FRESHFIELDS

Asia Redefined

Asia in-house counsel forum 2024

Agenda

The world is in flux, creating uncertainties and a new risk landscape that no business can ignore.

Freshfields Asia in-house counsel forum 2024 aims to equip clients as they face the challenges of a redefined Asia, and its place in the global economy. Supporting legal teams with a fresh way of thinking and exploring solutions as they adapt to these new challenges: from the bright spots in the Asia markets, to successful cross-border dealmaking, and meeting the many regulatory demands imposed on business.

Time	Session	Speakers
8.30am	**Welcome**	**Matthew O'Callaghan** Office Managing Partner, Hong Kong
8.35am	**Keynote remarks** Ambassador Juster shares perspectives on the geopolitical landscape for 2025, with particular focus on the implications for the Indo-Pacific region, and the potential impact of the US elections on this landscape.	**Ambassador Kenneth I. Juster** Former US Ambassador to India, Senior Consultant, Freshfields and Distinguished Fellow at the Council on Foreign Relations
8.50am	**Ballots and the boardroom – geopolitics and the 2024 election "supercycle"** Half the world's population votes in 2024, with the US election yet to come. How will the 2024 global election super-cycle shape geopolitics? Our panel of business leaders will share their insights on how they and their organisations interpret world events and manage geopolitical risk in shifting times.	MODERATOR **Arun Balasubramanian** Partner, Hong Kong & Singapore PANELLISTS **Ambassador Kenneth I. Juster** Former US Ambassador to India, Senior Consultant, Freshfields and Distinguished Fellow at the Council on Foreign Relations **Matthew Bland** Director & Group General Counsel, Jardine Matheson Limited **Alex Koustas** Head of APAC Country Risk Management, J.P. Morgan Chase & Co **Grace Yuen** Managing Director, Head of Legal APAC, CPP Investments

Agenda

Time	Session	Speakers
9.20am	**Insider's view on deal certainty** In today's increasingly complex regulatory environment, achieving deal certainty in cross-border transactions presents significant challenges. Merger control regimes are proliferating, with varying thresholds, review timelines, and enforcement practices across jurisdictions. The rise of foreign investment regulations, driven by national security concerns and protectionist policies, adds further complexity to cross-border transactions. This panel will explore how regulatory changes and political shifts impact dealmaking, providing insights from former regulators and senior regulatory specialists across key jurisdictions. Panellists will also discuss strategies to mitigate risks and secure successful outcomes amid evolving global dynamics.	MODERATOR **Ninette Dodoo** Antitrust, Competition and Trade Registered Foreign Lawyer (Belgium) PANELLISTS **Alastair Chapman** Partner and Head of Global Antitrust, Competition and Trade group, London **Ambassador Kenneth I. Juster** Former US Ambassador to India, Senior Consultant, Freshfields and Distinguished Fellow at the Council on Foreign Relations **Colin Raftery** Partner, London **Hazel Yin** Partner, RuiMin
9.45am	**A balancing act – navigating China during times of uncertainty** Multinational companies and global investors are continually reassessing their strategies for the China market amid geopolitical headwinds, regulatory pressures both domestically and internationally, and evolving dynamics in China's macroeconomy. Our seasoned China experts will provide an on-the-ground perspective on the approaches being evaluated or implemented by multinationals, and share key considerations that keep headquarter decision-makers up at night.	MODERATOR **Alan Wang** Partner, Shanghai PANELLISTS **Richard Bird** Partner and Asia Head of IP & Data, Hong Kong **John Choong** Partner and Head of China Arbitration Practice, Hong Kong **Sarah Su** Partner, Hong Kong

Agenda

Time	Session	Speakers
10.10am	**Navigating distressed situations – are you ready?** Proactively managing the undesirable situations and lessons learnt from the current market cycle, including certain duties that directors should be aware of.	**John Choong** Partner and Head of China Arbitration Practice, Hong Kong **Bing Guan** Partner, Hong Kong **Tony Chow** Lead, Insolvency Litigation, Hong Kong
10.30am	**Coffee break**	
11am	**A next step up for deal making in Japan** Japan's M&A landscape has been transformed by recent market reforms introduced by the Ministry of Economy, Trade and Industry (METI) to improve Japanese corporate governance and capital efficiency. As a result, we have seen more active deal-making in Japan, including takeover bids and unsolicited offers, and Japanese companies are under pressure to rationalise their business portfolios both in Japan and globally. This session will discuss the key trends in Japan M&A, as well as opportunities and pitfalls for strategic and financial investors.	MODERATOR **Sebastian Fain** Partner, New York PANELLISTS **Noah Carr** Partner, Tokyo **Tomoko Nakajima** Partner, Head of Japan M&A, Tokyo
11.20am	**AI Bite** The legal industry transition from a human capital industry to a human centred industry powered by AI and LegalTech.	**Gerrit Beckhaus** Partner, Co-Head Freshfields Lab, Hamburg & Berlin **Gil Perez** Global Chief Innovation Officer, Silicon Valley
11.30am	**Beyond China – Asia's expanding horizons** Exploring opportunities beyond China, Southeast Asia has seen significant growth in recent times. In this session, we will focus in particular on Vietnam, where foreign direct investment fuels transformative growth, and India, where effective economic management and innovation are paving the way for new possibilities.	MODERATOR **Edward Freeman** Partner, Hong Kong PANELLISTS **Arun Balasubramanian** Partner, Hong Kong & Singapore **Eric Johnson** Partner, Vietnam **Samantha Tan** Partner, Singapore

