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The law firm for success

Insights

Asia

Welcome to Insights Asia

Our update on pressing issues and news from the Withers world.

In this seventh edition of Insights Asia we invite you to explore top-of-mind issues from a macro-economic perspective and examine pivotal insights from lawyers from across our Asia-Pacific network.

We recognise that our focus on innovation, technology, sustainability and driving lasting positive impact is shared by many of you. We also recognise the fast-changing landscape that we all operate in. Businesses, families and successful individuals in Asia are navigating an increasingly complex geo-political landscape, and the looming threat of the next global pandemic or economic crisis remains ever present.

Now more than ever, macro-economic policies are prioritising innovation and the use of technology to drive sustainable growth and mitigate potential risks. It is this climate of uncertainty and opportunity that has underscored the importance of including Environmental and Social Governance (**ESG**) considerations for a long-term strategy across all industry sectors.

ESG: An imperative in Asia

Advocating for responsible and sustainable growth in innovative ways is especially important in Asia where businesses see a pressing need to address environmental and social challenges caused by rapid economic development. Families and individuals are increasingly aligning their investment portfolio with their personal values, looking to make a positive impact.

As trusted advisers, we work closely with clients to futureproof their success amidst these developments. We also take our own role very seriously and we are working hard to reduce our carbon footprint and create positive impact within the communities in which we operate. We report on our progress in the Withers news section.

Our team is growing

In Asia, we welcomed three new partners; corporate partners Yutaka Sakashita in Singapore, Kazumitsu Goto in Tokyo, and investment funds specialist Simon Wong in Hong Kong. They are highly regarded for their work across private equity, real estate, infrastructure, venture capital, cross-border mergers and acquisitions, strategic alliances and joint ventures, cryptocurrency and digital assets, and crisis management. Yutaka leads the Japan Desk in our Singapore office, providing end-to-end service offerings to support Japanese firms in cross-border transactions and day-to-day business operations in Southeast Asia. Meanwhile, Kazumitsu's complementary experience lies in advising international businesses looking to invest into Japan. Simon's joining completes our established APAC investment funds team who serve major clients in Singapore, Japan and now also Hong Kong.

The wealth of experience they bring into the firm reinforces our ability to provide strategic upstream and downstream legal advice, servicing the full lifecycle of our clients' businesses.

Harnessing Indonesia's growth potential

Indonesia saw tremendous economic growth last year – the highest in almost a decade. To service the intricate and expanding needs of the country, we announced the launch of a group focusing on Indonesia in 2022. It now comprises over 20 legal professionals including market specialists and Indonesia qualified lawyers.

With our long-standing experience in Indonesia, this group strengthens our capability to provide quality advice to businesses and individuals looking to invest in Indonesia, as well as advising those based in Indonesia looking to invest globally.

Celebrating the global rethinkers shaping our future

Creativity and innovation has never been more important. This year, we embark on a global campaign that shines the light on the revolutionary rethinking power of private individuals, families and private capital.

'The Global Rethinkers' includes a collaboration with The Financial Times featuring some of our ground-breaking clients who are rethinking the solutions to important global issues. Read their inspiring stories on FT.com and on our website.

In this issue we explore a range of topics from jet zero to crypto and Japan's investment environment to new regimes for family offices. We hope that you find our insights and news interesting and thought provoking!

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The great aviation race.
How to get to Jet Zero by 2050

Navigating the stormy seas of a crypto crisis: reputation lessons learnt

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Innovation and technology

Explore the latest advancements and trends across Asia Pacific and how they are shaping businesses and influencing families and individuals.

The great aviation race. How to get to Jet Zero by 2050

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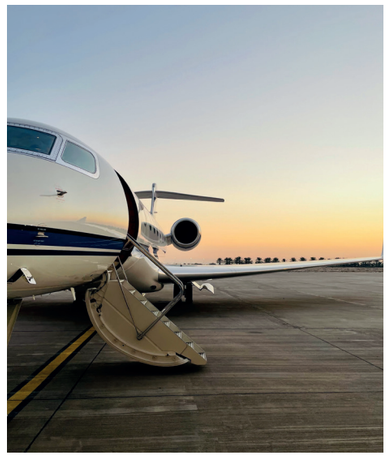

It was an otherwise straightforward deal. A company founder in the US had called on Paul Jebely, Withers' global head of aviation and marine, to advise on the purchase of a private jet. The aircraft would save the founder a significant amount of time while travelling between business and personal interests around the world.

As the legal team were kicking the tyres on the contract, however, the entrepreneur became concerned about the carbon footprint of private aviation. "After considering it further, the founder decided to walk away – even though it meant possibly losing a seven-figure deposit (which we ultimately avoided) – solely because of environmental and reputational concerns the founder had about owning a jet," says Paul, who adds "that was a first for me but perhaps not the last."

With the cost of living rising and a global recession predicted, there will be public and political pressure for others to follow suit. Many well-known figures in business and entertainment have been criticised for using private jets, with a high-profile Twitter account tracking the movements of French billionaires attracting tens of thousands of followers.

Politicians appear to be responding with the French transport minister calling for European-wide regulation of private jets and the leader of the Green Party for an outright ban.

Such proposals will be popular – however, Withers lawyers argue that they are not the answer to the aviation industry's pledge to reach net zero carbon emissions by 2050. Rather, private jet owners have an important role to play in decarbonizing the total estimated 4 billion passenger journeys that are made each year[1].

> In the short term we are having an increasing number of conversations around ways to mitigate the carbon burn.

First, influential frequent flyers are in a position to demand improvements that will make operations more efficient. And second, those with private capital can make investments in sustainable fuels and prototypes that have the potential to get the industry to 'jet zero'.

[1] https://www.iata.org/en/iata-repository/pressroom/fact-sheets/fact-sheet---alternative-fuels/

"Sustainability is a growing area of concern for people who rely on helicopters and private jets as a timesaving device," says Toby Joy, a senior associate and qualified pilot who is based in London. "In the short term we are having an increasing number of conversations around ways to mitigate the carbon burn."

Carbon offsetting schemes, in which passengers pay for trees to be planted, are one widely available option. Private jet owners are also in a position to choose sustainable aviation fuel (**SAF**), which the industry says can cut carbon emissions by up to 80 per cent[2].

At present, early adopters such as the Mercedes F1 team are using SAF made from recycled cooking oil and animal fats. However, more scalable alternatives are being explored, such as making SAF from agricultural waste or even from carbon dioxide[3].

"What began as a bit of greenwashing has become quite tangible change in the industry," says Paul. "SAF is increasingly viable and increasingly sustainable – but the real story at the moment is the developments with manufacturers, who are making lighter and more efficient aircraft."

> "What began as a bit of greenwashing has become quite tangible change in the industry.

Part of Paul's role in the private aviation industry is to consult with manufacturers on his clients' behalf, ensuring that what has been promised on paper (including efficiency claims) is a reality. He has been impressed by innovations in recent years that make new aircraft more sustainable and less costly to run. Such models are also more likely to hold their value.

"If you look at the history of aviation, it is a constant drive to achieve the next technological advancement," says Toby. "The first powered flight was in 1903, and within 70 years we had a supersonic airliner. Much development has come through privately owned, rather than state controlled, companies."

The next big developments are likely to be focused on sustainability, which is where individuals with an interest in the sector can help. "Private capital has the potential to create change," says Toby.

In one example, the philanthropists Brahman Vasudevan and Shanthi Kandiah have pledged £25 million to establish a sustainable aviation institute looking at everything from fuel and aircraft design, to infrastructure and operations.

And there are plenty of commercial opportunities. "There were some really interesting developments at the Farnborough International Airshow last year, from eVTOLs – electric vertical take off and landing vehicles that could replace helicopters for short-hop flights, to hydrogen-powered turboprop engines. Some of these companies will fail but if you back the right technology, the rewards are potentially huge. Just look at Tesla."

> "At first the idea [hydrogen airships] seemed a little farfetched, but since I learned more and heard about the kinds of clients who are interested, I very much believe that this is a gamechanger.

One exciting client that the Withers tech team is supporting has come up with a way to transport hydrogen by airship. H2 Clipper has been founded to overcome one of the key barriers to hydrogen technology, which is distribution. "The company has designed an airship that is lifted by hydrogen, powered by hydrogen and can contain about 200 tonnes of liquid hydrogen," says John Serio, an intellectual property partner in Withers' Boston office who has helped H2 Clipper to patent its ideas.

The company is now focused on building a prototype, which it expects to move at speeds of 150-175 miles per hour. The airships will also require far less infrastructure on the ground than traditional craft such as ships. "At first the idea seemed a little farfetched, but since I learned more and heard about the kinds of clients who are interested, I very much believe that this is a gamechanger," says John.

Paul also sees possibilities in electric and hydrogen-powered aircraft – but points out that the technology is still in its infancy. "This is how the future will look but it's not viable for any of our clients today."

