集的职权再次授权给相关部门、机构、组织。根据该分析，此为疫情防控这一特殊背景下个人信息处理的例外情形，但未获授权的其他任何单位或个人则不享有该等豁免。

2020年2月9日，中央网络安全和信息化委员会办公室发布的《关于做好个人信息保护利用大数据支撑联防联控工作的通知》要求，“除国务院卫生健康部门依据《中华人民共和国网络安全法》《中华人民共和国传染病防治法》《突发公共卫生事件应急条例》授权的机构外，其他任何单位和个人不得以疫情防控、疾病防治为由，未经被收集者同意收集使用个人信息。”对疫情防控条件下个人信息收集的例外情形以及适用范围予以进一步明确。

### 二、具体合规建议

当前疫情防控工作中，收集与使用个人信息的主体呈现出较为复杂的情况，疫情防控中不同的个人信息收集、使用主体具体适用的规则也有所区别。根据收集、使用个人信息主体的不同，可将疫情防控工作中涉及到的个人信息控制者分为两大类：一是政府等公共职能部门按照法定职责收集、公布相关信息，对疫情开展监测；二是未获授权的单位、个人承担信息报告义务，并可利用所掌握的数据支持疫情防控。对于后者，尤

其是针对未获法律授权、不享有“知情同意”豁免的各类用人单位，在涉及个人信息收集、使用时，我们建议：

首先，用人单位应当尽快着手建立个人信息管理的内控制度，明确信息采集、保存与披露的工作流程，要求接触相关信息的人员履行保密义务，不得私自对外披露相关个人信息。同时，明确岗位职责，确保个人信息的收集与处理工作全流程置于内部监管之下。

其次，用人单位应当建立起相应的加密与安全存储措施，防止所收集的个人信息遭到未经授权的访问、篡改或盗用。

再次，疫情过后，如果用人单位考虑进一步利用该等个人信息，必须向个人信息主体明示用途，并取得个人信息主体的授权同意，除非企业可以将该等个人信息进行匿名化处理。

最后，用人单位应当向个人信息主体提供访问与修改被收集的信息的途径，并在个人信息主体提出要求时，对相关信息予以删除。



# Black Swan Alert!

## Covid-19 and what senior partners should be doing right now to survive



**Patrick Dransfield**

*Introduction by Patrick Dransfield*

**T**he world has changed as a consequence of Covid-19 and during the past three the private sector legal services industry is experiencing the largest drop in activity for at least twenty years, if not ever.

Like the apocryphal plumber who never mends the dripping tap in her own home, senior partners in law firms have not always invested due time and care into their own crisis management. Advising clients on the legal consequences of various actions as a client's crisis unfolds is one thing, having to handle the Black Swan event of Covid-19 as it affects our own businesses, families and colleagues is quite another. Traditionally there has not been a great deal of advice or 'grey-haired' experience for senior partners to draw on. The profession could not be very well described as a 'caring' one and law firms by

the nature of the industry are naturally competitive. Fortunately, Paul Smith who has recently retired from being the Chairman of international law firm Eversheds Sutherland, is on hand to share some initial thoughts as we face what is hoped to be the peak of the Covid-19 crisis.

There are four tips I would like to share with you regarding other Black Swans such as SARs, the Asian Financial Crisis of 1997 and the World Financial Crisis of 2007:

- Be empathetic and do your best to think of other people first – the Covid-19 virus does not discriminate between client or partner, rich or poor, black, Chinese or Caucasian - but what we have to combat it is our shared humanity. And as we do not necessarily know the full extent of its impact on others we need to be mindful of their potential situation first.

- Be open, frank and honest with all your stakeholders – institutional client to law firm relationships can run deeper than you may credit. It is not in your top client's interest to see your law firm disappear and so it is crucial to have long and frank conversations with your clients: about how you can help them and also how they can help you.
- Be creative – now is the time for those projects that you never had time for previously; it is human ingenuity in the face of adversity that has been the spur for our collective success on this planet after all.
- Purvey 'deliberate calm' to those around you – a phrase from my youngest son's house master Jonathan Millatt that really resonated with me.