Agenda

Time	Session	Speakers
11.50am	**Investment Bite** As a financial sponsor or investor, what markets and sectors are you looking at? With our insights on recent trends we are seeing in the healthcare sector in China, this investment bite will arm you with a different perspective on not the usual types of deals.	**Sebastian Fain** Partner, New York **Ma Ya** Counsel, Beijing
12pm	**Asia risk landscape** In this session, we examine risks in two main areas: first, the risks for Hong Kong sponsor banks, listing applicants, and listed issuers arising from changes in Hong Kong Stock Exchange listing requirements and its enforcement focus. Second, the risks pertaining to investment-related disputes in Asia, excluding China, and we consider how we might navigate through those risks.	MODERATOR **Tim Mak** Partner, Hong Kong PANELLISTS **Samantha Tan** Partner, Singapore **Rohit Bhat** Lead, India Disputes, Singapore **Cindy Kwong** Counsel, Hong Kong
12.30pm	**Views from an Asia business leader**	**Teresa Ko** Partner and China Chairman **Pamela Mar** Managing Director, ICC Digital Standards Initiative
12.55pm	**Close**	**Robert Ashworth** Partner and Global Co-Head of M&A, Hong Kong
1pm	**Lunch**	

Key themes

Ballots and the boardroom – geopolitics and the 2024 election "supercycle"

Geopolitical factors are increasingly important to boards and management, and call for effective risk management. Our panel examined how elections around the world, conflicts in the Middle East and Ukraine, and evolving US-China relations may change government policies and influence other factors affecting investments. Our panellists also shared their views on the opportunities and risks of investing in China and in the Asia-Pacific region generally.

Key themes and takeaways

1. **Geopolitical factors bring not only risks, but also opportunities.** Accurate assessments and suitable strategies will place an organisation at a competitive advantage, but there is no one-size-fits-all approach.
2. **In-house legal counsel must look beyond legal issues, identify and assess geopolitical risks and opportunities, and put in place effective responses.** This calls for expertise and practical experience beyond the legal and commercial spheres.
3. **The investment environment in the Asia-Pacific region will be affected by the various elections in 2024.** Countries in the Asia-Pacific region stand to benefit from regional integration, but their engagement with the US and China, and the outcome of recent and upcoming elections, will impact the region's investment opportunities.

Your Freshfields contacts:

Arun Balasubramanian
Partner, Hong Kong & Singapore

Ambassador Kenneth I. Juster
Former US Ambassador to India, Senior Consultant, Freshfields and Distinguished Fellow at the Council on Foreign Relations

Special thanks to our guest speakers Matthew Bland (Jardine Matheson Limited), Alex Koustas (J.P. Morgan Chase & Co) and Grace Yuen (CPP Investments).

Key themes

Insider's view on deal certainty

While the vast majority of transactions continue to be executed without material regulatory intervention, "harder" transactions have been subject to greater scrutiny from antitrust and foreign investment authorities over the past few years, complicating the regulatory clearance process and resulting in new lows in deal certainty.

Key themes and takeaways

1. **A changing geopolitical and regulatory landscape.** The current perception among most political leaders in the US is that the policy for almost 80 years of global integration and trade liberalisation, including with China, has led to a series of problems in America, including the loss of manufacturing jobs and the hollowing out of American communities. These problems led the US National Security Adviser in April 2023 to deliver a critique of the neoliberal consensus that has served as the foundation for the US economic policy and embrace a new vision, focused on helping American workers and the middle class. This new approach, aimed largely at China, includes selectively raising tariffs, increasing scrutiny and restrictions on inbound and outbound investment, imposing new export controls on high-technology items, engaging in domestic industrial policy, and tightening antitrust enforcement. This approach, however, with its added attention on American labour and domestic politics, has also affected foreign investment from a close ally such as Japan. This is apparent in the opposition by the Biden Administration and both candidates running for president of to Nippon Steel's proposed acquisition of U.S. Steel, even though the acquisition does not appear to present antitrust or national security issues.