> "NASA has come up with a system that makes air traffic control systems way more efficient. Where that's been deployed it reduces emissions by 30 per cent.

One very quick win, Paul believes, is to improve operations. "One way to make aviation more efficient right now is to stop planes from sitting on the runway with their engines running for up to an hour before take-off. NASA has come up with a system that makes air traffic control systems way more efficient. Where that's been deployed it reduces emissions by 30 per cent, and of course it's beneficial to people's bottom lines."

With even very wealthy people are unable to conceal their private jet movements, being able to point to such measures will also have a reputational benefit, Paul adds. "What I say to people is: if someone really wants to know you ultimately cannot hide that you own an aircraft…so own it."

[2] https://www.economist.com/science-and-technology/2022/08/17/ways-to-make-aviation-fuel-green
[3] https://www.economist.com/science-and-technology/2022/08/17/ways-to-make-aviation-fuel-green

The Hong Kong Stock Exchange's proposal to go paperless

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Background

In line with its drive to improve its environmental credentials and to modernise its systems and procedures, the Hong Kong Stock Exchange Limited (the **"SEHK"**) issued a consultation paper in December of 2022 proposing to adopt a completely paperless listing regime. This comes on the heels of an SEHK consultation in December 2020 that introduced the paperless listing and subscription regime and online display of documents (the **"2020 Amendment"**).

Although the 2020 Amendment mandated the electronic publication of listing documents for new issuers and digitising the subscription for shares in new listings (i.e. by digitising the investor-facing dimension of a listing), the process by which a company applied to the SEHK for listing still involves the manual submission of a considerable amount of physical documents.

"We anticipate the recommendations to be adopted in substantially the same form, but the proposal is still subject to consultation with key stakeholders." A brief overview of the key points is briefly stated in the following paragraphs.

Proposals in the consultation paper

Proposal 1: Fewer documents required for a SEHK listing application that must be submitted thorough electronic channels

To do so, the SEHK proposes:

(a) removing submission documents that are unnecessary or redundant, such as those that simply reiterate the obligations already set out in the Rules governing the Listing of Securities on the SEHK (the **"Listing Rules"**) or other guidance materials that overlap with other submission materials or disclosure requirements.

Examples include:

(i) information provided under the current Form M104 (regarding, for instance, the listing applicant's top 5 customers and suppliers and its pre-listing reorganisation) are duplications of information otherwise included in the listing document; or

(ii) confirmations currently required to be given by legal advisers and the sponsor regarding the compliance of the listing documents with the Companies (Winding Up and Miscellaneous Provisions) Ordinance, which is already covered by the Listing Rules;

(b) codifying obligations contained in various undertakings (such as the directors' undertakings), listing agreements and various other confirmations and declarations into the Listing Rules and, accordingly, retiring such submission documents that will have become redundant as a result. Given that the SEHK has the power to take disciplinary actions against not only a listed issuer, but also its directors, substantial shareholders and professional advisers (and the Securities and Futures Commission also has power to regulate licensed persons such as sponsors and compliance advisers), the SEHK sees it as more effective and efficient to codify these obligations into the Listing Rules rather than require the submission of various cumbersome documents;

(c) consolidating certain requirements into existing forms. For instance, the SEHK proposes including in the Form A1 new undertakings by both listing applicants and sponsors regarding Listing Rules compliance, due diligence and accuracy of information. This will work in tandem with the proposed reduction of submission documents and the codification of corresponding obligations as Listing Rules, by way of overarching undertakings within the Form A1;

(d) removing signature and certification requirements if they only:

(i) evidence the sponsors' approval of the contents; or

(ii) certify that the submissions are true copies of their originals, since the duty of listed issuers and sponsors to satisfy themselves of the accuracy of information submitted is already covered under the Listing Rules (and in any event, the knowing or reckless submission of false or misleading information to the SEHK is a criminal offence under the Securities and Futures Ordinance); and

(e) mandating electronic submission for all submission documents unless otherwise required by the Listing Rules or the SEHK. To this end, the SEHK also proposes launching a designated online platform for communications between the Listing Division and listing applicants / listed issuers.

Proposal 2: Mandating listed issuers to send electronic corporate communications to the holders of securities after listing

The SEHK proposes mandating that listed issuers electronically disseminate corporate communications and enabling listed issuers to choose their own consent mechanism for disseminating corporate communications electronically, in each case where the chosen mechanism is permissible under the laws and regulations applicable to them and their constitutional documents. Indeed, the great majority of listed issuers in Hong Kong are incorporated in the Cayman Islands, Bermuda, and the People's Republic of China, where company laws generally allow or do not prohibit the digital transmission of corporate communications.

Concluding remarks

The foregoing proposals significantly streamline the administrative and logistical work involved in a listing. "By cutting down on submission documents, codifying obligations into the Listing Rules and mandating their submission by electronic means, the SEHK has streamlined the listing application process significantly without compromising on the standards and obligations required of listing applicants and their advisers." In so doing, the environmental costs of a listing are significantly minimised. Although it seems small in the grand scheme of things, the proposals are a significant and necessary step in the right direction towards environmental sustainability and modernization.

Navigating the stormy seas of a crypto crisis – and reputation lessons learnt

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In the cryptoverse a week is a long time, and it only takes a minute to topple a crypto giant. Our story started way back in the comparative midst of time, in early November 2022. And it started with the doom-heralding-document of a leaked balance sheet concerning Alameda Research.

For those in the know, bear with us; for those not so much in the know, a quick dramatis personae. Sam Bankman-Fried, who also goes by SBF, was a crypto good guy, billionaire political donor, and CEO of the Bahamas-based cryptocurrency exchange, FTX. Alameda Research was SBF's investment company which traded in digital currencies, including trading on the FTX exchange. The two SBF entities were considered to be independent from each other. However, the leaked balance sheet exposed otherwise. This revealed that the value of Alameda Research was in fact bolstered heavily by a token created by its sister company FTX, and not by independent assets such as fiat currency or other cryptocurrencies.[1] The balance sheet leak led to concerns, which led to a surge in withdrawals from FTX and led to a liquidity crunch for the third-largest crypto exchange by trading volume - USD 6 billion of withdrawals were made in just three days.[2] The rest, as they say, is history. Save that it is a history that almost never was.

A potential lifeline had been thrown to FTX by none other than its fiercest rival, Binance. Binance's CEO, Changpeng Zhao (CZ) initially revealed on Twitter that Binance had reached a non-binding deal with FTX "to fully acquire FTX and help cover the liquidity crunch."[3] Just one day later however, and seemingly upon more due diligence later, Binance backed out of the deal, explosively revealing on Twitter the existence of reports of "mishandled customer funds and alleged US agency investigations" and added that "the issues are beyond our control or ability to help".[4]

[1] www.coindesk.com/business/2022/11/02/divisions-in-sam-bankman-frieds-crypto-empire-blur-on-his-trading-titan-alamedas-balance-sheet/ [2] https://www.bbc.com/news/business-63577783 [3] https://twitter.com/cz_binance/status/1590013613586411520 [4] https://twitter.com/binance/status/1590449161069268992

As SBF and FTX dealt with the immediate aftermath of this crisis, a real sense of contagion spread across the entire digital assets ecosystem, with many platforms finding themselves exposed. Binance had planted the seed of doubt in the minds of many, with its 10 November 2022 tweet, "we believe in time that outliers that misuse user funds will be weeded out by the free market." Buyers were perhaps reminded of the Latin "caveat emptor", and thus became more aware of the risks, and more apt to exercise greater scrutiny as to the sufficiency of a platform's liquidity. The spectre of a "run on the bank" - akin to the "run on the Bankman-Fried" suffered by FTX - became more real, while questions were asked as to whether proper due diligence had been exercised prior to committing to exposures to FTX.

Cold, hard news such as that which chilled the crypto world can cause the otherwise hot-ticket of a reputation to burn in seconds. FTX carved like a mighty glacier, while its CEO felt the icy hatchet of media headlines strike at the heart of his erstwhile robust reputation. Others in the cryptosphere may fear a similar demise, but should not be fearful of learning lessons from the crisis faced by FTX.

According to Henry Ford, "the only real mistake is the one from which we learn nothing". A crisis can have a devastating effect – but if we learn from our own mistakes, or from those of others, we are better prepared in the event that a crisis repeats itself in some fashion or other, and perhaps even able to avoid an incident becoming a crisis. With the hope of Spring not quite yet in sight, those hoping to survive the crypto winter may want to ask themselves, "What would I do if faced with a crisis like this?"

5 steps to managing a crisis

1. Preparation

We may be lucky enough never to face a crisis – but we should not leave our reputation to luck. Preparing for the worst will help you to achieve the best result. Consider undertaking an online audit or reputation health-check, while also monitoring social sentiment in real time to help you understand the Zeitgeist and the up to date issues at play in the industry, to anticipate a potential crisis before it has picked up steam, as well as to take advantage of any opportunities which may be presented.

