with... insights

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Foreword

During the past year, we continued to strengthen our practice offerings to better serve the needs of our international and regional clients.

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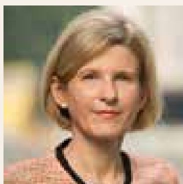

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In Singapore, we expanded our Corporate practice, as we welcomed new partners, Erlene Tan, Daniel Yong and their teams. Their experience in debt restructuring, cross-border M&A and private equity, as well as investment funds is an important boost to the depth of our offerings as we continue to work with clients around the region.

In Hong Kong, we strengthened our civil litigation and dispute resolution practice, with the hire of special counsel Angela Law. In Tokyo, we welcomed senior tax counsel, Kenichi Takashima, and funds specialist, Chiho Zen, as further additions to our fast growing international corporate tax and funds practice.

Leveraging our networks and expertise across multiple jurisdictions, our lawyers came together to host several events. Including, in May in Singapore, our annual family office conferences for clients and intermediaries on the theme of global developments in transparency regimes and their impact on ultra-high net worth clients, and in June in Tel Aviv, Israel a global investment seminar, to connect with Israeli investors who are looking at overseas investments. Our lawyers shared their knowledge on structuring investments in five different jurisdictions.

Now in its fourth edition, With… Insights continues to feature topical insights from our lawyers. We are pleased to present our wide expertise in the articles, which cover a plethora of topics including employment rights and tax considerations for the high net worth. In this issue, we also showcase our family law practices in Singapore and Hong Kong as they discuss the serious issue of cross-border child abductions and ensuring a child's safe return, with or without the application of the Hague Convention.

On a joyous note, we are proud to announce that our private wealth teams were recognised in this year's WealthBriefingAsia Awards for their work in Greater China and Southeast Asia. At the Macallan ALB Hong Kong Law Awards, Withers was named Private Wealth Law Firm of the Year for the third consecutive year and for the ninth consecutive year, Matrimonial and Family Law Firm of the Year. Individuals in our private wealth practice were also highly ranked in the latest Chambers High Net Worth Guide.

We hope that you will enjoy the articles thoughtfully penned by our lawyers and wish you a fruitful rest of the year!

Special Interest Group: Italy

Active in Italy for over 25 years, we understand the Italian market and have assisted clients in achieving success globally.

As one of the most attractive investment destinations in Europe, Italy has seen growing numbers of foreign investors (including many from Asia) investing in the country.

Through our network of Italian desks in Europe, Asia and the US, we are uniquely placed to provide a wide range of legal advice to individuals, entrepreneurs, families and organisations branching out into the Italian market.

In the spotlight

From left: Erlene Tan, Daniel Yong, Angela Law, Kenichi Takashima, Chiho Zen

Boosting our capabilities in practice areas and markets

In Singapore, the hires of M&A and debt restructuring partner Erlene Tan and investments funds partner Daniel Yong further expand our corporate practice and offerings.

Erlene's expertise in advising family-owned companies in Indonesia and Singapore on corporate and commercial issues will help enhance our presence in the Southeast Asian region. She has worked on transactions across a range of sectors, such as real estate, retail, commodities and finance, in both private practice and in-house.

Specialising in investment funds and cross-border private equity and M&A transactions, Daniel represents private fund managers, sovereign wealth funds, family offices and corporate clients from different sectors. He also routinely advises on regulatory and licensing issues affecting fund managers and capital markets intermediaries in Singapore.

We are also pleased to welcome Angela Law to the Hong Kong office. Angela joins as a special counsel and has broad civil litigation and dispute resolution practice, including banking, regulatory, contractual, company, trust and probate matters. She is experienced in handling various types of civil litigation cases at different levels of the Hong Kong courts and has acted for banks, companies, trustees, executors, family offices and ultra-high net worth individuals.

In Tokyo, accomplished tax specialist Kenichi Takashima joins Withers as senior tax counsel. Kenichi has an extensive experience in international tax advisory, tax strategies, tax planning, and tax structuring aspects of cross-border M&A, corporate restructurings and financing. His jurisdictional experience includes Japan, as well as other regions such as Singapore, Hong Kong, Malaysia, Australia, European and South American countries.

The investment management funds team in Tokyo continues to expand with the hire of Chiho Zen as associate who is experienced in advising securities companies and investment funds on Japanese financial regulations.

Testament of our legal services

At the WealthBriefingAsia Awards 2019, Withers was recognised as the Best Legal Team in Greater China and Best Estate Planning Team in Southeast Asia. The ceremony, honouring outstanding law firms' practitioners across various fields, was held in Singapore.

At the Macallan ALB Hong Kong Law Awards 2019, Withers was honoured to be named Private Wealth Law Firm of the Year and, for the ninth consecutive year, Matrimonial and Family Law Firm of the Year. We were also nominated for Tax and Trusts Law Firm of the Year and Sharon Ser was nominated for Managing Partner of the Year.

In the latest Chambers High Net Worth Guide, we are proud to have been ranked as a "Band 1" law firm in the categories of Private Wealth Law (International Firms) in China and Private Wealth Law in Singapore. Individually, our lawyers were recognised for their work in private wealth in China, Singapore and Indonesia.

China:

- Mary Ellen (Mimi) Hutton
- Katie Graves
- Wei Zhang
- Timothy Burns

Singapore:

- Stacy Choong
- Fernando Gandioli

Indonesia:

- Stacy Choong

Managing rising Asian wealth
The growth of Asian wealth has been matched by the rising number of family offices in this part of the world. We organised our annual two-day family office conference in May to discuss the hot topics relevant to family offices and their clients. Our private client and tax lawyers from Hong Kong and Singapore held panels to discuss the increasing focus on transparency across the globe; the popular structures and their suitability as family investment fund vehicles; and, together with guest panellists from SAS Technology, technological developments used by tax authorities for fraud detection and analytics.

Creating global investment opportunities
Different legal systems, political instability, cultural variations and other associated cross-border risks factor into the complications when investing overseas. In June 2019, we held a seminar in Tel Aviv to address the international corporate and tax considerations for Israeli investors investing in US, Europe and Asia.

The seminar, "Creating opportunities: Business and investments in Asia, US, and Europe", hosted at the Sheraton Hotel in Tel Aviv, connected investors to our lawyers who spoke on the intricacies of structuring personal investments globally. The speakers, Elliot Galler (New York), David Guin (New York), Giulia Cipollini (Milan), Roberto Bonomi (Milan), Mattia Biasi (Milan), Ugo Privitera (Hong Kong), Daniel Tang (Hong Kong) and Eric Roose (Tokyo and Singapore), shared their insights on cross-border investments within their respective jurisdictions.