2. **Increasing uncertainty in obtaining antitrust and foreign investment approvals.**

   Europe

   In the European Union (***EU***) and the United Kingdom (***UK***), we have observed falling levels of predictability in the merger control space. This is due to an overarching concern about historical under-enforcement, which has resulted in (a) the agencies more proactively taking jurisdiction over deals (eg until recently, the European Commission was using call-in powers even where transactions hit neither EU nor national jurisdictional thresholds; and the Competition and Markets Authority (***CMA***) is reviewing deals with only limited nexus to the UK); and (b) the use of novel theories of harm such as those relating to ecosystems, labour markets and killer acquisitions. In light of these changes, businesses should consider in advance – and certainly before engagement with the agencies – how traditional and novel theories of harm may apply to their transactions and how such theories might be defeated.

   Each of these changes can lessen the predictability of merger control. This tracks through into the deal document terms and structure. Parties typically want a long stop date that offers sufficient time to get the deal cleared (including – in the US – building in sufficient time to litigate against the agencies in court). And the seller wants protection against execution uncertainty. That said, hell or high-water obligations are becoming less common (as remedies are increasingly challenging to predict), whereas we have observed an increasing use of reverse break fees, as well as sellers requiring purchasers to pay a ticker fee for longer antitrust review processes.

   Even in this more challenging climate, sophisticated analysis is able to identify the key risks in most cases and how they can be navigated (or whether they might be 'deal-breakers'). While political interest tends to fuel the 'noise' around a deal, antitrust analysis in Europe and the UK still continues to stand or fall on objective and evidence-based analysis of competition concerns. And, when looking at the overall deal flow, a transaction not proceeding for competition reasons remains relatively rare. To take the UK, for example, while approximately 24 deals were prohibited or abandoned because of antitrust concerns, between 2018 and 2023, this represented fewer than 1% of the 3,500 transactions reviewed by the CMA over that period.

Key themes

China

In China, the government has been cautiously navigating through the changing international geopolitical landscape. Despite growing domestic calls for the Chinese government to engage in countermeasures against firms from jurisdictions where sanctions and trade controls have been levied against Chinese firms, the government's focus remains firmly on stimulating the economy and attracting investment into its priority sectors. Hence, although we are seeing an uptick of investigations, the State Administration for Market Regulation's (***SAMR***) is still taking the prudent approach of building robust theories of harm before taking concrete action.

On merger control, SAMR remains focused on transactions impacting supply chain security. We have observed lengthy review periods for these transactions, mainly due to the need for inputs from a broad group of stakeholders to assess their impact on competition and Chinese industrial policy. There is also an increased use of SAMR's call-in powers.

On national security reviews, the National Development and Reform Commission (***NDRC***) becomes increasingly interested in sectors involving advanced technologies, such as autonomous driving, and areas involving collection of personal data. Structural and/or behavioural remedies may have to be offered to resolve the concerns and obtain clearance.

Rest of Asia

Elsewhere in Asia-Pacific (***APAC***), we are also witnessing shifts in the balance between regulatory scrutiny of deals and facilitating them. The balance is currently headed towards intensifying deal scrutiny– especially in countries with mature merger control and foreign investment regimes. For example, Australia will introduce a new mandatory merger control regime requiring reportable deals to be notified and cleared before implementation, India has adopted a new transactional value threshold test under its existing merger control regime to capture deals that might otherwise have escaped scrutiny, and Singapore has launched a foreign investment screening regime which mandates national security review for deals involving so-called 'designated entities'. That said, some countries have signalled that they want to facilitate deal-making. For example, New Zealand very recently announced plans to streamline its foreign investment screening regime with a view to attract foreign investment. The evolving geopolitical climate, changes in industrial policy and trade realignment can be expected to shape the regulatory landscape in APAC.

3. **Planning ahead.** Notwithstanding the complexities in navigating through an uncertain regulatory environment, businesses can still achieve success by anticipating potential regulatory and geopolitical risks. Considering key risks in advance and developing a 'game plan' whilst cognisant of the issues in play will be critical for multinational businesses going forward.

Your Freshfields contacts:

Alastair Chapman
Partner and Head of Global Antitrust, Competition and Trade group, London

Ninette Dodoo
Antitrust, Competition and Trade Registered Foreign Lawyer (Belgium)

Ambassador Kenneth I. Juster
Former US Ambassador to India, Senior Consultant, Freshfields and Distinguished Fellow at the Council on Foreign Relations

Colin Raftery
Partner, London

Special thanks to our guest speaker Hazel Yin (RuiMin).