A final word about the Mindful Business

Charter, which may not seem obviously relevant right now at first but actually is. As we all have our own Covid-19 stories we need to demonstrate that we are sensitive and empathetic to others. Remote working means that we cannot judge the impact of our words, our emails and our tone as well as we can when in the same room as our counterparty. The Mindful Business Charter has evolved to help smooth the edges of remote transactional communications situations between in-house teams and their private practice counterparts. Now is the time to adopt and expand its principals so that none of us needlessly upset or feel undermined by the tactless and ill-thought through communications of others.

<https://mindfulbusinesscharter.com/>

## Crisis management and future scoping for senior law firm management

By Paul Smith, former chairman of Eversheds Sutherland and co-author of *The Real Deal: Law Firm Leadership That Works\**.



Paul Smith

Partners in many law firms are greatly concerned as to what the future will bring as they come to grips with dealing with the fall out of the Covid-19 crisis. Now is the time to focus beyond the here and now to take steps to position the firm for the new world. This article sets out the steps to be taken now to make the firm fit for the future.

Covid-19 is a classic 'Black Swan' event ('Black Swan' being an unpredictable or unforeseen event, typically with extreme consequences as first popularized by author and options trader Nassim Taleb in 2007). 'Black Swan' is an event with an extreme impact outside the realm of regular expectations because nothing in the past can convincingly point to its possibility or therefore its outcome. Before Covid-19, the law firm market superficially appeared to be in good health with rising profitability year on year. For many firms, however, this success was brought about by reducing equity partner numbers and thereby reducing the number of partners sharing in the profit, coupled with attempting

to increase the charge out rates to a progressively more resistant client base. The apparent good health was also disguised by firms taking on high levels of debt and individual partners also taking on large amounts of personal debt in the form of capital loans to fund their investment in the firms. Some firms had even outsourced their billing collections to third party debt collectors as a consequence of the build up of bad debt. Partners often justify the high levels of reward they are paid because of the level of risk they take.

As a consequence even prior to the Black Swan event of the Covid-19, many law firms were far more fragile than was thought or believed. The evidence is now piling up daily that many firms are already in distress. Deals and real estate transactions are drying up with layoffs and furloughs occurring in many firms. Partner drawings are being reduced or halted and 4 day weeks introduced. Sadly, as with the great recession of 2008, some firms will inevitably disappear. Among them will be some

household names within the industry as previous success does not guarantee a bright future. 2008 accelerated the demise of Dewey Le Boeuf in the US, Heenan Blaikie in Canada and Halliwells in the UK.

Dealing with the immediate fall out of the Covid-19 crisis law firm leaders will always do what they do which is to “batten down the hatches” and “ride out the storm.” The firm will have already set up its crisis management team with members from key disciplines such as finance and IT. The more forward-thinking and resilient of firms will have expanded this crisis management group to a highly trusted colleague from the marketing department. The firm will be focussed on keeping the cash flow coming in. Without sufficient cash flow, all businesses will fail. Discretionary spend will be cut. Staff will be furloughed or put on shorter working weeks or sadly will be laid off. The unpaid bills will be chased and the CFO will be constantly revising cash flow projections.

Firms will instinctively cut marketing budgets which are often the first to go and actually should really be the last to go. The smarter approach is to re-consign the marketing budgets previously allocated for

client-facing events into other media, including virtual activities, that demonstrate to existing clients and to the world that the firm is empathetic, pro-active and creative in the teeth of the crisis.

Firms will also be reviewing their lending facilities. Prudent firms will not have become dependent on a bank overdraft which can be withdrawn at any time but have in place longer term facilities like revolving credit facilities over say a 3 year period. These will buy the firm time to take whatever steps it needs to survive. There will inevitably need to be open and frank discussion with lenders. Before the crisis many law firms were already on the “at risk” lists. As the old adage goes - when the tide goes out you see who has been swimming naked.

