# with ... insights

March 2022

withersworldwide

# Contents

# Foreword

The global economic recovery around the pandemic has been a crucial impetus for immense transformation. This has proven to be especially prominent in Asia and its emerging economies.

As we transform our businesses and evolve in our personal lives, we have learned that attaining success in the path of recovery lies in the way we can both innovate and disrupt as stakeholders in a new digital ecosystem catalysed by flexibility and adaptability.

In Asia, we welcomed 15 new partners and special counsels who are highly regarded for their work in areas of technology, private capital, real estate, hotels and hospitality, banking and finance, life sciences and dispute resolution. Their combined wealth of experience enhances our expertise, widening the breadth and depth of service we can provide to our clients. This further augments the firm's capabilities in dealing with the ever-developing Asian markets.

Asia's technology and start-up scene is growing rapidly, with an increasing volume of investments and a rising number of unicorns emerging. To service the complex and ever-growing needs of the sector, we announced the launch of **Withers tech in Asia** in 2020, comprising over 20 specialists across the region with deep experience in funds, tax, corporate, intellectual property and data protection focused on serving the tech sector.

We continue to build on our strengths with regional accolades that further cement our reputation in legal circles in Asia. We have been recognised in the Chambers Asia-Pacific Guide 2022 across 10 practice areas and in the newly launched Chambers Greater China Guide 2022 with Band 1 ranking in the area of Family and Matrimonial Law in China. Similarly, we have also attained Band 1 rankings in the areas of Private Wealth Law in Singapore and China in the Chambers HNW Guide 2021. In The Legal 500 Asia Pacific 2022 rankings, we were recognised in 14 separate practice areas across Asia. We have also received positive affirmations at the WealthBriefingAsia Awards 2021, Benchmark Litigation Asia-Pacific 2021 rankings, Doyle's Guide 2021 and the 14th edition of the Global Arbitration Review (GAR).

In the sixth edition of With… Insights, we commemorate Withers' 125th year of service as your trusted advisors and share the interesting and impactful work of various lawyers across our Asia-Pacific network, geared towards championing your success through change. We hope that you will have a good read and we wish you an amazing year ahead!

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# In the spotlight

From left: Joel Shen, Chen Guan Feng, Koh Tien Gui, Alvin Lim, Liu Hailing

From left: Akinari Nakano, Paul Jebely, Michael Chik, Joseph Chu, Shaun Leong

From left: Ivan Cheong, Yeoh Lian Chuan, Koh Chin Chin, Wong Wei Ling, Kohei Kobayashi

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125 shaping the future together

## Commemorating 125 years

This year, Withers celebrates 125 years of serving as trusted advisors to successful people and businesses with complex legal needs. Commemorating this milestone with the theme 'Shaping the future together', the firm will be launching global initiatives towards creating an increasingly sustainable world which include taking steps to minimise our environmental impact and lowering our carbon footprint.

We have seen a year of exceptional growth in our capabilities across practice areas and markets. In Singapore, the entrance of corporate partner Joel Shen, banking and finance partner Chen Guan Feng and real estate partner Koh Tien Gui boosts our technology, finance, investment and real estate expertise in Asia amidst growing momentum in fintech and venture capital investments across the region. Joel co-heads Withers tech in Asia which comprises over 20 experienced specialists focusing on serving the tech sector, including special counsel Alvin Lim in the intellectual property and technology team. Guan Feng's specialised focus on private corporate debt restructurings and cross border banking and finance reinforces both of the firm's full-service practices and taps into all market opportunities. As the hotels and hospitality market in Asia poises for a strong recovery post-pandemic, we boosted our hotels and hospitality practice with the hires of partner Koh Tien Gui and special counsel Liu Hailing. Tien Gui is a hotels and hospitality specialist with extensive experience as a legal advisor and as a hospitality entrepreneur, investor, operator, and in-house lawyer with major hotel groups. Special counsel Liu Hailing complements the team with her expertise which spans a range of transactions relating to hotel management and ownership.

In Tokyo, our real estate team is strengthened by the joining of counsel Akinari Nakano, who advises Japanese and international investors and financial institutions on real estate acquisition and financing, real estate securitisation, onshore/offshore joint ventures, asset management and financial regulation matters.

In Hong Kong, we welcomed aviation partner Paul Jebely who is a leading global commercial aviation industry lawyer. Paul joined the firm as head of our newly launched global asset finance practice. He represents ultra-high net worth individuals and their business enterprises on all aspects of private aviation. He also regularly

counsels such individuals in connection with the acquisition, sale or financing of other high-value private assets, ranging from superyachts to rare collector cars.

The timely arrival of litigation and arbitration partners Michael Chik, Joseph Chu and Shaun Leong strengthens our dispute resolution team in Hong Kong and Singapore as demand for commercial dispute resolution services continues to grow. Michael is an experienced litigator, representing a broad range of institutional and individual clients. He is also a trusted advisor to corporate clients on regulatory matters including compliance issues, such as those in relation to the Securities and Futures Ordinance and the Listing Rules of the Hong Kong Stock Exchange. Joseph's practice focuses on commercial disputes and regulatory matters, advising clients in international arbitration, general commercial disputes, tax and trust disputes, insolvency proceedings and regulatory investigations, with a particular focus on regulatory investigation and cross-border litigation. Shaun focuses on developing and employing successful strategies to achieve clients' objectives in cross-jurisdictional disputes, with more than a decade of experience in complex cross-border commercial disputes across a myriad of sectors.

Experienced family law partner Ivan Cheong joins as a pivotal part of our Asia family law team, spearheading the development of our family and divorce practice in Singapore. Ivan represents clients in all aspects of family and divorce matters including divorce proceedings, custody disputes, Mareva Injunctions, maintenance, division of assets and family violence matters, as well as advising and assisting clients on the drafting of pre-nuptial and post-nuptial agreements.

To support the growing demand for advice on the deployment of private capital, our Singapore team is joined by private capital and tax partners Yeoh Lian Chuan and Koh Chin Chin, and special counsel Wong Wei Ling. Lian Chuan focuses on tax, financial regulation, corporate law and compliance for private and corporate clients, while Chin Chin specialises in succession planning for family businesses, family governance and family office set-up, advising on tax, legal and governance matters. Wei Ling advises on a broad range of corporate law, securities law and funds related matters, including experience gained while working in China and Singapore. Our tax team is also joined by new partner Kohei Kobayashi in Tokyo. Kohei's practice involves advising clients and international investors on international tax matters. He also advises high-net-worth individuals on Japanese tax planning matters.

To provide you with the best client experience, we are also pleased to announce that we have moved into our new office in Japan on the 21st floor of the JA Building. Overlooking views of the Tokyo skyscape, our new office space comprises of conference rooms equipped with the latest technology and virtual meeting capabilities. The move will better accommodate the team's growth and enable us to expand to better serve our clients.


Withers' Tokyo office at JA Building

## Enabling contributions to a more sustainable world

For over a century, our clients have used their success to make the world a better place to live in. The rise of environmental, social and governance ("**ESG**") matrices has been propelled by investors' desire to put their capital into sustainable investments which create long-term value into and through responsible business operations.

Our team in Japan recently advised on the launch of MPower Partners Fund L.P., Japan's first ESG focused global venture capital fund led by three female Japanese financial industry experts. The target of capital commitments is anticipated to be US$150 million, and currently committed limited partners include three leading Japanese financial institutions which are aligned with MPower Partners' mission of driving ESG throughout the venture ecosystem, alongside other global investors.

In Singapore, our team advised EDB New Ventures on the incubation of and on the investment in energy management company NaviX Solutions, alongside energy and automation multinational Schneider Electric. The company is expected to create about 100 new jobs in customer service, technical support, finance, human resources and logistics, amongst others in Singapore. The venture also advances Singapore's commitment to ESG and sustainable development by meeting the UN's sustainable development goals in its 2030 agenda.

## Advocating transformation and success

Earlier this year, Withers successfully helmed a global campaign to highlight inspiring stories of transformation and innovation from some of the world's foremost business leaders. Going beyond simply listing our services or track record, we decided that the best way to showcase what we do for our clients would be to place them and others we work closely with at the front of our campaign.