Key themes

A Balancing Act – navigating China during times of uncertainty

The Chinese economy is currently going through some structural challenges and a painful shift in its growth model, amid rising geopolitical and trade tensions with the US. Escalating sanctions, export controls and trade barriers, as well as increasing regulations on data transfers and cyber security are posing significant challenges for multinationals and global investors operating or investing in China.

Key themes and takeaways

1. **(Re)defining China strategies.** Navigating China during these uncertain times now increasingly involves a delicate balancing act to avoid being caught in the middle. Consequently, many international investors are now reassessing their China strategies and engaging in contingency planning amid the various headwinds.

   Some of the key strategies include (i) disposing of all or part of their China business (usually to a Chinese buyer); (ii) bringing in a local partner or pursuing a spin-off listing of their China business, which reduces exposure, whilst maintaining a continued presence; (iii) ring-fencing the China business so as to operate on a standalone basis, and (iv) supply chain diversification. However, while there has been much talk about "China de-risking", in reality most MNCs are taking a much more nuanced approach, recognising the fact that China is not only likely to remain a vast market and a highly efficient manufacturing base, but is also increasingly a source of innovation across many key technological and industrial domains.

2. **Balancing competing legal systems.** Multinational companies operating in China face competing obligations from China and foreign legal systems dealing with trade and data. Consequently, multinational companies must strike a careful balance in managing their interactions with multiple legal systems. Reaching an appropriate balance is not easy. Current challenges include foreign sanctions and export restrictions, and China's 'Unreliable Entity List', which may apply to multinationals who discriminate against Chinese counterparties. On the data side, it is important to be alive to restrictions against the transfer of data from China to foreign judicial and law enforcement bodies.

   There are no easy solutions, and all options require careful consideration. As basic mitigation steps, multinationals should (i) plan ahead and think carefully about China-based trade agreements and data, (ii) communicate with relevant government bodies and all other stakeholders; and (iii) ensure that evidence can be produced to foreign judicial and law enforcement bodies to show that reasonable efforts to comply with all applicable laws have been taken.

Key themes

3. **Managing cross-border data transfer.** China's multi-layered restrictions on cross-border transfers of data have precipitated many international businesses to explore approaches to localising data storage and systems hosting within China. Recent attempts by prominent free trade zones in China (including in Beijing and Shanghai) to classify 'important data' requiring government approval to export, indicate that the government's focus has mostly settled on online platforms, classic defence and national security interests, and a relatively small number of sensitive areas of the economy that could be considered indicative of its overall performance. More relaxed rules have also recently been brought in for overseas transfers of personal data, including introducing several exemptions, in response to issues raised by international businesses with the previous rules. And various mechanisms are also being developed to facilitate data sharing within the Greater Bay Area.

   Despite these more encouraging signals in recent months, this remains a fast evolving and still potentially highly impactful issue that international companies will want to pay close attention to as further details become available.

Your Freshfields contacts:

Richard Bird
Partner and Asia Head of IP & Data, Hong Kong

John Choong
Partner and Head of China Arbitration Practice, Hong Kong

Sarah Su
Partner, Hong Kong

Alan Wang
Partner, Shanghai

Key themes

Navigating distressed situations – are you ready?

Distressed situations continue to be on the rise in the region. Whether you're a debtor, a creditor or a sponsor, it is important to read the early warning signs of distress and prepare appropriately.

Key themes and takeaways

1. **Managing distress.** It is not uncommon for some businesses to experience difficulties due to external or internal factors, which can then lead to a company being in distress. The actual triggers for distress can arise from (i) liquidity issues (interest/operating costs); (ii) covenant breaches; or (iii) an inability to refinance where a company is unable to meet upcoming maturities.

   While there may be ways to mitigate or delay the triggers of a distress situation (for example, non-core asset sales), very often a more long-term solution will be required by a company.

   To achieve a more long-term solution, a restructuring may be needed, which can be achieved through one of the following routes:

   a) a consensual arrangement with existing lenders;

   b) a liability management exercise, being an overarching term for a variety of procedures and techniques used by debtors to adjust their capital structure or reset debt terms, such as an up-tiering transaction or asset drop down transaction; and

   c) a court based process such as a scheme of arrangement, which would allow a debtor to impose a deal on creditors where 75% by value of creditors in each class vote in favour.

2. **Directors duties.** It is important as a director of a company to be cognisant of your directors' duties in a distress situation. While ordinarily a director must act in the best interests of the company for the benefit of its members, these duties begin to shift in a distress context to be for the benefit of its creditors rather than its members. The shift is on a sliding scale, so the more precarious a company's financial position, the greater the shift in duties. A breach of such duties can lead to liability claims against the offending directors.