Investing into Italy
With economic reforms implemented since 2011, Italy is now one of the most attractive investment destinations in Europe (ranked fourth by the A.T. Kearney Foreign Direct Investment ("FDI") Confidence Index). Asia counts as one of Italy's highest source of FDI with China (US$136 billion), Hong Kong (US$104 billion) and Singapore (US$62 billion), ranked second, third and fifth respectively, in terms of investments into Italy.

At a recent seminar held in our Singapore office, our lawyers – Roberta Crivellaro, Giulia Cipollini, Robert Williams, Lada Shelkovnikova, Roberto Bonomi and Mattia Biasi – discussed opportunities and provided insights on key considerations when investing in real estate, as well as the hotels and hospitality sector, in Italy. The seminar was well-attended by our clients, with guests from the Italian Embassy of Singapore, the Italian Chamber of Commerce in Singapore and the Italian Trade Agency.

Vanished without a trace – Managing non-Hague cases

It would be a parent's worst nightmare to find out that their child has been whisked away to another country. In many instances, this is not the act of a stranger, but by a spouse or ex-spouse during or after divorce proceedings. While the thought of a parent abducting his or her own child to another country may not seem terrifying to some, the forceful and unexpected relocation of one's child, and the constant fretting of the parent left behind are unnecessary causes of stress.

Cross-border child abduction is when a child has been wrongfully removed or retained by one parent, without the consent of the other parent, to a different jurisdiction.

The Hague Convention

In 1980, the United Nations introduced the Hague Convention on the Civil Aspects of International Child Abduction, otherwise known simply as the Hague Convention. The Convention serves as a multilateral treaty to ensure children abducted to another country are returned to their rightful parent or guardian.

When a country is a signatory to the Convention, domestic laws will be implemented, in line with the country's obligations under the Hague Convention. In the case of Singapore, this would be the International Child Abduction Act (ICAA).

Cross-border child abductions

In the event of cross-border child abduction, a parent would hope that they can rely on the Hague Convention to recover their child. However, as of July 2019, only 101 nations have ratified the Convention.

Increased interconnectivity and ease of travel have contributed to a steady rise in the number of international families. The increase in migration has, however, brought with it a new set of family disputes and problems that may arise when marriages break down.

Should tensions run high, one may feel alone and trapped in the new country, and desperate to return home where their support network is located. In extreme cases, fuelled by the fear of losing the child forever, he or she may thus decide to pack up and leave with children in tow, without consent from his or her other half.

Return of the child from non-signatory countries

Should the country the child is brought to not be a signatory to the Hague Convention, recovering the child could prove more challenging. Parents who abduct their children thus take refuge in these countries, enticed by the possibility of cutting off any recourse the other parent may have.

Although seeking the child's return from a country that is not a signatory to the Hague Convention might seem like a rather tedious and tumultuous process, not all hope is lost. Despite not being a signatory to the Convention due to their reservations to the provisions laid out, many countries like India still prioritise the welfare and rights of children and have included measures to tackle cross-border child abduction in their own laws.

A closer look at India as a non signatory

India is not a signatory to the Hague Convention, citing reservations that it may lead to further harassment of women escaping marital discord or domestic violence. Nevertheless, the Indian Constitution addresses cross-border child abduction cases as custody cases, implementing certain procedures to help parents whose children have been abducted to India.

Under Article 226 of the Indian Constitution, parties can petition to the State High Court to issue a writ of Habeas Corpus (a court ordering summoning both the abducting parent and child) against the abducting

parent. The definition of abduction used in the Indian Constitution is also similar to that defined under the Hague Convention. Furthermore, changes in the interpretation of the Hindu Minority and Guardianship Act hint that India is slowly progressing towards implementing measures to ensure the swift return of abducted children across borders – reflecting the overarching aim of the Hague Convention.

Courts in India have also repeatedly stressed that the welfare of the child should be of paramount concern when dealing with child abduction cases. This has been expounded in prior judgments, such as in a case judged by the High Court of Delhi. The wife had brought her children from the US to India and informed her husband that she had no intention of returning. Despite a judgment obtained by the husband from the US courts for the sole, physical and legal custody of the children, and the filing of a writ of Habeas Corpus in the High Court of Delhi for the wife to return the children, the High Court of Delhi held that the paramount welfare of the children would lie in shared parenting in the US, and ordered the return of the children. Such a case demonstrates that, despite not being a signatory, there are provisions available to parents hoping for the safe return of their children.

A closer look at Singapore as a signatory

If residing in a signatory state, Singapore's ICAA allows for a parent to apply to the Singapore Court for a child, who has been wrongly removed or retained in Singapore, to be returned to them. Similar laws would have been put in place in other signatory states to ensure the safe return of a child between two signatories.

However, if the child was removed from a non-signatory state to Singapore, the ICAA cannot be applied for the return of the child. In such an instance, the Guardianship of Infants Act ensures the return of the child to the left behind parent, with the Singapore Court having determined that it is in the child's best interest to do so. Following which, the courts in non-Hague countries may give effect to the order for the child's return to Singapore, having held the child's welfare as paramount, as illustrated in the aforementioned Court of Delhi case.

Ensuring the safe return of the child

The ideal scenario would see all countries signing the Hague Convention and adhering to the provisions laid out within to ensure the safe return of abducted children, but any multilateral treaty is sure to be met with reservations from member states.

However, a parent need not immediately despair when their child has been forcefully relocated to a non-signatory state. As demonstrated by the Court of Delhi, even if a state has not signed the Hague Convention, countries have taken steps to not only tackle the issue of cross-border child abduction but have done so with the child's welfare held as paramount.

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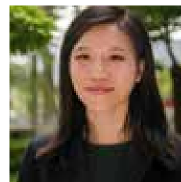

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Limitations of the Hague Convention and the fall-back for left-behind parents

In the midst of a divorce or break-up, there is always the possibility of either parent taking the child out of the jurisdiction without warning, a phenomenon known as international parental child abduction. In light of the prevalence of interracial relationships and international marriages, this has become a growing problem. The Hague Convention on the Civil Aspects of International Child Abduction, more commonly called the Hague Convention among legal professionals, is often invoked to resolve the situation.

The Hague Convention was developed in the 1980s with a view to protecting children who have been wrongly removed from their country of habitual residence, and securing their prompt return. Under the Treaty, the left-behind parent can make a Hague application to the Central Authority of the place of the child's habitual residence, and seek a return order. In cases where the child has been removed from Hong Kong, the parent should approach the International Law Division of the Department of Justice for assistance.

The provisions under the Hague Convention are tailor-made to deal with international parental child abduction where time is of the essence. If a Hague application is made within one year from the date of the child's removal, it is imperative for the Court to order the child's return if the rules and requirements are complied with.