In Asia, we shared pivotal moments in the journeys of Stanley Szeto, executive chairman of Hong Kong listed Lever Style; Pang Xue Kai, the co-founder of Tokocrypto, an Indonesia-based cryptocurrency exchange; Helga Angelina, social entrepreneur and the co-founder of Burgreens and Green Rebel; Annabelle Bond; Mike Culhane of Pepper Group; Lin Fengru and Max Rye, co-founders of Singapore's TurtleTree; and Dr Sinuhe Arroyo, CEO and Founder of Taiger.

From experiences in business transformation to personal accounts in defying seemingly insurmountable odds, these stories of success reached over two million readers and podcast listeners in Asia; and were published in The Business Times in Singapore and The South China Morning Post in Hong Kong.

For more information, scan to view the campaign








Featured: Stanley Szeto of Lever Style, Helga Angelina of Burgreens and Green Rebel, Annabelle Bond, Lin Fengru and Max Rye of TurtleTree, Pang Xue Kai of Tokocrypto, Dr Sinuhe Arroyo of TAIGER, Mike Culhane of Pepper Group

## Testament of our legal services

During this time of economic opportunity and uncertainty, we have had the distinction of supporting our clients in areas of growth and development, both personally and professionally.

In doing so, we have been recognised as a leading firm by the Chambers Asia-Pacific Guide 2022 in 10 practice areas across the Asia-Pacific (ex-China) region which includes practice areas for Tax, Real estate and Investment funds in Japan. We were similarly ranked Band 1 by Chambers Asia-Pacific Guide 2022 in the area of Family and Matrimonial Law in China.

We continue to be recognised for our market-leading expertise in serving private clients by the Chambers High Net Worth Guide 2021 with Band 1 rankings in the areas of Private Wealth Law (Domestic Firms) in Singapore and Private Wealth Law (International Firms) in China.

In The Legal 500 Asia Pacific 2022 rankings, we were recognised in 14 separate practice areas across Asia. Notably, we achieved Tier 1 rankings for Tax and Trusts in Hong Kong and Private Wealth and Tax in Singapore.

At the WealthBriefingAsia Awards 2021, our Private Client and Tax team in Asia achieved three wins including Tax Team of the Year (Greater China), Philanthropy Offering of the Year and Excellence in Servicing North American Clients (Greater China). Our wins demonstrate our ability to consistently provide exceptional client services to not only our Asian clients but those that are based overseas.

Our Hong Kong and Singapore practices received top accolades in the Benchmark Litigation Asia-Pacific 2021 rankings. Our Hong Kong practice was ranked Tier 1 in the area of family and matrimonial; and recommended in the areas of commercial and transactions, and international arbitration. Our Singapore practice was recognised as a recommended firm in five areas including commercial and transactions, insolvency, labour and employment, private client and white collar crime.

Withers has been ranked for the seventh consecutive year as top divorce law firm by Doyle's Guide Leading Family and Divorce Law Firms – Hong Kong 2021. We were also recognised as a leading law firm for employment and labour by Doyle's Guide for Leading Employment and Labour Law Firms – Singapore 2021; and for technology, media and telecommunications by Doyle's Guide for Leading Technology, Media and Telecommunications Law Firms – Singapore 2021.

We are also pleased to be recognised for our strong expertise in resolving complex commercial disputes in the 14th edition of the Global Arbitration Review (GAR) list of top 100 firms in arbitration.

# Parental rights for same-sex partners in Hong Kong and Singapore

Despite the advent of LGBTQ rights in Southeast Asia in the past few decades, parental rights for same-sex partners remain limited. This article offers insights into the challenges faced by same-sex partners in Hong Kong and Singapore who are seeking to become parents, as well as significant rulings that shed light on the future of LGBTQ rights in both cities.

## Hong Kong

In a landmark case before the Court of First Instance, the High Court ("**CFI**") ruled that the non-biological mother of children born by her prior same-sex partner should be granted guardianship rights, joint custody, and shared care and control over their children.

Same-sex marriages and civil partnerships are not recognised under the laws of Hong Kong. Many opt to have children with the assistance of a sperm donor but are faced with the conundrum that only the biological partner is recognised as the legal parent, despite both parents' intent to co-parent with equal involvement in their children's life.

A child's day-to-day routine may not be affected by this omission, but the ramifications for the non-biological parent may, however, be catastrophic. They potentially have no legal rights over their child in unforeseen extenuating circumstances, such as the sudden death or incapacitation of the biological parent, or the breakdown of their marriage. This is also a distressing

circumstance for the child, who will eventually have to grapple with the discrepancies between the rights of their parents and potentially a less-than-satisfactory legal outcome.

In this case, the Applicant is the biological mother of the children and the Respondent is her same-sex partner. With the assistance of a sperm donor, the Applicant gave birth to the couple's first child in Australia in 2010, with both mothers registered as his legal parents under Australian law, and their second child in Hong Kong, where it was not possible for the Respondent to be listed as the child's parent. Following the couple's separation, they transitioned into a co-parenting arrangement with equal involvement in their children's lives. The application was issued in order to formalise the non-biological partner's parental rights should anything happen to the birth mother amidst the current Covid-19 pandemic, or in the future.

In considering the matter, the Court called for a Social Welfare Report, which confirmed that both parents have always had de facto shared care and control of the children and that the children were accustomed to their family make-up.

The Court expressed it would not be in the children's best interests if the application was unsuccessful, as the children are close to each other and to both mothers.

As there was no dispute between both parents in their co-parenting relationship, the Court was satisfied that the Respondent be granted guardianship rights, joint custody, and shared care and control.

This case comes as a victory for the LGBTQ community, as same-sex parents may now apply to have equal parental rights over their newborn children. This follows on from the CFI's decision on 18 September 2020 in respect of Ng Hon Lam Edgar v. Secretary of Justice and Nick Infinger v. Hong Kong Housing Authority, whereby the CFI ruled that the exclusion of same-sex married partners' right to claim as "surviving spouses" under the Intestates' Estates Ordinance and the Inheritance (Provision for Family and Dependents) Ordinance constituted unlawful discrimination on the grounds of sexual orientation. The CFI's decision marks yet another milestone in the LGBTQ community's fight for equality.

## Singapore

Singapore does not recognise same-sex marriage and children are only recognised as legitimate if they are born in a recognised marriage.

As such, same-sex couples who have children through alternative reproductive routes face a constant uphill battle, as they have no legal rights to these "illegitimate" children.

Singapore's Constitution states that the biological mother of an illegitimate child is treated as their parent for the purposes of acquiring citizenship. As reproductive assistance services in Singapore are not permitted to provide or facilitate surrogacy services and single women or women in same-sex relationships are not permitted to receive intrauterine insemination, the biological mother of children conceived via alternative reproductive routes are, more often than not, a non-Singapore citizen. Consequently, it is very difficult for same-sex parents to be granted legal parental rights over their children in the absence of a dispute between the parents.

To support citizenship applications for their children, same-sex couples have applied to the Family Court for custody, guardianship, and adoption orders in the face of multiple failed attempts to secure long-term arrangements with Singapore's Immigration and Checkpoints Authority ("**ICA**"). However, the Family Court has definitively ruled that custody orders for a biological gay parent for his son who was conceived through surrogacy are unnecessary and that its jurisdiction should not be invoked in matters concerning the ICA. With respect to non-biological parents (i.e. the other partner in the relationship), the Family Court has also declined to appoint them as the child's guardian or to award both same-sex parents joint custody or shared care and control.

Adoption is only possible for biological parents, which means that non-biological parents have no rights to the child. Furthermore, it is not permitted for a man to adopt a female child. To date, there has only been one successful case of adoption by the biological father of his son. However, the Court has made it clear that while the applicant did not set out to violate public policy in Singapore, which does not permit the conception of a child through surrogacy and in a same-sex family unit, it would infer a future applicant's similar pursuit of an adoption order in the same manner as intending to violate public policy, which would warrant the Court to weigh against the approval of an adoption order in the future.

For further information on how Withers can help, please feel free to reach out to Jocelyn Tsao, Ivan Cheong or your usual Withers contacts.

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# Family offices: a new driver of impact and innovation

In recent years, family offices around the world have become increasingly active and sophisticated in their investments into innovative causes. Various interesting trends have emerged, but two are projected to gain prominence in 2022 and beyond.