   Directors owe their duties to the individual companies which they are appointed to. Where a director is appointed by a sponsor or a creditor, or where they have multiple appointments across a group, they should remain cognisant of this. It may be the case that the duties they owe to an individual company may conflict with their other roles or interests. For example, difficulties could be posed by the duties on directors to keep company information confidential and share relevant information with fellow directors. Conflicts can be managed with appropriate protocols being put in place.

   It is worth noting that duties extend to shadow directors and de facto directors, and they face the same liability risks as appointed directors. A shadow director is a person in accordance with whose directions or instructions the directors are accustomed to act (which the whole board or a majority follows). A de facto director is someone who is not formally appointed, but acts as a director. Shareholders, creditors and board observers must ensure they do not risk being classed as one to avoid liability. Again, planning and appropriate protocols are necessary to help avoid this.

   Boards and directors should ensure they are properly advised when a company enters into distress to help avoid any liability risks. It will also be important to check that appropriate directors and officers insurance coverage is in place.

Key themes

3. **Practical tips.** From a sponsor's perspective, a company in distress or not performing can pose issues with regards to the sponsor's exit strategy. A sponsor will need to balance a number of considerations, including risk of any redemption rights expiring, risk of having a conflicting position to any co-sponsors and reputational risks from adopting an overly aggressive position and exiting too early. Such situations can often lead to shareholder disputes, and to manage these it's important to have a clear strategy in place.

   Basic practical tips include the following:

   a) map out a clear plan of action: with milestone dates, red lines, and different options depending on how stakeholders react;

   b) review your strengths and weaknesses, and understand where you stand; and

   c) a parallel track strategy: on the one hand, continue to exert pressure using the arsenal of tools available; on the other hand, keep lines of communications open.

   From a company's perspective, there are a number of proactive steps a company should take when faced with distress:

   a) check the flexibility in the company's finance documents to determine the ability to obtain short term liquidity, address balance sheet issues and/or to undertake other potential actions or liability management exercises;

   b) consider financing sources, traditional sources of financing include debt and equity financing. Many companies will go to their relationship banks as their first port of call. Private credit is also now increasingly an option in Asia to raise funds from non-standard sources;

   c) consider implications of any default, for example, will this lead to any cross-defaults across other financing documents?;

   d) determine who the current lenders are and understand the transfer restrictions in the finance documents with a view to controlling or influencing any trading;

   e) anticipate what lenders/stakeholders can do proactively and understand their possible asks. Stakeholder management will be crucial to any successful restructuring, and the company will need to proactively engage with its creditors in restructuring discussions; and

   f) consider the right team of advisors and get them on board early on. This includes specialist restructuring lawyers and financial advisers.

   Our overarching message would be that it's important from an early stage to be proactive, plan appropriately, obtain proper advice and engage with stakeholders – this will help drive the dynamics in your favour towards achieving a commercially favourable resolution.

Your Freshfields contacts:

John Choong
Partner and Head of China Arbitration Practice, Hong Kong

Bing Guan
Partner, Hong Kong

Tony Chow
Lead, Insolvency Litigation, Hong Kong

Key themes

A next step up for deal making in Japan

M&A in Japan is booming again – inbound, outbound and everything in between. Our partners discussed the background, the trends, the opportunities, and the pitfalls for counterparties overseas.

Key themes and takeaways

1. **Bouncing Back.** Current activity levels reflect a return to form, after the Covid-19 pandemic and volatile exchange rates had slowed the pace. Japanese businesses have a long-term demographic need to grow into new markets and new, higher margin technologies. And inbound foreign investment to Japan, particularly from private capital sources, also has room left to grow and to "catch up" to the levels seen in other developed economies. The progress is slow, but momentous and inevitable. We have seen that foreign inbound deals in Japan are possible, and domestic hostile (or in more appropriate terminology, unsolicited) takeovers are possible – but the question is whether a foreign inbound unsolicited takeover is possible – there is a lot of interest in the market to see such a deal succeed.

2. **Stepping Up.** After decades of incremental measures, Japan's corporate governance reform has taken two major strides since 2023. First, the TSE has adopted something of an activist shareholders' mindset and required most listed companies to make special public disclosures regarding their strategic plans to improve price-to-book ratio and share price performance. (Which disclosures may touch upon various M&A and corporate finance matters, and hint and opportunities.)

   More importantly, the new Takeover Guidelines issued by the Ministry of Economy, Trade and Industry are a "sneaky powerful" weapon against the typical defences of entrenched management teams. These guidelines have successfully (and at long last) prompted boards to focus on shareholders over other stakeholders, and place a thumb on the scale in favor of engaging with offers on the basis that they are made in good faith.

   The result: Unsolicited acquisitions are clearly possible. Foreign acquisitions are clearly possible. And there is great interest across the market in seeing an unsolicited, foreign acquisition reach completion.