2. People

John Paul Satre wrote that "Hell is other people", but your people may be your saviors. Create and educate a small, nimble team of key advisers and stakeholders who have the authority and gravitas to make decisions and deliver messages if and when advised to do so. Think: your executive power holder, your attorney, your head of operations, your head of comms. And don't forget to circulate the emergency contact list, so the parties can speak out of office hours – a crisis doesn't work 9 to 5.

3. Plan

Direct your crisis team to prepare crisis management plans, which should be rehearsed and practised if possible, to deal with the likely eventualities anticipated from your due diligence work in the preparation stage. That should ensure that you don't have to make all your decisions from scratch and under time pressure, if and when the crisis arrives.

4. Define

The first 72 hours of any crisis can be critical, and having a set of guidelines for eventualities which can be easily actioned in a timely fashion can be the difference between make and break. But so too can knowing your objectives. Some situations may be avoided, some problems solved, and some crisis contained. When the issue first arises, define your objectives so you can work towards achieving your key performance indicators – but don't be overly rigid, and be prepared to be flexible as the situation unfolds.

5. Playbook

Your crisis communications playbook is a vital part of your plan to best advance your messaging accurately and to protect and defend your reputation. Prepare what you can in good times before any crisis occurs, create a consistent narrative which highlights the corporation's core values, and which can serve as the cloth from which you also later cut your crisis-specific, reactive messaging. Obtain the requisite in-house, communication adviser and attorney approvals, and update your playbook with relevant research to avoid a rushed approach in the hothouse environment of a press deadline or third-party enquiry.

The mandarin word for crisis is **危机**, an amalgamation of two words and concepts referring to risk and opportunity. The risk to FTX and SBF became only too obvious – once it became a reality. And there are similar risks to others swimming in the crypto sea. However, there are also opportunities as the tide ebbs and flows and parties sink or swim.

The FTX failure is perhaps a sign of the ecosystem cleaning itself out, as a natural consequence of the limits of – at least for now - self-regulation. Any consolidation while at first glance could be seen as contrary to the spirit of decentralisation, could actually pave the way for greater mass adoption, and become the framework for more robust decentralisation to take place.

Whatever ultimately happens to FTX or SBF, one thing is clear. This crisis will set a new market practice where major exchanges would publish proof of reserves to demonstrate that their customers' assets are backed (such as a Merkle Tree proof where hash on the blockchain could not be reversed).

A major issue at play and arguably the underlying factor that triggered the collapse is the valuation of FTT. We have already seen tokens become worthless overnight, revealed to be the true naked kings of their own realm of blockchain protocols. In the same fashion, FTT fell by approximately 80% in a day. There are now too many lessons on the importance of understanding the fundamentals of a token instead of relying on the perceived trading value in the market.

Get in touch with us

We have a market-leading, global practice working with clients in the cryptoassets world, including advising on disputes arising out of the digital assets and blockchain space where Shaun Leong has considerable expertise. This team works frequently with our highly-regarded global media and reputation offering headed by Amber Melville-Brown. Please get in touch if you would like us to share our expertise or to discuss further any of the issues outlined.

Data protection risks in a data driven economy: Tougher enforcement of data privacy laws in the region

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The data privacy landscape in the Asia-Pacific region (APAC) has transformed significantly in the last two years. While it still remains a patchwork of different privacy regimes, there is an increasing convergence taken by the respective authorities towards tougher enforcement to combat the ever-evolving risks of cyber-attacks and threats.

The following paragraphs explore developments in this area within Australia, Singapore, Indonesia, Japan, and Hong Kong.

Australia

Australia saw a spate of high-profile data breaches in 2022, such as the cyberattacks on Optus and Medibank, which saw nearly 12 million customers' personal data leaked and exposed by hackers within the span of just two months.

"The Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022[1] was passed in November last year, introducing, amongst other measures, whopping financial penalties for serious or repeated breaches by companies".

Described as being one of the highest penalties in the world for data contraventions to date, maximum penalties imposed on companies can now amount to the greater of[2] (a) AUD 50 million; (b) if a court can determine the value of the benefit that the body corporate (and its related bodies corporate) directly or indirectly obtains – 3 times the value of that benefit; or, (c) if the benefit cannot be determined, 30% of the company's 'adjusted turnover' during the 'breach turnover period' for the contravention.

Singapore

(i) Extension of fixed sum penalties to 10% of an organisation's annual turnover

With effect from 1 October 2022, organisations may now be fined up to SGD 1 million or 10% of the organisation's annual turnover in Singapore, whichever is higher, for violations of their data protection obligations under the Personal Data Protection Act (**"PDPA"**). This was extended from the previously fixed cap of SGD 1 million.

In ascertaining the amount of financial penalty to be imposed, relevant factors considered by the Personal Data Protection Commission include the number of affected individuals, types of personal data compromised, timeframe of the incident, and whether the organisation took any effort to mitigate the consequences of their breach.

(ii) Recognition of emotional distress as actionable head of damage

In the landmark decision of Reed v Bellingham [2022] SGCA 60, the Singapore Court of Appeal (**"SGCA"**) issued guidance on the right of individuals to commence private actions against organisations for data protection contraventions.

Any individual who has suffered 'loss or damage' as a result of an organisation's breach of certain PDPA obligations may commence private claims against the violating organisation, with possible remedies including: (a) an injunction or a declaration; (b) damages; and/or (c) such other relief as the court thinks fit.

Considering the challenges with quantifying the value of personal data, "the SGCA adopted the wider interpretation of the statute and held that emotional distress resulting from an organisation's breach may constitute sufficient "loss or damage" required to commence a private action under the PDPA."

Concurrently recognising the need to keep compliance costs manageable for organisations, several control mechanisms were raised to keep the right of private action within reasonable bounds. These include the clarification that the loss or damage must have been suffered *directly* as a result of the PDPA contraventions, and that mere loss of control of one's personal data is not an actionable loss or damage.

Indonesia

Indonesia's long-awaited Personal Data Protection Law (**"PDPL"**) finally came into force on 17 October 2022, with a transition period of 2 years at the latest for organisations to comply. If a company wishes to process personal data, it will be necessary to obtain explicit written consent from the owner of the personal data.

The PDPL establishes a range of criminal and administrative fines, depending on the type and extent of the contravention. Criminal sanctions include: imprisonment of up to 6 years; penalties of up to IDR 6 billion (around USD 400,000), seizure of assets or profits, freezing of the company's assets, permanent prohibitions from carrying on businesses or business activities, revocation of business licenses and/or dissolution of the company, amongst others.

"Administrative fines imposed on businesses can be a maximum of up to 2% of the company's annual revenue.[3]"

More detailed regulations are anticipated to be issued within the year or so.

Japan

As part of significant amendments to Act on Protection of Personal Information of Japan (**"APPI"**) in 2020, the maximum penalty amount which may be imposed for contravening the APPI was dramatically increased from JPY 0.3 million (around USD 3,000) to JPY 100 million (around USD 1 million). The penalty may be imposed if a business violates an order issued by the Personal Information Protection Commission to cure APPI violations. The increased penalty has been applicable since December 2020, while amendments to the APPI in 2020 came into force in April 2022.

A data subject whose personal data was affected may also bring a lawsuit against the business. In fact, "there have been cases where businesses were held liable for damages to the data subject caused by data breaches." In those cases, the courts took into account, among other things, categories of personal data subject to the data breach and their sensitivity, whether any data was exploited, and what actions the business took after the breach.

Hong Kong

The Personal Data (Privacy) Ordinance (**"PDPO"**) enshrines 6 data protection principles. If any data protection principle is breached, a complaint may be filed with the Office of Privacy Commissioner for Personal Data (the **"Commissioner"**). Contravention of any enforcement notice issued by the Commissioner is an offence which may result in a maximum fine of HKD 50,000 and imprisonment for 2 years, with a daily penalty of HKD 1,000. Subsequent convictions can result in a maximum fine of HKD 100,000 and imprisonment of 2 years, with a daily penalty of HKD 2,000.

While the limit on penalties have not been raised, the PDPO underwent recent amendments to introduce new offences and the penalties imposed under these new offences are much more severe. For example, "fines of up to HKD 1 million and imprisonment of up to 5 years could apply if a data user fails to comply with a data subject's request to cease the transfer of data for use in direct marketing, or if the data of the data subject is disclosed without consent, causing harm to the data subject or their family members."

In addition, common law principles continue to apply and supplement the protection offered under the PDPO. In a recent defamation case where photos of the plaintiff have been misused, the plaintiff raised a separate claim based on breach of relevant data protection principles and was awarded damages for injury to feelings of the plaintiff based on relevant principles in discrimination cases.