The first is the prevalence of impact and sustainability innovation. Entrepreneurs are increasingly invested in creating sustainable solutions to everyday problems. As these are capital-intensive, the pace of change is, to some extent, dependent on the size of available capital.

The second is the meteoric rise of "new money" family offices and the latest generations of legacy family offices, which are seeking to make a difference through influential investments in the area of sustainability.

## From economic return to impact investment

The increase in popularity of venture capital investing in the mid-80s gave rise to the creation of tax-efficient investment structures, which incorporate entities such as limited-partnership funds. These are structures which, by their design, are intended to have a relatively short life and designed to attain a high internal rate of return ("**IRR**"). However, a focus on IRR does not fully align with investors who aspire to make a societal impact or achieve a triple bottom line (profit, people and planet).

As a broad observation, the closer one is to the source of capital, the greater the emotional investment, which is why family offices are well-positioned to make a difference.

It is observed that family offices are gradually moving away from wealth creation and preservation towards philanthropic causes they champion.

The decision to invest directly as a lead in a syndicate or into a focused fund, such as an Environmental Technologies Fund ("**ETF**"), may depend on the internal infrastructure of the family office and whether it has the capacity to perform due diligence and make direct investments.

Whether a family office chooses to invest directly or through a focused fund, we believe that the capital has the potential to unlock rapid growth in the sector and drive substantial change. Nowhere is this truer than in the developing markets of Southeast Asia, where vast amounts of wealth are concentrated in the hands of a small number of powerful business families. In Indonesia, the largest economy in South-east Asia, private wealth has been responsible for funding and producing some of the largest and most prominent technology businesses, such as Gojek, Tokopedia, and Traveloka. It has played a pivotal role in shaping the country's technological landscape.

## The decade of purpose

“We are emerging from a decade of convenience and entering the decade of purpose,” said Stephane Kurgan, current Venture Partner at Index Ventures and former chief operating officer of King.com. The next decade is when the United States will see the largest transfer of generational wealth in its history. This view is affirmed by industry leaders such as John Seeg, Managing Director and the Global Head of Strategy and Investor Relations for BlackRock Private Equity Partners.

Furthermore, the next generation of investors are more aligned with the existing generation of entrepreneurs. This view is supported by findings of the Global Impact Investing Network’s 2019 report on Sizing the Impact Investing Market, which states that the impact investing sector has doubled in size over the last two years and will only continue to grow.

From a private capital perspective, the 2019 Global Family Office Report found that more than 25% of family foundations are actively engaged in sustainable investing, with climate change, clean water, and health issues as predominant concerns. All of these statistics suggest a continual uptick in family office investments in sustainable causes that benefit the world at large.

## A background of chaos

During the global financial crisis between 2008-2013, economies across the globe went into freefall and countless individuals lost their jobs and homes. Yet amidst the bleakness, we witnessed the emergence of fintech, which thrived on the disruption to the status quo, the availability of highly skilled individuals, and the glaring deficiencies in the banking and financial services sectors. Twelve years on, fintech startups now dominate the financial services landscape, many of which have become household names: Ant, Revolut, Wise, Raisin, Klarna, Grab Pay, and Starling Bank, to name a few. These companies have revolutionised the traditional banking sector, particularly in developing and under-banked markets like Indonesia and Myanmar, and reshaped the ways in which business is conducted.

It is therefore reasonable to believe that the chaos of the ongoing Covid-19 pandemic will effect a similar, if not greater level of disruption across various sectors. However, in comparison to 2008, the innovations brought to market from this year onward are much more likely to have impact and sustainability woven into its core. Furthermore, the total value of investment offered to fintech companies rose exponentially from just under US$1 billion in 2008 to an estimated US$35 billion in 2018, as demonstrated by fintech company Kantox's research. Impact-driven entrepreneurs are projected to receive an unprecedented amount of capital from private investors to fund their endeavours.

Today, we stand at an inflexion point: tech innovation with impact and sustainability at its core is developing at lightning speed and requires highly aligned capital to realise its full potential. We believe that family offices can play a pivotal role in propelling the growth of sustainable tech innovation.


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# 10 things to know before entering into a pre-nuptial agreement

Couples who opt to sign a pre-nuptial agreement, or a *"pre-nup"*, before their marriage appreciate the clarity that it offers with regard to the couple's individual and joint financial matters. Pre-nups are effective in avoiding acrimony, expensive legal bills, and drawn-out court proceedings. Here are 10 things to know if you and your partner are interested in entering into a pre-nuptial agreement.

### 1) Where you choose to sign matters

The country that governs your agreement impacts enforceability, which is why it is important to have an agreement drafted by specialist family lawyers who have a sound network of family lawyers in other countries. This allows you to ensure that all international elements are considered in the agreement.

### 2) Third parties cannot be bound by a pre-nuptial agreement

As a pre-nuptial agreement is only between a couple, third parties (e.g. parents, siblings, etc.) cannot be bound. If this is necessary, it should be raised to the family lawyer, who can explore alternative solutions to protect your rights vis-à-vis a third party.

### 3) A pre-nuptial agreement is not the be-all and end-all

A common misconception is that pre-nuptial agreements cannot be changed once they are signed. While this is true in relation to the specific document, it does not prevent couples from signing post-nuptial agreements to tackle new issues that arise during their marriage or mutually consent to updating any of the terms originally agreed upon.

### 4) Refrain from making arrangements relating to children

It is inadvisable to make pre-emptive arrangements for any children conceived during the marriage in the event of a divorce, as such agreements are rarely upheld by the court. This is because the child's best interests are best determined by the court at the time of the divorce. If a divorce is imminent, it is preferable to document any arrangements relating to children in a post-nuptial agreement.

### 5) Seek independent legal advice

Having independent legal representation ensures that you and your partner are able to navigate the process and reach an understanding on how your affairs will be settled in the event of a divorce. It also ensures that the agreement is enforceable, as one party cannot later claim ignorance of the agreement.

### 6) Disclosure is paramount

Couples need to make full and frank disclosure of all assets and financial resources they presently have, or assets which they believe they will acquire. This includes any inheritances or gifts they might receive in their lifetime. Failing to do so could render the agreement unenforceable.

### 7) Understand what assets you own

It is crucial to be aware of what assets you have, and which should be included in a pre-nuptial agreement. Is a joint bank account shared with your parents considered a personal asset? What about distributions from a trust fund from which you receive occasional payouts? This is where hiring family law specialist is crucial, as they can create a comprehensive pre-nuptial agreement that is tailored to your unique circumstances.

### 8) Acknowledge the difference between assets acquired before and during a marriage

In Singapore, assets acquired before a marriage will not be split in a divorce, unless they are used by the spouse during the marriage, or if they have been liquidated to acquire another asset during the marriage. For assets acquired during a marriage, these will likely be split between both parties upon divorce. However, if both parties reach a mutual understanding regarding what assets should or should not be split upon divorce, this will be reflected in the pre-nuptial agreement. This practice is recommended to ensure clarity over all financial matters and help couples save substantial time and legal fees.

### 9) Discuss the need for a pre-nuptial agreement with your partner

Both parties must willingly sign a pre-nuptial agreement. Beyond the moral concerns, coercing your partner into signing something they are not comfortable with renders a pre-nuptial agreement void. Broaching the topic with your partner may incite feelings of uneasiness and displeasure, but a pre-nup is the best way to plan for the future. It may not seem romantic or even necessary, but should the unwelcome happen, it will save you and your partner substantial time and effort.

### 10) Be clear about your intentions

Last but not least, be clear with your partner and lawyers involved about what your intentions are with the agreement. While marriages may change, the capacity for open and honest dialogue should always remain. Doing so prior to signing a pre-nuptial agreement is an ideal first step, as you can only benefit from clarity about your wishes and expectations.

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# Is it necessary to have a Chinese notarised will to deal with my assets in the mainland?

Many Hong Kong residents hold assets in Mainland China - from real estate in Beijing, Shanghai or the Greater Bay Area; to bank accounts (opened mainly for the utilisation of certain online payment platforms in order to enter into e-commerce with vendors in Mainland China that offer a diverse and coveted range of products).

