EXPANDING CROSS-BORDER ROLES OF LEGAL TEAMS IN EMERGING SOUTHEAST ASIAN MARKETS

The challenges and opportunities for legal teams working in the developing economies of our region.

The duties of a general counsel (GC) have evolved over the years from a purely legal-jurisdiction-specific position to an important strategic advisory role. Cross-border activity is on the rise and emerging economies in Southeast Asia (SEA) present untapped opportunities for business expansion plans. Business units now rely heavily on internal leadership from their GCs to enable them to exert an important influence on their business locally, regionally and internationally. Legal teams are expected to keep on top of all regulatory changes that might affect the business, such as changes to ABC and AML enforcement; changes to data protection and privacy, including the extra-territorial effects of the GDPR; digitisation and understanding how to incorporate new technologies into one's business; and even industry-specific legislation. The 2018 Lex Mundi Summit, which saw 24 CLOs of multinationals gather in Amsterdam for a leadership workshop dedicated to exchanging and enhancing management practices, identified horizon scanning as a vital part of a GC's role as strategic adviser to the business.

However, as GCs are asked to do more with less, preparing for shifting business environments has become increasingly challenging. In this digital era, harnessing technology to promote a business and its operations efficiently is particularly demanding for GCs with oversight over jurisdictions where modernisation is underway but legislation has not yet fully adopted digitisation. Further, managing cross-border transactions within a region with disparate levels of development, in innovation and legal framework, can prove difficult. According to Najla Zamri:

> *… the capital markets sector is seeing a lot of technological innovation, with the use of blockchain and tokenisation to enhance efficiencies in the market. 2018 is seeing increased deal flow into SEA, and most businesses are seeking new technologies to facilitate traditional businesses, particularly in the form of capital raising and secondary offerings. However, the regulatory development in this space on a global level is varied, with developed economies taking a hard stance while emerging economies are still grappling with their approach. For example, capital raising is made cheaper and faster with tokenised assets, and it allows businesses of any size to undertake cross-border capital raising without the need for multiple counterparties to be part of the ecosystem. However, the lack of consistency in development of securities laws across SEA can hamper this exercise. GCs would need to solve for these idiosyncrasies by keeping abreast of the developments of each country within the region, to facilitate business needs in this new environment.*

In developed countries, where regulatory requirements are clear and supportive of new technological innovations, GCs can play an important role in identifying a clear scope for the permissible adoption of new technology to promote operational efficiency. One of the key examples in recent years has been the adoption of e-contracts, with strategic advice from GCs often essential to market entry. In SEA emerging market countries, it is often the case that law relating to e-documents can lack sufficient clarity and certainty, and can vary substantially from country to country. Their use is no less important and GCs must be equally adept at navigating the law affecting them. Saovapha Chutrakul, Legal Lead, Emerging North Asia Cluster at Pfizer, covering Thailand, Vietnam, Pakistan, Myanmar, Cambodia and Laos, notes:

> *… while I need to ensure that I know each location well enough to understand the market conditions and dynamics and thus be able to provide practical and solution-oriented legal support to our in-house clients, who are based in different countries and have different background and cultures, I expect technology and digital tools will play a significant role in making me better and more efficient in my regional role.*

In order to achieve an efficient strategic advisory role, GCs in emerging countries may therefore need to work twice as hard— especially in situations where the international standards of the home office require 100% compliance.

Although this article should not be treated as formal legal advice, it identifies and addresses some of the key issues surrounding this topic in Cambodia, Laos, Myanmar, Thailand, and Vietnam. The article is designed to assist GCs who are responsible for these markets in their regional strategic advisory role and enable them to direct business operations by using technological innovation to promote business efficiently and cost effectively, while ensuring that regulatory compliance with local laws is not compromised.

Is a digital contract 100% enforceable? Can it entirely replace a written hardcopy contract?

A common query from businesses is whether contracts can be executed electronically in SEA emerging market countries, and, if so, whether the e-contract can replace the legal requirement for a hardcopy document. Myanmar, Thailand, and Vietnam have adopted the same principle, whereby "electronic transactions cannot be denied legal effect, validity or enforceability solely on the grounds of their being made through electronic technology".

The specific law in these countries further elaborates that e-contracts are permitted, so long as they comply with the specific requirements stipulated under the law (e.g. the e-contract must be generated in a form that is accessible and usable for subsequent reference, without its meaning being altered). Once these requirements are fulfilled, the e-contracts are validly enforceable and can entirely replace the hardcopy contract. Laos also has a similar concept of law that permits e-contracts to be created and used, thus replacing the use of traditional hardcopy contracts.