Even if the application is made more than one year from the date of removal, the Court is required to consider a list of factors in determining what is best for the child. The return of the child is the likely consequence, provided that the child has not yet settled in the new environment, and that nothing gravely adverse will occur upon his or her return (Articles 12 and 13 of the Hague Convention).

However, to successfully initiate a Hague application, there are several requirements that need to be satisfied.

First, the two places involved, namely where the child has been removed from and to, must be parties to the Hague Convention. As an international Treaty, the Hague

Convention only has effect on places which have agreed to be bound by its provisions. As such, where the child is removed to places such as Mainland China and Taiwan, the well-structured mechanism under the Treaty is of not much help. The return of a child from Mainland China and Taiwan to Hong Kong is a very different and arduous process.

The second hurdle for the left-behind parent to overcome is to establish "wrongful removal" of the child, which means the removal is in breach of his or her rights of custody (Article 3 of the Hague Convention). While it is not legally accurate to paraphrase it this way, "rights of custody" can be seen as something similar to parental rights granted by law.

Using Hong Kong as an example, both the mother and father are automatically granted parental rights if the child was born during the marriage and both parents have legal responsibility for their child's upbringing. If a man is registered as the father of the child on the child's birth certificate, he is presumed to be the father of the child even if the child was born to unmarried parents. However, the father does not enjoy and is not automatically granted parental rights at law until he makes an application to the Court under section 3(1)(c)(ii) of the Guardianship of Minors Ordinance (Cap. 13). The reality is that an application for parental rights is rare when everything is going well and the relationship between the parents is smooth.

Without rights of custody, the mother can make unilateral decisions without the father's consent. Unfortunately, this means that if the child is suddenly abducted by the mother, without rights of custody, the unmarried father will mostly likely fail in his Hague application.

The Hague Convention has its limitations and should not be seen as the universal solution to international parental child abduction.

That said, if there is a situation where the Treaty cannot be invoked, Courts in common law jurisdictions, including Hong Kong and the UK, have developed the practice of borrowing concepts and principles under the Hague Convention in another type of legal proceedings known as wardship.

For example, it was held in the case of Re J (Child) (Returned Abroad: Convention Rights) [2005] 2 FLR 802, that if the left-behind parent was not eligible to make a Hague application, he or she may initiate legal proceedings to make the child a Ward of the Court. The Court will then assume the role as a parent to make major decisions concerning the child's welfare, and more importantly, order the child's return and prohibit any further removal. It is well-established in a Hong Kong case QMY v GSS [2017] 4 HKC 521 that the Court of First Instance has the power to make the child a Ward of the Court, even if the child is not physically present in Hong Kong.

Wardship proceedings operate in place of the Hague Convention to address the Treaty's limitations in child protection.

According to case law, such proceedings also offer room and flexibility for the Court to consider relevant factors outside the ambit of the Treaty. Examples include the child's religious or cultural background, differences in the legal systems involved, etc.

While invoking wardship is not as straightforward as applying treaty provisions, it plugs the legal gap with advantages unique to legal proceedings of this nature. Safe to say, wardship proceedings serve as a well-qualified fall-back for left-behind parents in child abduction cases.

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Avoiding legal pitfalls in charitable giving in Singapore

Charities in Singapore attracted approximately S$2.9 billion in donations in 2016; however donations only account for 17.3% of the charity sector's 2016 annual receipts of S$16.6 billion, which includes government grants, donations, as well as fees and charges.[1] With those statistics in mind, there is room for more to be done in charitable giving, particularly for those who view philanthropy as a viable way to give back to society.

To ensure that the beneficiaries fully benefit from charitable giving, careful planning is required.

A charitable donor may need to consider what causes to support, who to donate to, perform due diligence on how charitable organisations utilise their resources, and understand the organisations' governance policies and transparency practices. Apart from that, there are also legal issues and tax considerations which a donor should take into account, so as to avoid unwanted surprises.

Some people prefer to make donations during their lifetime; some prefer for their donations to take effect only upon their passing. The latter is normally effected through a will, and are otherwise known as testamentary gifts. Much thought must be given when planning for charitable donations as testamentary gifts. Mistakes could frustrate the testator's charitable giving intentions and may be difficult to rectify after the testator has passed away. Some examples of common pitfalls include:

Gaps in the gift

While many people make donations of a specific amount to a charitable organisation, an issue could potentially arise when a specific purpose or designated use is attached to the donation. This is fine if the specific purpose or designated use specified in the will is aligned with the charitable organisation's mission and charitable objects, to which a charity is bound by. However, if there is a mismatch between the designated use of the fund and the charity's mission or charitable objects, the gap could potentially render the gift to fail. The potential consequence is that the gift may fall into the residuary estate or into intestacy, depending on the wording within the will. Therefore, if a donor wishes to attach a specific purpose or designated use to charitable donations made through a will, much thought should be given to whether it is in line with the charity's mission and charitable objects, while noting that these could change with time, whereas a will takes effect upon the passing of the testator.

Funds for non-charitable purposes

Save for very limited exceptions, Singapore law generally does not recognise funds being held for the benefit of purposes (as opposed to, persons), unless they are for charitable purposes. Singapore law recognises four main heads of charitable purposes: (1) the relief of poverty, (2) the advancement of education, (3) the advancement of religion, and (4) other purposes beneficial to the community not falling under the preceding heads. The fourth category has been developed to include the following:

- the promotion of health;
- the advancement of citizenship or community development;
- the advancement of arts, heritage or science;
- the advancement of environmental protection or improvement;
- the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantages;
- the advancement of animal welfare; and
- the advancement of sport, where the sport promotes health through physical skill and exertion.

Where a will specifies that funds be held for purposes that are not recognised as charitable purposes under the law, the gift in the will may fail or be void for uncertainty.

Lack of proper governance and succession mechanism

Even if a gift of a sum to be held for charitable purposes is properly drafted, a large sum held for charitable purposes requires proper governance in the long run, that is ideally built-in with a more comprehensive design of governance, management and succession mechanism. Depending on the desire of the donor and the intricacies of the proposed mechanics, a testamentary gift may not be as suitable as doing philanthropic planning during the donor's lifetime. Lifetime philanthropic planning options include collaborating with a regulated donor-advised fund/ grantmaker or setting up a regulated charitable purpose trust/foundation, with the latter requiring high level of commitment and long-term sustainability planning.

Less of a legal consideration than an emotional one, testamentary gifting is effected through a will, which only takes effect upon one's passing. Often, a person's passing is a significant event for his or her family. To avoid family members from being surprised at large gifts bequeathed to charities, at a more practical level, where desirable, some testators may get 'emotional sign-offs' from family members in their lifetime.