A question frequently asked by clients in Hong Kong when putting in place their succession plan is whether a separate will is needed to deal with their mainland assets, or whether they can simply rely on a will governed by Hong Kong law. The common approach to date is to have separate wills - a *"notarised will"* (公证遗嘱) in Mainland China to deal with mainland assets; and a "global will" to deal with the rest of the assets worldwide except for assets located in the mainland. A notarised will is one made in a notary office in Mainland China, witnessed by a notary and usually drafted in a format prescribed by the notary office.

This is due to a variety of reasons: The PRC Succession Law (继承法), which was enacted in 1985, (the "**Old Law**") recognised the testamentary freedom of individuals and the validity of several types of wills, including handwritten will (自书遗嘱); a will written by others on behalf of the testator (代书遗嘱) and a notarised will; but once a notarised will is put in place, it cannot be amended or revoked by other types of will. A notarised will therefore takes precedence over other types of wills and provides certainty. Further, since an *"inheritance right certificate"* (继承证明书) issued by the notary office is required before assets in Mainland China may pass to the beneficiaries following the death of the testator, it is logical that a notarised will be preferred as the notary office will unlikely raise further queries when such will is examined in the *"notarisation of inheritance"* (继承公证) process.

In addition, there are no express provisions in the Old Law recognising the validity of a printed will, which is usually the format of a Hong Kong will prepared by solicitors. A printed will may thus be considered invalid in Mainland China under the Old Law and if a person only has a printed will, intestacy may result with respect to his real estate located in Mainland China.

Such real estate would then pass under intestacy to his "Statutory Successors" (法定继承人) (i.e. his parents, children and spouse in the first tier (第一顺序) in equal shares, failing which to his siblings and grandparents in the second tier (第二顺序) equally).

However, the Old Law no longer applies following the enactment of the Civil Code (文法典)2020, which came into effect on 1 January 2021. The 'Book on Succession' (继承篇) in the Civil Code provides a few important changes, including:

- a printed will (**打印遗嘱**) made on instruction of the testator and executed in front of two witnesses is recognised as valid;
- a notarised will no longer takes supremacy;
- the testator may appoint an executor to administer the estate and the duties and powers of an executor are set out; as well as who may act as executor in default of appointment; and
- the testator has freedom to create a *'testamentary trust'* (遗嘱信托).

These changes, coupled with the conflicts of law legislation which came into effect in 2011 in Mainland China, have the effect that a printed form of will validly made in Hong Kong by a Hong Kong resident governing his global assets, including any real estate (immovables) and bank accounts (movables) in Mainland China, should - subject certain conditions as mentioned below - now be recognised as valid and effective in Mainland China. The executor, selected under the Hong Kong will, should also have the authority to deal with the notarisation process in Mainland China.

When drafting the distribution provisions concerning the real estate (immovable assets) in Mainland China in the global will, certain basic requirements under the Civil Code should be taken into account:

1. The testator should make provision for his Statutory Successors who have no ability to work (缺乏劳动力) nor source of income (没有生活来源).

2. If the testator intends to make a gift of such assets to any *"Donee"* (受遗赠人), i.e. a person other than any of the 'Statutory Successors', he should consider adding a provision in the will allowing the Donee to make a disclaimer at any time before distribution. Otherwise, the law provides that the Donee is deemed to have disclaimed unless he indicates his acceptance within 60 days after learning about the gift. The validity of such provision is still to be decided but the Civil Code does not state that the 60 days deadline cannot be overridden by express provision in the will.

3. The recognition of the creation of a testamentary trust is an exciting development and distribution of outright testamentary gifts to the beneficiaries seems no longer the only option.

The new rules governing succession under the Civil Code are still subject to further interpretation. For practical purpose, having a Chinese notarised will to deal with assets (especially the real estate) in Mainland China would still be advisable. However, in the event that a notarised will has not yet been put in place, clients should still consider having their mainland assets dealt with by a printed will in Hong Kong to avoid the results of intestacy. This is especially so since travel between Hong Kong and the mainland is still restricted, and there is uncertainty as to when one may visit a notary office for the preparation of a notarised will.

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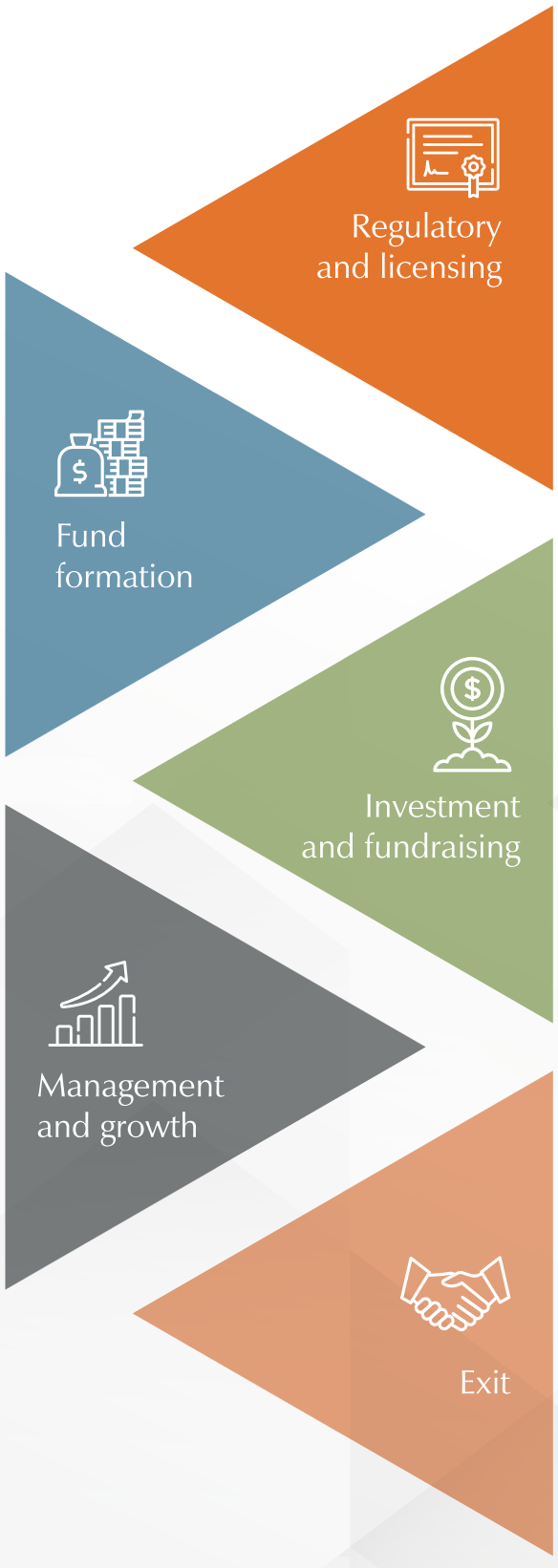
withers tech

# Riding the tech wave

From investors, fund managers, tech companies to successful tech company founders, Withers tech has the depth and breadth of experience to journey with you in Asia's thriving and vibrant technology startup ecosystem.

Comprising over 20 specialists dedicated to advising on tech related matters, we have worked with all stakeholders in the ecosystem, across all stages of the life cycle of a tech company.



# Structuring an ESG investment fund in Japan

At the time of its launch, Japan's first ESG-focused venture capital fund MPower Partners Fund, established by former Goldman Sachs vice-chair Kathy Matsui and sized at US$150 million, garnered substantial attention within the funds industry.

The MPower Partners Fund is a rarity in Japan given its female leadership, as noted by Bloomberg and other media. In addition, while the venture investment market has expanded rapidly in Japan in recent years, it remains small in comparison to its counterparts in the US and China. The launch of the fund marks a significant milestone in the Japan's investment fund industry.

Despite the relative newness of ESG funds in Japan, structuring an investment fund powered by an ESG strategy is similar to structuring any other type of investment fund. This article highlights practical insights and advice that fund managers can reference to when seeking to establish an ESG investment fund in Japan.

## Thinking it through

In Japan's investment fund industry, certain fund structures have become widely accepted within specific investor communities. Despite such familiarity, fund managers are still advised to assess how the considerations discussed below may apply to their proposed fund.

There is no guarantee that a fund structure that has worked in the past will work again in the future.

Furthermore, given the constant changes in the laws regulating investment funds, it would be precarious to launch a fund without careful assessment of its risks and potential for reward.