There is equally the old adage of – “Never let a crisis go to waste”. After Covid-19 it is generally acknowledged that the world will never be the same again. Trophy real estate has been an expensive mill stone around the necks of many law firm financiers for many years. Covid-19 has forced remote working in a way which would never have been possible before. Will people want to return to commuting every day to physical offices? Now is the time to look at the firm’s real estate footprint and see how it can be substantially reduced. Does the firm really need that thirty seat board room that is used once in a blue moon as the signing of large deals no longer requires acres of physical space? Review all lease commitments and see how soon properties can be vacated. Alternatively, talk to your landlord and negotiate a period of monthly rental relief – it is in their interests to keep responsible blue chip clients on their premises long term.

It will be important to properly institutionalise remote working into firm’s policies and procedures, the rules relating to the sharing of client data will be of paramount importance. It is vital to keep the firm’s people informed. Constant communication is vital to inform and reassure. Keeping the firm’s culture alive while people are working from remote locations is important and can be achieved through regular online team meetings, quizzes, competitions – I have even heard of a ‘virtual pub’. Do bear in mind that sharing from home will mean in the future that the



by Leo & Pat

“Digital platforms which understand their buyers’ needs and gather data will be more important. Digital offerings will enable to in-house teams and private practice teams to come together as one rather than a piece meal experience”

culture will be less hierarchical, less corporate and more informal than it was before and act accordingly. At a time when people are worried and concerned a powerful gesture that a leader can make is to pass on her / his cellphone number and direct email with the suggestion that anyone at the firm could contact her at any time. When I was the Chairman of Eversheds Sutherland I was always conscious that despite best endeavours someone somewhere would say that they had not been communicated to. I provided my personal contact details to all and the criticisms of lack of communication fell away. Curiously the gesture was not abused and a handful of useful conversations ensued. I subsequently discussed this with another law firm leader who had had the same experience. In these times of great uncertainty I wholeheartedly propose that law firm leaders embrace the role and make themselves available to all stakeholders of the firm.

It is equally vital to keep clients reassured and informed with constant Covid-19 updates. The crisis will accelerate firm’s digital offerings. Investment in technology was already happening pre-Black Swan as firms grappled with how to take the firms digital future forward. They knew they had to invest but some firms were not always sure quite what to invest in. Client meetings will be increasingly online rather than in offices and this will throw up a further challenge as to how to keep clients ‘sticky’ with the firm. Digital platforms which understand their buyers’ needs and gather data will be more important. Digital offerings will enable to in-house teams and private practice teams to come together as one rather than a piece meal experience of dealing with individual partners and individual teams.

Clients will increasingly become customers and will buy their services in a way that they buy other services in their lives. As Covid-19 plays out, law firm marketing will move inevitably from events and hospitality to savvy

digital offerings with more self-service emphasis and more sophisticated and mindful use of client data. Finally, this may be the point at which clients do seek to move away from the hourly rate to have more certainty with their billing and fees with more fixed price offerings. On the positive side, law firms often under-estimate the loyalty that clients have to the partners and firms. There is a huge amount of good will and clients understand what a firm stands for, what its beliefs are and what is its brand. Enhancing that brand when we come out of the other side will be all critical.

*Paul Smith is Head of Professional Services at Calls 9, a consultant to law firm leaders across the world. He was until recently the chairman of Eversheds Sutherland and is co-author of The Real Deal: Law Firm Leadership That Works, co-written by Sally Dyson, and recently published by Thomson Reuters. About the book: ‘For current and aspiring leaders in law firms, I cannot commend this book strongly enough. Rooted in rich experience, every page is packed with practical guidance and deep insight. This is a work that should be compulsory reading for law firm boards everywhere.’* Professor Richard Susskind OBE, author of Tomorrow’s Lawyers.  
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This is a first of what we hope will be helpful advice and we will be delivering further advice from Paul as we come to terms with the consequences of Covid-19. If you’d like to contact Paul, please find his email address above.