Lessons drawn

With increased penalties and enforcement, companies within the region can no longer afford to overlook data protection as the fines and liability towards individual claimants may potentially be crippling. It is imperative for companies to have in place a robust and comprehensive data protection framework, especially in response to potential data breaches. To ensure that they are prepared, organisations can consider the following:

(i) regularly review and update data protection policies for compliance with the latest regulations;

(ii) have in place robust contractual provisions with vendors to set out their responsibilities in relation to the personal data they process, and regularly monitor their compliance with these provisions;

(iii) adopt data protection by design in systems and processes;

(iv) develop and implement procedures for responding to data breaches;

(v) regularly train employees on these policies and procedures; and

(vi) appoint a Data Protection Officer (**"DPO"**) who is empowered to ensure that policies and procedures are effectively implemented.

[1] https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6940_aspassed/toc_pdf/22113b01.pdf;fileType=application%2Fpdf ("AU Bill"). [2] Amendment No. 14, AU Bill. [3] https://www.aseanbriefing.com/news/indonesia-enacts-first-personal-data-protection-law-key-compliance-requirements/

Divorce in the digital age in Singapore and Hong Kong: Crypto and NFTs as matrimonial assets?

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Two recent decisions of the Singapore High Court pertaining to digital assets have been eye-catching. In CLM v CLN, [2022] SGHC 46, the High Court decided that cryptocurrency holdings were 'property' and could be subject to proprietary injunctions. In Janesh s/o Rajkumar v Unknown Person (**'CHEFPIERRE'**), [2022] SGHC 264, the High Court came to a similar decision, albeit in the context of a Non-Fungible Token (**"NFT"**).

These decisions have sparked very substantial interest in digital assets in the legal industry, and may represent the latest frontier of potential new law-making. As a result, we have often been asked – how are digital assets treated in Singapore family law?

In Hong Kong, we are still eagerly awaiting the first published Family Court Judgment relating to digital assets but as we are seeing more and more families holding digital assets, as in Singapore, we are also often asked how they are treated in family law.

Matrimonial assets

In Singapore, only 'matrimonial assets' are subject to division post-divorce. The term 'matrimonial asset' is defined in section 112(10) of the Women's Charter, as: "… any other asset of any nature acquired during the marriage by one party or both parties to the marriage, …"

This definition is, of course, subject to exceptions that we will not discuss in this article. It is notable, however, that this definition is very broad. It encompasses any asset of any nature acquired during the marriage.

Notably, the definition of 'matrimonial asset' does not use the word 'property'. 'Matrimonial assets' thus, arguably, do not need to satisfy the four requirements which were discussed in CLM v CLN which have to be met before a thing can be considered 'property'.

The Family Court in Singapore is thus used to dividing, as matrimonial assets, things which we would not commonly regard as 'assets'. A 2002 decision of our Court of Appeal confirmed that stock options that have not yet been vested can be divided as matrimonial assets. Choses in action – i.e., intangible legal rights – have also been divided as matrimonial assets as long as they have value.

It would thus come as no surprise that digital assets are widely accepted in Singapore family law to be matrimonial assets that can be divided. In UTL v UTM, [2019] SGHCF 10, the Family Division of the High Court held that a Bitcoin holding was a matrimonial asset that was subject to division. We note, further, that neither party appeared to dispute that a Bitcoin holding was in principle liable to division – the dispute was over whether that particular Bitcoin investment still existed or had already been liquidated.

Thus whilst there are, at present, no reported decisions discussing whether digital assets fit the definition of 'matrimonial asset', it appears to be accepted by the Family Justice Court that digital assets with value can indeed be liable to division post-divorce. The recent decisions in CLM v CLN and Janesh s/o Rajkumar v Unknown Person (**'CHEFPIERRE'**) would only strengthen this view.

In Hong Kong, parties have a duty to disclose their worldwide assets whether they are liquid or illiquid so that it can be determined whether they are matrimonial assets. Digital assets will definitely be assets that need to be disclosed by a party so that they can be taken into consideration by the court when the assets are distributed.

Injunctions

Accordingly, and consistently with CLM v CLN and Janesh s/o Rajkumar v Unknown Person (**'CHEFPIERRE'**), proprietary injunctions (e.g. freezing injunctions) over digital assets can also be granted in divorce cases.

The Family Court is, however, averse to granting proprietary injunctions as a matter of course in divorce proceedings. A proprietary injunction will not be granted except as a last resort, in a situation where there is a clear risk of dissipation, and where the injunction is necessary to protect the claimant's interests in the division of assets. This is also bearing in mind that the risk of dissipation alone will not be sufficient to warrant an injunction, since it is established that the Court can notionally return dissipated assets to the pool for division to vindicate an aggrieved party's interest in the pool of assets.

Likewise, in Hong Kong, the Family Court, will not grant an injunction lightly, but if there is evidence of dissipation, it may be possible to seek an injunction to freeze the assets of the other party and, if necessary, seeking to cover for example cryptocurrency exchanges so that the investment can not be traded.

Challenges

Although it is almost trite in Singapore family law that digital assets can be liable to division, they nevertheless pose challenges. These challenges are, namely, (1) disclosure, and (2) valuation. Thankfully, these are not challenges that are novel and unique to digital assets, and there are solutions.

The same challenges of course exist in Hong Kong family law but as in Singapore, there are solutions.

Disclosure of digital assets

Cryptocurrency is widely used to transact on online black markets because it allows the parties to the transaction to remain anonymous. Cryptocurrency holdings are held through electronic 'crypto wallets' which are often untraceable to the owner of the wallets without engaging a specialist expert and expending very substantial time, effort, and money.

Thankfully, in the divorce setting, the problem is often the opposite one – i.e., not ascertaining the owner of a crypto wallet, but instead ascertaining whether a person owns a crypto wallet or not. This is a less problematic issue because digital asset holdings – these days – are often purchased using traditional currency. The days where substantial valuable cryptocurrency could be acquired by 'mining' are – to the authors' best (but still layman) knowledge – behind us. Given that digital asset holdings are usually acquired using traditional currency, the purchase of digital assets can usually be traced from bank account statements. This trace, if detected, can form the basis for a train of inquiry that can itself be the basis of discovery or interrogatories in the Court process.

We would recommend – if there is a prospect that substantial digital asset holdings have not been disclosed – that the aggrieved party engages specialist forensic accountants to assist with the tracing.

In Hong Kong, during divorce proceedings, each party must complete a financial statement known as a Form E to provide full disclosure of their means, both capital and income. There is a duty to provide full and frank disclosure of assets and financial resources, including holdings of any and all digital assets. If holding cryptocurrency, addresses such as Bitcoin addresses and exchange statements should be provided to evidence holdings.

If this disclosure has not produced what is believed to be the true extent of the digital holdings, the right questions need to be asked relating to the online accounts with exchanges, location of digital wallets etc. There is the opportunity to do this via legal correspondence, questionnaires and specific discovery applications. Failure to provide full and frank disclosure will place parties in contempt of court risking a fine and even potential imprisonment.

Valuation

Digital assets are notorious for being highly volatile in valuation. 1 Bitcoin was worth USD 7,887 on 11 March 2020. It had lost one-third of its value just 4 days later, on 15 March 2020, coming in at USD 5,165. Its value more than tripled in 9 months, and 1 Bitcoin was worth USD 18,245 on 11 December 2020. One month later on 10 January 2021, it had doubled in value again to USD 40,256. This level of volatility is seen across almost all classes of digital assets – not just Bitcoin. Not many traditional assets see this level of volatility maintained consistently over long stretches of time.

The default rules in proceedings for division of assets in Singapore are that the pool of assets is (1) identified at the time of the Interim Judgment, but (2) valued at the date of the hearing of the ancillary matters. Given that fully contested ancillary matters proceedings often take a year (sometimes more) to complete, a pool of digital assets could be valued very differently at the start and at the end of the proceedings. The specific date of the hearing could also cause a windfall to one party or the other, given that digital assets can fluctuate in value very substantially over very short periods of time.

This can be mitigated in two ways.

Firstly, the digital asset holdings can be divided in *specie*, instead of its *value* being divided. For instance, if a pool containing 2 Bitcoin is divided equally between the former spouses, each party will obtain 1 Bitcoin, instead of one party retaining 2 Bitcoin and the other party being paid the monetary value of 1 Bitcoin. This, however, only works with fungible digital assets (e.g. cryptocurrency) and may not work with NFTs.

Secondly, the digital asset can be subject to an 'if and as when' division order. This means that the value of the digital asset is divided only when it is sold. Such an order will align the parties' interests in maximising the proceeds of sale of the digital asset. Safeguards will, however, have to be put in place to ensure that the 'if and as when' division order is not frustrated by the owner of the digital asset retaining the digital asset indefinitely – as may be the case if a valuable NFT is retained purely for clout.