It remains to be seen whether these concepts of electronic transaction law can be expanded to include smart contracts made through blockchain technology, and whether these can also be acceptable and enforceable in accordance with this law. Since the concept of a blockchain dictates that amendment of content within a block (the contract) is impossible after it has been created, one could argue that blockchain-based "smart contracts" should be acceptable and enforceable in these four countries. As smart contract execution relies on the actual drafting of legal obligations and rights, GCs need to acquaint themselves with how the technology in smart contracts operates in order to be precise with the drafting of these contracts. The technological execution is only as good as the input; thus, GCs need to ensure that the drafting of legal rights and obligations are coherent enough to fit into computer codes.

At present, Cambodian legislation on e-contracts differs from similar laws adopted by its neighbours. Sophea Sin, local counsel for Tilleke & Gibbins (T&G), Lex Mundi member firm for Thailand, has identified that:

> *… although not expressly recognised under the current law, provided that the contract meets the basic validity requirements under the Civil Code, a digital contract should be fully enforceable to the same degree as a hardcopy. The only exception is for contracts requiring notarisation, such as transfers of land or registration of encumbrances. However, there is no case law on this subject, and currently, digital contracts are carried out on a trust basis between the contracting parties.*

Closer attention is required when a business elects to adopt the e-contract approach entirely without a hardcopy in Cambodia, and it remains inconclusive whether another set of hardcopy contracts would still be required.

Is it legally permissible to send a notice or file electronically?

The consensus in all five jurisdictions is that the law does not clearly specify this—except in the case where the notice is served between parties in performance of the contractual obligations, provided that both parties had contractually agreed to this e-notification approach in advance. However, for all five countries, unless expressly permitted by law (e.g. Myanmar's Electronic Transaction Act), e-notices should not be used if notice needs to be formally served or filed with a government authority.

The recommendation would be for parties to continue to use traditionally accepted methods (registered mail or hand delivery). T&G's counsels in Laos, Dino Santaniello and Saithong Rattana, observe that:

> *… in practice, emails can be used as a formal notice/communication between parties, including colleagues and partners, in the private sector only. Emails cannot be used as a formal method of notice or communication with the public sector (government offices).*

In Vietnam, T&G's registered foreign lawyer, Waewpen Piemwichai, commented that:

> *… electronic submission is increasingly being accepted by the authorities. As a matter of practice, many Vietnamese authorities, such as labor, investment, and tax authorities, require submission in the form of both electronic and hardcopies, whereby electronic application files and documents must be submitted in advance, before their hardcopies can be submitted.*

Can documentation be stored electronically and still meet statutory data-retention requirements?

Another contentious legal point that could prove very costly for business operators, particularly long-established entities, is related to statutory data-retention requirements. For example, Cambodia requires companies to maintain their accounting records for a period of 10 years. If there is no requirement for the records to be in hardcopy format, and electronic records are acceptable, time and costs would be saved.

In Cambodia, there is no specific law that would prohibit retaining such records in an electronic format. Market practice shows that data retainers must ensure such information can be retrieved and printed when requested by competent authorities. In Laos, Thailand, and Vietnam, the general answer to this point should be "yes", unless the law or any authority's guideline specifically requires that it must be kept in a hardcopy format. These requirements seem to be logical and realistic; a business operator should not be required to print out records simply for the purpose of storing them, especially when the filing or transaction that they relate to was made electronically.

The current approach adopted in Myanmar appears to differ from these other countries, as the general answer to whether records can be made electronically appears to be "no", except where certain legislation and regulations permit such practice. However, this approach is subject to change (i.e. the scope could be broader) when the new Companies Act comes into effect on 1 August 2018.

Can electronic transactions and information be treated as evidence at the local court?

The answer in all five jurisdictions is generally "yes". The most recent change to permit the practice occurred in Myanmar, where the Evidence Act now expressly includes electronic documents in the definition of "documents", allowing electronic documents to be treated the same as paper documents.

In all five jurisdictions, the party that uses such documents as evidence generally has the burden of proving their integrity and meeting accessibility conditions as set out by law.

Can board and shareholders' meetings be conducted via a video conference?

Can participants join annual shareholders' meetings via a video conference and, if so, will attendance validly be counted as a quorum, and can the vote be counted?