The structure of an investment fund is one of, if not its most important feature. While it is easy to fall back on 'tried and tested' fund structures, we recommend that fund managers carefully consider the structure of the fund prior to its launch.

## Considerations in structuring

When structuring any venture capital fund, taxation is one of the most important considerations. The performance of a fund's strategy is ultimately irrelevant unless both the investment of the fund assets and its distribution to investors are conducted in a tax-efficient manner. Multiple factors can potentially affect tax efficiency, including the nature and domicile of the target assets, the form of the investment fund itself, the administration of double tax treaties, and the jurisdiction of the fund investors.

In addition, it is equally important for fund managers to thoroughly understand any regulatory considerations which may be applicable to the operation of the fund, as each jurisdiction has its unique laws and regulations governing various aspects of its operations. The laws and regulations of each jurisdiction in which the fund will have nexus (e.g., where the investments are made, where the fund is being managed, where the fund interests are being offered, etc.) which should be properly examined to ensure that the fund can operate in full compliance with applicable laws. Given the inherently cross-border nature of investment funds, various licenses, registrations, or notifications may be further required by the regulators.

Lastly, it is important to note that the attractiveness of a fund is not necessarily linked to taxation concerns and regulations. Even if an investment fund is created in a manner that is both tax efficient and in full compliance with applicable regulations, there is no guarantee that the fund will raise capital successfully. Investors in certain jurisdictions may have strong preferences for specific types of investment funds based on their structure and domicile. Therefore, some investors will only invest in structures that they have invested in the past.

## The ESG component

While the process of structuring an ESG fund does not differ greatly from that of other venture capital funds, the portfolio company selection strategy plays a role of greater significance for ESG funds. ESG fund managers must strictly adhere to various self-imposed investment guidelines that restrict the industries they may invest in and the ways in which investments are to be made.

Due to the recent popularity of ESG strategies among allocators, some fund managers may seek to "greenwash" their fund by adding an isolated ESG component to their strategies.

This practice has been made increasingly prevalent by the discrepancies in the interpretations of "ESG".

However, "greenwashing" does not come without risks. Firstly, various regulators are taking steps to prevent this practice. For example, the US Securities and Exchange Commission released a "Risk Alert" in April following recent examinations of ESG investing and the discovery of problematic ESG investment practices.

Moreover, investors themselves are becoming more sophisticated in their understanding and monitoring of their investments into any ESG fund. We have observed that more and more key investors are documenting additional ESG investment restrictions and monitoring obligations in side letters with fund managers.

In light of recent trends, we anticipate that the popularity of "true" ESG-themed investment funds will only continue to grow in the future. As the regulations covering ESG funds continue to evolve and investors gain more experience in such investments, we believe that ESG fund managers who are truly dedicated to championing societal and environmental causes will be able to enjoy further opportunities and success in this space.

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# Understanding the “new normal” in the commercial real estate market

While the Covid-19 pandemic has given rise to a “new normal” in every industry and sector across the globe, its impact on the economies of individual countries has differed greatly. The commercial real estate market in Hong Kong and Japan have faced inevitable disruptions due to changes in business activity and the everyday lives of their citizens. This article will provide an overview of the shifts and developments in Hong Kong and Japan’s commercial real estate markets caused by the Covid-19 pandemic.

## Hong Kong

The significant year-on-year GDP growth of 8% and 7.6% in the first two quarters of 2021 respectively has put an end to the negative GDP growth recorded in 2019 and 2020. Stringent pandemic restrictions and the near-absence of local Covid-19 cases have boosted market confidence, resulting in a gradual increase in property transaction volumes.

The widespread adoption of remote working and cost concerns have reduced the demand for vast office spaces, which has resulted in mass corporate downsizing and a preference for flexible term and shared office spaces. Further decline in rents are expected before a rebound in 2022. On the flip side, the lowered rent and increase in vacancies offer tenants a range of office relocation and restructuring options.

Owing to social distancing orders and travel restrictions, retailers have been cutting costs and raising profitability by scaling back their brick-and-mortar presence and improving their online sales channel. As rent in prime shopping areas have plunged to record lows since the 2003 SARS outbreak, retailers such as American Eagle Outfitters and Decathlon have absorbed vacancies that previously housed high-end luxury brands in anticipation of the reopening of the city’s borders and the recovery of the tourism industry.

The industrial sector bounced back faster than the other two commercial sectors, with its investment transactions accounting for a large percentage of commercial property transactions in 2021. The meteoric rise of e-commerce during the pandemic boosted demand for logistics, cold storage spaces, and warehouse facilities. Furthermore, given the rapid development of telecommunications and 5G technology, the need for instant data analytics, reliable internet and cloud services, and ample storage for data has further heightened the demand for and expansion of data centres.

The government has backed the commercial real estate market through various initiatives across different sectors. Most notably, the abolishment of Double Ad Valorem Stamp Duty in November 2020 and a 10% increase in loan-to-value ratio caps since August 2020 encourages purchasers to borrow more money to acquire non-residential properties. In addition, under a pilot scheme launched in March 2021 by the Lands Department, land premiums relating to lease modifications for the redevelopment of pre-1987 industrial buildings are now charged at standard rates. Finally, leasing and investment transactions have been stimulated by financial incentives and border control measures. While the Consumption Voucher Scheme has increased local consumption, mid-term plans for cross-border travel are facilitated by ongoing discussions between the Hong Kong, Chinese, and Macau governments.

## Japan

Japan's real estate market is one of the largest in the world by transaction size owing to a variety of factors, including the ability of foreigners to own freehold interests in land, Japan's stable returns, and the low-risk investment environment. While the pandemic has affected the real estate market in Japan, its impact has not been as severe as in other countries that were hard-hit by Covid-19, such as the US and Europe. Investor demand in Japanese real estate remains strong as the market is generally considered an attractive option in times of instability and turmoil in the global market.

The commercial office sector in Japan was stagnant during 2020, with many owners opting to observe the market before making any significant moves. However, it appears that more assets are expected to enter the market in 2021 and beyond. The sector is projected to become more active as the Covid-19 pandemic continues to ease. With the increased adoption of remote working and an expected influx of vacant office spaces over the next few years, questions remain as to how rental rates and yields will be affected.

In contrast to the office sector, the pandemic has led to a rise in the demand for certain asset classes in Japan. Spurred on by the pandemic, the surge in e-commerce and remote working has created the need for large-scale, state-of-the-art logistics facilities and data centres. Several large-scale logistics facilities have been sold over the past year and more are expected to enter the market in the near future. Likewise, major data centre developers and operators have contracted to build several data centres and campuses in Japan. Demand for these asset classes is expected to continue to rise in the foreseeable future.

Other asset classes that have experienced a growth in demand over the past few years and are expected to continue to grow include: (i) multifamily residential portfolios, as they offer investors steady returns and a relatively low default rate, and (ii) student housing.

Finally, one segment of the market that remains small but is expected to grow exponentially is the ultra-luxury residential market, particularly in Tokyo and in ski resort regions such as Nagano and Hokkaido. Driven mainly by overseas ultra-high net worth individuals, this segment has begun to show signs of recovery from the effects of the pandemic and is expected to soar in demand.

On the whole, the real estate market in Japan remains vibrant. While uncertainty persists for other sectors that have been more adversely affected by the pandemic, such as retail and hospitality, traditional asset classes such as commercial offices are predicted to experience a definitive rebound. Investor optimism remains high for Japan's real estate market and demand for a variety of asset classes should continue through the next few years.

## Addressing the legal aspects of real estate transactions

We are witnessing the growth and recovery of two robust commercial real estate markets, but one should be mindful of the legal aspects involved before and after investment or leasing decisions. Interested investors should seek pre-acquisition legal advice to ensure that their position is tightly protected and to be aware of any mouse traps or complex governmental requirements. With the help of an experienced legal expert, companies will be well-positioned to maximise the advantages of the current market circumstances.


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With lawyers admitted to practice in multiple jurisdictions and qualified in both common and civil law jurisdictions, we offer clients international experience and versatility to advise in a variety of sectors, including oil and gas, construction, energy, technology and finance. Our work covers the entirety of arbitration cases, from initial case analysis through to successful enforcement of arbitral awards, to achieve the best results for our clients.