3. **Selling On. J**apanese companies have traditionally done far more buying than selling. Only very recently have attitudes begun to shift – away from the sense that selling a business represented a failure or weakening of the company, and towards more of a portfolio mindset. Some of our clients in Japan have been highly successful in repositioning their businesses through M&A – and some of our acquiror clients have reaped the rewards of highly capable and well-scaled targets.

   That said, the market's knowledge base is still heavily skewed towards the buyside – and the corporate and contractual structures are not always conducive to carve-out and sale. (For example, the otherwise well-developed and efficient Japanese domestic de-merger mechanism can become counter-productive in light of the corporate structures it incentivizes.) When the assets to be carved-out spread across multiple jurisdictions and include multiple legacy acquisitions, Japanese companies may be surprised by the complexity and time required to disentangle their businesses.

Key themes

4. **Digging In.** Japan is a market that rewards the investment of time. Freshfields is proud of our over 35 years in Japan, and we encourage overseas parties to build their local relationships and partnerships while taking a long view of the opportunities. Not every player must hire a large domestic team and build a Japan HQ. But "fly-in" counterparties should be prepared to fly in often, and for longer – and to work with advisors that can help to bridge the gaps. A full commitment to the market can be evidenced by a joint venture, strategic alliance or minority investment – structures that may seem messy and high-maintenance from the outside, but can ultimately work wonders in building local credibility, opportunities and expertise.

Your Freshfields contacts:

Noah Carr
Partner, Tokyo

Sebastian Fain
Partner, New York

Tomoko Nakajima
Partner, Head of Japan M&A, Tokyo

Key themes

AI Bite

The legal industry transition from a human capital industry to a human centred industry powered by AI and LegalTech.

Key themes and takeaways

- The use of AI must remain 'human-centric'. AI outputs should be enhanced and amplified with human input to ensure the completeness, auditability and accuracy of outputs.
- Proficiency and confidence in the use of AI through extensive training, and everyday usage are required to take full advantage of AI's benefits.
- Companies should set up AI oversight committees to ensure the successful and ethical integration of AI into their operations.
- Freshfields' human-centric approach empowers our lawyers to leverage AI to extract, analyse and organise information while retaining human oversight, which improves efficiency, reduces costs, and maintains the highest standard of work. Key areas where we use AI are mass claims, due diligence and contract review exercises, investigations, and multijurisdictional surveys.

Your Freshfields contacts:

Gerrit Beckhaus
Partner, Co-Head Freshfields Lab, Hamburg & Berlin

Gil Perez
Global Chief Innovation Officer, Silicon Valley

Key themes

Beyond China – Asia's expanding horizons

While the focus of foreign investment into the Asia region in the last couple of decades has been on China, in the face of its recent economic and political challenges, there has been significant uptick in activity in South and Southeast Asia. Our panellists shared their insights from working on-the-ground in two of the biggest beneficiaries of the China Plus One strategy, Vietnam and India. They shared about new opportunities and risk management strategies for negotiating deals in these emerging markets.

Key themes and takeaways

1. **Cautious optimism for Vietnam as political winds change**

   Foreign investment into the country has remained steady in the past few years, against a backdrop of a strong macroeconomic picture, made up of high GDP growth and other fundamentals such as a growing middle class and a young, motivated and digitally savvy population. With that in mind, we are expecting to see the inflow of foreign capital in the next 12 to 24 months focused on two main categories of deals: supply chain-related investments and consumer goods or services.

   Vietnam's latest political leader, To Lam, who rose to power this August also brings with him a pro-business narrative, potentially signalling a shift in government priorities from the focus over the last couple of years on internal investigations and the anti-corruption campaign to moving large investment projects forward and improving the investment environment in the country for foreign investors. A key question for foreign businesses eyeing investment opportunities in the country will be whether To Lam's pronouncements trickle down to the working level - signals that this is occurring would include renewed movement on long-stalled large infrastructure and power projects in the coming months.

2. **Indian markets face watershed moment**

   We are currently seeing very high levels of activity in India's capital markets, along with strong inflows of foreign investment and strategic capital. Business confidence in the Indian markets is being further bolstered by the growth of the domestic asset management industry and investment contributions from India's growing middle class. All of this lays a foundation for more sustained investments being made into the country, and we are expecting to see strong deal activity across various sectors in the coming year.

   What remains to be seen is how policy initiatives of the Indian government support its China Plus One strategy and whether this will translate into public and private investment into domestic logistics and infrastructure.

Key themes

3. **Integrate dispute resolution and jurisdiction clauses into your strategy**

   Engage in careful thinking around dispute resolution clauses at the time of deal-making to maximise the strength of exit and enforcement strategies down the road. Overlooking these clauses could create complications and cause unnecessary costs to be incurred.