Only Thailand and Vietnam permit attendance via video conference, provided specific requirements are fulfilled. In Cambodia, Laos, and Myanmar, the law is still silent on this point at the time of writing, but this is changing as the countries modernise their company legislation. T&G's local counsel in Myanmar, Nwe Oo, identifies that the new Companies Act, which becomes effective on August 2018, "allows directors' meetings to use video conferencing and by any other instantaneous communications medium, provided that it is consented to by all directors or as provided in the company's constitution".

Although there is still no clarity in Cambodia, the law allows board and shareholders' meetings to be conducted via means other than a physical meeting. This means that conducting meetings via a video conference could be acceptable if all parties agree, and if it is permitted under the company's articles of association (Articles). In Laos, the law is silent for shareholders' meetings. With regard to board meetings, however, the board may hold informal meetings through any means of communication. Further, the adoption of resolutions in informal meetings must be determined in the Articles, when these resolutions are passed by specific means of communication. Articles will therefore frame the possibility of conducting meetings by video conference.

What are the strategic challenges and opportunities related to digitisation?

Doing business in emerging markets can often throw up challenges that are unfamiliar in other jurisdictions, and the developing markets of SEA are no different. Although the law in the five jurisdictions covered by this article remains uneven, each of these countries has some measures in place to address e-contracts and modernisation is underway. Although progress may be slow, it is clear that each of these countries is seeking to create an environment in which digital business can operate. This makes sense—internet use in SEA is increasing more quickly than anywhere else in the world, thanks to inexpensive and readily available smartphones and mobile data plans. Although these countries may not have the digital business chops of more developed countries, the opportunity for digital business is certainly there for those willing to put the work in, and the benefits of first-mover advantage cannot be underestimated.

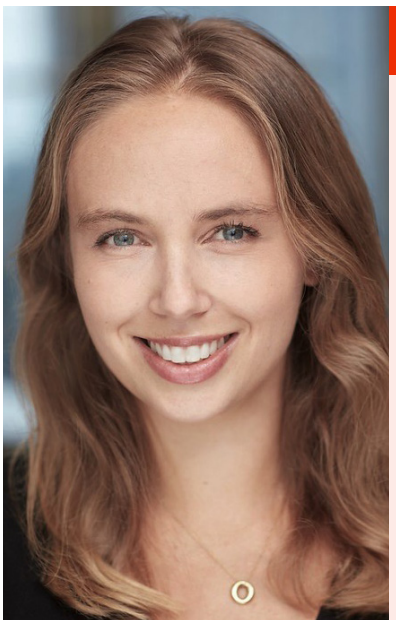
A thorough understanding of the legal regimes applicable in each jurisdiction can allow GCs to guide their companies through strategic market entries, or strategic product launches, with relative ease. However, investing in indigenous knowledge and deep-rooted local connections on the ground are critical to getting the right information about how business models are set to advance with the modernisation of local legislation. Doing so proactively can mean the difference between a jurisdiction-specific GC who is only consulted when a lawsuit needs to be avoided, and a GC acting as a strategic regional advisor who sustainably contributes to a company's growth. By tapping into the local capabilities and connections of indigenous firms, GCs ensure that they stay at the forefront of evolving legislation in the digital era.

Najla Zamri

As co-founder & General Counsel, Funder Exchange (FEX), Najla has enjoyed a diverse legal career and has leant her considerable legal expertise to a variety of roles. These have spanned launching an e-commerce start-up in London, to being part of the team responsible for introducing the Netting of Financial Agreements Act 2015, which promoted Malaysia as a transparent and efficient market for derivatives. A Malaysian citizen, Najla holds an honours degree in law from Queen Mary University of London.

Athistha (Nop) Chitranukroh

A partner in Tilleke & Gibbins' corporate and commercial group, Athistha (Nop) is one of the lead partners for the firm's insurance and technology practices. She represents multinational and local corporations on a range of key matters, including privacy and data protection, fintech/insurtech, and tech-related regulatory compliance across Southeast Asia. Prior to moving in-house, she worked at the Bangkok office of a leading international law firm.



Jenny Karlsson

Prior to joining Lex Mundi, a global client services platform with 160-member firms across more than 100 countries, Jenny worked as an international corporate lawyer, both in private practice and in-house, in Asia, Europe and North America. Jenny is a dual-qualified lawyer in New York and England & Wales and holds a Bachelors of Law degree from Durham University and a Master of Laws degree from University College London.