



Navigating a shifting landscape

In the ongoing transformation of Asian capital markets, money flows are changing direction and new industries are rising across the region. But Hong Kong and Singapore regulators still set the pace, reports Eric J. Brooks.

Capital markets are much like forests – even after a disastrous fire, they can quickly recover their old appearance while brimming with a diversity of new life. This is particularly true in Asia, where a new landscape was revealed after the dust from the financial crash cleared, with evidence of deep pockets of Asian capital, resource-rich western companies, and life sciences firms intersecting in the region’s leading entrepôts.

Yet appearances can be deceiving and beneath the facade of ‘business as usual’ in Asia’s promising economies, corporate counsel and law firms are being challenged by new industries, new investor classes and a slew of regulatory reforms. Whilst the region’s financial comeback has been impressive, it has not always been easy to manage. According to partner Jonathan B. Stone, who heads Skadden, Arps, Slate, Meagher & Flom’s corporate practice in Asia, the delicate state of markets in the first half of 2009 forced practitioners to manage the volatility of workflow, something he says has been a challenge for both in-house counsel and external lawyers.

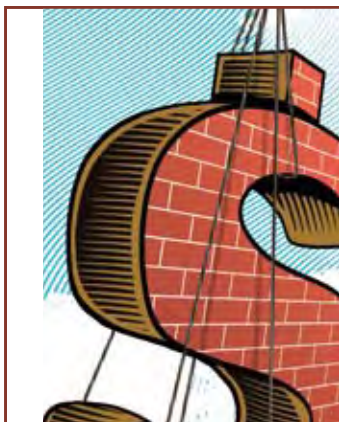
There are also new industries to contend with. Whereas at the turn of the century technology companies were the flavour of the month, with many keen to undertake IPOs, Stone comments, “If you have to look at a single industry that is [now] being looked on favourably, it is natural resources.” Indeed, whilst the exchanges of Tokyo and South Korea are being dominated by M&As, new stock

listings and the mining, energy and green technology sectors are taking centre stage in the vibrant markets of Hong Kong and Singapore.

M&A activity

Interestingly, despite the chaos created by the markets’ volatility, it was drastic changes in the value of debt and equity that kick-started today’s capital market revival. Manjula Chawla, a partner with India’s Phoenix Legal, states, “From an M&A perspective, the economic crisis left in its wake many operationally robust but financially beleaguered targets, which are now in the market at attractive price tags.”

Driven by rapid, unpredictable share price movements, M&As are becoming the defining feature of market activity in mature financial centres such as Tokyo and Seoul. Katsumasa Suzuki, a partner in the capital markets group of Mori Hamada & Matsumoto (MHM), reports that Japan’s M&A market has been very active. “Buyers have found good opportunities to acquire others at low prices, or have chosen M&A transactions to improve their competitive position for survival,” he says. The domestic nature of Japan’s M&A upsurge can be misleading – the multinational scope of Japanese corporations means that these transactions typically require a cooperative effort from an international network of law firms, with in-house counsel positioned at their regional subsidiaries. Suzuki recalls



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such an effort when MHM advised Sanyo Electric Corporation in an M&A involving Panasonic's assets. "We worked with local counsel in several jurisdictions to deal with anti-trust law issues all over the world, since Sanyo and Panasonic are major electronic manufacturers [with a global presence]," he says.

Real growth

While M&As currently dominate mature Asian financial centres with respect to market activity and regulatory reform, Tokyo and Seoul lag their more youthful rivals in relation to their pace of listings and IPOs. Real growth in capital market volume and share issuance is to be found in Hong Kong and, to a somewhat lesser extent, Singapore.

Needless to say, rapid growth implies greater risk, and in both Hong Kong and Singapore progress has come with its fair share of bumps and hiccups. Deflationary forces and new regulations have, for instance, often coincided to make M&As, listings and bond issues problematic. Freshfields Bruckhaus Deringer partner Kay Ian Ng, who is the global co-chair of the firm's Capital Markets Group, recalls the China Pacific Insurance IPO as one such example. "The IPO had a minimum price of RMB23.50 per share (approximately US\$3.44). That price was decided in July but the IPO was only done in December. At one point in December, the A share price went down to RMB23.80 (approximately US\$3.48), so we were just a whisker above the minimum price."

Ng notes there were further complicating matters at the time of the China Pacific deal. "The Ministry of Finance was harmonising the rules in respect of reporting accounting principles by which A and H insurance companies report their profits. From this year onwards, they have to

report under common GAAP principles. Undertaking an IPO when this regulation was on the cusp of being introduced was a tricky matter," he says. Indeed, ironing out such complexities may necessitate a three-way, cooperative effort on the part of corporate counsel, law firms and public accountants.

Hong Kong sitting on advantages

Despite such challenges, Hong Kong's superior capacity for accommodating Chinese corporate transactions is one reason why it has increased its lead over Singapore. As director Sin Boon Ann of Singapore-based Drew & Napier notes, "regulatory shifts in some countries have made it harder for cross-border listings to occur." With respect to overseas Chinese company listings, for instance, China Securities Regulatory Commission (CSRC) approval is now required for IPOs involving offshore special purpose vehicles (SPVs) holding China assets. The new rules mean that PRC companies hoping to list overseas now require CSRC approval, and they must restructure themselves into such SPVs prior to listing in overseas exchanges. Sin reports that, "new entrants to the SGX from China have slowed considerably since 2007. This is due to coming into effect of the M&A Rules in China."