Not qualifying for tax deductions

Charitable giving is not necessarily motivated by tax benefits. However, to encourage charitable giving in Singapore, deduction for tax purposes is granted in respect of two times (or as announced in Budget 2018, 2.5 times up till 31 December 2021) the amount of donations to an Institution of a Public Character (IPC). IPCs are enhanced status charities which are regulated by the Commissioner of Charities and/or the relevant Sector Administrator. In order to enjoy the deduction for tax purposes, it is essential that the donations to IPCs are outright gifts. A donation given in return for benefits of commercial value may not be regarded as an outright gift and consequently may not qualify for deductions.

While the primary idea behind charitable giving is the desire to do good, navigating through the legal pitfalls that could arise should be on the mind of those wishing to make donations, especially so for testamentary gifts. Potential donors should take heed of the legal considerations to ensure that donations, in their totality, are given to the causes and organisations they have in mind.

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[1] *Commissioner of Charities Annual Report 2017*

A version of this article was first published in the July 2019 issue of The Business Times Wealth Magazine

Increased scrutiny over tax planning makes it necessary for clients to pursue high-quality wealth planning advice

It is essential to understand and comprehend a client's intentions and purposes for seeking wealth planning advice. Clients will usually have an idea of the risks they want to minimise or avoid through taking our advice, and the objectives they want to achieve. However, each client's situation must be dealt with on a case-by-case, customised basis by reviewing all the risks and factors involved. Pre-designed wealth planning solutions will no longer work in this era. Trusts are among the most used wealth planning tools.

There is a common misconception that trusts are only utilised to help achieve tax avoidance, but there are many more reasons aside from tax advantages for setting up a trust.

This could be to do with asset protection, multi-generation succession planning, avoidance of forced heirship, incapacitated beneficiaries and many more. Often, clients assume that trusts are only available to high-net-worth individuals, as they are too expensive to establish and maintain. However, these misconceptions need to change.

There might be some scepticism in the use of lifetime trusts by clients from countries whose legal systems are not inspired by common law principles. However, if the benefits of using trusts are carefully explained, even the most reluctant client will be willing to set them up when appropriate, due to the great flexibility they provide.

As each individual client has specific, unique needs, the choice of trust type must revolve around these needs. In Asia, bespoke trusts are used for multi-generational succession planning purposes with the aim of ensuring that younger generations benefit from financial security, while taking into account the increasing geographical

and family complexities and the long-term support required by the older generation. In other areas of the world, such as in Europe, offshore irrevocable discretionary settlements are still used to achieve tax efficiencies or asset protection.

There has been increased scrutiny over tax planning vehicles around the world and many local trust companies are finding it too burdensome to comply with the regulatory, legal and tax requirements of clients from certain jurisdictions. High-quality advice, specialism and a global presence (as well as a wisely thought-out fee structure) are playing a key role in deciding who the front-runners in the market are.

The complexities of the ever-changing global regulatory, legal and tax frameworks have caused two factors: clients are now more aware of the need to have well-organised and compliant structures, which must be reviewed on an ongoing basis, and the costs connected with running them. Nevertheless, advisors and service providers have taken this opportunity to provide 'mentoring' to their clients and, to secure their loyalty, have sometimes shifted towards fixed fee arrangements. Overall, in the longer term, traditional fee structure based on time spent tends to fade away and this will ultimately benefit families and individuals seeking to establish trusted relationships with their wealth planning advisors.

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How key changes to the Singapore Employment Act affect business owners

Companies should take note of the substantive changes to the Employment Act (the "EA") that came into effect on 1 April 2019. The EA is the primary legislation governing the employment landscape in Singapore. It was amended to take into account the changing profile of Singapore's labour force and employment practices, providing greater protection to employees.

Significantly, the core provisions of the EA now extend to cover all professionals, managers and executives ("PMEs"), compared with previously limiting protection to only PMEs with a salary of under S$4,500 per month. As a result of the change, an estimated 430,000 more PMEs will now be protected under the fundamental employment benefits offered by the core provisions of the EA, including timely payment of salary, redress for wrongful dismissal and automatic transfers of employment pursuant to business transfers.

While these changes usher in an enhancement of employees' rights, they necessitate an assessment of companies' human resource ("HR") and employment practices to ensure compliance with the new slate of EA provisions.

Payment of salary in lieu of notice

Notably, the amended EA now grants both employers and employees the reciprocal right to pay salary in lieu of notice, giving the employee the right to terminate employment immediately. While employment contracts previously gave the employer the option of paying salary in lieu of notice but not vice-versa, this is now a mutual statutory obligation that employees can ask for.

In theory, this permits all employees, including PMEs, to buy out their notice periods even if their contract does not explictly state they can do so. This may undermine the traditional leeway given to companies to properly facilitate handover and succession planning during the notice period.

For business owners, this situation is exacerbated in cases where senior executives resign. Companies should therefore put in place measures to appropriately deal with handover obligations and succession in such situations to minimise disruption.

Wrongful dismissal claims

The amended EA has also expanded the scope of wrongful dismissal. Whereas dismissal had previously referred only to the termination of employment on grounds of misconduct or otherwise, dismissal now includes "constructive dismissal", which is when the employee is terminated by the conduct or omission of the employer.

Employers should also note that the changes to the EA allow PMEs who have worked at least six months with the company to file for wrongful dismissal compared to one year previously.

The Employment Claims Tribunal ("ECT") is an avenue for both parties to resolve wrongful dismissal and salary-related claims. The ECT, combined with compulsory mediation at the Tripartite Alliance for Dispute Management, aims to offer parties a cost-effective and streamlined dispute resolution mechanism.

Companies should take note that if they dismiss an employee on the basis of poor performance, the burden of proving poor performance is on the employer.

However, if the termination is done with proper notice given and without a reason for termination, the termination is generally considered to be valid without placing such a burden of proof on the employer. The Tripartite Guidelines on Wrongful Dismissal, issued on 1 April 2019, provides some examples of what might constitute wrongful dismissal.

Companies should take pre-emptive steps to safeguard against wrongful dismissal claims. They should ensure that their end-to-end internal HR policies (including investigation and disciplinary protocols) are sufficiently robust to minimise employee disputes. This should be complemented by training relevant personnel and managers on how to properly conduct termination exercises.

Leave entitlement

Companies should take note that all employees under the EA are now entitled to the following benefits: a minimum of 7 to 14 days of paid annual leave, paid leave on gazetted public holidays, 14 days of sick leave, and maternity protection and childcare leave, where applicable. Employees can encash accrued and unused annual leave upon termination of employment (except in misconduct cases). Companies should ensure that their current benefit provisions take into account these amendments at a minimum.

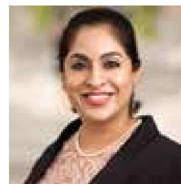
Enforcement

The changes highlighted above will impact business owners in their conduct of employee relations.