If the digital asset is divided between the parties, the risk or benefit of changes in value are shared. However, with its very specific market and specialised trading platforms not everyone will want to take on a significant digital asset/investment. It may be better for one party to retain the digital asset offsetting it against another. What though if one takes real estate worth USD 10million and the other takes digital assets worth USD 10million and the value of the digital asset crashes the following week? Or alternatively, they become a billionaire the following month? In Hong Kong, it is established law that where price fluctuations can be anticipated, as part of the natural function of a type of asset, the court will not be prepared to entertain the re-opening of a case that is "closed" even if the price fluctuations are extreme. Legal advice should be sought urgently if the hearing has concluded but the order has not been made yet or the order has not been sealed as then there may be scope to revisit the terms of the order.

Conclusion

Digital assets have for some time frustrated lawyers. The position has been clarified somewhat in the 2 recent decisions in CLM v CLN and Janesh s/o Rajkumar v Unknown Person (**'CHEFPIERRE'**).

Thankfully, in the arena of family law, the relatively broad definition of 'matrimonial asset' and the development of the law of division of choses in action have resulted in the widely-accepted mentality that digital assets are indeed liable to division. The challenges posed by digital assets are also not unique to digital assets.

It is, perhaps, for these reasons that we have yet to see a highly-publicised decision on the treatment of digital assets in divorce. In our view, there is less controversy over whether digital assets can constitute assets for division in the context of divorce proceedings. Parties may instead require greater professional assistance for the tracing of such digital assets.

There is the common fear that an ex-spouse may attempt to withhold information or lie to conceal their assets. The Hong Kong Family Court is well aware of and experienced in dealing with such behaviour and has adopted robust measures to disincentivise anyone's attempt to engage in non-disclosure of any asset which includes digital assets. Any belief that one can hide assets of any nature in divorce including digital assets is misguided. This approach is similar in Singapore.

Considering collaborative practice for divorce in Hong Kong

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It is widely recognised that the divorce process is one of the most stressful experiences ordinary people may have to endure. Even when a couple believes that they can solve all of the issues which arise during their separation, the nagging belief that they may not have received their fair share of the marital assets, or their share of their children's time, often remains.

Popularity of mediation

Over recent years, the process of mediation has become more popular. Mediation gives the parties more autonomy in reaching their own result with the assistance of a trained third party. It has also been incorporated into the court system for dispute resolution in many jurisdictions, including Hong Kong where a Family Judge may direct the couple in resolving their differences via mediation. The ability for couples to resolve their conflicts on their own terms is better for their long-term relationship and, most importantly, for their children.

Typically, in a private mediation, the parties will attend a meeting with their lawyers in attendance, hoping to reach a compromise with the assistance of the mediator. Generally speaking, these are the only individuals involved. Mediation is an excellent way to settle a dispute but there may be some need for other professional help, such as from an accountant to verify certain financial details, which may become a hurdle if one party does not trust the figures provided by the other party; or a parenting coordinator if they are not able to reach an agreement on specific arrangements for their children.

Alternative dispute - collaborative practice

Though mediation has become common practice now in Hong Kong, an alternative known as collaborative practice is now on the rise. "As with private mediations, as opposed to court led settlement hearings, collaborative practice is also a voluntary process." Lawyers who are specially trained can assist parties to resolve their differences, often with the help of other professionals such as accountants or child psychologists. All parties will sign a Participation Agreement where the common aim is to come up with a settlement. If they are unsuccessful, the lawyers and other experts can no longer represent the couples on the case.

There is no limit to the topics to be discussed in the collaborative process, including how to deal with the divorce itself which may be a highly emotional issue to the parties themselves. In litigation, parties may become polarised on this initial issue which could cloud their ability to settle later on. If this can be resolved amicably, it sets the tone for later discussions.

Children issues

Concerning children, there is much greater scope for considering the details which are important for day-to-day childcare. "A detailed parenting plan can be thoroughly drawn up and difficult terminology such as custody, care and control and access, which may easily be misunderstood, can be avoided all together." If the child is affected by the divorce or separation, the parents may amicably discuss and come to an agreement if some degree of therapy is necessary to tide the child through the most difficult periods. Furthermore, couples may jointly select a child psychologist to be involved, in place of having multiple child experts and social welfare officers interviewing them for their views and feelings. Other individuals who are important to the child may also be involved, such as their teachers or grandparents.

Financial issues

In respect to finances, lack of trust and belief that each party has been open and honest in their financial disclosure are potential hurdles for settlement that can lead to escalating divorce costs. If all parties in the room are genuinely keen to settle, then a rigorous discovery process must be undertaken which can be done if all parties are looking at the same documents, often assisted by forensic experts who can advise the parties whether the disclosure is sufficient or not. This could include accountants who can advise on, for example, company accounts, or valuers of property or other experts such as pension advisers or advice on Duxbury calculations* or what would be reasonable expenses for the wife and child(ren). If it is not only the lawyers giving the advice, the parties may well receive a necessary reality check on their expectations, either from the perspective of the receiver of financial provision or the provider.

With everyone in the room set on finding a realistic and balanced solution in order to avoid litigation in court, the emotional trauma of the divorce process can be reduced. The process, although complex in many cases, would undoubtedly be shorter than the court process which tends to suffer long delays due to a busy court system. This can only be to the benefit of the parties and their children.

Conclusion

Collaborative practice in Hong Kong is relatively new, but there are now over 40 qualified practitioners, including solicitors and barristers as well as psychologists and psychotherapists, which indicates that those who are frequently involved with divorce and separation cases recognise a need for a better way to solve problems in family law. Three of the qualified practitioners are with the Withers Family Team: Samantha Gershon, Billy Ko and Anisha Ramanathan. Anisha is a member of Hong Kong Collaborative Practitioner's Group Executive Committee.

*A Duxbury calculation is based on the receiving parties age, required annual income need and their estimated life expectancy, together with allowing for considerations such as the rates of capital growth and inflation.

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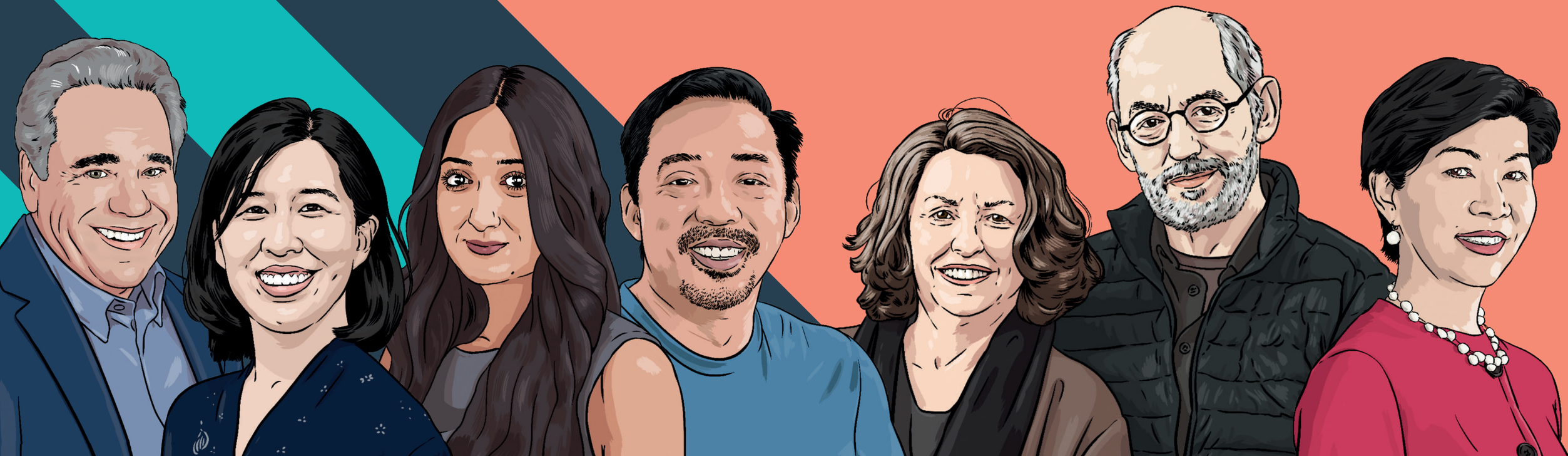

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The tremendous proliferation of Fintech companies and professionals based in Singapore over the past decade has demonstrated the country's reputation as a prime Fintech hub in Asia. This progress has been in no small part due to the Singapore government's unwavering support for the Fintech ecosystem, which is seen as a way to build a more dynamic economy that improves the lives of individuals.

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Change - How Japan's investment environment has improved over the past decade

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Japan has long presented a challenging environment for international investors despite having had very lenient foreign investment control. The challenges arise out of certain invisible barriers for non-Japanese investors to come into the Japanese market, including unique business and market cultures, limited transparency, and limited human resources with business-level English capabilities. However, things have changed drastically over the past decade. Foreign investors have streamed into the Japan market as a result of noteworthy changes in the investment environment in Japan, and significant and continuous efforts by the Japanese government to attract foreign investors.