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# Environmental risk management for Singapore fund managers

The top five global risks recognised by the World Economic Forum in 2020 share one commonality: they are all related to the environment. Environmental sustainability is no longer an unattainable ideal in the business world. Given the worldwide climate crisis, it has become a matter of significant immediacy. With pressure mounting from investors and regulators alike, asset managers are encouraged to pivot to environmental sustainability by integrating environmental risk management ("**ERM**") practices into their business practices.

## Guidelines on ERM for asset managers (the "Guidelines")

In the Guidelines published in December 2020, the Monetary Authority of Singapore ("**MAS**") recognises that the scale, scope, and business models of asset managers and their investment strategies differ markedly. Therefore, adherence to the Guidelines must be commensurate with the size and nature of individual investment activities, as well as the wider investment focus and strategies. Managers which are part of a global group can leverage group governance structures, frameworks and policies to meet the principles in the Guidelines.

Presently, the Guidelines apply to all discretionary licensed and registered fund management companies. Where investment management is delegated to sub-managers or advisors, managers nonetheless retain overall responsibility for ERM and are expected to assess and monitor their sub-managers' or advisors' compliance with the Guidelines. The Guidelines do not, for now, apply to non-discretionary managers. While a transition period of 18 months is in place to allow for the implementation of additional measures to comply with the Guidelines, the MAS is set to begin reviewing the implementation progress of certain managers soon.

The Guidelines broadly cover:

(i) governance and strategy
(ii) research and portfolio construction
(iii) portfolio risk management and
(iv) disclosure of environmental risk

## Governance and Strategy

The manager's board of directors and senior management should oversee the integration of ERM policies into the manager's investment risk management framework. ERM policies should be disclosed, regularly reviewed, and revised for continual effectiveness. Where environmental risk is deemed material, managers should designate a senior management member or a committee to oversee the management and implementation of the policies to minimise possible oversights.

At the operational level, ERM responsibilities should be clearly delineated as follows:

a) Business line staff to consider environmental risks when establishing and managing funds/ mandates;
b) Risk management and compliance to monitor the implementation of ERM policies and ensure their adherence to applicable rules and regulations; and
c) Internal audit function to test the robustness of its ERM framework.


### Research and portfolio construction

## The Guidelines set a consistent standard for managers to integrate assessment of environmental risk into investment decision-making.

Environmental risks should be factored into the evaluation of a potential investment's returns, while sectors with higher environmental risks should be identified and, one might argue, avoided. Thereafter, managers should evaluate the materiality of such risks. The Guidelines provide useful examples of factors relevant to the consideration of various asset classes, including public equities, fixed income, direct real estate, and REIT investments.

Subsequently, at the portfolio construction stage, managers should measure and assess all environmental risk factors present in a portfolio on an aggregate basis where material.

### Portfolio risk management

Developments such as the occurrence of natural disasters and changes in regulations could materially affect the operations and financials of an investee company. To mitigate these adverse impacts, managers should implement appropriate processes and systems to monitor, assess, manage, and respond to potential/actual material environmental risk on individual investments and portfolios on an ongoing basis.

A process and system highlighted in the Guidelines is "scenario analysis" based on forward-looking information and conservative assumptions that are regularly reviewed to assess and quantify the impact of various environmental risks on investments. Each analysis should be properly documented and maintained, including features such as the choice of scenarios, reasonableness of assumptions, assessment of results, considerations on potential action required, and actions taken to address the risk. For smaller managers, the MAS suggests performing scenario analysis at an individual investment level, focusing on sectors more affected by environmental risk before progressing to analysis at the portfolio level.

Another aspect of ongoing ERM is stewardship. Managers are expected to shape corporate behaviour of their investee companies through engagement, proxy voting, and sector collaboration.

The last process highlighted is capacity-building, which equips directors, senior management, and staff with adequate understanding and expertise to manage environmental risk in their respective roles. Capacity-building programmes should be regularly reviewed to incorporate emerging issues relating to ERM.

## Disclosure of environmental risk

Managers are expected to make meaningful disclosures regarding their approach to ERM in line with international reporting frameworks.

The MAS accepts disclosures via annual reports, sustainability reports, investor reports and/or websites. Managers should evaluate the various means and methodologies of disclosure and adopt an approach and frequency that best enables them to provide clear, meaningful, and timely information to their stakeholders.

## Conclusion

The Guidelines usher the beginnings of a new tenet of corporate governance. While helpful ERM resources, frameworks, and policies exist, these do not incorporate all risk areas covered in the Guidelines. Managers should consult their professional advisors to put together a comprehensive ERM policy, taking into account the specific features of their funds/mandates to ensure present and future compliance with the Guidelines. Asset managers who are quick to respond to regulatory changes will find themselves well-positioned to compete in the new realm of investment universe where, as a first, the earth and its wellbeing will take precedence.

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# Fight against doxxing: The Hong Kong response and regional landscape in Mainland China and Singapore

In the wake of rampant doxxing incidents in recent years, Hong Kong has made key revisions to the data privacy regime to criminalise the unauthorised disclosure of personal data causing specified harms to an individual and his family members, and to enhance the privacy watchdog's investigation and enforcement powers.

The Personal Data (Privacy) (Amendment) Ordinance 2021 targeting at curbing doxxing activities has taken effect on 8 October 2021. Apart from looking at the new legal regime in Hong Kong, this article will also highlight the legal landscape against doxxing in Mainland China and Singapore.

## Three main aspects in Hong Kong

**1. Criminalisation of doxxing behaviour**

To curb doxxing activities, the offence under the previous section 64(2) of the Personal Data (Privacy) Ordinance would be replaced by two offences of a wider scope.

The first tier offence is against disclosure of personal information without the victim's (the data subject) consent where the disclosing party has an intent or is reckless as to causing any specified harm by that disclosure. If the disclosure results in any specified harm, the disclosing party would be liable for a second tier indictable offence.

Under both offences, "specified harm" generally consists of four limbs, namely (i) harassment, molestation, pestering, threat or intimidation to the person, (ii) bodily or psychological harm to the person, (iii) harm causing the person reasonably to be concerned for the person's safety or well-being; (iv) damage to the property of the person.

**2. Conferring investigation and prosecution powers to the Privacy Commissioner**

The Privacy Commissioner will be empowered to investigate doxxing behaviour and prosecute relevant offences at the Magistrates' Courts.

This allows the Privacy Commissioner to choose whether it wishes to prosecute directly, or to refer more serious cases to the police or the Department of Justice for prosecution.

In order to facilitate investigations and toughen enforcement against doxxing behaviour, the Privacy Commissioner will be empowered to require any person to provide relevant information, answer relevant questions and give assistance. Consequently, it will be an offence for anyone who (i) without reasonable excuse, fails to comply with such a request, (ii) with intent to defraud, fails to comply with such a request, or (iii) during his compliance, with intent to defraud, provides materially false or misleading information. The Privacy Commissioner will have further powers to stop, search and arrest any person without a warrant, if the person is reasonably suspected to have committed certain offences and to apply for a warrant to enter and search premises, seize items and access electronic devices during their investigations.

**3. Privacy Commissioner may issue cessation notices and apply for injunctions**

If the data subject is a Hong Kong resident or is present in Hong Kong when an unauthorised disclosure is made, the Privacy Commissioner will have authority to issue a cessation notice to compel compliance, regardless of where the disclosure has taken place. Cessation actions can include the removal of doxxing content, limiting access to the doxxing content or its disclosing platform, as well as discontinuance of hosting service for that platform. They apply not only to individuals or companies in Hong Kong, but also overseas service providers that have no presence in Hong Kong.

In light of repeated doxxing behaviour prejudicing certain individuals or groups in the society, the Privacy Commissioner will also be empowered to make injunction applications to the court to compel compliance.

## Remedies for the deficiencies prior to the amendment

Between June 2019 and June 2021, the Office of the Privacy Commissioner for Personal Data, ("**PCPD**") received over 5,800 complaints of doxxing. The impact of exposing personal information is worsened by the internet and social media platforms which allow fast and easy sharing and reposting, thereby making it harder for the PCPD and police to track down culprits and control the outspread.