Under the WorkRight initiative by the Ministry of Manpower ("MOM") and the Central Provident Fund ("CPF") Board, companies are now subject to inspections and audits on compliance with the provisions of the EA.

These inspections not only involve a review of the documented procedures, but could also include interviews with individual employees to ensure adherence to the EA.

In light of these sweeping changes, and the MOM's firm stance on enforcement, employers are encouraged to review their existing employment framework and to implement necessary changes in their contracts, handbooks and practices to ensure compliance with the new EA.



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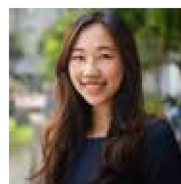

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Navigating the private placement regime of fund interests in Japan

With the prevailing low interest rates, Japanese asset allocators are increasingly turning to offshore fund managers for target returns, resulting in Japan remaining a key jurisdiction for fund managers to raise capital.

However, offshore fund managers often find it difficult to grasp the particularities of Japan's regulatory regime surrounding the solicitation and marketing of fund interests to its investors.

Below, we provide investors with an overview of Japan's regulatory framework regarding the private placement of fund interests.

A. The Financial Instruments and Exchange Act of Japan

The Financial Instruments and Exchange Act of Japan (the FIEA) governs the various financial instruments business activities, including the marketing of fund interests.

The FIEA governs four primary financial instruments business registrations:

1. Type 1 Financial Instruments Business Operator (a Type 1 Dealer);
2. Type 2 Financial Instruments Business Operator (a Type 2 Dealer);
3. Discretionary Investment Management Business Operator (a DIM); and
4. Investment Advisory and Agency Business Operator (an IAA).

Each registration allows a certain scope of activities. To understand the differences, we need to understand the two categories of securities under the FIEA.

Securities defined under Article 2, Paragraph 1 of the FIEA (Paragraph 1 Securities) are financial instruments such as shares of capital stock companies, bonds, units of investment trusts, shares of investment corporations, warrants and commercial paper.

Paragraph 2 Securities are those defined under Article 2, Paragraph 2 and include beneficial interests of a trust, interests in limited partnerships, limited liability partnerships and limited liability companies.

Any entity wishing to market securities must register with Japan's Financial Services Agency (the JFSA) as either a Type 1 or Type 2 Dealer permitted to market Paragraph 1 or Paragraph 2 Securities respectively.

The DIM permits the registrant to engage in a discretionary investment management business, which refers to the making of trades or investment decisions. This registration has increasingly been used as an indirect way to raise capital from investors, especially pension funds.

The IAA allows the holder to conduct two activities – providing non-discretionary investment advice to a third party about the value of securities and investment decisions; and acting as an intermediary or agent for a party entering into investment advisory or investment management agreements.

B. Private placement of fund interests in Japan

The regulations for Paragraph 1 and Paragraph 2 Securities differ significantly.

1. Any marketing of Paragraph 1 Securities can only be undertaken by a Type 1 Dealer. The FIEA allows four models of private placement:

(i) Small Number Private Placement - Up to 49 solicitations over a six-month period.

(ii) Hybrid Private Placement - Up to 49 solicitations, excluding solicitations to qualified institutional investors (QIIs), over a six-month period.
(iii) QII Private Placement - An unlimited number of solicitations to only QIIs.
(iv) Professional Investor Private Placement - An unlimited number of solicitations to only professional investors.

The exact model of the private placement will impact the specific disclosures and transfer restrictions which apply.

Before any marketing activities by a Type 1 Dealer, the fund is required to make a filing to the JFSA under the Act on Investment Trusts and Investment Corporations of Japan (the ITIC Notification). This summarises the fund's material terms, the Japan offering and its various service providers. The contents of the ITIC Notification are strictly for the JFSA's reference and are not available to the public.

2. The marketing of Paragraph 2 Securities can only be undertaken by Type 2 Dealers. The definition of a private placement varies significantly compared to Paragraph 1 Securities as the FIEA defines a private placement of Paragraph 2 Securities as any offering which has 499 or fewer Japan subscribers.

The ITIC Notification is not necessary for offerings of Paragraph 2 Securities.

C. Common exemptions

There are certain exemptions available to offshore fund managers.

1. The Foreign Securities Firm Exemption

Article 58-2 of the FIEA (the Foreign Securities Firm Exemption) allows a foreign securities firm to engage in limited marketing without being registered as a Type 1 or Type 2 Dealer. Restrictions vary depending on the type of investor targeted.

The firm cannot engage in any onshore marketing activities to most types of investors, and can only engage in offshore marketing activities into Japan (calls or e-mails).

For Paragraph 1 Securities, the fund must submit an ITIC Notification.

2. The Article 63 exemption

For the marketing of interests in limited partnerships to Japan investors, a common exemption is the “Special Permitted Businesses directed at Qualified Institutional Investors” under Article 63 of the FIEA (the Article 63 exemption).

This permits the general partner of a limited partnership fund to engage in: (i) ‘self-offering’ of the limited partnership interests; and (ii) ‘self-management’ of the assets of the Japan limited partners; and to be registered as a Type 2 Dealer or as a DIM, respectively.

However, as of 1 March 2016, the Article 63 exemption was significantly overhauled to raise the requirements of general partners operating under this exemption.

Despite Japan’s complex regulatory framework, there have been significant capital-raising activities there in the last few years.

Investors and investment allocators are increasingly looking to global managers to achieve target returns and Japan will continue to be a key allocator for investment funds. It is essential that offshore fund managers know how to navigate the regulatory landscape.

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Gleam of the white knights

More High Net Worth Individuals (HNWIs) are seeing distressed businesses as viable alternative investments.

Recent trends seem to indicate that there is growing interest among Asians and their families to come in as 'white-knight' investors for financially troubled and insolvent companies, suggesting that HNWIs may increasingly be seeing distressed companies and businesses as viable alternative investments.

Several debt restructurings in the Singapore market featuring (potential) investments by HNWIs in recent years support this trend:

A. Marco Polo Marine Ltd

The SGX-listed offshore and marine (O&M) company received a capital injection amounting to S$60 million. Interestingly, a large majority of the injection was from HNWI investors who were outsiders to the O&M sector, including Super Group's David Teo, Goldbell Group's William Chua, Soilbuild's co-founder Lim Chap Huat, the CEO of Yanlord Land Group Zhong Sheng Jian, and Oxley Holding's deputy CEO Eric Low.

B. Pacific Radiance Ltd

In an article in The Business Times in May 2018, the SGX-listed O&M group was reportedly in talks with Singapore's "Popiah King" - founder of the world's largest popiah skin maker, Tee Yih Jia Food Manufacturing - Sam Goi, who was reportedly interested to fork out the majority of a proposed S$120 million equity injection.