A similar type of restriction exists in India, whereby Indian companies are required by the Reserve Bank of India to be listed in that jurisdiction either prior to, or simultaneously with, undertaking a listing overseas. Sin concludes that these new regulations on the part of China and India function to discourage cross-border listings. "This affects us here in Singapore, as foreign companies constitute a significant proportion of our marketplace," he says.



Heng Loong Cheong,
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local businesses to list in Hong Kong. “In the past, you did an international offering so as to attract US & EU investors. The focus now is on attracting Asian investors”

While China’s capital market reforms have been favourable to Hong Kong, partner Heng Loong Cheong of Dewey & LeBoeuf notes, “historically the Hong Kong Stock Exchange has been conservative about allowing non-Hong Kong and non-PRC companies to list on the Hong Kong Stock Exchange.” In addition to its ability to attract Chinese companies for listing purposes, the special administrative region’s recent ascendancy in global finance is also the result of its new attitude toward foreign listings. According to Cheong, a lot of road shows are now conducted in London, Moscow and Almaty, in an effort to attract some of those local businesses to list in Hong Kong. He adds, “In the past, you did an international offering so as to attract US & EU investors. The focus now is on attracting Asian investors.”

Indeed, the coincidence of capital-rich Asian investors and crippled western banks is motivating resource companies headquartered anywhere from Canada to Russia to list themselves on the Hong Kong Stock Exchange, leading to a growing trend. Cheong reports, “Germany is a jurisdiction where companies have only recently been allowed to list on the Hong Kong exchange. Recently, Cyprus has also been added, and its significance is that many Russian businesses have Cyprus holding companies.” It is thanks to these recent reforms, Cheong concludes, that “companies far beyond China now have the possibility of listing in Hong Kong.”

Problematic relationship between SIPs and retail investors

Despite its strengths, one weakness in Hong Kong’s otherwise leading position is the issue of structured investment products [SIPs], which became something of a political issue following the crises of Lehman and AIG when many family savings were lost in SIPs. For Hong Kong, this is highly problematic as compared to New York or London, the special administrative region has a very high proportion of retail investors relative to institutions.

Several lawyers spoken to commented that in order to avoid embroiling SIP issuers in a regulatory minefield, some recent M&A deals have been structured in a manner designed to circumvent Hong Kong’s retail investors. This was essentially done by ‘shopping out’ the smaller investors which have become politically and legally awkward in international SIP issues.

These tactics are likely to be short-term, and will soon give way to more detailed, clear-cut regulations. Minny Siu, a partner with Mallesons Stephen Jaques’s Hong Kong office, says that Hong Kong’s Securities and Futures Commission (SFC) is scheduled to release a conclusive paper in the second quarter of 2010 with proposed regulatory reforms for the retail offering of SIPs. According to Siu, these new regulations will be keynoted by, “An enhanced disclosure regime and the product code for retail structured products, to improve product transparency with the aim of restoring market confidence.” Amongst the reforms underway is SFC clarification on M&A cash confirmation criteria, which should be finalised near to the time of this article’s publication.

New countries, laws and industries challenge counsel

Hong Kong’s open courting of foreign companies has been accompanied by a flurry of regulatory reform, in an effort to “bring Hong Kong listing rules up to the standard of the London, Toronto and other western exchanges which have successfully attracted natural resources companies,” says Dewey & LeBoeuf’s Cheong. Within this emerging capital market framework, in-house counsel will be challenged by two important factors. Firstly, while Hong Kong’s role as a financial centre has not come about overnight, there is a new set of industrial sectors in ascendance. Formerly sexy industries such as IT or telecommunications are now giving way to new kids on the block such as Canadian

mining companies, American life sciences firms or German solar panel suppliers. Furthermore, with foreign listings accounting for a greater share of the market, they increasingly bring the capital market regulations of other countries into play.

Secondly, whilst in-house counsel must stay abreast of capital market reforms in Asia's financial centres such as Hong Kong, new challenges are also coming in from the region's untamed hinterlands which it may benefit in-house counsel to remain aware of. ASEAN countries such as Vietnam, Indonesia, Laos and Cambodia, for instance, are undertaking a liberalisation of their capital markets in varying degrees and enjoying rising monetary inflows.

These shifting regulations may mean increased workloads for in-house counsel. As Matthew Bersani, Shearman & Sterling's managing partner for corporate finance and securities transactions, notes, "In-house counsel listing in Asia have got a whole new set of regulations to deal with. They have to hire people familiar with the local legal environment." Partner Ronald Tan of Malaysian firm Tay & Partners' debt capital markets practice concurs, "We therefore work more closely with in-house counsel to advise them of the requirements of the new guidelines."