On 27 September 2021, a former clerical assistant from the Immigration Department was sentenced to 45-month imprisonment after leaking personal information of 215 people, including government, judicial and police officers, politicians, public figures and their families, and sharing via Telegram for over 11 months. Condemning the behaviour as "a betrayal of moral standards" and "a cyberterrorist act", the court expressed that the sentence could have been longer and challenged the police's delay in identifying the culprit.

More importantly, the PCPD and police have experienced difficulty in enforcing the old section 64 prior to the amendment for a few reasons. First, they could not identify the data user given multiple reposting of the same doxxing content. Next, they were unable to prove that the content was obtained from that specific data user or that the disclosing party failed to obtain that data user's consent. The old section further fails to remedy situations where the data subject is harassed or physically harmed (as opposed to psychologically harmed), or where harm is caused to the data subject's family members, which unfortunately has been prevalent.

The PCPD's previous requests to remove doxxing content lacked non-compliance consequences, often resulting in delayed response and a response rate of only approximately 70% among internet service providers.

## Consequences of doxxing in Mainland China and Singapore

Doxxing behaviour is equally regarded as a serious issue outside of Hong Kong. In determining whether the proposed revisions are sufficient to tackle the problem, it would be helpful to consider the legal protection available in neighbouring jurisdictions.

**Mainland China**

In Mainland China, although the first reported doxxing or "internet vigilante" event dated back to 2001, there is still no specific offence of doxing and doxxing behaviour is only regulated as one form of violations of statutory personal information protection and personality right. It may trigger civil, criminal and/or administrative liabilities as follows:

**1. Civil liability**
Depending on the nature and seriousness of the infringement related to privacy, personal information or reputation and any financial consequences that result from it, the disclosing party could be exposed to civil liabilities, including an order to cease any infringement, making official apologies, as well as paying compensation to the victim.

If an internet user or internet service provider uses the internet to illegally disclose personal privacy and other personal information such as a natural person's genetic information, medical records, health examination data, criminal records, home address, private activities, etc., and thereby causing damage to others, they would be liable for compensating the victim's losses.

**2. Criminal liability**
Depending on the harm caused by doxxing behaviour, the perpetrators might commit the offence of insultation or defamation where the circumstances are serious. The penalty for such offences is up to imprisonment of three years.

As for what circumstances would be considered serious in terms of the offence of insultation, a case in 2013 can provide a useful illustration. In December 2013, a high school girl went shopping in a clothing shop. Soon after the shop owner uploaded the shop's surveillance screenshots to Weibo, falsely claiming that the girl was a thief. On the same day, the girl's school and home addresses were exposed. The girl committed suicide the very next day. The court held that the circumstance is serious, and the shop owner's activities constitute the offence of insulation as such activities exposed the girl to public humiliation and caused her death. But as the shop owner made compensation to the girl's parents, obtained the understanding of the girl's family after the incident and showed repentance, the court imposed a less severe punishment on the shop owner and eventually sentenced the shop owner to imprisonment of one year.

**3. Administrative liability**
Those who peek, sneakshot, eavesdrop or spread the personal information of others would be fined up to RMB500 or detained for up to five days, although for serious cases, the detainment could be prolonged to ten days.

Any network operator or provider of network products or services infringing upon personal information may be subject to a fine in the range of one to ten times the amount of illegal income, or if there is no illegal income therefrom, a fine of up to RMB1,000,000. The responsible person directly in charge would also be personally subject to a fine in the range of RMB10,000 to RMB100,000.

Apart from monetary penalties, various laws and regulations also provide for different kinds of administrative measures, such as a warning, order to correct, confiscation of the illegal proceeds, suspension or closure of the business, website or communication groups, cease and desist order, revocation of relevant business licence, temporary or definitive ban from the profession, property freezing, and recording and publishing of such sanctions in the "Social Credit Register" and other forms of 'public exposure' such as the public announcement of these measures.

**Singapore**

Over the years in Singapore, there has been progressive enhanced protection for victims of doxxing. Singapore enacted legislation known as the Protection from Harassment Act ("**POHA**"), which came into force in November 2014 with the overall aim of protecting victims of harassment and stalking. The POHA was later amended to provide for an offence known as "doxxing", and this came into effect on 1 January 2020.

The consequences of doxxing in Singapore include criminal liability and civil remedies such as protection orders which an applicant under the POHA can obtain against the perpetrator (who may either be an individual or an entity).

**1. Criminal liability**

Doxxing is a criminal offence under the POHA, if it is done to:

1. intentionally cause harassment, alarm or distress [section 3(1)(c) of the POHA]; or intentionally or knowingly cause the victim to believe that unlawful violence will be used against him or to facilitate the use of violence against the victim [section 5(1A) of the POHA].

2. The penalty for the former offence is a fine of up to SGD$5,000 and/or imprisonment for up to six months, and for the latter offence is a fine of up to SGD$5,000 and/or imprisonment for up to 12 months. These penalties may be enhanced for offences committed against vulnerable persons and victims in an intimate relationship with the offender.

**2. Civil remedies**

Civil actions may be brought against perpetrators which would allow victims to claim compensation for damages suffered due to doxxing. Victims will have access to a range of civil remedies, including:

- a stop publication order, requiring the perpetrator to stop publishing any false statement of fact; or
- a disabling order, requiring the internet intermediary to disable user access to any false statement of fact.

**3. Protection orders**

Another key civil remedy under the POHA is for protection orders ("**PO**") and expedited protection orders ("**EPO**") to be granted against the perpetrator. This is a highly effective and protective remedy as it may be tailored to the victim's needs and has strong deterrent value with severe consequences if breached.

A court may grant a PO against any individual or entity alleged to have committed the offence of doxxing, if the Court is satisfied that the perpetrator has committed a doxxing offence, and is likely to continue committing the offence or commit such other offence in respect of the victim. A PO may require the perpetrator to stop publishing the offending communication. This may even extend to requiring third parties, such as Facebook and Instagram, to remove the offending communication.

When a victim of doxxing is in dire need of protection, he or she may apply for an EPO, which offers a swifter application process for immediate protection. An EPO may be granted within 48 to 72 hours of filing an application and even within 24 hours if there is a risk of violence or actual violence.

There are severe consequences if a perpetrator breaches a protection order, involving a fine of up to SGD$5,000 and/or imprisonment of up to 6 months. A perpetrator who repeatedly breaches protection orders will be liable for a fine of up to SGD$10,000 and/or imprisonment of up to 12 months.

The POHA provides for reasonableness of conduct to operate as a defence against doxxing. There is no clear definition of what would constitute reasonable conduct, which is heavily fact-specific, but some factors which might be considered include the nature and context of the alleged offending acts, and the effect of those actions on the victim.

The Protection from Harassment Court (PHC) was established on 1 July 2021 to hear all criminal and civil matters pertaining to the POHA. The PHC adopts simplified procedures that are conducted on an expedited basis to provide victims with necessary legal recourse in a timely manner. This includes allowing PO and EPO applications to be filed via a straightforward claim form, without needing an Originating Summons that may be necessary in other courts. The establishment of the PHC is thus a welcome development which would help to strengthen the legal protection for victims of doxxing in Singapore.

The recent amendments in Singapore to enhance protections offered to victims of doxxing and provide swift recourse signals recognition of the severe harms posed by trends of posting people's personal information / photographs online to cause them embarrassment and harassment.

## Our observations

Some industry experts and critics have expressed concerns that the new amendments in Hong Kong lack clear definition of doxxing, which consequently could be interpreted broadly, whereas the Privacy Commissioner has repeatedly brushed off such claims on the basis that the new offences' essential elements are sufficiently fleshed out in the Amendment Ordinance. The Implementation Guideline recently issued by the PCPD may assist in the interpretation of various offences of concern.

The new offences in Hong Kong may raise red flags for companies of all kinds of industries who could be liable for sharing clients' personal information. A representative office in Hong Kong of a foreign company could be criminally liable for its company's non-compliance of a cessation order, exposing it to significant risks even though the doxxing content is disclosed outside of Hong Kong.

Following the implementation of the new amendments targeting at doxxing activities, it is prudent for companies to start reviewing their internal policies for collecting and processing customers' personal information and the purpose of such collection. There should be clear guidelines on how employees use and handle such personal information and protocols should be introduced for handling situations where the company is subject to a cessation notice.