C. Falcon Energy Group Limited

Boustead chairman and CEO Wong Fong Fui personally invested S$2 million by acquiring an 8 per cent stake in the beleaguered SGX-listed offshore oil and gas contractor.

D. CW Group

The Hong Kong-listed engineering solutions provider, which filed for court protection in multiple jurisdictions, was reportedly in discussions with an unnamed Singapore family office as a potential investor.

Although some of these deals eventually did not materialise, they clearly show HNWIs' interest in the distressed sector. Coupled with the availability of investment capital and a pent-up demand for yield, the interest in such investments is likely to continue to grow.

Unlike institutional investors, HNWIs can be more creative in how they create value for themselves in the midst of a restructuring exercise. Commonly-observed methods are the injection of equity through an investment holding company, or the provision of funds through a loan agreement with an option for the investor to convert the debt into equity at the investors' option.

Another option is to purchase existing non-performing loans in companies undergoing restructuring exercises. The Business Times observed in May 2019 that there is "bubbling interest" in the South-east Asian region in investments in distressed loan portfolios, with regional banks showing interest in offloading non-performing loans to private investors.

A few factors contribute to the attractiveness of distressed companies as viable alternative investments for HNWIs. With the threat of the company's potential demise hanging over them, shareholders and management of distressed companies are more amenable to the entrance of new equity investors, whose capital injection gives the company a much needed lifeline.

Quite often, these companies are still viable in the long run but are experiencing short- to medium-term financial or liquidity issues.

Unlike institutional investors, HNWIs are generally more prepared to take a longer position with their investments, and may have interests in these distressed companies that may take a longer time to turnaround.

As observed with the recent interest in the O&M sector by non-O&M investors, there appears to be an increasing trend in HNWIs willing to take a punt in alternative sectors. A possible explanation is the desire to diversify their businesses/investments and thereby insulate themselves from structural downturns in the economy. Furthermore, such investments typically provide higher yield to the lender/investor, in the form of higher interest rates or lower share issuance prices, albeit at a higher risk of non-recovery. With the reported increase in distressed debt portfolios, this may be an increasingly attractive investment option for HNWIs.

As Singapore positions itself to be a debt restructuring hub in the region, it remains to be seen how HNWIs can leverage the new restructuring laws in Singapore, consisting of the 2017 amendments which took reference from the US Chapter 11 regime, and the Insolvency, Restructuring and Dissolution Act 2018, which was passed in October 2018 but has yet to be given effect to.

An interesting space to watch would be the invoking of the new rescue financing provisions, which allow the Singapore Courts to grant super-priority status to financing provided in the midst of court-supervised restructuring exercises. With greater market awareness and advice (financial, legal and otherwise), such super-priority financing could be of greater interest for HNWIs to invest.

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Key considerations for retailers regarding tenancy contracts

In Hong Kong, it is very common for retailers to rent a space for businesses. It is of paramount importance that these retailers have sufficient contractual protection and measures in place to minimise their losses if circumstances become difficult. There are a few essential points for tenants to consider when dealing with tenancy contracts to ensure satisfactory protection in the event of an unexpected situation.

Local commercial tenancy contracts state that retailers are not allowed to close their businesses for a consecutive number of days or for an entire festive season during their tenancy as this will affect the turnover income of property owners. If such terms are breached, landlords would be entitled to terminate the tenancy contract, given this is a serious contractual violation.

To protect the business, retailers can include excepted situations, exclusion of liability clauses (or more specifically, defined Force Majeure clauses to include situations which are beyond the control of the owner or retailers) in their contracts to ensure that unforeseeable situations, which caused the business to close, would not prematurely bring an end to or constitute defaults in their contracts.

Nevertheless, inclusion of such clauses does not guarantee absolute protection for retailers as the clauses have to be drafted clearly and in a reasonable manner. Whereas contractual parties are normally bound by the terms as stipulated in the contract, the unique nature of exclusionary clauses means that they are subject to strict statutory and common law scrutiny. As stated under the Control of Exemption Clauses Ordinance ("CECO"), all exclusionary clauses will have to be fair and reasonable, or they will be voided.

What amounts to "fair and reasonable" is highly dependent on the contextual environment of when the contract was formed, and, comparisons with case law, must be made to ensure the validity of such clauses. Moreover, even if the exclusionary clauses are valid under the CECO, this still does not automatically entitle retailers the right to seek reliance on it.

In Hong Kong, courts adopt the Contra Proferentum rule in interpreting exclusionary clauses, which means that any ambiguity within the exclusionary clauses will be construed against the party seeking protection. With such a restrictive approach, exclusionary clauses must be carefully worded to cover a sufficient scope of eventualities.

Retailers who have been ordered to close by their landlords may be deprived from future business opportunities. To prevent a loss of revenue under such circumstances, these retailers can negotiate terms when signing their tenancy agreements. By doing so, they would, at the very least, be entitled to monetary compensation from the shop owners, and may even be allowed to terminate the tenancy, if the relevant terms are appropriately drafted.

As with other common law regimes, Hong Kong courts will enable the affected party to terminate its contract if the breached term concerned is categorised as a "Condition", or if the breach of such term would deprive the affected party from most of the benefits it had originally expected.

The right to terminate is important for retailers, particularly if their business operations are time-sensitive in nature. However, this legal protection is only afforded if the relevant terms are carefully drafted. Courts are generally reluctant to provide this drastic protective measure simply because the parties have branded a particular term as a "Condition".

A clear intention to treat the term as such must be evinced through delicate contractual construction, or the retailers may suffer from irretrievable losses that cannot be fully compensated through monetary means.

With on-going uncertainties in the market, contractual protection has long been proven to be an adequate recourse for the commercial losses suffered as a result, and professionals should always be consulted if one is in doubt of the soundness and protectiveness of their contracts.

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When music artists can no longer sing the same tune

The multi-million dollar award issued against Katy Perry for copyright infringement in her chart-topping hit "Dark Horse" now has many music artists on edge. With the spotlight now on legal issues in the music scene, music artists need to become aware of legal pitfalls which could waylay their best-laid plans.

"Us against the world"

Starting out, most artists have limited repertoires of original works and usually perform covers of famous hits to build a following. Many, however, do not realise that they need to obtain licences from collecting societies to perform cover songs each time they perform a live gig or post a video on social media platforms.

Even after having created their own original compositions, music artists may find out the hard way that their signature song is not as 'original' as they think.