   Businesses considering sizeable and longer-term projects in the region, especially in sectors exposed to government intervention and regulation (eg, energy and power, telecommunications, banking and finance) should also consider structuring their investments for investment treaty protection, in the same way you might structure to take advantage of tax treaties.

   While governing law will not be an unfamiliar topic for those negotiating deals in developing markets, the issue has risen to the fore as parties are increasingly under pressure to agree to local governing laws (eg, Indian law, Vietnamese law), including as a result of domestic regulation. Agreeing to a local governing law can be an acceptable compromise in contracts where the dispute resolution clause is an arbitration clause with a safe seat of arbitration, like Singapore or London. We would also recommend specifying the law governing the arbitration agreement if the governing law of the contract is different from the arbitral seat.

Your Freshfields contacts:

Arun Balasubramanian
Partner, Hong Kong & Singapore

Edward Freeman
Partner, Hong Kong

Eric Johnson
Partner, Vietnam

Samantha Tan
Partner, Singapore

Key themes

Investment Bite

Key themes and takeaways

- The acquisition of Gracell by AstraZeneca last year demonstrated a viable alternative exit for PE investors instead of IPOs.
- The VIE structure used by Gracell, which required careful analysis in that transaction, is no longer necessary for biotech companies engaged in human stem cell or gene therapy development in the free trade zones in Beijing, Shanghai, Guangdong, and Hainan.
- Companies focused on a standalone therapeutic area and having products with a high certainty of market approval are attractive targets for pharma MNCs, who are seeking supplements or synergies to their existing portfolios and operations.
- Private equity investors are actively pursuing control acquisitions of pharmaceutical product portfolios or businesses divested by pharmaceutical MNCs in China. Maintaining business continuity post-closing is a key challenge, which requires the private equity investors to assess every aspect of the target business and plan ahead.

Your Freshfields contacts:

Sebastian Fain
Partner, New York

Ma Ya
Counsel, Beijing

Key themes

Asia risk landscape

In this session, we examined the risks summarised below.

Key themes and takeaways

1. **Risks arise from the Stock Exchange of Hong Kong's continued focus on disclosure**

   HKEX's (***Exchange***) new "paperless listing regime", introduced in 2023, includes changes aimed at enhancing the efficiency of the listing process. In addition to the streamlined documentation and procedural requirements, listing applicants and sponsors should also pay attention to substantive changes brought on by the new regime, such as broadened undertakings to be provided by listing applicants and sponsors to the Exchange which expand the scope of their obligations and the related risks.

   In light of those expanded undertakings and the Exchange's continued focus on disclosure misconduct, listing applicants must ensure that: (i) all information and materials submitted to the Exchange, including the prospectus and other submissions (such as profit forecast memoranda) made during the listing process, are true, accurate, complete and not misleading; and (ii) they inform the Exchange promptly of any changes in submitted information/materials.

   Listing sponsors must ensure that they advise and guide listing applicants with respect to complying with the Listing Rules, including the obligation referred to above, and consider the implications on their own due diligence obligations in light of those requirements.

2. **Increased enforcement focus on listed issuer senior management and non-executive directors**

   When examining responsibility for compliance and any non-compliance, the Exchange increasingly scrutinises not just the issuer's executive directors but also members of senior management and non-executive directors. The latter are expected to provide an appropriate level of oversight with respect to executive management, and act as a "check and balance".

3. **Plan ahead to anticipate and manage risks that may arise when investing in Asia**

   While international arbitration is an effective neutral forum for resolving disputes that may arise from cross-border contracts, jurisdiction-specific nuances are increasingly frustrating users of arbitration. Consider the following recent trends:

   - local counterparties' push to use local arbitral institutions instead of more established international centres like the Singapore International Arbitration Centre (***SIAC***) or the International Chamber of Commerce (***ICC***) and their arbitration rules – the local institutions' more limited panels of arbitrators can restrict your choice of decision-makers, and they may be less equipped to render prompt and effective support, eg to consolidate cases;
   - parties are experiencing delays in some local courts' enforcement and execution of arbitral awards, with relative opacity of the reasons for those delays; and
   - satellite litigation during arbitral proceedings and re-litigation of the merits even after issuance of the arbitral award are now common occurrences, including due to applications for interim measures and allegations that certain issues are non-arbitrage, ie, not capable of resolution by arbitration.

   Tips to address these risks include:

   - if compelled to agree to arbitration administered by a local arbitration institution or under their rules, customising the arbitration clause to overcome potential limitations, eg expressly providing that arbitrators can be appointed from outside the institution's panel, and expressly preserving the right to be represented international counsel in any arbitration;
   - conducting asset-tracing early on, for awareness of the counterparty's available assets and the possible jurisdictions in which to file enforcement actions; and
   - keeping tabs on the peculiarities and recent developments in particular jurisdictions, eg the need to obtain powers of attorney from arbitrators for recognition and enforcement in Indonesia.