Enhanced market discipline in the Japanese capital markets

Historically, shareholders of Japanese listed companies did not exert much, if any, pressure on the management of such companies. Shares in Japanese listed companies were cross-held by their business partners and banks, who acted as management-friendly shareholders. Large domestic institutional investors, including pension funds and life insurance companies, were silent, passive investors, who almost always voted in favor of the management's proposals.

With the increasing awareness of the need for rules of conduct for management and institutional investors, Japan's Stewardship Code was published in 2014 (as amended, the **"Stewardship Code"**), and the Tokyo Stock Exchange (**"TSE"**) adopted Japan's Corporate Governance Code in 2015 (as amended, the "**Corporate Governance Code**").

The Stewardship Code emphasizes accountability of institutional investors and encourages them to disclose policies on proxy voting and their voting activities, to monitor their investments, and to engage in constructive dialogue with the companies in which they invest.

The Corporate Governance Code has significantly enhanced the corporate governance of Japanese listed companies to bring it up to par with the global standard. For example, in 2022, 92.1% of the listed companies in the TSE Prime Market have appointed 1/3 or more independent directors to their board of directors. This is a significant jump from 6.4% in 2014. The Corporate Governance Code has also increasingly evoked awareness of a director's responsibility and accountability to shareholders. About 70% of the companies in the TSE Prime Market now provide their earnings reports and notices of annual general shareholders meetings in English to international investors. The Corporate Governance Code requires listed companies to review and disclose the risks and benefits of cross-shareholdings, which caused a constant trend of unwinding of cross-shareholdings.

As a consequence of these changes, Japan's capital markets now impose significantly more discipline on listed companies and institutional investors, and offer substantially increased accessibility and transparency to international investors.

Such transparency has resulted in, more possibilities for activist funds to participate in the governance, particularly by making shareholder proposals. Increasingly, shareholder proposals have become more widespread among Japanese listed companies. 50 of the listed companies in the TSE Prime Market received 224 shareholder proposals in total for the shareholder meetings held in June 2022. This represents a sharp rise from 28 companies and 119 shareholder proposals in total in 2018.

Not only has the number of shareholder proposals increased, so has the support from shareholders in general for such proposals. In the past, shareholder proposals were almost never successful. However, this is beginning to change as, in 2022, there were a few proposals which were supported by other shareholders and were approved at the shareholders meetings. Even in cases where there were insufficient support to approve proposals, such proposals still received wide support from other shareholders; thus, demonstrating that shareholders are becoming more active participants in the governance process and willing to exert more pressure on the boards of directors and hold them accountable for their decisions.

M&A and start-up investment opportunities on the rise

M&A

The number of M&A transactions in which Japanese companies are involved in has been increasing year by year. Previously, Japanese companies were reluctant to sell their businesses, since it was perceived as a failure of the management and abandonment of their employees. More recently, however, this perception has changed and now M&A is widely recognised as a positive business strategy. One driver of this change has been the increase in global competition faced by Japanese companies which has been exacerbated by a domestic market that is shrinking due to an aging population. The shrinking domestic market drives not only conglomerates but also small to mid-sized companies to expand their businesses outside of Japan. Japanese companies are now actively selling their non-core businesses and acquiring businesses both within and outside of Japan which they expect to have strong synergy with their core business. Another recent trend giving rise to M&A transactions is utilising M&A for business succession. In such cases, older entrepreneurs sell their businesses because they cannot find adequate successors within their companies. With all these changes and the continued aging of Japan's population, it is very likely that the number of M&A transactions involving Japanese companies will continue to grow over the mid to long term.

Start-up investments

Start-up investments in Japan have also been steadily expanding due to a significant increase in appetite for equity financing by Japanese start-up companies. The result of this has been a steady increase in the number of investments made by non-Japanese investors, and a spike in such numbers in 2021. In Japan, IPO is the main exit path for investors, accounting for about 2/3 of the exit transactions in 2021, but exits through M&A transactions (such as the acquisition of Paidy by PayPal Holdings) are becoming increasingly repetitive common.

Improved investment environment for international investors

Changes in attitude towards non-Japanese investors

With the progress of global expansion of their businesses, many Japanese companies are now welcoming investments and employees (and even managers) from international investors. This is especially true for companies run by younger generation managers and start-up companies. Human resources with sufficient English language capabilities remain an issue for international investors, but is gradually improving, as many Japanese companies and people become increasingly aware of the importance of English language skills in a global market.

FDI regulations remain limited

Although the Foreign Exchange and Foreign Trade Act (as amended, the **"FEFTA"**) was amended in 2019 and 2020 to tighten the foreign investment regulations, Japan still has very limited foreign investment control. The FEFTA requires non-Japanese resident investors to make a filing before or after making an equity investment into Japanese companies or businesses, depending on the type of business conducted by the relevant target company. Such filings, however, are routine and are almost never rejected. In fact, there is only one known case in which the government did not approve the transaction. Except for the FEFTA, there are no general restrictions on investments or the appointment of non-Japanese directors by foreign investors, other than with respect to a few industries such as aviation, broadcasting and freight forwarding businesses.

Government policies promoting foreign direct investments

Over the years, the Japanese government has been actively implementing a variety of measures to make the investment environment in Japan more foreign investor friendly. In 2020, the government set a target to double the amount of the foreign direct investment to 80 trillion yen (12% of the GDP) in 2030. In particular, the government aims to (i) promote investment into human resources through the foreign direct investment; (ii) promote digital transformation (DX), green transformation (GX) and foster start-ups through foreign direct investments; and (iii) improve the living environment for non-Japanese people to promote foreign direct investments.

A key ongoing project regarding foreign direct investment promotion released last year (the actual action plans under this project will be finalised this year) includes preparation of model contracts to meet global standards, standard investment contracts, enhancing support to international companies entering into Japanese market, and establishing and expanding a wide array of subsidies and foundation grants to promote investments, including investments by non-Japanese enterprises into strategic focus areas (such as semiconductors, data centres, next-generation telecommunication technologies, and green innovations).

How we can support

Japan's markets are now more open, accessible and transparent to foreign investors than ever before. Nevertheless, understanding the legal rights and obligations affecting the operations of Japanese companies remains an integral part of successful investments. Our teams in Japan and around the region are looking forward to sharing our knowledge and experience with you and helping you to succeed in the Japan market.

Family offices should consider multiplying their giving with impact investing

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From the Carnegie Foundation in North America to the Li Ka Shing Foundation in Asia, wealthy families worldwide have long been making charitable donations to support worthy causes.[1]

Based on a report prepared by UBS in collaboration with Campden Wealth Limited, families in Asia Pacific, through their family offices alone, donated an average of USD 2.7 million each to philanthropic causes.[2]

Yet, only 25% of those same families reported that they were engaged in impact investing.

Charitable donations — while important and necessary to provide the financial resources necessary to overcome systemic and market based inequalities — are by their very nature, limited. Once expended, the grant is exhausted and the grant-maker must make a further donation if he/she wishes to sustain his/her cause.

Impact investments however leverage on these financial resources to generate returns which can then be recycled into the investment; same pool of resources, but a recurring and sustainable impact.

To give an example, a donation to build a hospital would be fully utilised on its construction. Any additional financial resources required by the hospital for its ongoing operations would then have to be funded by its own revenue, further donations from sponsors and government subsidies.

That same initial donation could instead have been invested in the hospital as equity in exchange for some management control over the running of the hospital, thereby enabling the investor to provide ongoing support to the hospital and potentially improving its performance in the long run; or as an unsecured long term loan to reduce the hospital's cost of financing. The returns from such investments could then be recycled into the hospital or other worthy causes.

Family offices can add value to social enterprises

The hospital example is only one of the ways in which the family offices I work with have been making an impact on social causes through their direct investments. Others have invested in education, micro-financing platforms and other social enterprises which not only provide the enterprises with much needed capital but also allow them to leverage on the family's brand and network to scale their operations.

"Family offices are in a prime position to lead the charge on impact investing" Here's why.

Family offices can bring market-based approaches to the social causes they care about, thereby reducing their reliance and dependency on government and donor support.

Family offices can tap on the infrastructure and resources of the family and their core businesses, whether in terms of technical support, financial expertise or simply drawing on the experience and wisdom of the founders. Therefore, they can offer invaluable experience and mentorship to the founders of these social enterprises. This in turn strengthens the enterprise's fundamentals, creating a more financially sound and sustainable business.

Family offices provide patient capital for promising social enterprises which may not as yet satisfy the financial metrics and returns that traditional funds or financial institutions demand, due to their higher risk and limited track record.

Through their brand and networks, family offices can also help social enterprises scale thus driving adoption of the sustainable technology or practices that they promote.