Sobering lessons on copyright infringement abound, from the sampling of a few bars of music in The Verve's Bittersweet Symphony, "subconscious copying" in George Harrison's My Sweet Lord, or even mere musical inspiration or influence in Blurred Lines by Robin Thicke featuring T.I. and Pharrell Williams. Popular artists such as Ariana Grande, Ed Sheeran and Sam Smith have since tried to pre-empt or settle copyright infringement claims by crediting writers of 'sound-alike' songs.

"Rage against the machine"

A professional record label or savvy agent can clear the path and prime an artist for success by managing permissions and licences, shouldering risk, and undertaking distribution and promotional activities.

However, they can sometimes be the artist's worst enemy, as may be seen from Taylor Swift's bitter struggle with her former record label, which held the rights to her earliest albums. Despite her enviable financial resources and bargaining power, she failed to seal a deal for the rights to be assigned back to her.

With management agencies and record labels holding the keys, it is easy for young and inexperienced artists to feel powerless, angry but resigned to signing their rights away in exchange for a chance at a major label debut.

However, with the rise of digital platforms such as Spotify and TuneCore, artists now have an opportunity to self-publish music and take matters into their own hands, even as they balance the benefits of autonomy carefully against the loss of having professionals and industry heavyweights supporting their career.

For such independent artists, social media platforms are a cheap and effective way of promoting their work and building a fan base. However, artists should always pay attention to the terms and conditions before posting their musical works.

Typically, an online platform such as YouTube or Facebook is granted a licence to use content posted by any user, and the usual ways of terminating the licence are by deleting that content or by terminating the user account permanently. It is difficult to control the use and reproduction of content once posted online and it often becomes a case of 'whack-a-mole' for anybody trying to police unauthorised infringement.

Certain platforms have particularly egregious terms and conditions, notably TikTok, which expressly warns users not to post commercial content because user content on TikTok is fully open to reproduction, adaptation and modification by all users in any format and on any platform.

"You've got a friend in me"

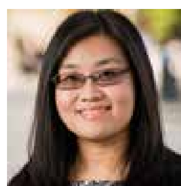
Friends, business partners, creative muse and family all rolled into one, bands have an additional complication to handle – their relationship vis-à-vis one another.

One of the first things they need to come to terms with is that they may not have equal rights to their music. Getting songwriting credits doesn't just mean recognition as a creator, it also means an entitlement to creator royalties. A band member who only plays the music will be entitled to less royalties than the band members who also write the lyrics or compose the music. However, if the band is an equal partnership with each member improving the song as they practise and rehearse the song together, they could agree on co-ownership over the work.

Bands which are serious about turning professional would also do well to enter into a band partnership agreement. This will deal with issues such as ownership of the band name, money management, major decisions that require majority vote or unanimous vote, and most importantly, consequences of members leaving the band.

Save for precious few examples such as Aerosmith or U2, which have enjoyed longevity with the same line-up over decades, instances of members leaving the band are so common that it would be foolish not to plan for it. Uncomfortable issues are best not left until members are no longer on speaking terms. Does the band retain the right to the band name and to play the same songs? What if the departing band member was the key songwriter or is leaving for another band?

These issues may well dampen a budding artist's enthusiasm, but armed with talent, passion and good legal advice, the music scene is still alive and well for those who have the thirst for success.



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A boost to mediation, and Singapore as a premier dispute resolution destination

7 August 2019 was a historic moment for Singapore. 46 countries signed the Singapore Convention, more formally known as the United Nations Convention on International Settlement Agreements Resulting from Mediation – a record number of first-day signatories for a UN trade convention.

The signatories include the world's two largest economies, China and the US, as well as major Asian economies, India, South Korea and Saudi Arabia.

Better enforceability of the mediated agreement

The aim of the Singapore Convention is to provide an internationally uniform framework to recognise and enforce mediated settlement agreements, similar to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) for international arbitration awards. By providing a stronger enforcement mechanism for mediated settlement agreements, the Singapore Convention will elevate the importance and effectiveness of mediation globally and provide another attractive option for businesses in resolving international commercial disputes.

According to a 2019 study by Ipsos and Singapore Academy of Law, enforceability is the biggest factor for legal professionals in their choice of dispute resolution options. Without an effective enforcement mechanism, there is no assurance that either party will honour their side of the bargain or satisfy any judgment or award against them. Traditionally, settlement agreements are legally treated as contracts and a party must first sue for breach of contract in order to obtain an enforceable judgment/award. In Singapore, subject to the requirements under the Mediation Act, parties can convert their mediated agreement immediately into an enforceable court order.

The New York Convention coupled with decades of jurisprudence has greatly promulgated the usage of international arbitration worldwide. A large majority of arbitral awards are complied with little need to resort to enforcement measures since the straightforward resort to enforcement is simply there. The New York Convention started with 10 signatories in 1958 and now boasts 160 signatories. With the success of the

New York Convention, the reception for the Singapore Convention certainly looks promising. The Singapore Convention will similarly grant a greater level of expectation and efficiency with regards to mediated settlement agreements.

Better for businesses and investments

With its non-adversarial and relationship-preserving process, mediation could very well be the alternative dispute resolution mechanism of choice for commercial parties. Considering the enabling legal framework put in place by the Singapore Convention, being a party to the Singapore Convention signifies a greater commitment to international trade and uniform best practices. A Singapore Convention signatory would be a good place to start for businesses looking to explore investment and business opportunities overseas.

A major issue for transnational businesses and investments is the unfamiliar and cumbersome cross-border dispute resolution process. The immediate problems include unpaid accounts, missed deadlines, and increased costs from rectification or changes. Unresolved disputes can also lead to the potential loss of profits from the breakdown of business relationships and the diversion of resources away from further business development. A cumbersome process would involve high legal costs and expenses. An unfamiliar dispute resolution system will also deter businesses and investors from entering the country. If the dispute resolution process can be simplified, streamlined and made uniform across borders, the reduced costs required to resolve disputes would create a robust and more attractive business climate.

The Singapore Convention also complements Singapore's plans to accelerate business and infrastructure development in the region, such as through Enterprise Singapore's initiative Infrastructure Asia. The Asian Development Bank estimates that Asia requires US$1.7 trillion in investment into infrastructure annually. The Belt and Road Initiative involves infrastructure development across 152 countries and has stemmed various projects in ports, railways, highways, aviation, power and telecommunications. To promote infrastructure and other projects in Asia, there is a need to put in place a business-friendly legal and regulatory framework for public-private partnerships.

With so many ambitious and promising Asian projects on the horizon, the private sector will definitely have plenty of opportunities to get involved. To those mindful of the past Asian financial crisis, a strong international dispute resolution mechanism can allay the risk-averse and rebuild trust in the system. Ideally this should lead to better private sector funding and usher in a new age of economic development in the region.

When will the Singapore Convention apply?