Please be safe, and if you would like to take part in a webinar in this area, or we at the In-House Community can help at all, please drop me a note at: [patrick.dransfield@inhousecommunity.com](mailto:patrick.dransfield@inhousecommunity.com)

**Webinar:**  
On Tuesday May 5, 2020, Paul Smith and Sally Dyson will be presenting an exclusive webinar with the *In-House Community* specifically for law firm partners and leaders: **COVID-19 and What Law Firm Leaders Should be Doing Right Now to Survive.** For more information and to register for this interactive session, click here: <https://www.inhousecommunity.com/events/webinar-covid-19-law-firm-leaders-right-now-survive/>



Photo: Patrick Dransfield

## The thing about ...

# Simon Davis

Recently, the Law Society of England & Wales president Simon Davis met up with Asian-mena Counsel's Patrick Dransfield and answered a series of questions put to him on behalf of the In-House Community.

**When you took up the position of president of the Law Society in July 2019, you articulated the main themes for your office as “promoting the role of solicitors in upholding the rule of law; sustaining an open profession and jurisdiction; and building a top-class in which all solicitors, whether they work in a firm or in-house, offer the best service to their client”. What have been the successes of your tenure? How would you define the legacy you will be passing on to the next Law Society president?**

When I first became president it was not uncommon to hear solicitors asking “How is the Law Society relevant to me?” I made it clear that one of my goals by the end of my presidency was for solicitors to be saying instead “What would I do without the Law Society?” Little was I to know that a crisis of terrible proportions would arise which required the Law Society to step forward to keep the wheels of justice turning, the public protected and solicitors supported as they in turn tried to keep the system of justice afloat.

The way in which the Law Society's full-time teams and volunteer members have put their shoulders to the public/professional wheel makes me proud. Without credit being due to me, I am quite sure that large numbers of solicitors now appreciate what the Law Society means for them.

Leaving aside the virus, the Law Society has been very visible in being a resource for government as it seeks to negotiate a Brexit outcome which does not damage unnecessarily the close links which exist between the legal professions in the UK and Europe, and enables the citizens and corporates to choose their own lawyers, and the laws that suit them, and have those choices respected by the UK/Europe. We have also fought the corner of underpaid legal aid practitioners with cash for the first time in 20 years coming into that beleaguered part of the profession. The legacy that I will be passing on to David Greene is one I hope of a thriving and relevant Law Society leading the way in a time of crisis.

**Common law, as practised in the UK, has been defined as “less is better” – everything is permitted that is not expressly prohibited by law. The EU’s approach has been defined as “more is best” – to legislate in anticipation of every eventuality. In retrospect wasn’t Brexit – or something akin to Brexit – inevitable given the incompatibility of these legal philosophies?**

I do not believe that the difference in legal systems contributed to Brexit, any more than us speaking different languages. I have no doubt that Brexit was our symptom of a worldwide mistrust of globalisation and a desire for greater individual national identity. The challenge now is for the UK and Europe to stand together in the face of this virus and to make sure that Brexit does not hinder the free flow of data, experience and expertise which will be needed to deal with other global challenges coming down the road.

**“The future is bright for English law practitioners and indeed bright for the many hundreds of lawyers from overseas who practise in our jurisdiction”**

**Lawyers, along with other professions, have experienced an erosion of trust since the global financial crisis. In what ways is the Law Society promoting the legal profession to the wider public?**

The Law Society has been exceptionally prominent in recent times in a way which demonstrates that the profession is one that puts the interests of clients above our own, ranging from domestic abuse through care in the community to those areas in the country where legal advice “deserts” have emerged due to the unavailability of legal aid in areas such as family and housing. It is never possible to measure success, but the absence of lawyer bashing in the newspapers may be one indicator.