It may be a common perception that impact investments provide limited financial returns, if at all. However, a survey by the Global Impact Investing Network finds that 67 per cent of impact investors target market risk-adjusted rates of return. Respondents also report that portfolio performance overwhelmingly meets or exceeds investor expectations for both social and environmental impact and financial return, in investments spanning emerging markets, developed markets, and the market as a whole.[3]

"Apart from financial returns, impact investments can also complement the family's philanthropic aspirations by bridging the gap between the family's "for profit" business persona and its "for good" philanthropic one."

As the next generation of socially-conscious family members become more actively engaged in the business and impact investments, they can also positively influence the wider family and normalise investing for change. The returns that an impact investment can offer to the family thus go beyond the financial.

Wealth and purpose are not mutually exclusive

Impact investing is not without its challenges, and it is natural for family offices to have reservations.

Unlike financial metrics, how much good an investment has on society is not easily measured.

A healthcare social enterprise may be judged by the number of people that have benefitted from its programme while a micro financing platform's impact may depend on the increase in small businesses in underbanked communities. Each impact investment is different and requires a different assessment criteria which lean family office setups may not have the resources to carry out. A charitable donation can therefore feel like an easier path.[4]

However, with more tools such as the ESG Book, which is an online platform which aims to make ESG data more widely accessible to investors, available to help investors assess their impact investments and increased regulatory scrutiny of greenwashing, the divergent path towards impact investments may not be as hard going forward.

As the environmental, social and other challenges societies face become more deep-rooted, government and philanthropy also cannot be expected to solve them on their own.[5] "The United Nations has estimated that developed countries must contribute USD 100 billion a year to developing countries in order to help the latter cope with climate change." It is clear that change requires cash and quite a lot of it according to these estimates.

Wealth and purpose are not mutually exclusive and family offices have a real value to add to this space. Just as populations worldwide have embraced the new normal created by the Covid-19 pandemic, family offices too, can and should embrace the new normal of investing for change.

If you have any queries, please feel free to reach out to your usual Withers contacts or Erlene Tan.

A version of this article was first published in the February 2022 issue of The Business Times Wealth.

[1] https://www.forbes.com/sites/forbeswealthteam/2021/01/19/americas-top-givers-the-25-most-philanthropic-billionaires/?sh=7ace55d71f59 [2] https://www.ubs.com/global/en/wealth-management/uhnw/global-family-office-report/global-family-office-report-2019.html [3] https://www.morningstar.com/articles/1017056/sustainable-equity-funds-outperform-traditional-peers-in-2020 [4] https://www.asianinvestor.net/article/why-family-offices-blend-impact-investing-with-philanthropy/473390 [5] https://www.rockpa.org/guide/impact-investing-introduction/

A snapshot of Hong Kong's proposed tax concession regime for family offices

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Scan here for the latest updates

Background

The Financial Service and Treasury Bureau ("**FSTB**") announced in a Policy Statement on March 24 several measures with a view to creating a conducive and competitive environment for the businesses of global family offices and asset owners to thrive in Hong Kong.

These measures include a dedicated regime which aims to provide a tax concession for single 'family offices' operating in Hong Kong. It should be clarified that the tax concession regime proposed under the Inland Revenue (Amendment) (Tax Concessions for Family-owned Investment Holding Vehicles) Bill 2022 (the "**Bill**")[1] has not yet come into effect. The Bill is still under review by the Legislative Council of Hong Kong and this article refers to the provisions of the Bill as gazetted.

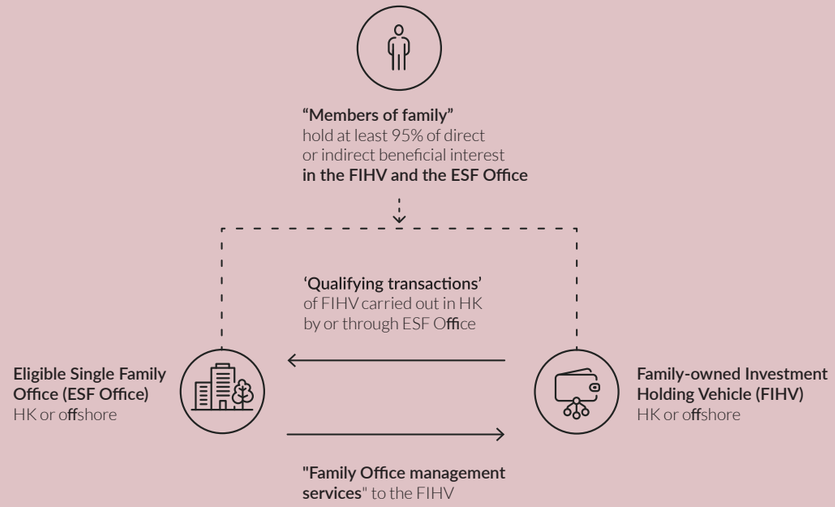
Though Hong Kong adopts a mainly territorial basis of taxation, and entities which hold investments are generally only subject to Profits Tax[2] if they 'carry on trade or business in Hong Kong' and derive 'Hong Kong sourced' profits which are 'trading' (as opposed to capital) in nature the application of these common law principles is fact specific and not clear cut.

In addition, with the recent changes[3] to tax 'specified foreign sourced income'[4] in Hong Kong, entities carrying on a trade or business in Hong Kong may face a further risk of Profits Tax if they receive such foreign sourced income in Hong Kong[5], subject to certain conditions and exceptions.[6]

Currently, Profits Tax is charged at 16.5% for corporations (with the first HK$2 million of assessable profits being taxed at 8.25%, subject to certain conditions being met).

The Bill aims to offer certainty such that income derived by a Family Investment Holding Vehicle ("**FIHV**") shall be charged at a concessionary tax rate (which will be 0% for the tax year 2022-23) provided that certain conditions are met. The regime aims to benefit families with FIHVs and family offices already operating in Hong Kong, as well as families located overseas who intend to establish their investment teams in Hong Kong.

It is anticipated the Bill will be refined and enacted by the end of April or May 2023 with the tax concession applying retrospectively from 1 April 2022.



The conditions

Relationship between the FIHV and the family office

The Bill seeks to provide a tax concession for an eligible FIHV which holds the investments and which is managed by an eligible single-family office (the "**ESF Office**").

Main requirements for the FIHV and the ESF Office

The FIHV can be any entity, including any legal arrangement; corporation; partnership; or trust, established in or outside Hong Kong. On the other hand, the ESF Office must be a private company.

Both the FIHV and the ESF Office must have their 'central management and control' exercised in Hong Kong. Additionally, one or more members of the 'family' must cumulatively hold at least 95% of the beneficial interest.in the FIHV and the ESF Office. Any interest held by parents, spouse, descendants, siblings, niece, nephews, cousins, and their in-laws can be included in calculating beneficial interest.[7]

[1] Gazetted on 9 December 2022
[2] Under Section 14 of the Inland Revenue Ordinance (the IRO) Cap 112 of the laws of Hong Kong.
[3] The Inland Revenue (Amendment) (Taxation on Specified Foreign-sourced Income) Ordinance 2022 enacted on 22 December 2022 introduced a limitation to the Foreign-sourced Income Exemption (FSIE) regime in Hong Kong
[4] As defined under new Section 15 H (1) of the IRO, which includes non-Hong Kong sourced dividends, interest and disposal gains from equity interest
[5] Section 15 H (5) of the IRO
[6] The conditions include if the entities are considered 'MNE entities' as defined under Section 15 H of the IRO; and the exceptions include the 'substance' and 'participation' exception as set out in the FSIE regime

[7] Section 4 of the proposed new Schedule 16 E (the **"Schedule"**) to the IRO. The definition of 'children' is extensive including adopted / stepchildren/ illegitimate children of either the person or his spouse.

There are also elaborate provisions in the Bill recognising beneficial ownership of a natural person in an entity by having voting control, or via a trust structure. This means that if the FIHV (or ESF Office) is an underlying company held by a discretionary trust where one or more members of the family are named as a beneficiary (or a class of beneficiaries), the ownership requirement would be met.

Key financial parameters

The key financial parameter is that the total net asset value ("**NAV**") of the Schedule 16C assets (see below) of the FIHVs (and their underlying entities) managed by the ESF Office at the end of each tax year shall not be less than HK$240 million. It is anticipated a Department Interpretation and Practice Note ("**DIPN**") will be published to clarify how the NAV will be calculated and investments valued.

In addition, the minimum average number of qualified employees[8] of the FIHV must be adequate in the opinion of the Commissioner for Inland Revenue ("**CIR**") and in any event not less than two. The total amount of operating expenditure incurred by the FIHV in Hong Kong from carrying out investment activities each tax year should also be adequate and in any event not less than HK$2 million.[9] It is also expected that there will be further guidance on the substance requirement in a DIPN.