The Singapore Convention applies to settlement agreements that result from mediations to resolve international commercial disputes. The following criteria must be met for the purposes of recognition and enforcement of the settlement agreement between the signatory states:

1. The agreement is "international", meaning either (i) at least two parties have their place of business in different countries, or (ii) the country where the settlement agreement is to be performed or is most closely connected to the agreement, is different to the parties' place of business.

2. The agreement is signed by the parties and "resulted from mediation". Mediation is defined broadly as a process whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third-party (mediator) lacking the authority to impose a solution upon either party to the dispute.

3. The agreement does not fall within the list of excluded agreements:
   (i) arising from transactions engaged by one of the parties for personal, family or household purposes;
   (ii) relating to family, inheritance or employment law;
   (iii) which have been approved by a court or concluded in the course of proceedings before a court and are enforceable as a judgment in a court; and
   (iv) recorded and enforceable as an arbitral award.

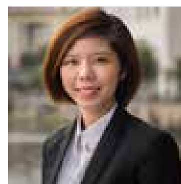
4. None of the exhaustive list of grounds for refusing relief applies:
   (i) A party to the agreement was under incapacity;
   (ii) Granting relief is contrary to public policy;
   (iii) Subject matter of dispute is not capable of settlement by mediation;
   (iv) Settlement agreement is null and void, inoperative, incapable of being performed, not binding, not final, not clear or comprehensible;
   (v) Serious breach by the mediator of standards applicable to the mediator or the mediation;
   (vi) Failure by the mediator to disclose circumstances relevant to the mediator's impartiality or independence.

What's next?

Countries that have signed will have to go through a domestic process to ratify the Convention. The Convention will only formally come into effect after the ratification process has been completed by at least three signatory states. This is likely to be achieved, given that 46 countries signed on the first day it opened for signatures.

While its full impact, particularly whether it will be as significant as the New York Convention, remains to be seen, but strong early uptake is a very promising indicator.

Consistently ranked amongst the top least corrupt country in the Corruption Perceptions Index and the only Asian country within the top ten, Singapore is well-poised to service businesses in the Asian region and beyond. Singapore law is well-established, commercially-sensitive, has its roots in English law, and will be familiar to any common law practitioner. Singapore's unique position as the crossroads between the East and West, and its proficient dispute resolution institutions, make it the ideal location to base businesses and resolve disputes. The Singapore Convention will further reinforce Singapore as the premier hub for dispute resolution in Asia.



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What rights do the LGBTQ+ community receive in Hong Kong?

Pride Parades in support of the lesbian, gay, bisexual, transgender (LGBTQ+) community are celebrated worldwide, as well as in many parts of Asia. However, LGBTQ+ rights are not recognised universally. Therefore, international companies may find it difficult to implement global policies and strategies to advance diversity and inclusion. Hong Kong in particular is relatively behind other key financial hubs such as New York and London when it comes to recognising LGBTQ+ rights.

Equality is noted in Hong Kong's Bill of Rights Ordinance ("HK Bill of Rights") and the constitutional document known as the Basic Law. The Basic Law stipulates that "all Hong Kong residents shall be equal before the law: (article 25). Specifically, article 22 under section 8 of the HK Bill of Rights prohibits any discrimination and guarantees equal and effective protection against discrimination on any grounds such as race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. However, these rights are only enforceable against the government and public authorities.

Beyond the HK Bill of Rights, members of the LGBTQ+ community have little protection and are not afforded equal rights, as discrimination on the basis of sexual orientation is not included.

As of today, Hong Kong's legislation only recognises marriages between a man and a woman. However, in spite of this, there have been two recent court cases which have ruled in favour of LGBTQ+'s rights and represented small wins for the community:

Case 1. QT v Director of Immigration FACV 1/2018; [2018] HKCFA 28

QT and SS entered into a same-sex civil partnership in 2011 in the UK. SS was offered employment in Hong Kong and was granted an employment visa. SS applied for dependent visa for QT, which was available to spouses and dependent children, but this was refused due to the policy limiting spouse visas to couples in a heterosexual marriage.

QT challenged the Director of Immigration (the "Director")'s refusal of a dependent visa application on the ground that this was discrimination based on sexual orientation. The Court of Final Appeal ("CFA") ultimately ruled in favour of QT and found that the differential treatment was not justified and was also counterproductive to attracting talent.

Case 2. Leung Chun Kwong v Secretary for the Civil Service, Commissioner for Inland Revenue [2018] HKCA 318; [2018] 3 HKLRD 84; [2018] 6 HKC 173; CACV 126/2017

Mr. Leung, a Senior Immigration Officer and Hong Kong permanent resident, legally married his same sex partner, Mr. Adams, in New Zealand. Mr. Leung's employment contract entitled him and his family to receive certain medical and dental benefits from the Civil Service Bureau ("CSB"). Mr. Leung sought to access the benefits that he and his family were entitled to under his employment contract by updating his marital status with the CSB and filed for a joint assessment of taxes under the Inland Revenue Ordinance. Both applications were at first denied, stating that the same-sex marriage fell outside Hong Kong's definition of marriage, so Mr. Leung applied for judicial review of both decisions.

In June 2019, the CFA unanimously ruled in favour of Mr. Leung on both issues. The CFA held that there was no rational connection between denying Mr. Leung employment and tax benefits and the aim of protecting the institution of marriage in Hong Kong.

The two recent cases before the CFA indicate that there is a growing support for LGBTQ+ rights in Hong Kong. Following the judgment of QT v SS, the Immigration Department has updated its eligibility criteria for dependent visas to include dependents in a same -sex marriage.

However, the rights of local same-sex partners remain unprotected and the government has been reluctant to review and rectify other social policies that affect the core livelihoods of local same-sex partners.

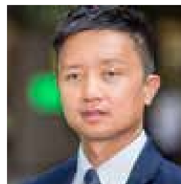
Likewise, the victory in the Leung Chun Kwong decision falls short of a breakthrough as it only recognises the spousal benefits of same-sex partners in the public sector, while same-sex partners in the private sector are subject to the whims of their employer's own policies.

Despite the fact that same-sex marriage is still not recognised in Hong Kong, the government has begun to recognise the increasing importance of protecting the LGBTQ+ community in the workplace.

It has issued (through the Constitutional and Mainland Affairs Bureau) the Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation (the "Code of Practice"), for employers in the private sector to adopt.

The Code of Practice sets out guidelines to facilitate self-regulation on the part of employers and employees in eliminating discriminatory practices and seeks to promote equal employment opportunities among all persons – irrespective of their sexual orientation.

While the Code has no statutory force, organisations are encouraged to adopt the Code of Practice as a public demonstration of their commitment to anti-discriminatory practices. As of May 2019, the Code of Practice has been adopted by approximately 230 companies in Hong Kong.



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