Key themes

4. **Particular complexities in India**

   India is an increasingly popular investment destination. But because of its size and diversity (in terms of language, culture, and the range of local courts, among other factors), unique risks and challenges often arise in India-related disputes. That makes planning ahead and strategising all the more essential. For example, in India, unlike in Singapore and elsewhere, shareholder oppression and mismanagement claims are non-arbitrable. Indian parties also commonly start court proceedings in parallel with arbitration, to seek interim relief. Anticipating the use of these tactics and knowing how to navigate them are critical.

5. **Investment treaty protection can afford tangible benefits**

   In a landmark case in 2020, an international arbitral tribunal held that India's retroactive imposition of a US$2.7bn tax on Vodafone was contrary to India's international law obligations under the Netherlands-India bilateral investment treaty.

   Vodafone's high-profile award highlights the importance to investors of considering available investment treaty protections against potentially arbitrary or unfair government action.

   Bilateral investment treaties enable a qualifying investor to sue a host State directly in arbitration, with the dispute to be decided by an independent international arbitral tribunal. These tribunals may award significant damages where the conduct of a State is found to have been in breach of international law.

Your Freshfields contacts:

Tim Mak
Partner, Hong Kong

Samantha Tan
Partner, Singapore

Rohit Bhat
Lead, India Disputes, Singapore

Cindy Kwong
Counsel, Hong Kong

Key themes

Views from an Asia business leader

Key themes and takeaways

The vision behind DSI – Empowering small players in emerging markets through standardisation

In an insightful discussion featuring Teresa Ko and Pamela Mar, the Managing Director of Digital Standards Initiative ***(DSI***) of the International Chamber of Commerce (***ICC***), the conversation centred on the future of global supply chains through digitalisation and harmonisation.

Pamela's leadership of the DSI is driven by a clear objective: to drive sustainability, efficiency, and visibility in global trade network, particularly in the emerging markets.

Pamela underscored the ongoing challenges faced by small and medium-sized enterprises (***SME***) in developing nations, especially around access to finance and navigating complexities of trade. The inability to get through the various standards and data needs that different players demand in the global supply chain present a structural barrier for SMEs in these regions to scale and fully engage in cross-border trade.

The DSI envisions an efficient, secure and agile system. Inclusivity is at the heart of this initiative, not only geographically but also in terms of enterprise size. By moving away from paper-based processes to standardised data flows, the DSI seeks to lower trade barriers, reduce costs and tackle issues such as fraud and illicit trade. This paves the way for SMEs in developing regions to secure financing and participate in the international markets more readily.

The process of transforming vision to reality – the tangible benefits of digitalised trade

Digitisation and the standardisation of data promise substantial benefits, including enhanced security, speed and efficiency. For instance, by leveraging technology and smart contracts, processing times for checking critical documents such as bills of lading could be reduced from days to mere hours, eliminating the need for multiple exchanges of physical paperwork. Research conducted by the ICC and Boston Consulting Group also suggested that adopting digital standards could boost global trade revenues by as much as 20%, while cutting processing costs by up to 60%. This would not only expedite the movement of goods across borders but also enabling more SMEs in developing nations to participate in global trade.

The DSI is working together with public and private sector players, including the World Trade Organisation and World Commerce Organisation, to make this vision a reality. The DSI is partly funded by the ICC, the Asia Government Bank and the Singapore government. Pamela noted the importance of government's role in capacity building to create a supportive regulatory framework, a challenge in many regions due to the lack of precedent but essential to enabling digital trade.

Significant process is already being made in harmonising standards across borders. As Pamela pointed out, 12 nations, representing 37% of the global GDP, have now made electronic transferrable records fully legal tender, with a further 26% of the global GDP moving towards alignment. This momentum reflects a growing global recognition of the importance of standardisation in unlocking the potential of interoperable, digitalised trade, with developing economies joining in gradually.

Key themes

Looking ahead: Hong Kong's role in shaping the future of digitalised trade

Hong Kong is positioned to play a pivotal role in this transformation. The city's high-energy business environment, coupled with recent initiatives to integrate digital economy and real economy within the Greater Bay Area as highlighted in the Chief Executive's 2024 Policy Address, makes it a key player in the digitalisation of global trade.

Pamela's advice for us is to move fast. No one has the grand blueprint for what digital trade looks like, but if we would like to be a part of shaping it, we should look at where the world is heading to and the developments around global interoperable standards. The future is there for us to create it.

Your Freshfields contacts:

Teresa Ko
Partner and China
Chairman, Hong Kong

Special thanks to our guest speaker Pamela Mar (Managing Director, ICC Digital Standards Initiative).