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# Keeping up to date with Hong Kong regulatory developments in the ESG space

The global economic downturn caused by the Covid-19 pandemic and unprecedented spread of wildfires across five continents have reinvigorated scrutiny from investors and consumers of ecological and social considerations when investing in products that claim to meet environmental, social and governance ("**ESG**") standards. Regulatory developments are evolving to enhance transparency and consistency in the market and ensure that investors are well-informed of the ESG credentials and criteria of investment products available.

## Enhanced disclosures for ESG funds

The Securities and Futures Commission ("**SFC**") maintains a list of green and ESG-approved funds that meet certain requirements regarding investment threshold, disclosure requirements, and ongoing monitoring

A new circular was issued by the SFC on 29 June 2021 to provide further guidance on enhanced disclosure regarding all SFC-authorised funds with ESG factors as a key investment focus.

From 1 January 2022 onwards, any reference to ESG or similar terms in the fund's name and marketing materials should accurately reflect the ESG features in proportion to other features of the fund and should not overstate or over-emphasize the ESG features.

ESG funds will be required to include a description of the fund's focus, a list of ESG criteria, and its investment strategy in the offering document. Furthermore, a summary of the risks or limitations associated with the ESG focus must also be highlighted to investors.

Fund managers must ensure the ESG focus continues to be met. In addition, they must inform investors of how the fund is attaining its ESG focus and the actual proportion of underlying investments that are commensurate with the ESG focus through annual reports or other appropriate means.

Where the fund is tracking an ESG benchmark (e.g. an index fund), details of the benchmark must be disclosed and a comparison of the performance of the fund's ESG factors against the benchmark should also be made available to the investors annually. If ESG is no longer the focus of a fund's investment strategy, investors and the SFC must be informed as soon as reasonably practicable.

## Management and disclosure of climate-related risks by fund managers

In line with international regulations, such as the EU's Sustainable Finance Disclosure Regulation, the SFC published the consultation conclusions on its earlier proposals which require fund managers to take climate-related risks into consideration in their investment and risk management processes, and make appropriate disclosures.

The new requirements are structured in two tiers, namely (i) **baseline requirements**, which will be applicable to all SFC-licensed fund managers and (ii) **enhanced standards**, which will be applicable to large fund managers with assets under management that equal or exceed HK$8 billion for any three months in the previous reporting year. The requirements cover the following four key elements:

**Governance**
The board of the fund manager should steward the management of climate-related risks by setting out strategic objectives, and assigning roles and responsibilities to management-level executives or management committees. They are recommended to review the firm's climate management approach on an annual basis and keep abreast of the implementation progress.

**Investment management**
Fund managers are required to identify relevant and material climate-related risks for each investment strategy and factor the material climate-related risks into the investment management process. Where a fund manager assesses that climate-related risks are irrelevant to certain investment strategies, it should disclose these exceptions and maintain appropriate documentation.

**Risk management**
Fund managers are required to take climate-related risks into consideration in risk management procedures, and apply appropriate tools and metrics to assess and quantify climate-related risks. Recommended practices include establishing

appropriate processes for timely escalation and conducting ongoing assessments of climate-related risks by updating the fund's ESG scores regularly.

**Disclosure**
As detailed above, fund managers are responsible for making appropriate disclosures to investors in respect of their governance and risk management roles and responsibilities, as well as risk management policies and procedures as delineated by their jurisdiction.

## The push by the Hong Kong Stock Exchange and listed issuers

In line with global social and market trends, ESG is becoming a growing priority for the Hong Kong Stock Exchange and listed issuers.

In December 2019, with general support from market participants, the Stock Exchange concluded that it would amend the existing ESG reporting requirements for listed issuers in Hong Kong, with the amendments to take effect in financial years beginning on or after 1 July 2020. The amendments enhance the robustness of ESG reporting requirements of listed issuers and require the board of listed issuers to expressly take leadership and accountability for the company's ESG objectives and strategy. Moreover, they are required to assess which ESG issues are material in respect of its business and proactively incorporate ESG considerations into their decision-making.

The Stock Exchange has since followed up with further suggested amendments in a consultation paper issued in April 2021, offering concrete proposals to enhance governance standards and other ESG considerations. Notably, listed issuers would be required to disclose numerical targets and timelines to achieve gender diversity in the boardroom and workplace. Single-gender boards would be given a three years transition period after the amendments take effect to appoint at least one director of the other gender onto their boards.

With a combination of strict requirements and softer disclosure incentives, these proposals motivate fund managers and listed issuers to put ESG in its matrix of business considerations. Given current market and social trends, this is, on the whole, a step in the right direction. Market participants that abide by the new requirements and take the initiative to go further will find themselves warmly received both by their peers and in communities generally, and attract the interest and capital of ESG-minded investors.

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# Contractor data leaks in Singapore: A holistic approach towards risk mitigation

With the dramatic increase of cyber threats during the pandemic, multiple data leaks were reported by major internet service providers and various government agencies within the span of a year. When examining the details of the breaches, it is evident that many of them occurred on the end of external vendors, which were targeted and exploited by attackers.

Outsourcing in the field of IT and cybersecurity is commonplace, as few companies have the resources and manpower to handle these aspects in-house. What should companies take note of in outsourcing arrangements where work involving the storage or processing of personal data is conducted by an external vendor?

## Largest cyber-attack in Singapore

It would be instructive to refer to the case of **Re Singapore Health Services Pte. Ltd. & Integrated Health Information Systems Pte. Ltd.** [2019] SGPDPC 3, the largest cyber-attack on SingHealth's patient database system which resulted in a data breach involving the personal data of 1.5 million patients.

A committee of inquiry convened by the Singapore government to examine the attack found that the Integrated Health Information System ("**IHiS**"), SingHealth's vendor and the technology outsourcing arm of hospitals in Singapore, lacked adequate levels of cybersecurity awareness, resources, and training to properly respond to the attack on SingHealth's system.

More importantly, in finding that SingHealth had breached its obligations under data protection law, Singapore's Personal Data Protection Commission ("**PDPC**") noted in its grounds of decision on the data breach that SingHealth personnel were overly dependent on IHIS in the immediate aftermath of the cyber-attack and failed to take the initiative to understand the significance of the information regarding suspicious activity provided by IHIS.

The decision of the PDPC further stated: *"There should be a clear meeting of minds as to the services the service provider has agreed to undertake and organisations must follow through with procedures to check that the outsourced provider is delivering the services."* While work may be delegated to a vendor, the responsibility for complying with statutory obligations under data protection laws remain with the company as a data controller and may not be delegated. It is also the responsibility of the company to ensure that the vendor is able to comply with requirements under data protection law, and to proactively monitor the vendor's performance.

## Lessons drawn

The decision of the PDPC demonstrates that in spite of the provisions of security, operational, and notification obligations for personal data that comes into a vendor's possession, which is typically accompanied by explicit data breach indemnification and limitation of liability language, the company cannot completely excuse itself from liability in the event of a data breach.

In addition, while a vendor may be contractually compelled to assist the company in fixing vulnerabilities, preventing additional data loss, and investigating the matter in the event of a data breach, it is the company who has to shoulder the ramifications of the data breach, such as complying with breach notification requirements, working with the authorities, and handling customer relations and the media.

While contract remains the primary means and, indeed, the bare minimum by which a company may protect personal data entrusted to a vendor, companies should take the following steps to ensure their preparedness for a potential data breach:

- Understand the nature and amount of personal data held by the company and conduct data protection impact assessments to identify and minimise data protection risks;
- Assemble a data breach response team and define their roles and responsibilities in breach detection, containment, and handling;
- Conduct tabletop exercises to simulate real-time crisis management, such as a phishing attack;
- Develop a data breach incident plan which sets out the procedure for breach containment and response, taking into account reporting and notification obligations and including a strategy for internal and external communications; and
- Conduct training and promote awareness amongst employees on how to tackle potential data breach incidents.

In conclusion, contracts alone may not be enough to mitigate data protection-related risks.

The consequences of failing to put in place robust and comprehensive measures can be serious, ranging from fines and damages from claims brought by affected individuals to irreversible harm to the company's reputation.

At the same time, a company needs to balance compliance against costs and strive to future-proof its protective frameworks in an uncertain business environment with fast-evolving cyber and data protection threats. This is where collaborating with savvy legal professionals can help a company achieve a win-win outcome.

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