The profits received by the ESF Office (as opposed to by the FIHV) from providing family office management service should be at least 75% of the total profits of the ESF Office each year, where such profits should be subject to Profits Tax. The 75% safe harbour rule allows the ESF Office to derive income from third parties, though it is not the intention of this tax concession to benefit multi-family offices.

Qualifying transactions

Profits of an FIHV arising from Qualifying Transactions, meaning the profits arising from the disposal of assets listed under Schedule 16C[10], which consist of mainly traditional financial assets, will be taxed at the concessionary rate as long as such transactions are carried out in Hong Kong by the ESF Office.

At first glance it seems that the FIHV may only hold the Schedule 16C assets to qualify for the concession. However, the Bill actually further envisages that the FIHV may hold "**specified securities**"[11] in "**relevant**" or "**investee companies**" and these companies may themselves hold other assets, such as artwork, cryptocurrencies, non-fungible tokens, immovables located outside of Hong Kong. The profits from the disposal of such specified securities by the FIHV (but not the profits from the disposal of assets by the relevant or investee companies themselves) will still qualify for the concessionary tax treatment, as long as certain tests are met.

In addition, any trading receipts from Incidental Transactions such as interest income arising from the holding of the Schedule 16C assets by the FIHV will also benefit from the concession, provided that they amount to not more than 5% of the trading receipts of the FIHV from both Qualifying Transactions and Incidental Transactions.

Opt in

The FIHV can make an irrevocable election in writing to take advantage of the regime. There is no preliminary approval by the CIR required, but records of ownership and compliance should be kept by the FIHV and ESF Office which may be audited in the future. Families may apply for an advance ruling from the CIR if they wish to ensure their structures are eligible for the tax concession.

The future

With the regime, FIHVs managed by a team of asset managers sitting in Hong Kong who are affecting trades and investments for the FIHV should be able to take advantage of the concession as long as the conditions are met. Family asset holding structures, in particular those held by trusts, looking to take advantage of the concession should seek advice as soon as possible.

[8] i.e. someone who is a full-time employee in Hong Kong who carries out investment activities in Hong Kong and has the necessary qualifications

[9] Although the Bill refers to these requirements as applicable to the FIHV, the Legislative Council brief published on 7 Dec 2022 (the "**Brief**") sets out that the FIHV may still fulfil the requirements by outsourcing its core income generating activities to the ESF Office. The CIR will consider the totality of facts including the investment strategy of the FIHV, types of assets held by the FIHV etc. to determine if there is adequate substance

[10] Schedule 16 C of the IRO, which also applies to the "unified funds regime" under Section 20 AM of the IRO

[11] Meaning the shares, stocks, debenture, loan stock, funds, bonds or notes issued by the private company

Purchasing real estate in Singapore – What to watch out for

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Singapore's stable economy and political climate have made it an attractive destination for investors looking to diversify their portfolios. With the instinctive flight to quality, the real estate market has witnessed significant growth and is considered one of the most sought after in the region.

However, purchasing real estate in the current economic climate is not without potential pitfalls. Investors must be ever vigilant when it comes to reviewing penalty clauses in any kind of commercial contract.

In commercial contracts, parties may agree that, upon breach, the defaulting party is obliged to pay the innocent party a specified sum. Nevertheless, the rule against penalties (i.e. the penalty rule) serves to protect the weaker contracting party from oppression by its stronger counterpart. In this regard, the Courts have long differentiated between a specified sum which represents a genuine pre-estimate of loss (which is enforceable) from a sum which is out of proportion to any damages liable to be suffered and serves only to penalise (which would bean unenforceable penalty clause).

A related question arose in the context of a real estate contract in the recent Singapore High Court case of TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd. The court considered whether an investor would be entitled to a refund of monies paid pursuant to an Option to Purchase (**"OTP"**) when the monies were forfeited from his failure to exercise the OTP within the exercise period. The details of the case are set out in the following paragraphs.

TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd

An investor (the **"Investor"**) was interested in buying eight units in a new condominium development. The condominium developer (the **"Developer"**) had therefore issued the Investor eight separate OTPs with option periods of two years each, in consideration for the investor paying option fees roughly equivalent to 2% of the sale price of each unit.

The Developer intended to allow the Investor to occupy and/or sublease the 8 units prior to purchase. The terms of the eight OTPs therefore required the Investor to make a further payment of SGD 500,000 towards each unit (equivalent to roughly 18% of the sale price of each unit) (hereinafter, **"Further Sums"**) within four months of the OTPs being

being issued to the Investor, upon which the Developer would enter into a tenancy agreement with the Investor for the units.

Most crucially, the 8 OTPs all separately contained bundling provisions which required the Investor to make payment of the Further Sums for **all** of the eight units, before any of the OTPs could be separately exercised by the Investor. In other words, considering the option fees and Further Sums for all eight OTPs, the Investor was obligated to pay 160% of a single unit's sale price before he was even able to exercise any of the OTPs for the units. At trial, the Developer explained that the bundling provisions were included to account for the bulk discount that the Developer had given for anticipated bulk purchase of 8 units by the Investor.

After the Investor paid the Further Sums, he ultimately decided not to exercise any of the OTPs. This resulted in the Developer forfeiting the Further Sums for all OTPs.

Notwithstanding the fact that the OTPs contained express terms that allowed the Developer to forfeit the Further Sums paid by the Investor in the event that the Investor did not exercise the OTPs, the Investor was ultimately successful in his counter-claim against the Developer for the full refund of the Further Sums.

The two issues before the Court in deciding whether a refund was warranted were:-

1. Were the Further Sums a deposit or part-payment;
2. If they were part-payment, whether the Developer's right to forfeit the same a penalty.

Deposit vs Part-Payment

As the OTPs gave the Developer the right to forfeit the Further Sums, the Court first had to determine whether the Further Sums paid by the Investor were a deposit or part-payment. This was crucial as a deposit could be validly forfeited (i.e. not subject to the penalty rule), while part-payment could only be forfeited if it did not offend the penalty rule.

Under the law, a deposit must be reasonable as earnest money i.e. that it is meant to indicate a purchaser's interest and good faith in a transaction. In determining reasonableness, the Court will have regard to the customary amount that is usually collected in a specific context. In this particular case, the Court noted that a 10% deposit was customary in the context of contracts for the sale of land and/or immoveable property.

As the Further Sums (equivalent to roughly 18%) far exceeded this customary amount, the Developer bore the burden of showing "special circumstances" to justify this higher amount. Although the Developer alluded to the relatively long option period that was granted in this case (i.e. 2 years), the Court disagreed that the longer option period in itself qualified as such special circumstances. The Court therefore held that the Further Sums were to be characterized as a part-payment instead.

Whether forfeiture of the Further Sums contravened the penalty rule

Having found that the Further Sums were collected by the Developer as part-payment, the Court then went on to examine whether the forfeiture of the Further Sums was a penalty. In essence, a forfeiture of a sum paid would be deemed a penalty if it was imposed by Party A to penalise or punish Party B for breach or non-performance of the contract, as opposed to being a genuine pre-estimate of Party A's loss resulting from Party B's breach or non-performance.

In this case, the Court found that the forfeiture of the Further Sums infringed the penalty rule. In particular, the Court held that the fact that the Investor was required under the terms of the OTPs to pay the Further Sums to the Developer for all 8 units in order to exercise the OTPs for any of the units was clearly penal in nature, as it was imposed to compel the Investor to pay the Further Sums so that he could deal with each of the Properties individually. The Court also found that there was no proper reason why the Developer would require retention of the Further Sums to account for any loss it may suffer.

The Developer was therefore ordered to return the full Further Sums amount (amounting to SGD 4 million) to the Investor.

Concluding remarks

This case illustrates that it may be worth consulting a lawyer to see if certain clauses in your real estate contracts are enforceable, even if after you have already entered into the contract and have paid sums pursuant to it. In particular, purchasers or investors need not necessarily let the threat of the forfeiture of paid sums deter them from pulling out of an investment.

[1] [2022] SGHC 316

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Southeast Asia has been a growing region of economic relevance to Japan, with a staggering 40% of outbound annual investment from the country focused on the region last year. Singapore remains a longstanding regional hub for investment work, and home to the largest number of Japanese subsidiaries outside Japan.

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We operate a charity partner scheme in order best to be able to channel funds and efforts specifically to those partners. We have concluded that this is the best way to focus our firm's and our people's resources and to obtain engagement, raise funds and raise awareness.

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Our central aim is to empower our lawyers to give some of their time to serve the disadvantaged with their expertise. Our pro bono programme spans across all our offices and draws upon the many skills that our lawyers and legal staff have across our business.

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"Even in difficult cases, they sincerely discuss with clients and give accurate conclusions and advice.

They have a good business sense while clearly understanding the clients' position.

Chambers, Asia-Pacific Guide, 2023

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