**The Criminal Bar Association warned in 2018 that prisons, the police and probation services are “underfunded and in chaos”. Has the situation improved recently?**

It has been quite extraordinary how solicitors have continued to go into prisons, police stations and courts at risk to their own health. In a recent announcement by the Lord Chancellor relating to a financial package to improve cashflow, he went out of his way to praise these frontline solicitors. Even before the crisis, I think there had been a political consensus that parts of the legal justice system were financially unsustainable and needed supporting. I hope that recent events will lead to an acceleration in the financial support that these solicitors need to stay in business.

**How much of your time has been spent lobbying those with access to power to persuade them to treat the law as a national asset?**

It is not so much a question of lobbying, more of spending time with government, regulators and the judiciary visibly acting in the public interest and supporting access to justice. The best way to enhance the reputation of solicitors is for us to demonstrate our worth and value to society.

**English & Welsh Law can be considered an international asset also. Is the future bright for English law practitioners?**

English is the language of international trade and most lawyers in the world are familiar with the common law. It is the system in English-speaking countries from America to India and from parts of Africa to Singapore. Those who come from civil law jurisdictions will have often studied the common law in England and the US. Familiarity with English and Welsh law is important, as is the knowledge that our courts seek to give effect to the commercial intention of the parties without seeking to introduce terms which the parties have not chosen to include when negotiating freely a contract. The future is bright for English law practitioners and indeed bright for the many hundreds of lawyers from overseas who practise in our jurisdiction, with some 200 overseas firms having offices here.



*Simon stands in front of “Field Justice” a painting he commissioned personally for his office from Martin Wade, a former Army solicitor who has turned his talents to painting.*

**“In my experience, solicitors are empathetic worriers, often tough on themselves, perfectionists and good at taking problems from other peoples’ shoulders and putting them on their own”**

**You spent five years as the recruitment partner at Clifford Chance – would you share your thoughts about the present recruitment policies of private practice law firms? Should this now be entirely the preserve of the HR professional?**

When I talk to a range of firms across England and Wales, I do not find that the recruitment policies have changed fundamentally. Firms want bright, ambitious people who understand that their purpose every day when they walk into an office, or work from home, is to do a brilliant job for a client in need and to give them advice which is not academic theorising, but practical advice intending to keep them out of trouble.

**What do you think are the most important personal character traits for those currently considering a legal career?**

A mind which thinks in structures (ie starts a thought process with A and goes to Z, rather than starts at Z and then flits from G to A and B to Y), a strong sense of service and low sense of self, an ability to make your clients laugh and a personality which prefers to talk about answers rather than “difficulties”.

**In a recent poll of junior lawyers in the profession almost half of the respondents said they experienced mental health issues. What can the profession as a whole do to prevent toxic work environments and promote positive work cultures?**

In my experience, solicitors are empathetic worriers, often tough on themselves, perfectionists and good at taking problems from other peoples’ shoulders and putting them on their own. Bearing in mind that a solicitor’s life revolves around sorting out other peoples’ problems, day after day, it is no wonder that we experience mental health issues. A positive work culture is one which helps solicitors maintain a sense of perspective, tolerates mistakes and treats each person as an individual with unique personalities and needs. One which encourages everyone to treat others with decency, kindness and humour, whatever their position in the firm or client.

## **Davis’s professional and academic experience**

**President of the Law Society of England and Wales, since July 2019**

Davis studied Law at Oxford and qualified as a solicitor in 1984. He has been a commercial litigation partner at the London office of Clifford Chance since 1994, having joined the firm in 1982. Davis was the firm’s recruitment partner between 1995 and 2000, and spent two years as President of the London Solicitors’ Litigation Association. Since 2008, Davis has also been a member of the Court of Appeal Mediation Panel.

In 2014, Davis was appointed to conduct an inquiry into the circumstances surrounding the provision of potentially sensitive information to The Telegraph by the Financial Conduct Authority. (the Davis Review).

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

**AMC** Indicates an ASIAN-MENA COUNSEL Firm of the Year. **2017** **2018** **2019**

**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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