ASEAN plays catch up

Hong Kong's success at attracting both Asian and western listings is forcing capital market regulators in Singapore, Malaysia and Indonesia to undertake their own reforms. Drew & Napier's Sin reports, for example, that Bursa Malaysia is now seeking to attract more foreign listings, including Chinese ones. "To this end, Bursa Malaysia has waived its former requirement for a 30 percent Bumiputera [ethnic Malay] shareholding," he notes. Partner Dato' Johari Razak of Malaysia's Shearn Delamore & Company expects to see more M&A-type activities and IPOs following the recent liberalisations which have, he says, been attracting the attention of foreign investors. Tan adds, "A new set of due diligence guidelines was introduced in mid-2009. This further refined the due diligence and disclosure requirements of public listed companies."

By taking these incremental steps, ASEAN nations are gradually streamlining the complexities associated with investing in this fast-growing and resource-rich, but legally immature, region. Tuti Dewi Hadinoto, a senior partner and capital markets practice group head at Hadiputranto, Hadinoto & Partners, is in a position to provide hands-on insight. As head of research and development on the board



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of Indonesia's Capital Market Legal Consultants' Association, she is actively involved in the review of new BAPEPAM [Capital Market Supervisory Agency] rules, and says, "In Indonesia, there have been quite a few new regulations in relation to IPOs issued since 2008. However, these regulations in fact made the process to obtain the funding from the market smoother and easier, as well as shortening the period of the process."

Whilst progress is being made, the greatest challenge to in-counsel supervising ASEAN investments remains, in that its fastest growing economies are new to global capital markets and therefore have very little experience in managing the legal implications. Consequently, from the perspective of in-house counsel, unprecedented investment opportunities are matched by equally daunting learning curves. It comes as little surprise, then, that Hadinoto states, "New regulations [have] in fact strengthened our relationship with our clients, [including] in-house counsel."

One example of such a challenge is the recent convertible bond offering out of Vietnam involving Vincom, a private property company. Shearman & Sterling's Bersani recalls, "It was the first of its kind and incredibly complex. It required various Vietnamese government approvals [and] we needed the state bank in Vietnam's approval, even though it was a private company. Even more complicated was the back-end conversion of debt to equity.



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Drew & Napier

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products’ and with it, the red tape that accompanies the capital market clearance of deals that have features which conformed to its criteria. Steps such as these can be interpreted as a belated move by Singapore to ensure that it does not lose too much business to Hong Kong”

Getting approval for that required conversations with five or six governmental or quasi-governmental agencies.”

Another recent Asian deal of similar complexity was the US\$141 million initial public offering of Grameenphone Ltd, a Bangladeshi wireless services provider. Skadden, Arps, Slate, Meagher & Flom represented Citigroup Global Markets Bangladesh in connection with the transaction, in which it acted as sole placement agent and issue manager, alongside other underwriters. The deal’s complexity and need for extensive regulatory consultations was augmented by the fact that it was the largest IPO in Bangladesh’s history.

In these cross-border and emerging country contexts, in-house counsel play a crucial role in coordinating the flow of issue resolution between legal firms, host country bureaucracies and their fellow counsel in overseas corporate headquarters. Yet the effort is worthwhile, as capital markets are rapidly opening up in promising but legislatively immature Asian countries. In Vietnam, for example, Bersani notes, “They’ve done a sovereign bond and con-

vertibles so we could be seeing the opening of Vietnam and its capital markets.”

Singapore strikes back

As Southeast Asia’s financial capital, much of ASEAN’s new investment activity should gravitate to Singapore. To better answer opportunities on its doorstep and respond to competition from Hong Kong, Singapore’s regulatory agencies have been busy. Drew & Napier’s Sin notes that, “The Monetary Authority of Singapore recently dropped its definition of ‘complex investment products’ and with it, the red tape that accompanies the capital market clearance of deals that have features which conformed to its criteria. Steps such as these can be interpreted as a belated move by Singapore to ensure that it does not lose too much business to Hong Kong.”

In early March, the SGX also enacted new rules for the admission and listing of life sciences companies without a financial track record. In addition, the SGX is proposing allowing the listing of Special Purpose Acquisition Companies [SPACs], which are cash pools seeking to acquire viable businesses through public funding.

Evidently, rather than fight against China’s natural fit with Hong Kong on natural resource listings, Singapore is responding by creating legal frameworks that will give it an intermediary role in the financing of these emerging industries. Sin states, “Given the Singapore government’s emphasis on promoting this industry, I expect to see many more examples of such listings in the future.”

A regional perspective

While it is difficult to summarise a region as legally, culturally or economically diverse as Asia, several continent-wide trends are visibly clear. First is the fact that Asia’s strong fiscal position gives it the gravitas to finance new industries, undertake financial reforms and attract western companies to its exchanges.

Secondly, while Asian investors are happy to enjoy the high returns found in the region’s riskier, less developed states, they clearly prefer financial centres with strong legal traditions and a history of hosting western investment. Whilst Tokyo and Seoul are mature markets in their own right, China and India may one day have large enough domestic economies to turn their backs on global capital. For now, however, the financial rivalry between Hong Kong and Singapore continues to define Asian finance’s legislative agenda.

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